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

In the Matter of: **RICHARD USHER**, Former Head of EMEA FX Spot Trading JPMorgan Chase Bank, N.A. Columbus, Ohio	OCC Docket No.: AA-EC-2017-3

ORDER DENYING ENFORCEMENT COUNSEL'S MOTION FOR DEFAULT AND RESPONDENT'S OMNIBUS MOTION TO DISMISS

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The Office of the Comptroller of the Currency ("OCC") commenced this action against Respondent Richard Usher ("Respondent") on January 10, 2017, filing a Notice of Charges ("Notice") that seeks an order of prohibition and the imposition of a $5 million civil money penalty against Respondent pursuant to Section 8 of the Federal Deposit Insurance ("FDI") Act, 12 U.S.C. §§ 1818(e) and (i). On July 14, 2017, Enforcement Counsel for the OCC ("Enforcement Counsel") moved for an entry of default pursuant to Rule 19(c) of the OCC's Uniform Rules of Practice and Procedure ("Uniform Rules") based on Respondent's alleged failure to timely answer the Notice and timely request a hearing on the assessment of the civil money penalty, as required by the Uniform Rules and, latterly, 12 U.S.C. § 1818(i)(2)(E)(ii). Respondent has now moved to dismiss the Notice[1] on numerous grounds—including sufficiency of service, lack of personal jurisdiction, and, broadly, that the OCC lacks the statutory and constitutional authority to bring enforcement proceedings against a foreign national who resides and works in a foreign country, where that individual was seconded to a U.S. bank during the relevant period and, in the course of that secondment, made hundreds of millions of dollars of daily foreign exchange ("FX") spot trades with U.S. residents, exposing the bank to credit risk and potential liability, while engaging in the activity that forms the basis of the OCC's allegations against him. For the reasons set forth below, both parties' motions—specifically, Enforcement Counsel's July 14, 2017 Motion for Entry of an Order of Default ("OCC Mot.") and Respondent's April 2, 2020 Renewed and Omnibus Motion to Dismiss and Opposition to Motion for Default ("Resp. Mot.")—are denied.

The undersigned notes at the outset that, in evaluating a motion to dismiss for lack of personal jurisdiction in accordance with federal court practice, this tribunal is not confined to the

[1] The Uniform Rules contain no specific provision regarding the mechanics of this tribunal's consideration of dispositive motions other that motions for summary disposition. Consequently, in addressing Respondent's motion, the undersigned will adopt and apply as appropriate the standards set forth with respect to motions to dismiss under Rule 12 of the Federal Rules of Civil Procedure.

pleadings but "may receive and weigh affidavits and any other relevant matter to assist it in determining the jurisdictional facts."[2] While the OCC bears the burden of showing that personal jurisdiction exists in order to defeat the motion, it need only make a *prima facie* showing at this stage.[3] Moreover, "all factual discrepancies" relating to jurisdictional facts will be resolved in the agency's favor as the nonmoving party.[4] Finally, where they are not purely conclusory or "[t]hreadbare recitals of the elements of a cause of action," the undersigned will take all allegations in the Notice as true for the purpose of Respondent's motion.[5]

I. <u>Background</u>

Respondent is a citizen and resident of the United Kingdom. From July 2010 through January 2013 ("the Relevant Period"), Respondent worked in London, England at the London branch of JPMorgan Chase Bank, N.A. ("JPMC" or "the Bank"), first as an FX spot trader and then as Head of Europe, Middle East and Africa ("EMEA") FX Spot Trading on the Bank's London FX spot desk.[6] Notice ¶¶ 18-20, 28. In this capacity, Respondent traded currency pairs—including, primarily, the euro/U.S. dollar ("EUR/USD") currency pair—with counterparties in a decentralized electronic marketplace. *Id.* ¶¶ 6-7, 19. Upon his promotion in 2011, Respondent also assumed "supervisory responsibilities over the Bank's FX spot trading desks in Europe." *Id.* ¶ 20; *see also* Opposition to Omnibus Motion to Dismiss ("OCC Opp."), Ex. 6 at 1 (indicating that as

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[2] *Scurlock v. Lappin*, 870 F. Supp. 2d 116, 121 (D.D.C. 2012) (internal quotation marks and citation omitted); *accord*, *e.g.*, *Pederson v. Frost*, 951 F.3d 977, 979 (8th Cir. 2020); *Mwani v. Bin Laden*, 417 F.3d 1, 7 (D.C. Cir. 2005).

[3] *Mwani*, 417 F.3d at 7; *see also Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 81 (2d Cir. 2018) (*prima facie* showing "entails making legally sufficient allegations of jurisdiction, including an averment of facts that, if credited, would suffice to establish jurisdiction over the defendant") (internal quotation marks and citation omitted).

[4] *Scurlock*, 870 F. Supp. 2d at 121.

[5] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[6] As the OCC explains, "[t]he foreign exchange market enables participants to buy, sell, exchange, hedge, and speculate on currencies. The [FX spot market] is the market where currencies are traded for one another in pairs for settlement generally within two days." Notice ¶ 5. There appears to be no material dispute between the OCC and Respondent regarding the nature of the FX spot market. *See* Resp. Mot. at 7.

Head of EMEA FX Spot Trading, Respondent had "responsibility for management oversight of the firm's European activity in the region" with respect to the legal entities "JPMorgan Chase Bank, N.A. – London branch" and "J.P. Morgan Securities plc").

The Secondment Agreement

Respondent performed his duties during the Relevant Period subject to a secondment agreement between the Bank, a federally insured U.S. depository institution and national banking association,[7] and two of the Bank's U.K. subsidiaries—J.P. Morgan Europe Limited ("JPMEL") from July 2010 through May 2011 and J.P. Morgan Limited ("JPL") from May 2011 through the end of the Relevant Period.[8] Specifically, "[d]uring his employment with both JPMEL and JPL, Mr. Usher was seconded to JPMorgan Chase Bank, N.A. – London Branch."[9] Importantly, the Bank's counsel has represented, and the undersigned takes as true for purposes of determining the jurisdictional facts, that the London branch to which Respondent was seconded is the Bank's "place of business in the United Kingdom, and not a separate legal entity from [the Bank]."[10] The undersigned will presume that it was a good faith oversight for Respondent's counsel to quote the Bank's erroneous statement on March 6, 2020 that the Bank's London branch was a separate legal entity from the Bank itself, rather than the Bank's subsequent statement on April 1, 2020 acknowledging that error and correcting the record.[11]

Respondent's specific employment posture under the terms of the secondment agreement is crucial to the disposition of his instant motion. It is important, first, to note that the agreement

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[7] *See* Notice ¶¶ 1, 3.

[8] OCC Opp., Ex. 12 (April 1, 2020 letter from the Bank's counsel at Skadden, Arps, Slate, Meagher & Flom LLP to Enforcement Counsel) at 1; *see also* Resp. Mot., Ex. 6 ("Corporate Tree" showing relationship between the Bank and JPMEL).

[9] OCC Opp., Ex. 12 at 1-2.

[10] *Id.* at 2.

[11] *Compare* Reply at 4 (quoting OCC Opp., Ex. 8 at 3) *with* OCC Opp., Ex. 12 at 2.

makes clear that individuals seconded to the Bank, like Respondent, do not become employees of the Bank as a function of the secondment, but rather remain employees of the relevant U.K. subsidiary "at all times, both during the secondment and after." OCC Opp., Ex. 3 ("Secondment Agreement") §§ 6.2(c), 6.3.[12] In addition, the secondment agreement is between various J.P. Morgan employing entities ("Employers") and seconding entities ("Clients") operating in London: as Respondent observes in his reply in support of his motion to dismiss ("Reply"), neither Respondent nor any other employee is a party to the agreement or otherwise specifically identified therein. *See* Reply at 2; *see also* Secondment Agreement at 9-12 (signature pages). Indeed, Respondent avers that he does not recall having any knowledge of the secondment arrangement at all.[13] Reply, Ex. 1 ("Reply Decl.") ¶ 2.

Secondment by the terms of the agreement operates as follows: all employees in a given Line of Business ("LOB")—for Respondent, FX trading—are immediately seconded from their Employer to the Relevant Client for the entirety of their time working in that LOB. *See* Secondment Agreement, Arts. 4.1 & 4.2. Put simply, "[i]n relation to each Relevant LOB, the Relevant Client requires individuals employed by the Relevant Employer to work in their businesses." *Id.* at 2. During the period of secondment—that is, the full period of employment with

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[12] Enforcement Counsel alleges that "[p]ursuant to Respondent's employment contract with JPEL, Respondent was immediately seconded to the Bank pursuant to a secondment agreement that existed before he became an employee of JPEL. This secondment agreement was modified as of May 31, 2011." OCC Opp. at 6. Respondent does not at this stage dispute the authenticity of the two documents proffered by Enforcement Counsel as the operative secondment agreements. *See* OCC Opp., Ex. 4 (agreement dated December 24, 1996); OCC Opp., Ex. 3 (agreement dated May 31, 2011). In establishing the terms under which Respondent was seconded, the undersigned draws from the later of the two secondment agreements, which is significantly more detailed and which spans the majority of the Relevant Period. To the extent that Respondent has a basis to argue that the terms of secondment prior to May 2011 were materially different in a way that affects the disposition of this case, he may raise that argument at a later point in the proceeding. The undersigned further notes that neither Enforcement Counsel nor Respondent have offered Respondent's employment contract with JPMEL as an exhibit, and the undersigned accordingly does not rely on Enforcement Counsel's representations regarding that document—beyond that it presumably existed and permitted Respondent's secondment to the Bank—when considering the question of personal jurisdiction.

[13] That being said, however, Respondent does not contest the fact of the secondment, merely his recollection of it. And it appears beyond dispute that Respondent was, in fact, seconded to the Bank's London branch during the whole of the Relevant Period. *See* OCC Opp., Ex. 12 at 1-2.

an Employer in a given LOB—the employee's "services shall be at the disposal of the Relevant Client." *Id.*, Art. 3.3. In exchange, the Relevant Client agrees to compensate the Employer for each seconded employee's salary, benefits, and other "remuneration of whatever nature and in whatever form" to which the employee is entitled, as well as any other costs incurred by the Employer with respect to that employee. *Id.*, Art. 5.1.

As noted, the Relevant Client to which Respondent was seconded during the Relevant Period was the London branch of JPMC, a U.S. depository institution. In practical terms, this meant that all work done by Respondent during this period was done for JPMC. He was directed by JPMC "as to the performance of his . . . duties." *Id.*, Art. 6.5. He was supervised and managed exclusively by JPMC. *Id.*, Art. 6.8.[14] He could not be terminated from his position or removed from the scope of secondment by JPMEL or JPL, his nominal employers during the Relevant Period, without JPMC's consent. *Id.*, Art. 4.4.

Moreover, any liability or loss arising from Respondent's acts or omissions during the course of his secondment was borne by JPMC rather than any European entity. *Id.*, Art. 7.1 ("The Relevant Employer shall not be liable in respect of an Employee Act and the Client shall indemnify the Relevant Employer against all Losses arising from any Employee Act.").[15] And apart from legal liability, "[i]n the event a counterparty to an FX spot trade that was executed and risk managed by Mr. Usher failed to fulfill the terms of that trade, . . . JPMorgan Chase Bank London would have incurred the resulting loss," and not JPMEL or JPL. OCC Opp., Ex. 8 at 3.

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[14] *See also* OCC Opp., Exs. 7 (Respondent reporting to Claudia Jury and Troy Rohrbaugh), 8 (Jury employed by JPMC), 9 (listing Jury as Respondent's manager for Relevant Period and Rohrbaugh writing performance review), 10 (listing Rohrbaugh as immediate manager), 12 (Rohrbaugh employed by JPMC).

[15] The secondment agreement defines "Employee Act" as "any act or omission on the part of a Relevant Employee during the Secondment" and "Losses" as "all damages, losses, liabilities, expenses, claims, demands and proceedings." Secondment Agreement at 2, 3.

Respondent's Position with the Bank

Enforcement Counsel identifies multiple instances in which Respondent purportedly "held himself out as a Bank employee" in submissions to U.K. regulators. OCC Opp. at 6. For instance, Respondent was granted regulatory approval to perform as a trader and, later, a senior manager for both the U.K. entity "J.P. Morgan Securities plc" and the U.S. entity "JPMorgan Chase Bank, N.A."[16] *Id.*, Ex. 5 at 1, 3. Likewise, the "Regulatory Role Profile" that Respondent completed, signed, and "routinely . . . provided to the U.K. regulators" lists JPMC's London branch—and therefore JPMC—as one of two legal entities for which Respondent served as European head of FX spot trading. *Id.*, Ex. 6 at 1. Respondent also attested, through this form, to being "individually responsible for assisting the firm to ensure that there is a clear and appropriate governance structure," a responsibility that "includes ensuring that reporting lines between [himself] and others are clear." *Id.* § 2.1. Respondent agreed that he was "responsible for risk planning, including identifying, measuring, managing, and controlling risks of regulatory concern" in his line of business "for the legal entities [he was] approved for," which included JPMC. *Id.* § 2.4. And Respondent represented to regulators his agreement with the following: "You must make yourself aware and ensure you understand the risks in the business for which you are responsible (including, for example, relevant operational risks, risk of financial crime, business continuity, etc.) and show how you mitigate risks as relevant to your area of responsibility." *Id.* § 2.5.

In sum, Respondent now characterizes JPMC as merely "his employer's distant parent," Reply at 3, but does not question the authenticity of these documents, which (along with the secondment agreement and other indicia) reflect a much less remote relationship. And although

[16] The notices of approval take the form of emails sent to Respondent on August 4, 2010 and July 24, 2013, respectively. *See* OCC Opp., Ex. 5. The July 2013 notice approves Respondent to "act[] as a senior manager with significant responsibility for a significant business unit." *Id.* at 1.

Respondent claims to have believed at the time that he worked only for JPMEL and that his "colleagues on the foreign exchange (FX) desk in London also worked for that same English company," Reply Decl. ¶ 3, the regulatory documents demonstrate that, at minimum, Respondent represented something different to U.K. regulators during the Relevant Period. Further, the documents show that Respondent knowingly bore the responsibility of understanding, for example, that his direct supervisors in London and New York worked for, and the risk from his trading adhered to, an American financial institution operating under U.S. law as well as English.

Respondent's U.S. Contacts While Seconded to the Bank

Enforcement Counsel adduces other evidence of Respondent's regular contacts with Bank employees and with the United States during the course of his secondment, much of which is uncontroverted by Respondent. Among the most salient examples: Respondent does not dispute that, even before she became his manager, he "communicated frequently with . . . Claudia Jury," the Bank's Global Head of FX, who was located in New York.[17] OCC Opp., Ex. 1 ("Swanson Decl.") ¶ 19; *see* Reply at 2-3. He does not address, and thus does not contest, Enforcement Counsel's general assertion that he "also communicated regularly with other Bank employees in New York," Swanson Decl. ¶ 20, although Respondent does state that the specific individual identified by Enforcement Counsel was London-based rather than New York-based. *See* Reply Decl. ¶ 7. Respondent does not dispute that his 2010, 2011, and 2012 performance reviews were written by Bank employees, *see* OCC Opp., Ex. 9; contrary to a statement in the 2010 review, however, he does not recall meeting with clients when he traveled to the Bank's New York office that year.[18] *See* Reply Decl. ¶ 4. Respondent does not deny that he had U.S.-based clients, but

[17] Respondent also does not dispute that his managers were Bank employees, stating only that the majority of them were based in London rather than New York. Reply Decl. ¶ 6.

[18] The performance review, written by Respondent's manager (and Bank employee) Antony Foster, stated that "Richard visited New York, to meet their desk and some clients out there." OCC Opp., Ex. 9 at 2.

states only that his dealings with those clients were limited to "their London or European offices." *Id.* ¶ 8; *see* OCC Opp. at 7; Swanson Decl. ¶ 22. There are further insights to be gleaned from a close reading of what Respondent does and does not say regarding the examples of ostensible U.S. contacts proffered by Enforcement Counsel—for example, the tension between Respondent's claim that the Bank was only a "distant parent" of his employer and the fact that he traveled to the United States to "mark [his] promotion" to Managing Director in 2012, Reply Decl. ¶ 5—but the above is sufficient to establish, as jurisdictional facts, that the ecosystem in which Respondent worked was populated heavily with Bank employees and involved some routine component of interaction with, and communication about, U.S.-based individuals or companies.

More significantly, Respondent does not dispute Enforcement Counsel's assertions that he traded on the FX spot market entirely on behalf of the Bank during the Relevant Period and that, in the course of doing so, he executed hundreds of trades involving hundreds of millions of dollars of currency with U.S. residents on a daily basis. *See* OCC Opp. at 7-10; Swanson Decl. ¶¶ 3-18. Enforcement Counsel concludes, for example, that on January 31, 2012, "Respondent executed 483 trades with U.S. resident parties with a value of $753,000,000," comprising approximately half of Respondent's trades on that date, and including "163 trades with U.S. resident parties with a value of $341,000,000" in the ten minutes prior to the World Market/Reuters ("WM/R") fix point regarding which Respondent is alleged to have engaged in collusive activity.[19] OCC Opp. at 9-10; *see* Swanson Decl., Ex. C. Enforcement Counsel further avers that the trading activity on this date, and on the two other dates for which it provides data, "is representative of Respondent's trading patterns during the relevant period described in the Notice." OCC Opp. at 8-9; *see* Swanson Decl. ¶ 5.

[19] *See* Notice ¶¶ 14-17 for a detailed explanation of the WM/R fix and FX spot fixes (or "benchmarks") in general, and see the rest of the Notice (as well as *infra*) for specific allegations regarding Respondent's collusive activity.

In response, Respondent argues that because the electronic trading system utilized by Respondent was anonymous, "he had no way of knowing where his counterparty would be located" at the time of any given trade. Reply at 3. This statement proves far too little, however. First, it does not refute Enforcement Counsel's assertion that such trades with U.S. residents in fact took place at the claimed volume and frequency. Second, and critically for purposes of personal jurisdiction, it says nothing about whether Respondent—as a trader or in his capacity as Head of the Bank's FX Spot Desk in London—was aware generally that a significant percentage of his trades were with U.S. residents, even if he could not know at the point of any particular trade the provenance of the particular counterparty with whom he was trading. Respondent makes no representation that he did not trade regularly with U.S. residents or that he was unaware of that fact. As such, the undersigned will take Enforcement Counsel's assertions in this regard as true at this stage and, further, conclude that if this is so, Respondent would have been generally aware—particularly once he assumed "[r]egional oversight of G10 FX Trading Desk activities," OCC Opp., Ex. 6—that a large proportion of the trades he executed on behalf of the Bank during the Relevant Period were with entities domiciled in the United States.[20]

II. <u>Summary of Allegations and Relevant Procedural History</u>

This action concerns alleged misconduct by Respondent in the course of his work trading EUR/USD currency pairs on behalf of the Bank during the Relevant Period. Specifically, the OCC

[20] As Respondent notes in his Reply, the Bank's counsel represents that it would be difficult to identify, based on trading data provided to the OCC, "sales-initiated transactions in Mr. Usher's risk book in which an external counterparty either was domiciled in the United States or had executed the transaction via the North American sales desk." OCC Opp., Ex. 8 at 3. It is unclear the extent to which this casts doubt on the accuracy of the conclusions drawn by Enforcement Counsel from the trading data. *See* Swanson Decl. ¶¶ 2-11 (explaining methodology). As discussed *infra*, the undersigned finds that Enforcement Counsel's assertions *in toto* are sufficient to establish at least a *prima facie* case for personal jurisdiction. Should Respondent wish to pursue jurisdictional discovery, following the disposition of the instant motions, regarding the proportion of his trades during the Relevant Period that were *in fact* made with U.S. residents, he may do so concurrently with the discovery period set in the May 18, 2020 Order Setting Procedural Schedule.

alleges that Respondent engaged in a "conspiracy with EUR/USD traders at competing financial institutions . . . to suppress or eliminate competition and increase, decrease, fix, maintain, or stabilize prices in the FX Spot Market." Notice ¶ 24. According to the OCC, in furtherance of this conspiracy, Respondent "engaged in near daily conversations" with his alleged co-conspirators "in a permanent electronic chat room that on certain occasions referred to itself, and was known in the market, as the 'Cartel.'" *Id.* ¶ 28.

The OCC alleges that Respondent and the other traders in this chat room "(1) agreed to coordinate trading in the EUR/USD currency pair in connection with the ECB and WM/R FX spot benchmarks; (2) agreed to withhold certain bids and offers when one trader . . . had an open risk position; and (3) disclosed, discussed, and coordinated currency pair spreads to be quoted to customers." *Id.* ¶ 25. The OCC further alleges that, as part of this conspiracy, "Respondent disclosed confidential, commercially sensitive information, such as information on customer orders and currency pair spreads, to the Bank's competitors in the Cartel chat room or elsewhere." *Id.* ¶ 26. The OCC alleges that Respondent's conduct violated Section 1 of the Sherman Antitrust Act ("Sherman Act"), caused the Bank likewise to violate the Sherman Act, constituted unsafe and unsound practices in connection with an insured depository institution, and breached Respondent's fiduciary duty to the Bank. *Id.* ¶¶ 23-26. Finally, the OCC alleges that, through his misconduct, Respondent "caused the Bank to suffer significant losses from legal liability, including $99.5 million to resolve civil litigation, and an additional $1.2 billion in penalties to three government agencies." OCC Opp. at 41; *see* Notice ¶¶ 51-52.

Issuance and Service of the Notice

The OCC commenced this action before this tribunal on January 10, 2017, seeking the issuance of a prohibition order and the imposition of a $5 million second-tier civil money penalty

against Respondent pursuant to 12 U.S.C. §§ 1818(e) and 1818(i)(2)(B) respectively.[21] *See* Notice at 1-2. The Notice was signed by Maryann Kennedy, then-Deputy Comptroller for Large Bank Supervision, "on behalf of the Office of the Comptroller of the Currency." *Id.* at 21. The Notice directed Respondent to file both a written Answer to the Notice and a request for a hearing concerning the assessment of the civil money penalty "within twenty (20) days after date of service of this Notice." *Id.* at 19, 20. The Notice warned that failure to answer within the prescribed period "shall constitute a waiver of the right to appear and contest the allegations contained in the Notice," and that failure to timely request a hearing on the civil money penalty "shall cause this assessment to constitute a final and unappealable order . . . against Respondent." *Id.* at 19, 20 (citing Rules 19(a) and 19(b) of the Uniform Rules and, as to the request for hearing, 12 U.S.C. § 1818(i)).

Also on January 10, 2017, the OCC mailed the Notice by United Parcel Service ("UPS") Worldwide Express delivery to Respondent's residence in the United Kingdom, where it arrived on January 12, 2017. OCC Mot. at 2; *see id.*, Ex. A. On January 11, 2017, the OCC also submitted a request for service of the Notice via the U.K. Central Authority pursuant to the Hague Convention for Service Abroad of Judicial or Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 ("Hague Service Convention"). *Id.* at 2-3. Respondent asserts that he received the Notice from the U.K. Central Authority on June 16, 2017. *See id.* at 4; June 30, 2017 Respondent's Assented-To Motion for Extension of Time to Respond at 1.

On January 26, 2017, Respondent's then-counsel requested, and Enforcement Counsel provided, an electronic copy of the January 11, 2017 Notice of Designation and Order Regarding

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[21] Although the Notice itself is dated January 9, 2017, Enforcement Counsel represents in its Motion for Default that the Notice was not filed with this tribunal until the following day. *See* OCC Mot. at 2.

Electronic Service ("Designation Notice") issued by this tribunal.[22] *See* OCC Mot. at 3; *id.*, Ex. D. Respondent's counsel then responded to Enforcement Counsel with a letter dated February 1, 2017. *See id.*, Ex. E ("February 1, 2017 Letter"). In that letter, Respondent's counsel acknowledged "[t]he OCC's recent attempts to serve Mr. Usher in the United Kingdom through UPS mailing," but maintained that those attempts "were legally ineffective" on several grounds.[23] February 1, 2017 Letter at 1. The letter further contended that "[b]ecause service has not been effectuated, the OCC proceeding against Mr. Usher did not legally commence and his 20-day response period has not begun to run." *Id.* at 2. The letter stated that "[s]hould proper service be effectuated at some point in the future, Mr. Usher will strongly contest the merits of the allegations of the OCC against him at that time."[24] *Id.*

On July 5, 2017, Respondent filed an Answer to the Notice through his new counsel. *See* Answer at 12. On July 14, 2017, Enforcement Counsel moved for entry of an order of default against Respondent, arguing that he had failed to timely file an answer or request a hearing on the OCC's assessment of a civil money penalty. Respondent opposed that motion and moved to dismiss on jurisdictional grounds on July 31, 2017.

The Parallel Criminal Action

In his Answer, Respondent sought an immediate stay to the proceedings pending the resolution of a criminal case brought by the Department of Justice ("DOJ") against Respondent and two other defendants in the United States District Court for the Southern District of New York.

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[22] Consistent with its general practice, the tribunal also mailed a copy of the Designation Notice to Respondent's U.K. residence on January 11, 2017. *See* Designation Notice at 3 (providing UPS Worldwide Express tracking number for delivery to Respondent's address).

[23] The arguments in the February 1, 2017 Letter as to the putative ineffectiveness of the OCC's service are largely mirrored in Respondent's instant motion to dismiss and will be addressed as applicable *infra*.

[24] Respondent's counsel also reserved, on Respondent's behalf, "all potential defenses with respect to this or any other United States Government proceeding." *Id.* at 1.

Answer at 2, 10. According to Respondent, the charges brought against him in that case "overlap[ped] substantially with the [Notice's] allegations." *Id.* at 2. On August 1, 2017, upon receiving a representation from Enforcement Counsel that it did not oppose such a stay, this tribunal stayed the administrative proceedings until the referenced criminal case could be resolved. August 1, 2017 Stay Order at 1. On February 6, 2018, this tribunal entered an order extending the stay until further notice, as the criminal matter remained ongoing. February 6, 2018 Order at 1. Finally, on October 24, 2018, a jury acquitted Respondent of the single-count charge of criminal conspiracy to violate the Sherman Act. *See* Resp. Mot. at 2-3.

The *Lucia* Decision

This matter was originally assigned to Administrative Law Judge ("ALJ") Christopher McNeil. On August 21, 2018, the Comptroller of the Currency ("Comptroller") reassigned this matter to ALJ C. Richard Miserendino following the Supreme Court's decision in *Lucia v. SEC*, which held that ALJs at the Securities and Exchange Commission ("SEC") were "inferior officers of the United States" subject to the strictures of the Appointments Clause of the United States Constitution.[25] The Comptroller explained that, in accordance with *Lucia*, "any pending proceeding [would] be reassigned, where practicable, to [a properly appointed] ALJ who had not been previously engaged in the case."[26]

In his August 24, 2018 Notice of Case Reassignment and Opportunity to File Objection and Response, consistent with the direction of the Comptroller's Order, ALJ Miserendino permitted the parties to file objections "[b]y no later than October 5, 2018" to any prior orders

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[25] 585 U.S. ___, 138 S. Ct. 2044 (2018); *see* Order in Pending Enforcement Cases in Response to *Lucia v. SEC* (August 21, 2018) ("Reassignment Order").

[26] Reassignment Order at 1.

issued in this action by ALJ McNeil. Neither party filed any objection by the October deadline or, for that matter, sought to clarify the applicability of that deadline with the action still stayed.

On November 6, 2018, upon joint notification by the parties of the conclusion of the parallel criminal proceeding against Respondent, ALJ Miserendino lifted the stay in this action. Again, neither party filed objections pursuant to the August 24, 2018 Order or otherwise endeavored to move the matter immediately forward. One and a half months later, without any further filings in the case, ALJ Miserendino retired. Because ALJ McNeil was the only other ALJ at the Office of Financial Institution Adjudication ("OFIA") at that time,[27] and because he could not preside over the case again by the terms of the Comptroller's Order, this matter was for all intents and purposes—albeit not formally—stayed again in January 2019 until another ALJ could be appointed.

On November 14, 2019, Secretary of the Treasury Steven T. Mnuchin approved the appointment of the undersigned as an OFIA ALJ assigned to hear OCC administrative enforcement proceedings. On January 6, 2020, the Comptroller issued an Order reassigning this matter to the undersigned, who then promptly notified the parties of this reassignment and directed them to file, by February 21, 2020, any objections they may have to the reassignment or any actions taken in the case by either of the prior ALJs.[28] Between the time of ALJ Miserendino's retirement and the undersigned's assignment to this case, neither Respondent nor Enforcement Counsel made any filing in this action or in any way sought to expedite proceedings before this tribunal.

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[27] *See* 12 C.F.R. §§ 19.101, 109.101 (all OCC enforcement proceedings to be conducted by OFIA ALJs); *see also* Financial Institution Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. 101-73, title IX, § 916, 103 Stat. 486, 12 U.S.C. § 1818 note (1989) (Improved Administrative Hearings and Procedures) (directing certain federal banking agencies, including the OCC, to jointly establish a pool of ALJs to hear enforcement actions).

[28] *See* Notice of Reassignment and Order Regarding the Comptroller of the Currency's Order in Pending Enforcement Cases, issued on January 8, 2020.

The Instant Motions

On February 21, 2020, Respondent filed objections to the undersigned's assignment to this matter on the grounds that she had not been constitutionally appointed. Respondent also noted, and the parties confirmed in a February 28, 2020 Joint Status Report, that he intended to file a supplemental motion to dismiss on various grounds, including that the OCC lacked subject-matter jurisdiction over the enforcement action and personal jurisdiction over him. On March 12, 2020, the undersigned issued a Notice and Order directing Respondent to file, by April 2, 2020, an omnibus motion to dismiss and response to Enforcement Counsel's motion for default, superseding both Respondent's July 2017 motion to dismiss and his February 2020 objections and consolidating all of Respondent's asserted grounds for dismissal. Respondent did so.

On April 23, 2020, Enforcement Counsel filed its opposition to Respondent's omnibus motion. On April 30, 2020, Respondent sought, and was granted, leave to file a reply regarding discrete aspects of Enforcement Counsel's Opposition. The undersigned then directed Enforcement Counsel to respond to certain issues raised in the Reply ("OCC Response") regarding Respondent's Appointments Clause argument and offered Respondent the opportunity to respond to Enforcement Counsel's Response ("Resp. Response"). Both Enforcement Counsel's motion for entry of default and Respondent's omnibus motion to dismiss have now been fully briefed and are ripe for determination.

III. Applicable Statutes

Because several of Respondent's arguments for dismissal go to the scope of enforcement powers afforded the OCC, it is worth first discussing the statutory framework under which that agency brings this action. Section 8 of the FDI Act, as amended most pertinently by the Financial Institutions Supervisory Act of 1966 ("FISA") and the Financial Institutions Reform, Recovery,

and Enforcement Act of 1989 ("FIRREA"), vests in "the appropriate Federal banking agency" the authority to institute enforcement proceedings for the imposition of various sanctions against "institution-affiliated parties" who the agency alleges have engaged in actionable misconduct.[29] The OCC is the appropriate federal banking agency under the FDI Act for, among other institutions, "any national banking association."[30] 12 U.S.C. § 1813(q)(1)(A). The OCC alleges that the Bank is a national banking association and that Respondent is an institution-affiliated party ("IAP") of the Bank.[31] *See* Notice ¶¶ 1-2; 12 U.S.C. § 1813(u) (defining IAP). The OCC therefore asserts that it has the authority to bring this action against Respondent for a prohibition order under 12 U.S.C. § 1818(e) and a second-tier civil money penalty under 12 U.S.C. § 1818(i). *See* Notice ¶ 4.

Elements of Sections 1818(e) and 1818(i)

To merit a prohibition order against an IAP under Section 1818(e), an agency must prove the separate elements of misconduct, effect, and culpability. The misconduct element may be satisfied, among other ways, by a showing that the IAP has (1) "violated any law or regulation," (2) "engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution," or (3) "committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty." 12 U.S.C. § 1818(e)(1)(A). The effect element may be satisfied, in turn, by showing either that the institution at issue thereby "has suffered or probably will suffer financial loss or other damage," that the institution's

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[29] *See* FISA, Pub. L. 89-695, § 204, 80 Stat. 1028 (1966) (codified as amended at 12 U.S.C. § 1818(e)); FIRREA, Pub. L. 101-73, §§ 901, 903, 907, 103 Stat. 183 (1989) (codified as amended at 12 U.S.C. §§ 1813 and 1818(e), (i)); *see also* Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. 95-630, § 107(e)(1), 92 Stat. 3660 (1978) (codified as amended at 12 U.S.C. § 1818(i)).

[30] The statute provides that "more than one agency may be an appropriate Federal banking agency with respect to any given institution," if that institution so qualifies. 12 U.S.C. § 1813.

[31] The undersigned addresses whether Respondent is, in fact, an IAP of the Bank in Part IV.C.1, *infra*.

depositors' interests "have been or could be prejudiced," or that the charged party "has received financial gain or other benefit." *Id.* § 1818(e)(1)(B). And the culpability element may be satisfied that the alleged violation, practice, or breach either "involves personal dishonesty" by the IAP or "demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution." *Id.* § 1818(e)(1)(C).

The imposition of a second-tier civil money penalty under Section 1818(i) also requires the satisfaction of multiple elements. First, the agency must show misconduct, which can take the form of a violation of "any law or regulation,"[32] the breach of "any fiduciary duty," or the reckless engagement "in an unsafe or unsound practice in conducting the affairs" of the institution in question. *Id.* § 1818(i)(2)(B)(i). Second, the agency must additionally show some external consequence or characteristic of the IAP's alleged 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 party." *Id.* § 1818(i)(2)(B)(ii).

Although the misconduct prongs of both Sections 1818(e) and (i) may be satisfied by an IAP's engagement or participation in an "unsafe or unsound practice" related to the depository institution with whom he is affiliated, that phrase is nowhere defined in the FDI Act or its subsequent amendments. John Horne, Chairman of the Federal Home Loan Bank Board ("FHLBB") during the passage of FISA, submitted a memorandum to Congress that described such practices as encompassing "any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would

[32] The misconduct elements of both Section 1818(e) and (i) can also be satisfied by the violation of (a) an agency cease-and-desist order, (b) a condition imposed in writing by a federal banking agency, or (c) any written agreement between such an agency and the depository institution in question. *See* 12 U.S.C. §§ 1818(e)(1)(A)(i), (i)(2)(A). The OCC does not allege any such violations in this case.

be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds."[33] This so-called Horne Standard has long guided federal banking agencies, including the OCC, in bringing and resolving enforcement actions.[34] It has also been recognized as "the authoritative definition of an unsafe or unsound practice" by federal appellate courts.[35] The undersigned accordingly adopts the Horne Standard, both for purposes of Respondent's instant motion and going forward in this proceeding, when evaluating allegations of unsafe or unsound practices under the relevant statutes.[36]

Timely Requests for a Hearing

Finally, Section 1818(i) states that an institution or person against whom a civil money penalty has been assessed is entitled to a hearing before the assessing agency, but only if they "submit[] a request for such hearing within 20 days after the issuance of the notice of assessment." 12 U.S.C. § 1818(i)(2)(H). The statute further provides that if a hearing is not requested within the prescribed timeframe, then the agency's assessment of a civil money penalty "shall constitute a final and unappealable order." *Id.* § 1818(i)(2)(E)(ii).

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[33] *Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before the House Comm. on Banking and Currency*, 89th Cong., 2d Sess. 49 (1966) (statement of John H. Horne, Chairman of the FHLBB), 122 Cong. Rec. 26,474 (1966).

[34] *See*, *e.g.*, *In the Matter of Patrick Adams*, Final Decision, No. AA-EC-11-50, 2015 WL 8735096 (OCC Sep. 30, 2014) (discussing Horne Standard in detail).

[35] *Gulf Federal Sav. & Loan Ass'n of Jefferson Parish v. FHLBB*, 651 F.2d 259, 264 (5th Cir. 1981); *see also Patrick Adams*, 2014 WL 8735096, at **14-17 (surveying application of Horne Standard by various circuits).

[36] Respondent suggests that the definition of "unsafe or unsound practices" should be limited to those practices that in fact "threaten[] the financial integrity of [a] banking institution," following a line of cases interpreting the Fifth Circuit's *Gulf Federal* decision cited immediately *supra*. Resp. Mot. at 55 (citing *Dodge v. Comptroller of the Currency*, 744 F.3d 148, 156 (D.C. Cir. 2014)). For the reasons amply articulated in *Patrick Adams* and in this tribunal's March 2, 2020 order in a Federal Deposit Insurance Corporation ("FDIC") enforcement action in which the same issue arose, the undersigned declines to restrict the scope of "unsafe or unsound practices" in this way. *See Patrick Adams*, 2014 WL 8735096, at **14-30; *see also* Order Regarding Respondent's Objections on Remand to Pre-Hearing Actions, *In the Matter of Cornelius Burgess*, Nos. FDIC-14-0307e & FDIC-14-0308k, at **4-11 (OFIA Mar. 2, 2020). This tribunal will furnish copies of this Order for informational purposes upon request.

IV. Argument and Analysis

Enforcement Counsel has moved for an entry of default against Respondent on the grounds that Respondent did not timely file an Answer to the Notice or timely request a hearing on the assessment of a civil money penalty as required by Rule 19 of the Uniform Rules and, as to the request for hearing, 12 U.S.C. §§ 1818(i)(2)(E) and (H). For his part, Respondent has moved for dismissal on over a dozen distinct grounds, including lack of valid service, lack of personal jurisdiction, lack of OCC authority to enforce the relevant statutory framework in the United States or abroad, and the constitutional infirmity of the Notice, the FDI Act, the Deputy Comptroller who initiated proceedings, this tribunal, and the undersigned herself. The undersigned will take each of these arguments in turn.

A. Service and Default

Enforcement Counsel argues that because Respondent did not file an Answer or request a hearing within 20 days of the registered UPS delivery of the Notice to Respondent's U.K. residence on January 12, 2017, the OCC is entitled to an entry of default against Respondent and a final, unappealable order on its assessment of a $5 million civil money penalty. OCC Mot. at 1-2. Respondent contends that service of the Notice was ineffective because the OCC is not authorized to effect service internationally. Resp. Mot. at 10-12. In the alternative, Respondent argues that only the June 16, 2017 service of the Notice by the U.K. Central Authority constituted effective service, and therefore Respondent's July 5, 2017 Answer and request for hearing were timely filed. *Id.* at 14. Respondent also asserts that even if he had not submitted a timely Answer and request for hearing, an entry of default would be unwarranted because any delay was inconsequential and had been cured by the time of Enforcement Counsel's motion. *Id.* at 14-19.

1. International Service is Authorized by Regulation and Statute

To begin with, the undersigned finds that both Respondent and Enforcement Counsel err in presuming that the applicable rule for valid methods of service in this instance is Rule 11(b) of the Uniform Rules. *See* OCC Mot. at 4-5 (citing 12 C.F.R. § 19.11(b)); Resp. Mot. at 10 (same). While Rule 11(b) does generally govern service of papers in an OCC enforcement action, it is Rule 11(c)(2) that applies when "a party has not yet appeared in the proceeding"—that is, when a respondent has not yet been served.[37] 12 C.F.R. § 19.11(c)(2). Enforcement Counsel takes the position that Rule 11(c)(2) is inappropriate here because it only covers service "[b]y the Comptroller or the administrative law judge," rather than by Enforcement Counsel as a "party" on behalf of the OCC. *Id.*; *see* OCC Mot. at 5 n.5. But Rule 18(a) states that enforcement proceedings are "commenced by issuance of a notice by the Comptroller," and that such "notice must be served by the Comptroller upon the respondent." 12 C.F.R. § 19.18(a). While Enforcement Counsel may have mailed the Notice, it was drafted and signed on behalf of the Comptroller at a point in the proceeding where no party, Enforcement Counsel included, had entered an appearance.[38] Rule 11(c)(2) therefore governs the service of the Notice.

The FDI Act provides that "[a]ny service required or authorized to be made by the appropriate Federal banking agency under this section may be made by registered mail, or in such other manner reasonably calculated to give actual notice as the agency may by regulation or otherwise provide." 12 U.S.C. § 1818(l). Rule 11(c)(2) mirrors this, stating that service of a notice

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[37] *See In the Matter of Christopher Ashton*, Nos. 16-015-E-I & 16-015-CMP-I, 2017 WL 2334473, at *1 (FRB May 19, 2017) (Final Decision) (applying identical rule for service of notice in Federal Reserve Board enforcement action).

[38] *See* Notice at 1 (stating that "the Comptroller . . . hereby assesses a civil money penalty"); 21 (stating that "[t]he Comptroller prays for relief" and signed by Deputy Comptroller Kennedy "on behalf of the Office of the Comptroller of the Currency"); *see also* 12 C.F.R. § 19.3(c) (defining "Comptroller" as "the Comptroller of the Currency or a person delegated to perform the functions of the Comptroller of the Currency under this part"); OCC Opp. at 79-80 (Deputy Comptroller Kennedy exercising delegated function when signing Notice).

may be made, among other ways, "[b]y registered or certified mail addressed to the person's last known address" or "[b]y any other method reasonably calculated to give actual notice." 12 C.F.R. § 19.11(c)(2)(iv), (v). Both statute and regulation comport with Supreme Court precedent regarding service within the boundaries of constitutional due process.[39] There should be no question that using UPS Worldwide Express delivery to mail the Notice to Respondent's address in the United Kingdom, as the OCC indisputably did, was allowable by these terms.

Respondent nevertheless argues that because neither Section 1818(l) nor the Uniform Rules specifically state that international service is authorized, the OCC lacks the authority to effect service outside the borders of the United States. Resp. Mot. at 10-11. In support, Respondent points to Rule 11(e), entitled "Area of service," which states in full:

> Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service shall be made on at least one branch or agency so involved.

12 C.F.R. § 19.11(e). In Respondent's view, this rule describes the whole of the area in which the OCC is permitted to serve a party—because the "rule makes no allowance for service outside the United States," such service is therefore precluded, regardless whether it is made by registered mail or otherwise reasonably calculated to give notice. Resp. Mot. at 10.

[39] *See Jones v. Flowers*, 547 U.S. 220, 226 (2006) ("[D]ue process requires the government to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.") (internal quotation marks and citation omitted); *Tulsa Prof'l Collection Svcs. v. Pope*, 485 U.S. 478, 490 (1988) ("We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice.").

Respondent has misapprehended the purpose of Rule 11(e), which—although admittedly abstruse—does not mention service outside the United States because it is not concerned with service outside the United States. Rather, the rule sets forth two distinct points regarding *domestic* service. First, it states that the location of the hearing does not circumscribe where in the United States a person or company doing business in the United States may be served.[40] Second, it offers a caveat to that general direction in one circumstance: if the entity to be served is a foreign bank, and if the action concerns one or more of that bank's U.S. branches, then service may not be made at a different U.S. branch of the bank. If the OCC commences an enforcement action against a French bank in which the Seattle branch of that bank is alleged to have engaged in actionable misconduct, then service at that bank's Manhattan branch would be deemed ineffective. Rule 11(e) says nothing regarding when and how a foreign bank with *no* U.S. branches alleged to have been involved in the action may be served, let alone whether a foreign national over which the agency may exercise personal jurisdiction[41] can be served in a foreign country as long as the method of service accords with statutory requirements and due process. There is no basis to conclude that Rule 11(e) operates to forbid otherwise valid service on foreign nationals unless and until they set foot in the United States.

Respondent also argues that only statutory schemes that expressly provide for service abroad should be construed to permit such service, in keeping with the general principle that statutes should not be presumed to reach beyond U.S. borders in their application. *See* Resp. Mot. at 11 and n.4 (citing cases). Such an argument largely overlaps with Respondent's broader

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[40] Respondent and Enforcement Counsel offer competing interpretations of this rule's applicability to other persons—*i.e.*, persons not doing business in the United States—"as otherwise provided by law." *See* OCC Opp. at 14; Reply at 6-7. The undersigned concludes that it is unnecessary to resolve this difference in interpretation because the rule does not address, and therefore does not foreclose, the prospect of international service in any event.

[41] *See* Part IV.B *infra*.

contention that the FDI Act as a whole has no extraterritorial application and that any alleged foreign misconduct by Respondent is out of the grasp of the OCC entirely. *See id.* at 43-44; Reply at 7-8. The undersigned concurs with Enforcement Counsel that to the extent the FDI Act does apply to at least some extraterritorial conduct by at least some extraterritorial actors, it makes little sense to construe Section 1818(l)'s provision that service in enforcement actions "may be made by registered mail" to apply only within domestic borders.[42] *See* OCC Opp. at 12. The undersigned therefore holds that where a banking agency's enforcement power reaches conduct overseas that has had the requisite effect on U.S. depository institutions, depositors, or the Deposit Insurance Fund, so too does the agency's ability to effect service internationally, so long as that service is made consistent with statute and due process.[43] As addressed *infra* in Part IV.E.4, the undersigned concludes that the FDI Act does have some extraterritorial application, and Respondent's argument that service under Section 1818(l) must necessarily be domestic fails as a result.

Finally, the undersigned notes that the Federal Reserve Board of Governors ("FRB" or "the Board"), an OFIA constituent agency, has previously considered and rejected both aspects of Respondent's argument. In *Christopher Ashton*, an enforcement action arising from the same alleged misconduct as the present matter, the FRB concluded that its rules—and in particular its

[42] Enforcement Counsel cites to 12 U.S.C. § 1818(r) as evidence that the service provisions should be construed to permit service internationally. *See* OCC Opp. at 12-13. Here, the undersigned is less persuaded. Enforcement Counsel's logic is as follows: Section 1818(r) provides for enforcement actions in certain circumstances against foreign banks and foreign IAPs of those banks, yet only describes the method for serving foreign banks. Therefore, Section 1818(l) must cover service of foreign IAPs of foreign banks, and such service must be permitted internationally, or else the agency's enforcement powers would be thwarted. *See id.* at 13. This logic is sound but falls at an early hurdle—namely, that it is unclear that the language in Section 1818(r) to which Enforcement Counsel refers in fact authorizes enforcement actions against foreign IAPs of foreign banks, rather than actions against foreign banks based on the conduct of their foreign IAPs. *See* 12 U.S.C. § 1818(r)(1) (guiding the application of Section 1818 generally "to foreign banks"). The undersigned accordingly does not rely on Section 1818(r) as any basis for concluding that international service of nonresident IAPs is contemplated by the statute.

[43] *See* OCC Opp. at 12 ("Presumably . . . Congress did not intend for nonresident IAPs who cause significant losses to FDIC-insured depository institutions to be able to evade the Comptroller's jurisdiction, solely because section 1818(l) does not explicitly provide for service abroad.").

identically-worded version of Rule 11(e)—“do not limit service to the United States.”[44] And in *Agha Hasan Abedi and Swaleh Naqvi*, the Board held that “Enforcement Counsel’s use of international registered mail as a method of service is encompassed within the authorization in the FDI Act and the Board’s regulations of ‘registered mail’ as a method of service.”[45] Furthermore, Respondent’s cite to the District of Columbia Circuit’s 1984 decision in *Commodity Futures Trading Commission v. Nahas* as support for the argument that service statutes should be construed to permit only domestic service is inapposite. *See* Resp. Mot. at 11. The court in that case remarked upon the “critical” distinction between service of a subpoena, which was at issue there, and service of notice, observing that the latter did not present the same issues in terms of extraterritorial application.[46] In sum, the undersigned finds that international service by registered mail is authorized by regulation, statute, and the contours of constitutional due process.

2. The Hague Service Convention Permits Service by Registered Mail in the United Kingdom

Respondent argues that even if international service of the Notice was authorized, it could only be effected through the U.K. Central Authority pursuant to the Hague Service Convention rather than by registered mail. *See* Resp. Mot. at 12-14. Respondent thus contends that the first date on which he was validly served was June 16, 2017, and that his July 5, 2017 Answer and request for a hearing were therefore timely filed. This is wrong.

The Hague Service Convention requires each signatory state, including the United States and the United Kingdom, “to establish a central authority to receive requests for service of

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[44] *In the Matter of Christopher Ashton*, 2018 WL 513536, at *2 (FRB Jan. 11, 2018) (Decision on Motion to Vacate and Void Final Decision).

[45] *In the Matter of Agha Hasan Abedi and Swaleh Naqvi*, 80 Fed. Res. Bull. 74, 76 (F.R.B.), 1994 WL 3572 (FRB Jan. 1, 1994) (citing 12 U.S.C. 1818(l) and 12 C.F.R. 263.11(c)(2)(iii)).

[46] *CFTC v. Nahas*, 738 F.2d 487, 494 n.14 (D.C. Cir. 1984) (“When process in the form of a complaint is served extraterritorially, the informational nature of the process renders the act of service relatively benign in terms of infringement on the foreign nation’s sovereignty.”).

documents from other countries."[47] While the purpose of these central authorities is "to simplify, standardize, and generally improve the process of serving documents abroad," they are not "the only method of service approved by the Convention."[48] Rather, Article 10(a) of the Hague Service Convention states that "[p]rovided the State of destination does not object," the Convention does not "interfere with [] the freedom to send judicial documents, by postal channels, directly to persons abroad."[49]

In *Water Splash, Inc. v. Menon*, the Supreme Court squarely addressed the question of international service by mail under the Hague Service Convention. There, the Court considered the question of whether the use of the word "send" in Article 10(a) encompassed service of judicial documents, and concluded that it clearly did.[50] The Court therefore held that "in cases governed by the Hague Service Convention, service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law."[51]

As discussed above, the OCC's service of a notice of charges by registered mail, whether domestically or internationally, is authorized both by statute and by rule. The question, then, is whether the United Kingdom objects to service of "judicial documents, by postal channels, directly to persons abroad" rather than exclusively through its Central Authority. It does not.[52]

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[47] *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1508 (2017) (internal quotation marks and citation omitted); *see also* Hague Service Convention Art. 2, *available at* https://www.hcch.net/en/instruments/conventions/full-text/?cid=17.

[48] *Water Splash*, 137 S. Ct. at 1507, 1508.

[49] Hague Service Convention Art. 10(a).

[50] *See Water Splash*, 137 S. Ct. at 1509-10.

[51] *Id.* at 1513.

[52] *See* https://treatydatabase.overheid.nl/en/Verdrag/Details/004235_b#United%20Kingdom (U.K. objecting to other subsections of Article 10 of the Hague Service Convention, but not Article 10(a)).

Accordingly, the OCC was authorized to effect service of the Notice by registered mail, and Respondent was validly served on January 12, 2017.[53]

3. Respondent Did Not Timely Answer the Notice

The Uniform Rules provide that once a notice has been served, the respondent has twenty days to file an answer "specifically respond[ing] to each paragraph or allegation of fact contained in the notice" and setting forth any affirmative defenses that the respondent wishes to assert. 12 C.F.R. § 19.19. The time for response is computed beginning the day after service and running until the first date, once the prescribed period has passed, that is not a Saturday, Sunday, or federal holiday. *Id.* § 19.12(a). If service is made by express mail, as it was in this case, then one calendar day is added to the end of the prescribed period. *Id.* § 19.12(c)(1).

The Rules further state that a respondent's failure to timely file an answer "constitutes a waiver of his or her right to appear and contest the allegations in the notice," and authorizes Enforcement Counsel to move for the entry of an order of default. *Id.* § 19.19(c)(1). Upon such motion, the ALJ must determine whether good cause has been shown for the failure to file a timely answer. *Id.* If no good cause has been shown, the ALJ is directed to "file with the Comptroller a recommended decision containing the findings and relief sought in the notice." *Id.*

Here, because the Notice was served on January 12, 2017, the time period within which Respondent was required to file his answer ended on February 2, 2017. Respondent concedes that he did not file an Answer until July 5, 2017. *See* Resp. Mot. at 4. Therefore, Respondent's Answer was not timely filed, and Enforcement Counsel was entitled to move for an entry of default, as it duly did.

[53] *See* OCC Mot., Ex. A (proof of delivery).

4. Respondent Timely Requested a Hearing on the Civil Money Penalty

Both the FDI Act and the Uniform Rules state that once an agency issues a notice of assessment of a civil money penalty pursuant to Section 1818(i), the respondent has twenty days from receipt of that notice[54] to request a hearing on that assessment, or else the assessment will "constitute a final and unappealable order." 12 U.S.C. §§ 1818(i)(2)(E)(ii), (H); 12 C.F.R. § 19.19. Under the Uniform Rules, the time period for requesting a hearing is computed in the same manner as for filing an answer. *See* 12 C.F.R. § 19.12(a), (c). Thus, Respondent had until February 2, 2017 to request a hearing on the $5 million civil money penalty assessment reflected in the Notice.

Because the statute itself imposes this time limit, and not simply the Uniform Rules, there is one added wrinkle: if a timely request for a hearing within the prescribed period constitutes a "jurisdictional" requirement—that is, a rule intended by Congress to limit a tribunal's capacity to adjudicate the proceedings if the rule is not followed—then the OCC's assessment of a civil money penalty would be set in stone unless Respondent had requested a hearing by February 2, 2017.[55] Respondent would be fined $5 million regardless of the outcome of the remainder of the case, and that assessment would be unreviewable, whether by this tribunal or the federal court of appeals that would otherwise have jurisdiction over orders issued by the agency in this matter.[56] If, on the other hand, the statutory requirement to request a hearing by a certain date is not jurisdictional,

[54] The statute provides that a request for hearing must be made within twenty days "after the *issuance* of the notice of assessment," 12 U.S.C. § 1818(i)(2)(H), while the Uniform Rules require the respondent to request a hearing within twenty days of "*service* of the notice," 12 C.F.R. § 19.19(a) (emphases added). Lacking any basis to believe that Congress intended the clock to start on a respondent's time to request a hearing before he or she had been served with the notice of assessment, the undersigned will construe the language in both statute and rule to prescribe concurrent and coterminous periods within which a hearing on a civil money penalty assessment may be requested.

[55] *See Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011) ("Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system.").

[56] *See* 12 U.S.C. § 1818(h)(2) (providing for Article III review of final agency orders in enforcement actions); *see also Henderson*, 562 U.S. at 435 (noting that "the consequences that attach to the jurisdictional label may be . . . drastic").

then it can be waived, the deadline extended, or noncompliance forgiven for good cause or by consent of the parties and assent of the judge.[57]

Requiring respondents to request a hearing on the assessment of a civil money penalty within twenty days of service of the notice is effectively what the Supreme Court has called a "claim-processing rule"—that is, a rule that seeks "to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[58] In this instance, the purpose of such a rule is to balance the opportunity for respondents to contest an assessment with the efficient administration of enforcement actions in circumstances when the respondent, despite being properly served, is unwilling to appear and timely exercise that opportunity. Although the Supreme Court has expressed the view that claim-processing rules "should not be described as jurisdictional" in the ordinary course, it also recognizes that Congress may make such rules jurisdictional by "attach[ing] the conditions that go with the jurisdictional label."[59] The Court thus has devised "a readily administrable bright line rule" in which a tribunal must "look to see if there is any clear indication that Congress wanted the rule to be jurisdictional."[60]

There are at least some indicia that the requirement for timely requesting a hearing on a civil money penalty assessment was intended to be jurisdictional. The first subsection of Section 1818(i), for example, states that "no court shall have jurisdiction to affect . . . the issuance or enforcement of any notice or order under [Section 1818], or to review, modify, suspend, terminate, or set aside any such notice or order," except as provided. 12 U.S.C. § 1818(i)(1). Section 1818(i) itself is entitled "Jurisdiction and enforcement; penalty," and the Supreme Court has looked to the

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[57] *Cf.* 12 C.F.R. §§ 19.13 (ALJ may extend time limits for good cause shown "[e]xcept as otherwise provided by law"), 19.19(c)(1) (ALJ may excuse failure to timely file answer on showing of good cause).

[58] *Henderson*, 562 U.S. at 435 (noting that "[f]iling deadlines . . . are quintessential claim-processing rules").

[59] *Id.*; *see also*, *e.g.*, *Bowles v. Russell*, 551 U.S. 205 (2007) (holding that statutory limitation on length of extension of time to file a notice of appeal in ordinary civil case is jurisdictional).

[60] *Henderson*, 562 U.S. at 435-36 (internal quotation marks and citation omitted).

title of a statutory section for guidance as to whether rules therein should be treated as jurisdictional.[61] The statute prescribes a specific "jurisdictional consequence" for failure to adhere to the deadline—to wit, the assessment becomes a final and unappealable order.[62] And multiple circuit courts of appeal have discussed the provision in question in jurisdictional terms, albeit several decades ago and largely in dicta.[63]

The question of Section 1818(i)(2)(E)'s jurisdictionality under current Supreme Court precedent is an open one that will likely one day require resolution by the agencies. The discontinuity between the potential result of missing a deadline to answer by one day and missing a deadline to request a hearing by one day if the latter is jurisdictional is striking, particularly in cases like this one where the agency seeks both a prohibition order and a civil money penalty and the hearing will therefore happen anyway. Yet even recognizing the "harsh consequences that accompany the jurisdiction tag,"[64] it may well be what Congress intended. It is ultimately unnecessary to decide that question here, however, because the undersigned finds that Respondent's counsel's February 1, 2017 letter to Enforcement Counsel constituted a timely request for a hearing on the assessment of the civil money penalty.

Section 1818(i)(2)(E) directs respondents to "submit[] a request for [a] hearing" on an assessment of a civil money penalty by a specified time. The statute does not specify in what form

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[61] *See id.* at 439-440 (noting that time limit at issue in that case was located in subchapter captioned "Procedure" rather than subchapter captioned "Jurisdiction; finality of decisions").

[62] *Id.* at 438.

[63] *See Amberg v. FDIC*, 934 F.2d 681, 688 (5th Cir. 1991) (suggesting that Section 1818(i) "posit[s] a jurisdictional default upon failure to file a request for hearing within the statutorily prescribed time limit"); *Kronholm v. FDIC*, 915 F.2d 1171, 1174 (8th Cir. 1990) (holding that "Congress has expressly indicated, through section 1818(i)(2)(E)(ii), its intent to prohibit judicial review of a civil money penalty absent an administrative hearing").

[64] *Henderson*, 562 U.S. at 441.

the request for hearing must take or to whom the request must be made.[65] In a 2016 decision on a motion for interlocutory review, the Federal Deposit Insurance Corporation ("FDIC") Executive Secretary concluded that a respondent had adequately requested a hearing within the allowable time period when her counsel filed a motion for extension of time to file an answer that did not explicitly request a hearing on the civil money penalty but mentioned future "hearings" in passing.[66] The Secretary there found that because the caption of the motion included the docket numbers for both the prohibition action and the civil money penalty action against the respondent, "the request of counsel to avoid certain dates for hearings constituted a concurrent request for a hearing on the [civil money penalty] assessment."[67] He further emphasized that this conclusion reflected "the specific and unique facts and circumstances" of that case and did not relieve respondents of the responsibility to be as clear as possible when fulfilling their statutory obligation to timely request hearings.[68] Finally, he noted that permitting the respondent to contest the assessment of a civil money penalty at an evidentiary hearing "should not adversely affect or unduly burden the FDIC," because a hearing on the prohibition action would take place regardless and the agency had a "virtually identical" evidentiary burden in both instances.[69]

Likewise here the undersigned concludes that the specific circumstances of the case merit treating Respondent's February 1, 2017 letter as a constructive request for a hearing on the OCC's

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[65] Rule 19.19 directs that a request for hearing should be "file[d]," which suggests a formal submission, but it is the statutory language that would determine the bounds of a respondent's compliance if the requirement to timely request a hearing were deemed jurisdictional.

[66] Decision and Order on Motion for Interlocutory Review, *In the Matter of Diana Yates*, FDIC No. 14-0217k, at 1-2 (March 17, 2016) (concluding that the motion for extension of time "should be construed as a timely request for hearing"). The Executive Secretary was acting pursuant to delegated authority from the FDIC Board of Directors. *See id.* at 10.

[67] *Id.* at 7.

[68] *Id.*; *see also id.* at 8 (finding that respondent could not have retroactively "satisf[ied] the statutory requisite" with affidavits explaining that her intent had been to request a hearing).

[69] *Id.* at 8.

assessment of a $5 million civil money penalty. That letter, which was sent one day before the statutory deadline, clearly indicates an intention to be heard in opposition to any proceeding initiated by the OCC against Respondent. It expresses the view that service had not been validly effected, based on the arguments Respondent now raises in his instant motion, and that therefore the twenty-day period to respond following service had not yet begun to run. And it then states without equivocation that "[s]hould proper service be effectuated at some point in the future, Mr. Usher will strongly contest the merits of the allegations of the OCC against him at that time." February 1, 2017 Letter at 2.

It is true that the letter does not say that Respondent is formally requesting a hearing on the assessment, or even mention the civil money penalty at all. But such magic words are unnecessary when considering the particular context of this communication. This is not a case where the notice of charges went blithely unheeded until after the statutory deadline had passed. Rather, it is clear from the facts adduced by Enforcement Counsel that Respondent was aware of the Notice and the commencement of proceedings following service on January 12, 2017, but chose not to appear in the proceeding until a second form of service was effected several months later, based on his timely asserted position that the first service was ineffective and thus did not trigger an obligation to respond. *See* OCC Mot. Exs. D-F. Respondent could certainly have requested a hearing in no uncertain terms in January or early February as a prophylactic matter to guard against the risk of that service being deemed effective—as indeed it was—and the assessment therein therefore final and unappealable, but this tribunal will not conclude that the failure to do so was a $5 million error in judgment. Better, by far, to find that the statute should not be read to exact such a weighty toll in these narrow circumstances—that is, where Respondent clearly indicated his opposition to the proceedings within the specified time period, including his view that the twenty-day period had

not begun to run; where there is no question that Respondent is present in this matter and willing to contest the validity of the charges leveled against him; and where, if the undersigned finds that there is good cause to deny Enforcement Counsel's motion for default, the OCC's allegations against Respondent will be adjudicated on the merits in any event.[70]

5. The Entry of Default is Unwarranted

While Enforcement Counsel was entitled to move for default under the Uniform Rules following Respondent's failure to timely file an answer, the undersigned concludes that good cause has been shown to excuse the untimely answer and permit this matter to proceed. The entry of default is disfavored when the matter is capable of being resolved on the merits and the agency has not been prejudiced by any occasioned delay.[71] Moreover, "[b]ecause of the strong preference for resolving disputes on their merits, any doubts must be resolved in favor of the party seeking relief from the default."[72] Though most commonly applicable to civil litigation in which a plaintiff seeks entry of judgment against an absent defendant, this applies with equal, if not extra, force in agency enforcement actions. As the Eighth Circuit observed in *Oberstar v. FDIC*, "[t]he judicial preference for adjudication on the merits goes to the fundamental fairness of the adjudicatory process. Fairness concerns are especially important when a government agency proposes to assess a quasi-criminal monetary penalty on a private individual."[73]

Here, Enforcement Counsel moved for entry of default four weeks after service of the Notice was effected by the U.K. Central Authority and ten days after Respondent had filed his

[70] Nothing about this conclusion, of course, in any way relieves respondents of the statutory obligation to timely request hearings on the assessment of civil money penalties, and they are well-advised to be as clear and unambiguous as possible in doing so given the potentially irrevocable consequences.

[71] *See*, *e.g.*, *Oberstar v. FDIC*, 987 F.2d 494, 504 (8th Cir. 1993) (noting "the strong judicial policy against default judgments").

[72] *Republic of Kazakhstan v. Stati*, 325 F.R.D. 507, 509 (D.D.C. 2018) (internal quotation marks and citation omitted).

[73] *Oberstar*, 987 F.2d at 504.

Answer. By its own telling, Enforcement Counsel had endeavored to serve Respondent through the Central Authority as well as by registered mail "out of an abundance of caution." OCC Mot. at 6. It therefore follows that Enforcement Counsel recognized some possibility that service might not have been validly effected, and the proceedings not fully commenced, until the Central Authority did so in mid-June 2017. To all appearances, furthermore, Respondent's failure to timely file his Answer arose from a good faith, if incorrect, belief that he was not required to do so until served by the Central Authority. Respondent also communicated this position, and his willingness to appear and contest the charges when validly served, to Enforcement Counsel. These things being the case, it would ill-serve the interests of justice to enter an order of default against Respondent when the parties are able to proceed on the merits and there is no suggestion that Enforcement Counsel has been prejudiced by any delay. The undersigned accordingly denies the instant motion for entry of default.

B. <u>Personal Jurisdiction</u>

Respondent argues that this tribunal cannot exercise personal jurisdiction over him under the Due Process Clause of the Fifth Amendment because he is a foreign national residing in a foreign country whose alleged actions while employed by a foreign company took place overseas and were not directed at the United States in any purposeful way. *See* Resp. Mot. at 21-25. In response, Enforcement Counsel contends that Respondent has extensive contacts with the United States through his conduct and that exercising jurisdiction over him "would not 'offend traditional notions of fair play and substantial justice.'" OCC Opp. at 1-2. Among other things, Enforcement Counsel argues that Respondent's alleged misconduct came in the direct course of his formal secondment to a U.S. bank; that he traveled to the United States and there communicated with U.S. clients of the Bank as well as U.S.-based Bank employees; that he was supervised and directed

exclusively by Bank personnel, including one based in the United States; that he traded regularly and extensively on behalf of the Bank with U.S. residents; that the Bank bore the credit risk of his trades and absorbed his profits and losses; and that his alleged collusion with Bank competitors in connection with his trading activity in fact caused the Bank to incur substantial financial loss. *See id.* at 2, 21-38. For the reasons below, the undersigned agrees with Enforcement Counsel that Respondent has sufficient contacts with the United States as a forum to make the exercise of personal jurisdiction over him in this matter appropriate.

1. The OCC Has Asserted Specific Jurisdiction Over Respondent Based On His Contacts with the United States

When determining whether the exercise of personal jurisdiction over a nonresident of a forum is appropriate, "[t]he question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct."[74] Moreover, where the operative statute provides "for nationwide or worldwide service," as Section 1818(l) does in this case, "the relevant inquiry is whether the respondent has had sufficient minimum contacts with the United States" as a whole, rather than any state in particular.[75] While such contacts can form the basis for either general or specific personal jurisdiction, Enforcement Counsel here asserts only the latter—that is, that the claims in the Notice arise out of, or relate to, Respondent's contacts with the United States.[76] *See* OCC Opp. at 19 n.12.

The Supreme Court has held that for a forum to exercise specific jurisdiction over a nonresident defendant, "the defendant's suit-related conduct must create a substantial connection

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[74] *J. McIntyre Machinery, Ltd. v. Nicastro* ("*Nicastro*"), 564 U.S. 873, 884 (2011) (plurality opinion).

[75] *SEC v. Knowles*, 87 F.3d 413, 417 (10th Cir. 1996); *see also Waldman v. PLO*, 835 F.3d 317, 330 (2d Cir. 2016) ("[U]nder the Fifth Amendment[,] the court can consider the defendant's contacts throughout the United States.").

[76] *See Charles Schwab Corp.*, 883 F.3d at 82; *see also Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984) (distinguishing between general and specific jurisdiction).

with [that forum]."[77] Further, the relationship between the defendant's conduct and the forum "must arise out of contacts that the defendant *himself* creates with the forum State."[78] In the familiar formulation, "there [must] be some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[79] Specific personal jurisdiction may not be established "solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person."[80]

"By requiring that individuals have fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign, the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[81] Thus, the Supreme Court has "upheld the assertion of jurisdiction over defendants who have purposefully reached out beyond their State and into another by, for example, entering into a contractual relationship that envisioned continuing and wide-reaching contacts in the forum State."[82] As a general matter, when a foreign person "deliberately has . . . created continuing obligations between himself and residents of a forum, he manifestly has availed himself of the privilege of conducting business there."[83]

Once the moving party has demonstrated that a nonresident "who purposefully has directed his activities at forum residents" has had sufficient minimum contacts with the forum in question,

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[77] *Walden v. Fiore*, 571 U.S. 277, 284 (2014).

[78] *Id.* (internal quotation marks and citation omitted) (emphasis in original).

[79] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985) (internal quotation marks and citation omitted).

[80] *Id.* at 475 (internal quotation marks and citations omitted).

[81] *Id.* at 472 (internal quotation marks and citations omitted).

[82] *Walden*, 571 U.S. at 285 (internal quotation marks and citation omitted).

[83] *Burger King*, 471 U.S. at 475-76 (internal quotation marks and citation omitted).

the nonresident may seek to defeat jurisdiction.[84] To do so, "he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable."[85] Broadly speaking, these further factors to be evaluated speak to "whether the assertion of personal jurisdiction would comport with fair play and substantial justice."[86] They include "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, [and] the . . . judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies."[87] In considering these factors, a court may even conclude that they "serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."[88]

2. Respondent's Work On Behalf of the Bank Constitutes Purposeful Availment of the U.S. Forum and Its Laws

The undersigned agrees with Enforcement Counsel that Respondent's course of conduct "in performing work for the Bank over several years pursuant to the clear terms of a formal secondment agreement" demonstrates purposeful availment of the U.S. forum. OCC Opp. at 23. While Respondent contends that the secondment was more of a technicality and that he was "really" working for a European nonbank entity rather than an American bank during the Relevant Period, *see* Reply at 2-3, the terms of the secondment agreement and the other evidence adduced by Enforcement Counsel suggest the opposite—that in all but name, Respondent was a Bank employee at the Bank's London branch doing Bank work on behalf of the Bank. Enforcement

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[84] *Id.* at 477.

[85] *Id.*; *see also Asahi Metal Indus. Co. v. Superior Court of Calif.*, 480 U.S. 102, 114-15 (1987).

[86] *Burger King*, 471 U.S. at 476 (internal quotation marks and citation omitted).

[87] *Id.* at 476-77 (internal quotation marks and citation omitted).

[88] *Id.* at 477 (citing cases).

Counsel has made, at minimum, a *prima facie* case that the European entities JPEL and JPL had little to do with Respondent's day-to-day employment activities at the Bank's London FX Spot Trading Desk other than signing his paychecks, and even in that, they were reimbursed by the Bank. *See* Secondment Agreement, Art. 5.1.

As described more fully in Part I *supra*, Respondent does not dispute that he traded on behalf of the Bank. He does not dispute that he was supervised and directed exclusively by Bank personnel, including a direct supervisor based in New York, and that he traveled to the United States to mark his promotion to Managing Director. He does not dispute that he represented himself to U.K. regulators as serving as the Bank's European head of FX spot trading. He does not dispute that he dealt with the London or European offices of U.S.-based clients or that he communicated regularly with Bank employees in the United States in the course of his duties. He does not dispute that he made hundreds of millions of dollars of daily currency trades with U.S. residents. And he does not dispute that the Bank bore the credit risk of loss on his trades and that his actions could expose the Bank to legal liability. Respondent is correct that the mere act of causing U.S. dollars to be transferred to and from bank accounts in the United States will not necessarily suffice to establish personal jurisdiction.[89] And he is right that injuries suffered by a U.S. entity are not by themselves an adequate jurisdictional hook.[90] But these things comprise only a small part of Respondent's interactions with the United States as a forum during the Relevant Period.

Respondent understood—or at least should have understood, and averred to U.K. regulators at the time that he did understand—that his trading activities carried with them certain

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[89] *See* Reply at 5 (arguing that "[t]he innumerable individuals making dollar-based transactions worldwide cannot be availing themselves of U.S. laws simply because those transactions might figure into banks' eventual score-keeping.").

[90] *See Walden*, 571 U.S. at 290 ("[A]n injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State. The proper question is not where the plaintiff experienced a particular injury but whether the defendant's conduct connects him to the forum in a meaningful way.").

risks. *See* OCC Opp., Ex. 6 § 2.5. Indeed, he affirmed to those regulators that he was "responsible for risk planning, including identifying, measuring, managing and controlling risks of regulatory concern" in his line of business for the Bank's London branch. *Id.* § 2.4. One of the risks inherent in trading extensively with U.S. residents on behalf of a U.S. bank operating in part under U.S. banking law and regulated in part by U.S. banking agencies is that Respondent foreseeably could be subject to U.S. jurisdiction, even as a foreign national working in the United Kingdom. Respondent exercised significant management functions for the Bank, a U.S. national banking association and insured depository institution; he cannot now credibly claim to be insulated and beyond reach of the U.S. agencies that oversee such institutions, if those agencies allege that his conduct while working for the Bank has had actionable effects within their statutory purview in the United States.[91]

Further, even by Respondent's own reckoning, his affiliation with a foreign "nonbank subsidiary of an Edge corporation" such as JPEL would bring him under the enforcement jurisdiction of a different U.S. banking agency, the FRB.[92] Resp. Mot. at 48; *see id.* at 46-48. The question is thus not whether Respondent "has the requisite relationship with the United States government" to be subject to U.S. jurisdiction *at all*,[93] but rather which agencies have enforcement authority over him. The undersigned finds that Respondent's conduct in the course of his affiliation with the Bank during the Relevant Period constituted purposeful availment of the U.S. forum and

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[91] *Cf. In the Matter of Ralli Brothers (Bankers) S.A.* ("*Ralli Brothers*"), No. 82-15, 1984 WL 48041, at *4 (CFTC Nov. 30, 1984) (Initial Decision on Summary Disposition) ("Congress intended the [Commodity Futures Trading] Commission to have, in effect, transactional jurisdiction over any person believed to be violating the Act, without regard to the person's nationality or location. Of course, any violation of the Act would necessarily involve some nexus between the person's activities and those activities regulated by the Commission.").

[92] As Respondent notes, "[t]he Edge Act, 12 U.S.C. §§ 611 *et seq.*, authorizes the FRB to charter Edge corporations for the purpose of engaging in international or foreign banking or in other international operations. . . . [The FRB] is authorized to bring enforcement against the institution-affiliated party of a nonbank subsidiary of an Edge corporation." Resp. Mot. at 46-47, 48.

[93] *Nicastro*, 564 U.S. at 884.

its laws, such that Respondent had "fair warning" that he could foreseeably be subject to the exercise of U.S. jurisdiction over him by appropriate federal banking agencies with respect to that affiliation.[94] That being so, Respondent's argument that the OCC is not itself one such agency is not strictly speaking an argument about personal jurisdiction,[95] and it is addressed more fully in Part IV.C.1 *infra*.

3. The Claims in the Notice Relate to Respondent's U.S. Contacts

Not only must a nonresident have sufficient contacts with a forum in order to be subjected to specific jurisdiction therein, but it must be the nonresident's "suit-related conduct" that substantially connects him to the forum, rather than some other ancillary activity or relationship.[96] In other words, Respondent's extensive contacts with the U.S. forum as a result of his work on behalf of the Bank, as enumerated above, would be irrelevant to a personal jurisdiction analysis if a U.S. enforcement agency sought to exercise jurisdiction over Respondent for some entirely unrelated conduct: the Department of Agriculture could not bring an enforcement action regarding the conditions of Respondent's U.K. chicken farm by virtue of Respondent's work for the Bank or his trading activity with U.S. residents. As the Supreme Court puts it, the jurisdictional inquiry "focuses on the relationship among the defendant, the forum, and the litigation"[97]—all three must interrelate to a substantial degree.

Here, there is no question that the OCC's claims against Respondent relate to his contacts with the United States as a forum. The Notice alleges that Respondent, in the course of his work as a trader for the Bank and then as the Bank's Head of EMEA FX Spot Trading, engaged in

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[94] *Burger King*, 471 U.S. at 472 (internal quotation marks and citation omitted).
[95] *See* Resp. Mot. at 32-36, 44-48.
[96] *Walden*, 571 U.S. at 284.
[97] *Id.* (internal quotation marks and citation omitted).

manipulative and collusive trading in the FX Spot Market that caused the Bank to violate U.S. law, constituted unsafe and unsound practices in conducting the Bank's affairs, breached his fiduciary duty to the Bank, and ultimately caused the Bank to incur significant losses. *See* Notice ¶¶ 23-26, 54. Enforcement Counsel has further averred that Respondent executed hundreds of trades for hundreds of millions of dollars in currency with U.S. residents on the dates and during the times in which Respondent is alleged to have engaged in collusive activity. OCC Opp. at 9-10; *see* Swanson Decl., Ex. C. This is not a case where the alleged contacts with the forum are "random, fortuitous, or attenuated" [98]; rather, they are the underpinning of the OCC's asserted impetus for this action. Accordingly, the undersigned finds that it is Respondent's conduct that "form[s] the necessary connection with the forum State that is the basis for its jurisdiction over him."[99]

4. The OCC's Exercise of Personal Jurisdiction Over Respondent Is <u>Reasonable</u>

Having concluded that Respondent's "suit-related conduct" has sufficient connection to the United States to satisfy the minimum contacts standard and justify an assertion of jurisdiction by the OCC, the undersigned must now determine whether the exercise of such jurisdiction would "offend traditional notions of fair play and substantial justice."[100] As Enforcement Counsel has made a *prima facie* case for jurisdiction, the burden falls to Respondent to articulate "the presence of some other considerations would render jurisdiction unreasonable."[101] Respondent does not attempt to do so, *see* Reply at 1-6, and a review of the relevant factors as elucidated by the Supreme Court reveals nothing that casts doubt upon the reasonableness of jurisdiction in this instance.[102]

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[98] *Burger King*, 471 U.S. at 475 (internal quotation marks and citation omitted).
[99] *Walden*, 571 U.S. at 285.
[100] *Nicastro*, 564 U.S. at 880 (internal quotation marks and citation omitted).
[101] *Burger King*, 471 U.S. at 477.
[102] *See Asahi*, 480 U.S. at 114-15; *see also* OCC Opp. at 38-42 (discussing factors).

To the contrary, if indeed it is within the OCC's ambit to bring an enforcement action against a foreign national whose alleged extraterritorial misconduct while seconded to a U.S. depository institution caused loss to that institution and otherwise fulfills the statutory elements of Sections 1818(e) and 1818(i)—a question that is addressed further in Part IV.E.4 *infra*—then those factors on balance weigh in favor of jurisdiction, not against it.

In particular, the U.S. forum's "interest in adjudicating the dispute" is significant if Respondent's conduct is in fact regulable,[103] because there is no alternative forum in which the agency could bring this action, and to deny jurisdiction would be to permit non-U.S. residents to escape liability entirely for conduct on behalf of a U.S. bank for which U.S. residents could be held liable.[104] As Enforcement Counsel observes, "Respondent's contention that he could act on the Bank's behalf for a several year period—but not be subject to the Comptroller's jurisdiction—would undermine the legitimate purpose of the FDI Act and the Comptroller's mandate to protect the safety and soundness of the national banking system." OCC Opp. at 40. For this reason and the rest, jurisdiction is therefore proper.

C. <u>Sufficiency of Pleading</u>

Respondent argues that the Notice fails to allege facts sufficient to state a claim under the relevant statutes. Specifically, Respondent contends that the OCC has not demonstrated that he is an institution-affiliated party ("IAP") of the Bank as necessary to exercise enforcement authority over him pursuant to 12 U.S.C. § 1813(u). *See* Resp. Mot. at 45-46. Respondent also asserts that the Notice's allegations do not satisfy the "misconduct" prongs of 12 U.S.C. §§ 1818(e) and (i), in

[103] *Burger King*, 471 U.S. at 477.

[104] *See Ralli Brothers*, 1984 WL 48041, at *4 ("[S]ubjecting United States residents to Commission jurisdiction while permitting non-U.S. residents to benefit from Commission regulation without being subject to its enforcement power would be manifestly unfair to the former, a circumstance presumably contrary to Congressional intent when the regulatory scheme was established.")

that they do not allege the "substantial effect in the United States" necessary to sustain a violation of the Sherman Act and do not otherwise allege that Respondent engaged in unsafe or unsound practices or violated his fiduciary duty to the Bank. *See* Resp. Mot. at 53-55. The undersigned agrees with Enforcement Counsel that Respondent is wrong in each respect.

1. Respondent is an IAP of the Bank Under Section 1813(u)

"The Comptroller's authority over individuals is circumscribed to a narrow subset of individuals who generally work for, control, or perform services on behalf of U.S. 'insured depository institutions.'" OCC Opp. at 24. Only individuals who are IAPs may properly be the subject of prohibition actions or the assessment of civil money penalties under the FDI Act and its progeny. And Section 1813(u) defines the term "institution-affiliated party" as including, in relevant part, "any director, officer, employee . . . of, or agent for, an insured depository institution" as well as "any other person . . . who participates in the conduct of the affairs of an insured depository institution." 12 U.S.C. § 1813(u)(1), (3).

Enforcement Counsel alleges, and Respondent does not dispute, that the Bank is an insured depository institution within the meaning of the FDI Act. *See* Notice at 2; *see also* 12 U.S.C. § 1813(c)(2). Respondent argues, however, that he is not an IAP of the Bank because he was formally employed during the Relevant Period by JPEL and JPL, which are the Bank's distant subsidiaries that are not insured depository institutions, and Enforcement Counsel has alleged nothing that would warrant piercing the corporate veil. *See* Resp. Mot. at 45-46. In response, Enforcement Counsel contends that regardless of whether Respondent was an "employee" of the Bank under Section 1813(u), he is nevertheless an IAP because he acted as an agent for the Bank and participated in the conduct of the Bank's affairs. *See* OCC Opp. at 60-65. The undersigned concurs that the facts as alleged and adduced—in particular, Respondent's exclusive work on

behalf of the Bank pursuant to a formal secondment agreement—compel the conclusion that Respondent was an IAP of the Bank during the Relevant Period.

As discussed above in Part IV.B, while Respondent technically remained an employee of JPEL and then JPL during the course of his secondment (which, again, began the day of his employment and ran coextensively with it), in all practical respects he worked for the Bank, contracted with outside parties on behalf of the Bank and for the benefit of the Bank, and was subject to the Bank's supervision, direction, and control. *See* Secondment Agreement Arts. 3.3, 6.5, 6.8. The Bank bore the risk of all loss or liability occasioned by Respondent's trading activity, *see id.* Art. 7.1, and Respondent held himself out as exercising significant business functions and responsibilities in the Bank's name, *see* OCC Opp., Exs. 5 & 6. Enforcement Counsel makes a colorable case that as a Managing Director and Head of EMEA FX Spot Trading at the Bank's London FX spot desk, Respondent also participated in the conduct of the Bank's affairs, *see* OCC. Opp. at 63-65, and it could likewise be argued that Respondent was a Bank "employee" within the meaning of Section 1813(u) notwithstanding the technical designation of his employment. Neither conclusion is necessary, however, because through the facts pled, Respondent meets the classical definition of an "agent" of the Bank,[105] and he therefore falls within the definition of an IAP subject to the Comptroller's regulatory and enforcement authority.

[105] *See*, *e.g.*, RESTATEMENT (THIRD) OF AGENCY §§ 1.01 cmt. c ("[T]he concept of agency posits a consensual relationship in which one person . . . acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person. The person represented has a right to control the actions of the agent."), 2.02(1) ("An agent has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives."); Black's Law Dictionary 10th ed. (2014) (defining "agent" as "[s]omeone who is authorized to act for or in place of another; a representative" and "corporate agent" as "[a]n agent authorized to act on behalf of a corporation"); *see also* OCC Opp. at 61-63 (collecting cases re definition of "agent").

2. The OCC Has Adequately Pled the Misconduct Element of Section 1818(e)

Respondent argues that the Notice fails to allege the requisite "misconduct" element of Section 1818(e)—see Part III *supra*—and must therefore be dismissed. Respondent's argument is twofold: first, that the Notice does not allege the violation of "any law or regulation" because its allegations regarding the Sherman Act do not state that Respondent's conduct caused a "substantial effect in the United States," Resp. Mot. at 53-54, and second, that the Notice does not contain enough detail regarding Respondent's alleged breach of fiduciary duty or his alleged engagement in unsafe or unsound practices, *id.* at 54-55. The undersigned finds that each of these aspects of Section 1818(e)'s misconduct element is adequately pled.

The Supreme Court has held that in order "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[106] The Uniform Rules likewise require that a notice of charges contain "[a] statement of the matters of fact or law showing that the OCC is entitled to relief."[107] Further, "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."[108] Thus, what matters to the sufficiency of a complaint is not "[t]hreadbare recitals of the elements of a cause of action," but rather whether its "well-pleaded factual allegations . . . plausibly give rise to an entitlement to relief."[109] And a claim is facially plausible, in turn, "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[110]

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[106] *Iqbal*, 556 U.S. at 678 (internal quotation marks and citation omitted).
[107] 12 C.F.R. § 19.18(b)(2).
[108] *Iqbal*, 556 U.S. at 679.
[109] *Id.* at 678, 679.
[110] *Id.* at 678.

Here, the Notice offers detailed factual allegations to support its charge that Respondent violated the Sherman Act "by entering into and engaging in a combination and conspiracy with EUR/USD traders at competing financial institutions . . . to suppress or eliminate competition and increase, decrease, fix, maintain, or stabilize prices in the FX Spot Market." Notice ¶ 24; *see id.* ¶¶ 28-50 (allegations of violative misconduct). The Notice further alleges that the FX spot benchmark rates that Respondent is alleged to have manipulated "are important in U.S. and global finance because they are used by numerous parties in the valuation of global portfolios and financial derivatives traded in the U.S. and elsewhere." *Id.* ¶ 16.

Respondent, however, asserts that these allegations are deficient because they do not specifically state that the alleged misconduct "produce[d] some substantial effect in the United States," as required for Sherman Act liability based on foreign conduct.[111] While it is true that Enforcement Counsel ultimately will have to prove that Respondent's complained-of conduct "was meant to produce and did in fact produce" a substantial domestic effect in order to "avoid global overreaching" through the Sherman Act,[112] the undersigned finds that Notice sufficiently pleads facts that, taken as true, meet the *Iqbal* standard for facial plausibility. If Respondent wishes to argue that his alleged conduct did not *in fact* produce a substantial effect in the United States, as it appears is his position (Resp. Mot. at 53-54), he may do so at a later stage in the proceeding.

Similarly, the undersigned concludes that the Notice adequately alleges that Respondent breached a fiduciary duty to an insured depository institution. To wit, the Notice alleges that Respondent traded on behalf of the Bank, including as "Head of EMEA FX Spot Trading on the Bank's London FX spot desk with supervisory responsibilities over the Bank's FX spot trading

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[111] Resp. Mot. at 53 (quoting *Hartford Fire Ins. Co. v. Calif.*, 509 U.S. 764, 796 (1993)).

[112] *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 438 (6th Cir. 2012) (internal quotation marks and citation omitted).

desks in Europe." Notice ¶ 20. It alleges that he "breached his fiduciary duties to the Bank" by, among other things, disclosing "confidential and commercially sensitive information, such as information on customer orders and currency pair spreads, to the Bank's competitors" in the course of a conspiracy to coordinate trading. *Id.* ¶¶ 23, 26. Again, Respondent may choose to argue at some future point that he did not *in fact* have a fiduciary duty to the Bank during the Relevant Period, but the Notice's allegations amply support a plausible claim to relief on this score.

Finally, Respondent claims that the Notice does not adequately allege the "unsafe or unsound practices" prong of Section 1818(e)'s misconduct element because it contains no allegations that Respondent's activities "threatened the financial integrity of any banking institution." Resp. Mot. at 55. As Enforcement Counsel observes, this is not the correct standard for determining whether a party has engaged in unsafe or unsound practices. *See* OCC. Opp. at 77. Rather, the Comptroller has made it clear in his 2014 *Patrick Adams* decision that the Horne Standard governs whether a practice is unsafe or unsound for purposes of Section 1818: that is, that "unsafe or unsound practices" include those that could cause "abnormal risk" of loss or damage to a bank, its shareholders, or the Deposit Insurance Fund, without more.[113] The Notice alleges that the Bank suffered approximately $1.3 billion in losses as a result of Respondent's allegedly unsafe or unsound practices, *see* Notice ¶¶ 51-52, and these allegations are more than sufficient to defeat Respondent's motion to dismiss on this basis.

D. <u>Preclusive Effect of Acquittal</u>

Respondent argues that his 2018 acquittal on the charge of criminal price-fixing conspiracy under the Sherman Act merits dismissal of the Notice on multiple grounds. First, Respondent asserts that the OCC's enforcement action—and in particular its allegation that Respondent's

[113] *See Patrick Adams*, 2014 WL 8735096, at **12-31 (comprehensive discussion of applicability of Horne Standard); *see also* Part III, *supra*.

activities in the Cartel chat room violated the Sherman Act—is "based upon" a predicate criminal charge that has now been proven baseless. *See* Resp. Mot. at 26-29, 30-31. Second, Respondent contends that his acquittal fatally undermines the OCC's claim that he engaged in unsafe and unsound practices. *See id.* at 29-30. Finally, Respondent argues that the doctrine of collateral estoppel precludes the OCC from maintaining an action to relitigate charges on which he has already been acquitted. *See id.* at 41-43. The undersigned concludes that Respondent's acquittal in the criminal case has no direct bearing on the OCC's maintenance of the instant action.

To begin with, it is beyond dispute that the charges in the Notice arise from the same alleged course of conduct that formed the basis for Respondent's criminal prosecution by the Antitrust Division of the DOJ. *See* Resp. Mot. at 26-27; *see generally also id.*, Ex. 7 ("Indictment"). Neither is it in dispute that Respondent was acquitted of the charge brought by the Antitrust Division. *See id.*, Ex. 1 ("Usher Decl.") ¶ 12. Respondent offers no concrete basis, however, why this alone should be fatal to the Notice. Put simply, the acquittal carries with it no preclusive effect in this tribunal, because the OCC's ability to seek a prohibition order and civil money penalty here is not contingent on a successful criminal prosecution, and because the standard of proof in an administrative proceeding is materially different, and lower, from that in a criminal case.

1. <u>This Action is "Based Upon" More than a Sherman Act Violation</u>

The Notice is not "based upon" only an alleged criminal violation of the Sherman Act, but upon allegations that the same acts that constituted antitrust conspiracy also caused Respondent to breach his fiduciary duty to the Bank and to engage in unsafe or unsound practices in connection with an insured depository institution.[114] Each of the three prongs of Section 1818(e) and Section

[114] *See*, *e.g.*, Notice ¶¶ 23 ("Respondent's conduct . . . was recklessly unsafe or unsound[] and breached his fiduciary duties to the Bank"), 26 (Respondent acted "[c]ontrary to prudent banking practices and in breach of his fiduciary

1818(i)'s respective misconduct elements is an independent and sufficient basis for an enforcement action, assuming the rest of the statutory elements are also met.[115] There is nothing in Section 1818 that requires the OCC to wait until a respondent has been convicted before commencing an enforcement action, and nothing that requires dismissal of the action in the event of a criminal acquittal. Indeed, as discussed further in Part IV.E.2 *infra*, Section 1818 even expressly states that a criminal acquittal *prior* to instituting proceedings should not preclude an agency from seeking a prohibition order against an IAP who has allegedly participated in certain criminal activity.[116]

Furthermore, it is of course the case that a criminal acquittal does not mean that the charged individual did not, as a matter of fact, engage in the alleged activities. As the Supreme Court has stated, "an acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt."[117] The result of Respondent's criminal case does not immunize Respondent against non-criminal charges that arise from the same allegedly actionable misconduct.

2. Respondent's Acquittal Does Not Preclude the OCC From Maintaining This Action

Nor does Respondent's acquittal serve to vitiate the OCC's allegation that the Bank suffered financial loss or other damage "by reason of" Respondent's alleged unsafe or unsound practices, as is required by one prong of Section 1818(e)'s "effect" element. Respondent's argument is that because he was acquitted, his "conduct could not have caused the [B]ank to plead

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duty" by sharing commercially sensitive information with competitors), 38 (Respondent acted "[c]ontrary to the Bank's policies" by helping competitors manipulate fix rate), 42 (Respondent acted "[c]ontrary to prudent banking practices and in breach of his fiduciary duty" by colluding with competitors "to suppress or eliminate competition").

[115] *See In re Seidman*, 37 F.3d 911, 929 (3d Cir. 1994) (agency entitled to prohibition order upon showing of "at least one of the prohibited acts, accompanied by at least one of the three prohibited effects and at least one of the two specified culpable states of mind" in Section 1818(e)).

[116] *See* 12 U.S.C. § 1818(g)(1)(D)(ii).

[117] *United States v. One Assortment of 85 Firearms*, 465 U.S. 354, 362-63 (1984).

guilty" to a Sherman Act violation, and therefore the criminal penalty paid by the Bank in connection with that guilty plea, and subsequent settlements with other private and public entities, could not have been prompted by any of the actionable misconduct alleged in the Notice. Resp. Mot. at 29; *see* Notice ¶¶ 51-52 (summarizing Bank's civil and criminal payments arising from alleged Cartel chat room conspiracy). There are any number of issues with this logic, but the most straightforward is that the $1.3 billion in fines, penalties, and settlements allegedly paid by the Bank as a result of Respondent's misconduct all took place years before the Notice and the criminal indictment were filed in January 2017, let alone before Respondent's acquittal in October 2018. *See* Notice ¶¶ 51-52 (alleging that Bank's losses occurred in 2014 and 2015). The fact that Respondent was acquitted well after the payments were made does not retroactively change the circumstances under which the Bank made the payments.[118] The undersigned will therefore take as true the OCC's allegations in this regard.

Finally, Respondent's argument that the OCC is collaterally estopped by the principle of issue preclusion or the Double Jeopardy Clause from "relitigating" its charges against Respondent also must fail. *See* Resp. Mot. at 41-43. The Double Jeopardy Clause "protects only against the imposition of multiple *criminal* punishments for the same offense," and the Supreme Court has squarely held that "the OCC money penalties and debarment sanctions" authorized by Section 1818 were intended to be, and are, civil in nature.[119] Further, the Supreme Court has held that "acquittal in a criminal case does not preclude the Government from relitigating an issue when it

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[118] *See* Notice ¶¶ 51 ($99.5 million in January 2015 to settle civil antitrust suit brought by Bank's FX spot customers "based upon the conspiracy between Respondent and his co-conspirators in the Cartel chat room"), 52(a) ($550 million criminal penalty in May 2015 as part of guilty plea "based largely on Respondent's conduct within the Cartel chat room"), 52(b) ($352 million to U.K. regulator in November 2014 to resolve charges relating to "misconduct in the FX Spot Market by the Bank's traders, including Respondent, attempting to manipulate FX spot benchmarks"), 52(c) ($310 million to CFTC in November 2014 to settle allegations "based largely on Respondent's conduct in the Cartel chat room").

[119] *Hudson v. United States*, 522 U.S. 93, 99, 103 (1997) (emphasis in original); *see id.* at 103-05.

is presented in a subsequent action governed by a lower standard of proof."[120] Enforcement Counsel unquestionably must meet a lower burden of proof in these proceedings than the "beyond a reasonable doubt" standard considered by the jury at Respondent's criminal trial.[121] Even if the OCC was relying on identical evidence and identical allegations in this matter as the DOJ did, which it is not (*see* OCC Mot. at 43-44), it would not be estopped from maintaining the action.

E. Scope of OCC and OFIA Authority

Respondent raises several challenges to the scope of the OCC's authority to institute these proceedings, either generally or in this tribunal. Specifically, Respondent argues that (1) the FRB, not the OCC, has exclusive enforcement authority over Respondent as an IAP of nonbank subsidiaries JPEL and JPL, Resp. Mot. at 46-48; (2) the OCC is not authorized to institute enforcement proceedings based on alleged criminal violations of the Sherman Act, given the Antitrust Division's exclusive authority to prosecute such cases, *id.* at 32-36; (3) this tribunal has no authority to hear the OCC's charges because all Sherman Act claims must be adjudicated by Article III courts, *id.* at 36-41; and (4) the OCC has no authority to bring this action against Respondent because the FDI Act has no extraterritorial application, *id.* at 42-44. The undersigned concludes that she is bound by statute and Comptroller precedent on the issue of criminal violations of the Sherman Act and that Respondent's arguments are otherwise meritless.

1. The OCC Has Enforcement Authority Over Respondent as an IAP of the Bank

Respondent's argument that only the FRB is "authorized to bring enforcement against the institution-affiliated party of a nonbank subsidiary of an Edge corporation" (Resp. Mot. at 46) is

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[120] *Dowling v. United States*, 493 U.S. 342, 349 (1990); *see also One Assortment*, 465 U.S. at 361 ("It is clear that the difference in the relative burdens of proof in [] criminal and civil actions precludes the application of the doctrine of collateral estoppel.").

[121] *See Patrick Adams*, 2014 WL 8735096, at *7 (allegations must be supported by a preponderance of the evidence in OCC enforcement action).

irrelevant in light of the undersigned's conclusion that Respondent is also an IAP of the Bank. *See* Part IV.C.1 *supra*. The Bank is a U.S. national banking association, and the OCC is an appropriate federal banking agency with respect to national banking associations. Notice ¶¶ 3-4; *see* 12 U.S.C. § 1813(q)(1)(A). The OCC therefore has enforcement authority over Respondent.

2. The OCC May Institute Enforcement Proceedings Based on Alleged Criminal Violations of the Sherman Act

Respondent contends that because the Antitrust Division of the DOJ "has the exclusive statutory authority to seek indictments and prosecute Sherman Antitrust criminal conspiracy cases" in the first instance (Resp. Mot. at 32), the OCC may not bring enforcement actions in which the "misconduct" element needed for a prohibition order or civil money penalty is an alleged criminal violation of the Sherman Act. Respondent's stance is overbroad and, in any event, is foreclosed by the FDI Act and Comptroller precedent.

The undersigned acknowledges at the outset that this tribunal is not a natural fit for the adjudication of criminal violations, whether of the Sherman Act or otherwise. As Respondent notes, the authority to bring federal criminal prosecutions lies exclusively with the U.S. Attorney for each district and, more broadly, with the DOJ. *See id.* Certain constitutional protections and strictures adhere in criminal cases that are not present in administrative proceedings. It need hardly be said that OFIA is not a criminal court. And the lack of fit is compounded when the application of the criminal statute at issue frequently involves highly specialized and technical questions of law and fact that are more properly—and more formally—the subject of some other agency's expertise, as is certainly true of antitrust law.

Yet the statutory language seems clear. Respondent recognizes, as he must, that Section 1818 empowers federal banking agencies to institute enforcement proceedings against IAPs who the agencies determine have "violated[] any law or regulation," assuming the other statutory

elements are met. 12 U.S.C. § 1818(e)(1)(A)(I); *see also id.* § 1818(i)(2)(A)(i). The statute makes no distinction between civil or criminal violations, let alone between different flavors of alleged criminality.[122] Undaunted, however, Respondent offers three distinguishable justifications for why such limitations should be read into the grant of enforcement authority under Section 1818, and the undersigned considers each in turn.

First, Respondent argues that only the DOJ has "any authority to bring criminal cases in our federal criminal justice system." Resp. Mot. at 32. Although he does not frame it in this way, the logic behind this argument would necessarily foreclose banking agencies from premising an enforcement action on *any* alleged criminal violation, at least in the absence of a successful prosecution by the DOJ. As such, this argument fails by its sheer breadth: the Comptroller specifically has held that "[a] violation of criminal law may support a violation-based enforcement action pursuant to 12 U.S.C. § 1818,"[123] and this tribunal is bound by that holding. More to the point, limiting the application of Section 1818 to alleged civil violations only would materially alter the plain meaning of the statute, and Respondent offers nothing to suggest that Congress intended such a cabined reading.

Nor can the statute be reasonably read to permit enforcement actions premised on alleged criminal violations only in parallel with, or at the conclusion of, a successful DOJ prosecution. To the contrary, a separate provision of the FDI Act expressly states that banking agencies can use alleged criminal violations as the "misconduct" required by Section 1818 even after prosecutors have failed to secure a conviction. In relevant part, Section 1818(g) provides that, upon the indictment of an IAP for "a crime involving dishonesty or breach of trust," the appropriate banking

[122] *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (citation omitted).

[123] *In the Matter of Steven J. Ellsworth*, AA-EC-11-41, AA-EC-11-42, 2016 WL 1157958, at *11 (OCC March 23, 2016) (Final Decision).

agency may issue a prohibition order against that IAP—without a hearing or other enforcement proceedings—as long as it determines that continued participation in the banking industry by the IAP "posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution."[124] The statute contemplates that this prohibition will remain in effect until final disposition of the criminal indictment "or until terminated by the agency."[125] Most pertinently, as noted *supra*, Section 1818(g) goes on to provide that "a finding of not guilty" on the charges in the indictment "shall not preclude the agency from instituting proceedings after such finding . . . to prohibit further participation [by the IAP] in depository institution affairs, pursuant to [Section 1818(e)]."[126] The statute thus directs that even acquittal before the fact is no impediment to a Section 1818 enforcement action premised on an alleged criminal violation, at least if that violation meets the criteria of Section 1818(g).[127]

Second, Respondent argues that the "special complexities" of antitrust law should exclude it from banking agency enforcement authority. Resp. Mot. at 33. He observes that "[t]he Sherman Antitrust Act is a unique statute" under which uniformity of enforcement is particularly important, and that all federal antitrust jurisdiction is vested exclusively in two other agencies—namely the DOJ and the Federal Trade Commission ("FTC")—for this reason. *Id.* at 34; *see id.* at 33-35. He points out that criminal Sherman Act violations in particular are handled by a specialized branch

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[124] 12 U.S.C. § 1818(g)(1)(A).

[125] *Id.* § 1818(g)(1)(B)(ii).

[126] *Id.* § 1818(g)(1)(D)(ii).

[127] There are two classes of criminal violations that fall within Section 1818(g)'s scope. One is any "crime involving dishonesty or breach of trust which is punishable by imprisonment for a term exceeding one year under State or Federal law," and the other is "a criminal violation of section 1956, 1957, or 1960 of Title 18 or section 5322 or 5324 of Title 31." *Id.* § 1818(g)(1)(A). A violation of Section 1 of the Sherman Act carries with it a penalty of imprisonment for up to ten years, 15 U.S.C. § 1, and, as the undersigned explains below, the OCC at least considers antitrust conspiracy under this statute to be a crime involving dishonesty or breach of trust.

of the DOJ, the Antitrust Division, exactly because that Division has the expertise necessary "to ensure a consistent, national Department-wide policy on antitrust questions"—expertise that the OCC lacks. *Id.* at 33 (internal quotation marks and citation omitted).

Again, there is some force to this argument. While Section 1 of Sherman Act authorizes "[b]oth civil remedies and criminal sanctions . . . with regard to the same generalized definitions of the conduct proscribed,"[128] enforcement and prosecution of Sherman Act violations and federal antitrust law more broadly is generally committed to the Antitrust Division and the FTC, bodies with the technical fluency and experience to navigate what can be an extremely complex and economics-driven area of the law.[129] Jurisdiction over civil enforcement of Sherman Act violations is also largely vested in federal district courts rather than administrative tribunals.[130] And Enforcement Counsel may well find it more difficult to make the requisite showing of a criminal Sherman Act violation than one of the other "misconduct" prongs of Sections 1818(e) and (i), considering that the agency with exclusive enforcement authority in the first instance has already tried and failed to establish such a violation, albeit under a higher burden of proof. Certainly, the OCC's path here would be easier had a criminal violation already been established by the jury.

All that being said, however, the undersigned will not gainsay an agency's decision to commit resources to the enforcement of a given alleged violation, as long as an enforcement action predicated on that violation is within the scope of the statute. There is no reason to conclude—nor does Respondent suggest—that the OCC would lack authority to institute proceedings based on a criminal antitrust violation if the respondent had pled guilty to the violation or been duly

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[128] *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978).

[129] *See Mountain States Tel. & Tel. Co. v. FCC*, 939 F.2d 1021, 1034 (D.C. Cir. 1991) ("Antitrust suits frequently present a multitude of complex issues, many of which may be intertwined with esoteric economic concepts in a legal context where precedents and clear standards may be hard to come by.").

[130] *See* 15 U.S.C. §§ 4, 15a; *but see* 15 U.S.C. § 45(b); 16 C.F.R. § 3 *et seq.* (administrative adjudication of antitrust enforcement actions by FTC).

prosecuted and convicted. Indeed, the OCC and other OFIA constituent agencies appear to have done just that with some regularity.[131] And if criminal antitrust violations are within the scope of Section 1818(e)(1)(A)(i) when there has been a guilty plea or guilty verdict, then there is no reason to limit that statutory scope when the respondent has not been found guilty, in light of the lack of effect a criminal acquittal has on the institution of enforcement proceedings in Section 1818(g). The OCC has utilized Section 1818(g), in fact, to issue a prohibition order against the former Executive Director for FX Trading at JPMC, the Bank with which Respondent is affiliated, based on that individual's indictment—not conviction—for conspiracy to restrain trade in violation of 15 U.S.C. § 1, the same statute that Respondent is alleged to have violated.[132] It therefore follows that alleged criminal violations of the Sherman Act may reasonably be the basis for a non-criminal administrative enforcement action under Section 1818(e) or (i), notwithstanding the DOJ's exclusive jurisdiction over criminal prosecutions.

Third and finally, Respondent argues that the federal banking agencies lack authority to bring enforcement actions based on the violation of laws and regulations that are not themselves banking-related. *See* Resp. Mot. at 35-36, 40-41. In particular, Respondent points to the D.C. Circuit's opinion in *Grant Thornton LLP v. OCC*, 514 F.3d 1328 (D.C. Cir. 2008), for the proposition that "Section 1818 requires insertion of the words 'banking' or 'banking practice' for the statute to make any sense." Resp. Mot. at 36; *see also id.* at 41. This is an inaccurate characterization. Interpreting a different section of the FDI Act, *Grant Thornton* held that a bank's

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[131] *See*, *e.g.*, *In the Matter of Christopher Cummins*, No. AA-EC-17-5, 2017 WL 3017328 (OCC Jan. 23, 2017) (consent prohibition order in connection with guilty plea to Sherman Act violation); *In the Matter of Jason Katz*, Nos. 17-001-E-I & 17-001-B-I, 2017 WL 591437 (FRB Jan. 14, 2017) (order of prohibition in connection with guilty plea to Sherman Act violation); *cf. In the Matter of Donald Kary*, No. 90-229L, 1991 WL 789334 (FDIC Aug. 1, 1991) (denial of reinstatement application in light of guilty plea to Sherman Act violation).

[132] *See* Notice of Prohibition, *In the Matter of Akshay Aiyer*, No. AA-EC-2018-68, 2019 WL 1615466 (OCC Jan. 7, 2019).

accounting firm was not engaged in actionably "unsafe or unsound practices in conducting the business of [an] insured depository institution" or "in conducting the affairs of [an] insured depository institution" when it performed an external audit of the bank's books, because "unsafe or unsound practices" in that context should be read to be limited to banking practices—that is, the "business" or "affairs" of the bank—rather than outside accounting.[133] The *Grant Thornton* Court nowhere addressed or opined on the scope of the phrase "any law or regulation" in Sections 1818(e) and (i) or whether that scope is or should be constrained. There is again no compelling reason to read "any" as meaning something other than "any," particularly in light of Section 1818(g)'s invocation of crimes "involving dishonesty or breach of trust," which are not necessarily banking-related, and its citation to non-banking-related criminal codes such as 18 U.S.C. § 1957, which prohibits any "monetary transaction in criminally derived property of a value greater than $10,000 [that] is derived from specified unlawful activity." If such crimes may form the basis of enforcement actions, then the agencies' enforcement authority is perforce not limited to alleged violations of laws relating only to banks.

3. The OCC's Charges Involve "Public Rights" and are Properly Adjudicated in this Tribunal

Respondent argues that Section 1818 is unconstitutional to the extent that it permits Sherman Act claims to be brought before a non-Article III tribunal by an enforcement agency without antitrust expertise. *See* Resp. Mot. at 36-41. In response, Enforcement Counsel contends that both Section 1818 and the Sherman Act involve the adjudication of "public rights" that Congress may validly assign to agencies for resolution. *See* OCC Opp. at 45-46. Enforcement Counsel further asserts that the OCC's relevant expertise for the purpose of enforcing Section 1818 is that of "safeguard[ing] the national banking system by preventing unlawful conduct by banks

[133] *Grant Thornton LLP v. OCC*, 514 F.3d 1328, 1332 (D.C. Cir. 2008) (discussing 12 U.S.C. §§ 1818(b), (i)(2)).

and their employees, officers and directors." *Id.* And Enforcement Counsel notes that all final agency decisions in proceedings such as these are subject to "adequate and meaningful Article III review . . . by an appropriate United States Court of appeals." *Id.* at 48. The undersigned agrees with Enforcement Counsel that the OCC's claims involve the enforcement of public rights and may initially be adjudicated before this administrative tribunal.

Article III, Section I of the United States Constitution provides that "[t]he judicial power of the United States" is vested exclusively in the federal judicial branch—that is, in those entities whose existence arises from and conforms to Article III's contours.[134] It is generally established, then, that the other branches of the federal government may not confer Article III judicial power on non-Article III tribunals, so that the judiciary can "remain truly distinct from both the legislative and the executive."[135] Particularly where claims are "matters of private right, that is, of the liability of one individual to another under the law as defined," such as those traditionally decided at common law, federal jurisdiction may be conferred only to Article III judges in Article III courts rather than to agencies or otherwise.[136] In *Stern v. Marshall*, for example, the Supreme Court concluded that a non-Article III bankruptcy court had impermissibly exercised Article III judicial power when it adjudicated a petitioner's common law counterclaim for tortious interference, ultimately entering a final judgment for over $425 million dollars in compensatory and punitive damages "on a common law cause of action" that did not "derive[] from [or] depend[] upon any agency regulatory regime."[137]

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[134] *See Stern v. Marshall*, 564 U.S. 462, 482-83 (2011) (noting that Article III "both defines the power and protects the independence of the Judicial Branch") (internal quotation marks and citation omitted).

[135] *Id.* at 483 (internal quotation marks and citation omitted).

[136] *Id.* at 489 (quoting *Crowell v. Benson*, 285 U.S. 22, 52 (1932)); *see also id.* at 488 ("Congress cannot 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.") (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1856)).

[137] *Id.* at 494; *see also id.* at 471 (procedural history).

Yet the Supreme Court has recognized one area in which issues or claims over which Article III courts might normally have jurisdiction may nevertheless be heard in a non-Article III forum.[138] This "public rights exception" encompasses matters "arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments"[139]—*e.g.*, cases "where the Government is involved in its sovereign capacity under . . . [a] statute creating enforceable public rights,"[140] or when the right being adjudicated is otherwise "integrally related to particular Federal Government action" or "derives from a federal regulatory scheme" such that agency adjudication is appropriate.[141]

Although claims asserted by the government itself do not *always* fall within the public rights exception, courts have drawn a distinction between actions by the government as a sovereign in service of some public purpose, which need not be heard in an Article III court, and those in which the government "is vindicating a right which a private party was entitled to vindicate in his own right," which do.[142] Thus, in holding that OCC enforcement actions against a failed bank's IAP "clearly implicate[d] public rights," the Second Circuit distinguished between such actions pursuant to Section 1818 and an action taken against the same IAP by the FDIC as receiver for the failed bank, finding that the former but not the latter could be heard by an administrative tribunal.[143] The Ninth Circuit, likewise, concluded that cease-and-desist proceedings by the Office

[138] *See Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 583 (1985) ("Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts.").

[139] *Stern*, 564 U.S. at 489 (internal quotation marks and citation omitted).

[140] *Atlas Roofing Co. v. Occupational Safety and Health Rev. Comm'n*, 430 U.S. 442, 458 (1977).

[141] *Stern*, 564 U.S. at 490-91; *see also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54-55 (1989) ("If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court.").

[142] *Occidental Life Ins. Co. of Calif. v. EEOC*, 432 U.S. 355, 381 (1977).

[143] *Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995).

of Thrift Supervision ("OTS") under the FDI Act constituted an enforcement of public rights, given that "[t]he purpose of enforcement of the thrift regulation laws is to safeguard the thrift industry, the depositors, and the federal insurance fund."[144]

Respondent argues that the public rights exception does not apply here because "the Sherman Act codifies a right of action rooted in the common law and because [the] OCC possesses no particular expertise in enforcing antitrust law." Resp. Mot. at 40. Respondent maintains that Congress did not create a regulatory scheme susceptible to the adjudication of OCC claims under the Sherman Act, because enforcing such claims "is not 'essential' to any 'limited regulatory objective' Congress has assigned to the agency." *Id.* More broadly, Respondent asserts that Section 1818 itself would be unconstitutional if it is read to permit the OCC to "determine [an IAP's] liability under any law or regulation and impose an array of remedies—including civil money penalties—within the confines of the agency's administrative tribunal." *Id.* at 38. Respondent thus contends that the Notice must be dismissed. *See id.* at 41.

These arguments miss the mark. To start, dismissal of the Notice as a whole would be inappropriate even if Respondent were correct that the OCC's Sherman Act claim must be adjudicated in an Article III court, because the OCC's charges are not premised solely, or even predominantly, on an alleged violation of the Sherman Act. *See* Part IV.C.2 *supra*. Beyond that, moreover, government enforcement of Sherman Act violations is not rooted in common law and does not concern a "private-right law[]." Resp. Mot. at 41. Rather, as Enforcement Counsel notes (OCC Opp. at 47), the Supreme Court has repeatedly recognized that the purpose of the Act is "to *protect the public* against evils commonly incident to monopolies and those abnormal contracts

[144] *Simpson v. OTS*, 29 F.3d 1418, 1423 (9th Cir. 1994) (stating that "[b]y instituting the cease-and-desist proceedings, the OTS served a public purpose of the sort Congress envisioned in providing for administrative adjudication").

and combinations which tend directly to suppress the conflict for advantage called competition."[145] It is fair to say that an enforcement action premised on the Sherman Act is nearly a quintessential example of a case "where the Government is involved in its sovereign capacity under . . . [a] statute creating enforceable public rights."[146] Indeed, the fact that the FTC—as part of its core mission—adjudicates antitrust enforcement actions functionally identical to those based upon Section 1 of the Sherman Act is powerful evidence against Respondent's contention that such claims are "traditional common law claims" that must be heard by an Article III court.[147]

Nor is it dispositive of a public rights analysis of the OCC's Sherman Act claim that the agency lacks specific antitrust expertise. *See* Resp. Mot. at 38. Expertise in a particular topic area is not a necessary prerequisite for an agency to adjudicate a claim involving that topic in a non-Article III forum. While the *Stern* Court did state that the public rights exception applied to cases "in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority," it in no way purported to limit the exception to *only* those such cases.[148] The expertise of an agency relative to the courts may be salient to "the concerns that drove Congress to depart from the requirements of Article III,"[149] one of several nondeterminative factors weighed by the Supreme Court in its public rights cases, but the Court

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[145] *United States v. Am. Linseed Oil Co.*, 262 U.S. 371, 388 (1923); *see also*, *e.g.*, *Wilder Mfg. Co. v. Corn Products Co.*, 236 U.S. 165, 174 (1915) (Sherman Act "founded upon broad conceptions of public policy" and "enacted to prevent . . . the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented").

[146] *Atlas Roofing Co.*, 430 U.S. at 458 (emphasis added).

[147] *See* 15 U.S.C. § 45(b) (empowering FTC to issue notice of charges against entities "using any unfair method of competition"); 16 C.F.R. § 3 *et seq.* (administrative adjudication of antitrust enforcement actions by FTC); *see also In the Matter of Polypore Int'l, Inc.*, 149 F.T.C. 486, 2010 WL 9434806, at *236 (March 1, 2010) (Complaint and Initial Decision) ("Although the Commission does not directly enforce the Sherman Act, conduct that violates the Sherman Act is generally deemed to be a violation of Section 5 of the FTCA Act as well, and principles of antitrust law developed under the Sherman Act apply to Commission cases alleging unfair competition.").

[148] *Stern*, 564 U.S. at 490.

[149] *CFTC v. Schor*, 478 U.S. 833, 851 (1986).

has been firm that there are no "formalistic and unbending rules" to when Congress may confer adjudicative power outside of Article III.[150]

Furthermore, Respondent's premise is faulty: the OCC is an agency with expertise enforcing the substantive regulatory regime under which these issues are being adjudicated and upon which the action depends.[151] The OCC's claims are "closely intertwined with a federal regulatory program" that it has been charged by statute to oversee.[152] And that agency's enforcement authority under Section 1818 directly advances its statutory mission to, *inter alia*, protect against losses to insured depository institutions, safeguard the interests of depositors and the Deposit Insurance Fund, and maintain public confidence in banks and the banking system.[153] Part of that mission is to institute enforcement proceedings against IAPs—that is, "persons subject to its authority in connection with the performance of [its] constitutional functions"[154]—who have violated laws or regulations, if the OCC determines that such violations have prejudiced the interests of an institution's depositors or caused loss to the institution itself, among other possible effects.[155] In other words, it is immaterial whether the OCC has substantive experience enforcing Sherman Act violations *per se*, because the extent of its enforcement authority over violations of "any law or regulation" in that regard is limited to the specific regulatory objectives within its charge as an "appropriate federal banking agency."[156] As before, Respondent offers no rationale

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[150] *Id.*

[151] *Compare Stern*, 564 U.S. at 493 (no public rights exception where the party's "claimed right to relief does not flow from a federal statutory scheme . . . [and] is not completely dependent upon adjudication of a claim created by federal law") *with Schor*, 478 U.S. at 855 (public rights exception where non-Article III jurisdiction over a claim "mak[es] effective a specific and limited federal regulatory scheme" as to which the agency possesses "obvious expertise").

[152] *Granfinanciera*, 492 U.S. at 54-55.

[153] *See Simpson*, 29 F.3d at 1423; *see also* OCC Opp. at 52-53 (collecting cites).

[154] *Stern*, 564 U.S. at 489 (internal quotation marks and citation omitted).

[155] *See* 12 U.S.C. § 1818(e)(1)(B).

[156] *Id.* § 1818(e); *see also id.* § 1813(q).

why the phrase "any law or regulation" should be read as "only some laws and regulations" when it comes to determining whether the OCC's exercise of its Section 1818 enforcement authority validly implicates "public rights" for purposes of adjudication in this tribunal.

4. The FDI Act May Reach Extraterritorially If the Statutory Elements Are Met

Respondent argues that the OCC has no authority to bring an action against him under Section 1818 because Congress did not intend for the FDI Act to apply to the conduct of extraterritorial persons. Resp. Mot. at 43-44. Respondent states that where a statute contains no express indication that it was meant to apply extraterritorially, its reach is limited only to conduct that, unlike his own, occurred within the United States. Reply at 7-8. In response, Enforcement Counsel asserts that any action against an IAP that meets the statutory elements of Sections 1818(e) or 1818(i) is at base a "domestic application" of the FDI Act—regardless of whether the complained-of conduct occurred overseas—because the domestic focus of the law is "to protect against losses to federally insured depository institutions [and] protect such institutions' depositors and the Deposit Insurance Fund." OCC Opp. at 52-53. Alternately, Enforcement Counsel contends that Respondent's specific conduct was sufficiently domestic in nature to override any concern regarding extraterritorial application of the Act. *Id.* at 56-57. The undersigned concludes that the OCC's allegations, taken as true, describe a domestic application of the Act and are enough to defeat Respondent's motion to dismiss the Notice on this basis.

The judicial doctrine of "presumption against extraterritoriality" provides that "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application."[157] This presumption, which "reflects the . . . commonsense notion that

[157] *RJR Nabisco, Inc. v. European Community*, 138 S. Ct. 2090, 2100 (2016).

Congress generally legislates with domestic concerns in mind," involves a two-step analysis.[158] First, the court must look to see "whether the statute gives a clear, affirmative indication that it applies extraterritorially."[159] If it does not, the question becomes "whether the case involves a domestic application of the statute," which is determined "by identifying the statute's focus and asking whether the conduct relevant to that focus occurred in United States territory."[160] The focus of a statute, in turn, "is the object of its solicitude, which can include the conduct it seeks to regulate, as well as the parties and interests it seeks to protect or vindicate."[161]

Here, Enforcement Counsel takes as given that the FDI Act "does not contain a clear expression of extraterritoriality." OCC Opp. at 51. It must therefore be that agency enforcement authority under the statute extends only to the limits of the statute's domestic focus—that is, "the focus of congressional concern."[162] If the object of the statute's focus is domestic in this case, be

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[158] *Id.* (internal quotation marks and citation omitted).

[159] *Id.* at 2101; *see also Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none.").

[160] *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018) (internal quotation marks and citation omitted); *see also Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 126 (2013) (Alito, J., concurring) ("[A] cause of action . . . is not barred by the presumption[] only if the event or relationship that was 'the focus of congressional concern' under the relevant statute takes place within the United States.") (quoting *Morrison*, 561 U.S. at 266).

[161] *Id.* (internal quotation marks and citation omitted). The undersigned observes that the Supreme Court's discussion of this second analytical step is not without ambiguity. In particular, the Court makes clear that the focus of a statute can be something other than the conduct that is being regulated—it might, instead, be the interests being protected or the parties being regulated. *See id.* at 2138 (noting that a statute's focus "can turn on the conduct, parties, or interests that it regulates or protects") (internal quotation marks and citation omitted); *see also RJR Nabisco*, 138 S. Ct. at 2100; *Morrison*, 561 U.S. at 267-68. Yet when determining whether a case involves a domestic application of the statute, the Court frames the inquiry solely in terms of where "the conduct relevant to the statute's focus occurred." *WesternGeco LLC*, 138 S. Ct. at 2137 (internal quotation marks and citation omitted). Left unresolved in this dichotomy, then, is whether a statute can have domestic application in a case where "the focus of congressional concern" is unmistakably domestic—for example, the safety and soundness of the U.S. banking system—and there are many significant domestic components relevant to that focus, but the conduct being regulated (which is not the focus of the statute) arguably occurred entirely overseas. Because the touchstone of the Court's analysis appears, above all, to be whether application of the statute would be consistent with Congress's "domestic concerns," the undersigned declines to reduce the inquiry to simply asking where the complained-of conduct took place if Congress's focal concern when enacting the statute was something other than the conduct itself. *See RJR Nabisco*, 138 S. Ct. at 2100; *Morrison*, 561 U.S. at 255 (important question is whether Congress was "primarily concerned with domestic conditions" when passing statute).

[162] *Morrison*, 561 U.S. at 266.

that the regulated conduct or the protected parties or interests, "then the case involves a permissible domestic application of the statute."[163] Discerning the focus of a statute, in turn, "involves an interpretation of what the legislature was concerned with when it enacted the law."[164] Fundamentally, "[t]he presumption against extraterritoriality is not 'a limit upon Congress's power to legislate,' but a canon of construction meant to guide our understanding of a statute's meaning."[165] It is thus important to identify the "overriding purpose" of the provision in question when considered in the context of the regulatory scheme as a whole.[166]

In this instance, the undersigned agrees with Enforcement Counsel that the "regulatory focus" of the OCC's enforcement powers under Section 1818 is not the specific conduct being regulated,[167] but the risk engendered by that conduct to the wholly domestic parties and interests that the FDI Act and its successor statutes seek to protect. *See* OCC Opp. at 52-55. In giving federal banking agencies the authority to institute prohibition actions against parties affiliated with the federally insured depository institutions that those agencies supervise, Congress sought to prevent losses to those institutions and "ultimately protect such institutions' depositors and the Deposit Insurance Fund." *Id.* at 53 (citing sources). This is the "overriding purpose" of Section 1818, and agency enforcement powers are meant to be employed judiciously with that goal in mind. To the extent that an IAP has engaged in conduct that Congress has deemed actionable in furtherance of this statutory mission, then, an agency is engaged in a domestic application of Section 1818 when it institutes a domestic enforcement action to protect domestic parties and domestic interests, even

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163 *WesternGeco LLC*, 138 S. Ct. at 2137 (internal quotation marks and citation omitted).

164 *Motorola Solutions, Inc. v. Hytera Commc'ns Corp.*, 436 F. Supp. 3d 1150, 1167 (N. D. Ill. 2020) (citing *Morrison*, 561 U.S. at 266).

165 *In re Picard*, 917 F.3d 85, 100 (2d Cir. 2019) (quoting *Morrison*, 561 U.S. at 255).

166 *WesternGeco LLC*, 138 S. Ct. at 2137 (internal quotation marks and citation omitted); *see also id.* ("When determining the focus of a statute, we do not analyze the provision at issue in a vacuum.").

167 *Picard*, 917 F.3d at 99 (internal quotation marks and citation omitted).

if the conduct in question occurred overseas.[168] The question of whether Respondent's specific conduct *in fact* meets the elements of Sections 1818(e) or (i) and thereby implicates the statutory "focus of congressional concern" is a merits question to be addressed at the appropriate later stage; it is enough now to say that the OCC's allegations, if true, describe an application of Section 1818 in line with Congress's domestic concerns when enacting that statute. The undersigned will not conclude that Congress intended for the IAP of a domestic institution whose conduct caused loss to that institution or otherwise prejudiced the interests of domestic depositors or the Deposit Insurance Fund to be categorically immune from enforcement action based solely on where the otherwise actionable conduct took place.

F. **<u>The Timeliness of the OCC's Pursuit of its Claims</u>**

Respondent objects to the pace of these proceedings and moves to dismiss the Notice against him on the grounds of unreasonable delay. *See* Resp. Mot. at 48-51. He argues that the OCC has yet to afford him a hearing "more than a year after the criminal trial has ended" and that he has been significantly prejudiced as a result, both in his "ability to prepare his case" and in his own professional prospects. *Id.* at 49. Given that prejudice, he contends that both the statutory requirement that "a defendant in a prohibition enforcement action receive a hearing no 'later than sixty days after the date of service of such notice'" and the considerations of constitutional due process require that the charges against him now be dismissed in their entirety. *Id.* (quoting 12 U.S.C. § 1818(e)(4)). Respondent further asserts that to allow the agency "to proceed with the charges, despite the delay, would incentivize agencies to file placeholder [notices of charges] and delay hearings indefinitely." *Id.* at 51.

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[168] *See id.* at 97 (concluding that bankruptcy statute was being applied domestically to recover from party who had acquired property extraterritorially when the initial avoidance was domestic and "[a] general purpose of the Bankruptcy Code's avoidance provisions . . . is protecting a debtor's estate from depletion to the prejudice of the unsecured creditor") (internal quotation marks and citation omitted).

In response, Enforcement Counsel argues that the sixty-day hearing timeframe set out in Section 1818(e)(4) is not jurisdictional and that dismissal is not an appropriate remedy here. *See* OCC Opp. at 65-67. It further maintains that the OCC has acted in good faith in prosecuting these proceedings and that the matter has been delayed for reasons largely beyond the OCC's control. *See id.* at 70. Enforcement Counsel also notes that Respondent is the one who "requested a stay of this proceeding . . . pending the resolution of the criminal case," and following his acquittal "could have filed a motion earlier compelling the Comptroller to act" if he was "legitimately aggrieved by the delay." *Id.* at 68. Finally, Enforcement Counsel contends that Respondent has failed to demonstrate that he has "suffered any actual prejudice with respect to his ability to defend himself in this proceeding." *Id.* at 69. The undersigned agrees with Enforcement Counsel.

This tribunal has already considered and rejected similar timeliness claims in a separate case arising from the same alleged FX trading chat room conspiracy, and its conclusion is unchanged here.[169] Section 1818(e)(4) provides, in relevant part, that a hearing on a notice seeking an order of prohibition "shall be fixed for a date not . . . later than sixty days after the date of service of such notice, unless an earlier or later date is set by the agency at the request of (A) [the charged] party, . . . or (B) the Attorney General of the United States."[170] In this case, service was effected by registered mail on January 12, 2017 and through the U.K. Central Authority on June 16, 2017. *See* Part IV.A *supra*. Thus, in the ordinary course of events, an adjudicatory hearing on the Notice against Respondent was required to have taken place no more than sixty days after the effective service date—or by Tuesday, August 15, 2017 at the very latest—absent the intervention

[169] *See* Order Denying Respondent's Motion to Dismiss the Notice of Charges for Prohibition and Assessment of Civil Money Penalty, *In the Matter of Rohan Ramchandani*, OCC No. AA-EC-2017-2 (OFIA March 16, 2020). To the extent that this order is not readily accessible to the parties, this tribunal will furnish copies upon request.

[170] 12 U.S.C. § 1818(e)(4). As Enforcement Counsel notes, no similar statutory timeframe exists during which a hearing on the OCC's assessment of a civil money penalty must be fixed. *See* Opposition at 3.

of the Attorney General or (as in fact occurred) Respondent's consent to a later date through his repeated requests that the matter be stayed indefinitely. *See* Answer at 2, 10; August 1, 2017 Stay Order at 1 (noting that Respondent "reiterated his request that the administrative proceeding be stayed pending the determination of the referenced criminal case"). This stay was then extended by stipulation of both parties on February 6, 2018. *See* February 6, 2018 Order at 1.

Indeed, Section 1818(e)(4)'s sixty-day timeframe is rarely observed in enforcement actions before this tribunal: not because the Attorney General typically intervenes or because the agencies routinely violate the statute, but because it is generally in respondents' interests to agree to a schedule allowing more time before the hearing so that they may, for example, conduct document discovery, file dispositive motions, and otherwise vigorously contest the charges against them in a way that would not be possible if both parties hurtled headlong into an adjudication two months after those charges had been served. Here, Respondent's multiple stay requests make it clear that he had agreed to a pre-hearing timeframe in this matter stretching well beyond the sixty-day default outer limit prescribed by Section 1818(e)(4).

Respondent can hardly thus argue that he was not afforded a timely hearing on the basis of an indefinite stay that he himself requested. Instead, Respondent suggests that the OCC has prejudicially delayed its prosecution even after the stay was lifted in November 2018. See Resp. Mot. at 49-50. He intimates, though does not state outright, that the sixty-day window for a hearing opened again once the parties jointly notified this tribunal of the conclusion of the criminal proceedings, such that the OCC is now long in arrears of that obligation.

But there is nothing to suggest that a violation of Section 1818(e)(4)—to the extent that one occurred—should perforce result in dismissal of the action, and dismissal is not merited here. In *Brock v. Pierce County*, the Supreme Court addressed whether the failure of the Secretary of

Labor to issue a final determination regarding the recovery of misspent funds within the statutorily-mandated timeframe necessarily divested the Secretary of all further power to act in that case.[171] The Court concluded that it did not, "especially when important public rights are at stake . . . [and] there are less drastic remedies available for failure to meet a statutory deadline."[172] The *Brock* Court noted further that assuming that Congress intended such a deadline to be treated as jurisdictional, if it did not expressly say so, was particularly inappropriate when the statute requires that a "substantial task" such as the resolution of an entire dispute be completed within a specified timeframe, given that an agency's ability to timely complete that task may be "subject to factors beyond [its] control."[173]

As in *Brock*, the statute here directs that an agency "shall" complete a significant task – in this case, the pre-hearing process for an OCC enforcement action and adjudication, as governed by a uniform set of procedural rules established by direction of Congress[174]—in a certain amount of time. Important public rights are at stake, namely the protection of the federal banking system from unsafe or unsound practices or other violative conduct or breach of fiduciary duty that could jeopardize the stability of financial institutions or prejudice the interests of depositors.[175] Less drastic remedies for the agency's untimeliness are available, namely a reinstitution of proceedings upon petition of a respondent aggrieved by the delay. And the length of the enforcement proceeding is self-evidently subject to factors outside of the OCC's control, ranging in this case from the stay itself to ramifications of the *Lucia* decision to ALJ Miserendino's retirement.

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[171] 476 U.S. 253, 258-62 (1986).

[172] *Id.* at 260.

[173] *Id.* at 261.

[174] *See* FIRREA, Pub. L. 101-73, title IX, § 916, 103 Stat. 486, 12 U.S.C. § 1818 note (1989) (Improved Administrative Hearings and Procedures) (directing certain federal banking agencies, including OCC, to "develop a set of uniform rules and procedures for administrative [enforcement] hearings, including provisions for summary judgment rulings where there are no disputes as to material facts of the case").

[175] *See* 12 U.S.C. § 1818(e).

In the Matter of First National Bank ("*First National Bank*"), a pre-*Brock* OCC decision cited by both parties, also is instructive.[176] There, the Comptroller interpreted a related provision of 12 U.S.C. § 1818 with an identically mandatory sixty-day timeframe in which to hold a hearing in a cease and desist proceeding.[177] The enforcement counsel in that case argued that the OCC had "made a good faith attempt to hold the hearing within the statutory time limit, but due to factors beyond its control, was unable to comply."[178] Specifically, although the OCC had (in that pre-OFIA era) requested the use of an ALJ for the proceeding in November 1986, one was not appointed until two months later, and in the intervening time the statutory hearing deadline had passed.[179] While the respondent contended that the proper remedy for such untimeliness was dismissal of the action, the Comptroller disagreed, finding that the statute was "directory only," that delays resulting from the appointment of an ALJ were "not unusual," that "a good faith effort was made to obtain an [ALJ] in a timely manner," and that the respondent had not been substantively prejudiced.[180] The Comptroller also noted that dismissal would not serve the purpose of the statute, which was "to enhance the Comptroller's authority to promote and assure the financial stability of national banks."[181]

Brock and *First National Bank* demonstrate why Respondent's narrative of disregard by the OCC following the stay being lifted omits important context. Respondent contends that the OCC "has yet to afford [him] a hearing" almost two years after his acquittal in the criminal case. Resp. Mot. at 49. Yet this overstates the role of the OCC in prolonging or delaying proceedings

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[176] *In the Matter of First National Bank of ***, ***, ****, Dkt. No. AA-EC-85-127, 1986 WL 236392 (May 13, 1986).
[177] *See id.* at *1 (citing 12 U.S.C. § 1818(b)(1)).
[178] *Id.*
[179] *See id.*
[180] *Id.* at **2, 4, 5.
[181] *Id.* at *4.

against Respondent. Here, as in *First National Bank*, the agency found itself without an ALJ to whom it could assign the matter. Here, as in *First National Bank*, the agency was ready to proceed as soon as an ALJ was appointed. The most material difference is that the process of finding and appointing an ALJ in *First National Bank* took two months, whereas here it took approximately one year—and the undersigned notes that the month and a half of that period between the undersigned's appointment in mid-November 2019 and her assignment to this matter in early January 2020 spanned the holiday season, a time when some sluggishness in the gears of government is both inevitable and understandable. Moreover, where in *First National Bank* the agency took steps to obtain an ALJ to preside over the proceedings by requisitioning one from the Office of Personnel Management,[182] here the process of replacing ALJ Miserendino required the coordination and agreement of four agencies,[183] with all the potential for delay that this entails, and it is unclear that the OCC could have sped up the appointment significantly even had it sought to do so. The undersigned will not penalize the OCC for the sometimes halting nature of the federal appointment process.

This is especially so because Respondent nowhere elaborates as to which specific points in the process he believes the OCC has dragged its feet and what more the agency could have done, given the circumstances. It is one thing to say that the OCC should have more actively prosecuted this enforcement action in the eleven months following ALJ Miserendino's retirement—and Respondent does not even say that, as the retirement and the vacuum it created are not mentioned at all despite bearing directly on why resolution of this matter has been delayed—but the suggestion of bad faith (Resp. Mot. at 51) rings hollow without some detail as to how the agency

[182] *See id.* at *1.

[183] *See* FIRREA, Pub. L. 101-73, title IX, § 916, 103 Stat. 486, 12 U.S.C. § 1818 note (1989) (Improved Administrative Hearings and Procedures) (directing that "appropriate Federal banking agencies . . . jointly establish their own pool of administrative law judges").

has been remiss, let alone some acknowledgment that, largely, the delay in this case has been caused by external factors that neither the OCC nor Respondent had much power to alter.

Could the OCC have taken some action to restart these proceedings in the interregnum, sometime between January and November 2019, despite the absence of an ALJ? The Comptroller was certainly so empowered to take over the case entirely if he chose, although doing so would have required an affirmative and unusual step divergent from normal practice under the OCC's Uniform Rules.[184] But Respondent offers no reason why it should have been incumbent or expected, during the indeterminate period while a new ALJ was being found to replace ALJ Miserendino, for the Comptroller to assume an active adjudicative role in Respondent's case or any of the other then-pending enforcement actions that had temporarily been put on hold.

More to the point, there was no reason why Respondent himself could not have petitioned the Comptroller to restart proceedings, if the delay was causing him "irremediable prejudice" as he claims. Resp. Mot. at 51. If nothing else, to prompt things along, Respondent could have moved for his July 31, 2017 motion to dismiss for lack of jurisdiction to be granted due to lack of opposition, once the stay had been lifted and Enforcement Counsel had not filed a response within the requisite time.[185] Yet, like the OCC, Respondent filed nothing at all in this case for two and a half years—from August 2017 until February 2020—save for the November 6, 2018 Joint Notice of Disposition of Criminal Prosecution that led ALJ Miserendino to lift the stay. This is not to say that some further action was required of Respondent during this time, only that the decision not to

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[184] *Compare* 12 C.F.R. § 19.4 ("The 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.") *with* 12 C.F.R. § 19.101 (requiring enforcement proceedings to be conducted by ALJs "[u]nless otherwise ordered by the Comptroller").

[185] *See* 12 C.F.R. § 19.23(d)(2) ("The failure of a party to oppose a written motion . . . is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.").

speak out or seek to rouse the matter at any point *then* renders speculative assertions of prejudice and claims of unreasonable delay *now* considerably less persuasive.[186]

In sum, the undersigned cannot conclude that it was bad faith or lack of diligence for the Comptroller to wait until ALJ Miserendino's replacement had been duly appointed before resuming proceedings in this action. The resultant delay, while unfortunate, appears predominantly to be the product of factors outside both parties' control, and Respondent has not demonstrated why dismissal, as opposed to an expeditious resolution of the matter through the normal processes, would be an appropriate remedy to the "professional and personal limbo" in which he now assertedly finds himself. Resp. Mot. at 49.

G. The Eighth Amendment

Respondent argues that the penalties sought by the OCC—specifically, the imposition of a $5 million civil money penalty and an order of prohibition—are unconstitutionally punitive in violation of the Excessive Fines Clause of the Eighth Amendment.[187] Resp. Mot. at 51-52. Pointing to the fact that he has been acquitted of criminal charges stemming from the same alleged conduct, Respondent asserts that he has already "lost 6 years of his working income" and that a prohibition order would deprive him of a further twenty-five years working in the banking industry. *Id.* at 51. He then cites summarily to the Supreme Court for the proposition that "a punitive forfeiture" is unconstitutional "if it is grossly disproportional to the gravity of a defendant's offense." *Id.* (quoting *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)).

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[186] The undersigned also agrees with Enforcement Counsel that Respondent has not demonstrated actual, rather than speculative, prejudice with respect to how this delay has hampered his ability to conduct his defense, the criterion by which claims of prejudice are typically analyzed when determining whether dismissal is warranted due to dilatory prosecution. *See* OCC Opp. at 68-69 (citing cases).

[187] The Excessive Fines Clause provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

Enforcement Counsel contends that Respondent's argument is unripe because no penalty has yet been imposed. OCC Opp. at 70-71. It further asserts that there is no basis to challenge a prohibition action under the Excessive Fines Clause in any event and that the amount of civil money penalty assessment is proportional to the gravity of the offense. *Id.* at 72-73. In support of this latter point, Enforcement Counsel relates "the statutory and interagency framework [that] must be applied to the facts and circumstances of each individual case" when determining an appropriate civil money penalty to assess, *id.* at 74, and describes in detail the steps assertedly taken to calculate the civil money penalty assessed against Respondent, *see id.* at 73-76.

The undersigned agrees that this issue is not ripe for adjudication. Courts have consistently held that "Eighth Amendment challenges are generally not ripe until the imposition, or immediately impending imposition, of a challenged punishment or fine."[188] Respondent cites to no authority—nor even makes any argument—supporting the conclusion that dismissal of an action prior to a hearing or other adjudication on the merits might be appropriate based on the severity of the penalty sought. Respondent may, if he wishes, revisit the Eighth Amendment if and when it becomes immediately pertinent in this case. Before doing so, however, he is advised to review Enforcement Counsel's thorough recitation of the asserted basis for the civil money penalty assessment and consider specifically addressing the points raised therein. Respondent should also bear in mind that the mere fact of acquittal under the higher burden of proof of a criminal case is neither dispositive of his innocence as to the Notice's charges, *see* Part IV.D.1 *supra*, nor of the proportionality of any of the penalties that may statutorily be imposed in this forum following adjudication on the merits.

[188] *Cheffer v. Reno*, 55 F.3d 1517, 1523 (11th Cir. 1995) (citing cases).

H. The Appointments Clause

Finally, Respondent argues that the Notice should be dismissed because these proceedings are defective under the Appointments Clause of the United States Constitution in two respects: first, that the individual who signed the Notice, then-Deputy Comptroller for Large Bank Supervision Maryann Kennedy, is an inferior constitutional officer required to have been appointed by the Secretary of the Treasury ("Treasury Secretary"), which she was not, Resp. Mot. at 55-58; and second, that the undersigned—and OFIA ALJs generally—enjoys multi-level statutory protections from removal that the Supreme Court has held to be unconstitutional for inferior officers in *Free Enterprise Fund v. PCAOB*[189] ("*Free Enterprise Fund*"), Resp. Mot. at 59-61. The undersigned disagrees on both points. Furthermore, Respondent offers no reason to conclude that this tribunal has the authority in the first instance to decide arguments regarding the constitutionality of the appointment of ALJs, and Respondent's arguments are accordingly preserved for appeal. As such, the undersigned will treat the Notice as validly issued and the case will proceed with the undersigned as the assigned ALJ.

1. The Comptroller's Authority to Issue Notices of Charges Is Delegable to "Mere Employees" Who Are Not Subject to the Appointments Clause

Respondent's argument that then-Deputy Comptroller Kennedy was not constitutionally appointed is founded on the following premises: (1) 12 U.S.C. § 4 directs the Treasury Secretary to appoint up to four "Deputy Comptrollers of the Currency" to serve as successors to the Comptroller in the event of vacancy, absence, or disability; (2) these Deputy Comptrollers of the Currency are constitutional officers who must be appointed in accordance with the Appointments Clause; (3) Maryann Kennedy's job title at the time that she signed the Notice was Deputy

[189] 561 U.S. 477 (2010).

Comptroller for Large Bank Supervision;[190] (4) by dint of her title and her authority to initiate these proceedings, Maryann Kennedy is and was a Deputy Comptroller of the Currency within the meaning of 12 U.S.C. § 4; (5) Maryann Kennedy was not appointed by the Treasury Secretary or as otherwise required for a constitutional officer; (6) therefore, the Notice was issued by an unconstitutionally appointed individual, is defective, and must be dismissed. *See* Resp. Mot. at 55-58; Reply at 8-10; Resp. Response at 1-5.

Enforcement Counsel contends in response that the position of Deputy Comptroller for Large Bank Supervision is entirely unrelated to the "Deputy Comptroller of the Currency" position created by 12 U.S.C. § 4. As such—and unlike Deputy Comptrollers of the Currency—an OCC employee with the title of Deputy Comptroller for Large Bank Supervision is not a constitutional officer, does not require appointment by the Treasury Secretary, and has no powers of succession to the Comptroller's office. *See* OCC Opp. at 78-79 (stating that the position of Deputy Comptroller for Large Bank Supervision "is an employee position pursuant to 12 U.S.C. § 482"). Enforcement Counsel further avers that Ms. Kennedy was validly authorized to sign and issue the Notice by virtue of 12 U.S.C. § 4a, which permits the Comptroller to delegate powers to "any duly authorized employee," and a July 2014 memorandum delegating "[t]he signature authority to issue, modify, terminate, or withdraw notices of charges . . . to the appropriate Deputy Comptroller." OCC Opp. Ex. 14-A ("Delegation Memo"); *see* OCC Opp. at 79-80; OCC Response at 9-10. In support of these assertions, Enforcement Counsel offers two sworn declarations by Cassandra Cuffee-Graves, the OCC's Deputy Comptroller for Human Capital responsible for the agency's

[190] Enforcement Counsel represents that Ms. Kennedy's current title is that of Senior Deputy Comptroller of Large Bank Supervision. OCC Opp. at 78 n.32; *see also* OCC Opp., Ex. 14, Declaration of Cassandra Cuffee-Graves ("First Cuffee-Graves Decl.") ¶ 6 (averring that Ms. Kennedy served as Deputy Comptroller for Large Bank Supervision from June 14, 2015 through April 13, 2019).

human resource operations and the custodian of its personnel records and files. *See* OCC Opp., Ex. 14 ("First Cuffee-Graves Decl."); OCC Response, Ex. 1 ("Second Cuffee-Graves Decl.").

12 U.S.C. § 4 provides in full as follows:

> The Secretary of the Treasury shall appoint no more than four Deputy Comptrollers of the Currency, one of whom shall be designated First Deputy Comptroller of the Currency, and shall fix their salaries. Each Deputy Comptroller shall take an oath of office and shall perform such duties as the Comptroller shall direct. During a vacancy in the office or during the absence or disability of the Comptroller, each Deputy Comptroller shall possess the power and perform the duties attached by law to the office of the Comptroller under such order of succession following the First Deputy Comptroller as the Comptroller shall direct.

Enforcement Counsel agrees that the individuals described by this statute are "Officers of the United States" within the meaning of the Appointments Clause and must be appointed by the President, a court of law, or a head of department (of which the Treasury Secretary is one).[191] OCC Response at 3. Enforcement Counsel claims, however, that there are only two individuals who are currently "Deputy Comptrollers of the Currency" within the meaning of 12 U.S.C. § 4—Brian Brooks, who was appointed by the Treasury Secretary on April 1, 2020 and is currently serving as Acting Comptroller due to a vacancy in the position, and Jonathan Gould, who was appointed by the Treasury Secretary on December 23, 2018.[192] Second Cuffee-Graves Decl. ¶¶ 6-10. Enforcement Counsel asserts that Ms. Kennedy, as Deputy Comptroller and now Senior Deputy Comptroller for Large Bank Supervision, is not and has never been in the line of succession to act as Comptroller, *id.* ¶¶ 11-13, and therefore is what the Supreme Court has termed a "non-officer

[191] U.S. CONST., Art. II, § 2, cl. 2; *see also Lucia*, 138 S. Ct. at 2051-52.

[192] Of the two, Enforcement Counsel asserts that Mr. Brooks has been designated First Deputy Comptroller of the Currency in accordance with the requirements of 12 U.S.C. § 4, and that prior to him, that office was filled by Morris R. Morgan from April 19, 2019 through March 29, 2020. Second Cuffee-Graves Decl. ¶¶ 7, 9; *see also* OCC Response at 8-9.

employee" who is "part of the broad swath of 'lesser functionaries' in the Government's workforce."[193] *See* OCC Response at 3-4, 7-8.

Respondent, by contrast, contends that all of the roughly three dozen individuals bearing the title "Deputy Comptroller" or "Senior Deputy Comptroller" on the OCC's "Leadership" web page[194] are constitutional officers with the powers of a Deputy Comptroller of the Currency under 12 U.S.C. § 4. *See* Reply at 8 ("A Deputy Comptroller in the OCC is . . . , by necessity, a Deputy Comptroller of the Currency."). According to Respondent, each of these Deputy and Senior Deputy Comptrollers, including Ms. Kennedy, are in the line of succession to become Acting Comptroller in the event of absence, disability, or vacancy of the office. *See* Resp. Response at 6 ("The authority to succeed the Comptroller flows from an appointment as a Deputy Comptroller."). And according to Respondent, each of these Deputy and Senior Deputy Comptrollers who has not been appointed by the Treasury Secretary or otherwise in conformance with the Appointments Clause, including Ms. Kennedy, are therefore constitutionally infirm and their actions in that role constitutionally illegitimate. *See* Resp. Mot. at 56-58.

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[193] *Lucia*, 138 S. Ct. at 2051.

[194] https://www.occ.treas.gov/about/who-we-are/leadership/index-leadership.html ("Leadership Page") (accessed July 10, 2020). The undersigned takes official notice of the fact that, as Respondent asserts, none of the individuals listed on this page are identified as "Deputy Comptrollers of the Currency." *See* Reply at 8; *Kaspersky Lab, Inc. v. Dep't of Homeland Sec.*, 909 F.3d 446, 464 (D.C. Cir. 2018) (courts may consider "public records subject to judicial notice" on motion to dismiss). In particular, the undersigned notes that Jonathan Gould, who Ms. Cuffee-Graves avers is "[t]he second Deputy Comptroller of the Currency," Second Cuffee-Graves Decl. ¶ 10, is not identified as such on the above-referenced web page or on Mr. Gould's personal biographical page. *See* Leadership Page (identifying Mr. Gould only as "Senior Deputy Comptroller and Chief Counsel"); https://www.occ.treas.gov/about/who-we-are/leadership/bio-jonathan-gould.html (accessed July 10, 2020) (same). Similarly, Brian Brooks is identified as "Acting Comptroller of the Currency" on the Leadership Page, and his biographical page states that he ascended to that position "as a result of his designation as First Deputy Comptroller [*sic*] by Treasury Secretary Steven T. Mnuchin pursuant to his authority under 12 U.S.C. § 4," https://www.occ.treas.gov/about/who-we-are/comptroller/bio-brian-brooks.html (accessed July 10, 2020), but neither page uses the title "First Deputy Comptroller of the Currency" to describe him, despite that being the title given in 12 U.S.C. § 4 and by Ms. Cuffee-Graves. *See* Second Cuffee-Graves Decl. ¶¶ 7, 9. The undersigned highlights this only to demonstrate that the discrepancies in wording used by Respondent to further his argument that a Deputy Comptroller for Large Bank Supervision is a Deputy Comptroller of the Currency do exist and appear to be due, at least in part, to a lack of precision or consistency in the public-facing materials of the agency itself.

Much of the dissonance between Respondent's arguments and Enforcement Counsel's asserted reality stems from the OCC's unfortunate practice of not clearly demarcating its "Deputy Comptrollers of the Currency," who the parties agree are constitutional officers established by and appointed under 12 U.S.C. § 4 and who may succeed to the office of Acting Comptroller if needed, from more garden-variety "Deputy Comptrollers," who the agency claims are mere employees who may be delegated powers by the Comptroller but who are outside the line of succession and are not subject to the strictures of the Appointments Clause. Respondent offers no basis to dispute the OCC's averment that only two individuals are currently (and have been as a matter of practice) designated "Deputy Comptrollers of the Currency" by the Treasury Secretary and are thus in line to succeed the Comptroller according to an established order of succession. *See* OCC Response at 9.[195] Yet by the same token, if those numerous other Deputy and Senior Deputy Comptrollers who were not so appointed under 12 U.S.C. § 4 were instead called something else—say, "Assistant" and "Senior Assistant" Comptrollers, then Respondent's contention that there is "no distinction between a 'Deputy Comptroller' in the OCC and a 'Deputy Comptroller of the Currency'" would perforce lose its veneer of surface logic. It must therefore be said that the OCC could have done, and could yet do, a better job of avoiding potential confusion in this regard.

Regardless, however, the undersigned cannot agree with Respondent that a similarity in job titles must "by necessity" vest all three dozen Deputy and Senior Deputy Comptrollers, over the agency's objection, with the powers and succession authority directed by Congress to be given to no more than four duly appointed officers. Respondent makes much of the seemingly common-sense notion that "[a] Deputy Comptroller is a Deputy Comptroller," Resp. Response at 5, but such

[195] *See also* OCC Response at 4 ("[T]he relevant inquiry in determining whether an OCC employee must be appointed by the Secretary of the Treasury under 12 U.S.C. § 4 is whether they 'possess the power' of the office created by 12 U.S.C. § 4; namely, whether they will assume the powers of the Comptroller in the event of vacancy, absence, or disability.").

a reductive interpretation of the agency's application of 12 U.S.C. § 4 does violence to the putative scope of that statute and serves no interests or ends but Respondent's own. There is no reason to doubt the OCC when it says that it has not contrived to exceed the allowable number of Deputy Comptrollers of the Currency under 12 U.S.C. § 4 by a factor of nearly ten. *See* OCC Opp. at 79. There is no reason to presume that the statute governs any aspects of the agency's structure beyond establishing a specific succession order of up to four constitutionally appointed officers.[196] *See* OCC Response at 1-3. Most of all, there is no reason to resort to the conclusion that the historical actions of three dozen positions within the OCC must be invalidated because their titles contain the words "Deputy Comptroller" when there is a perfectly reasonable alternate explanation—that the Treasury Secretary has appointed two Deputy Comptrollers of the Currency to succeed the Comptroller as needed under 12 U.S.C. § 4, and that anyone else with the title of Deputy or Senior Deputy Comptroller does not wield that statutory authority.

In the alternative, Respondent argues that whichever individuals are responsible for issuing the Notice against him—whether Ms. Kennedy or someone else—are constitutional officers "not because of their job titles, but because of the authority they wield." Reply at 9. Respondent cites the Delegation Memo, under which the Comptroller "delegates authority to bring enforcement actions pursuant to 12 U.S.C. § 1818(e), assess civil monetary penalties under 12 U.S.C. § 1818(i), and issue notices of charges to a committee of five senior Deputy Comptrollers" comprising the Major Matters Supervision Review Committee ("MMSRC"). Resp. Mot. at 58 n.33; *see also* Delegation Memo at 1-3. Respondent asserts that these powers constitute "significant authority pursuant to the laws of the United States" that neither Ms. Kennedy nor the members of the MMSRC can validly be delegated—much less exercise—unless they have been appointed by the

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[196] *See English v. Trump*, 279 F. Supp. 3d 307, 312 (D.D.C. 2018) (describing 12 U.S.C. § 4 as Congress providing "agency-specific rules for acting officers").

Treasury Secretary, which they have not. *See* Resp. Response at 1-2 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

Such an argument also must fail, at least before this tribunal. Respondent contends that the issuance of a notice of charges is necessarily a power reserved to constitutional officers alone. *See* Resp. Mot. at 58; Resp. Response at 1. Yet 12 U.S.C. § 4a expressly provides that the Comptroller "may delegate to *any duly authorized employee*, representative, or agent *any power* vested in the office by law."[197] This provision was enacted in 1980, four years after the *Buckley* Court invoked the exercise of "significant authority" as a touchstone for inferior constitutional officers.[198] Congress, moreover, is presumed to be aware of judicial interpretations of extant law when passing new legislation.[199] The undersigned, then, will presume that Congress, in describing the scope of the Comptroller's delegation authority to "any duly authorized employee," was aware of *Buckley*'s clear distinction between "officers," who are subject to the Appointments Clause, and "employees," who are not.[200] The Delegation Memo authorizes the members of the MMSRC to initiate enforcement actions and "the appropriate Deputy Comptroller"—here Ms. Kennedy—to sign notices of charges issued pursuant to that delegation. Delegation Memo at 3. Thus, such powers, while residing at base with the Comptroller, may be validly delegated to Ms. Kennedy and the members of the MMSRC as "duly authorized employee[s]" under 12 U.S.C. § 4a. To the extent that Respondent wishes to argue that 12 U.S.C. § 4a is on its face unconstitutional because it permits the full breadth of the Comptroller's powers to be delegated to "mere employees," *Lucia*,

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[197] Emphases added.

[198] Pub. L. 96–221, title VII, § 707(a), Mar. 31, 1980, 94 Stat. 188.

[199] *See, e.g.*, *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014); *La. Pub. Svc. Comm'n v. FERC*, 482 F.3d 510, 519 n.* (D.C. Cir. 2007).

[200] *See Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976) ("Employees are lesser functionaries subordinate to officers of the United States."); *id.* at 269 (White, J., concurrence in part) ("The appointment power provided in Art. II also applies only to officers, as distinguished from employees, of the United States."); *see also Lucia*, 138 S. Ct. at 2051 (distinguishing between constitutional officers and "mere employees").

138 S. Ct. at 2051, he does not make that argument here, and has presented no authority suggesting that such a question may be decided by this tribunal in any event.

To sum up: The parties agree that Ms. Kennedy was not appointed by the Treasury Secretary as would be required of a "Deputy Comptroller of the Currency" under 12 U.S.C. § 4. Respondent has made no showing that Ms. Kennedy has ever exercised any power that this statute would have conferred, nor does the OCC claim that such power is hers to wield. In signing the Notice, Ms. Kennedy did not purport to be acting as Comptroller, but on the Comptroller's behalf pursuant to authority that is capable of being delegated to non-officer employees and in fact was delegated to her. The undersigned will not imbue Ms. Kennedy with powers that she has not used and that the agency says she does not possess in order to find that she was therefore not properly appointed under the Constitution to a position that she does not claim to hold.

2. The Supreme Court's Decisions in *Free Enterprise Fund* and *Lucia* Do Not Compel a Conclusion that OFIA ALJs are Unconstitutionally Appointed

Respondent argues that because OFIA ALJs "enjoy multilevel protection from removal," the undersigned is unconstitutionally insulated from presidential oversight and, therefore, the undersigned's appointment is unconstitutional. Resp. Mot. at 59. In support of this position, Respondent cites *Free Enterprise Fund*, in which the Supreme Court held that members of the Public Company Accounting Oversight Board ("PCAOB") were unconstitutionally appointed due to the multiple levels of protection from removal that they enjoyed.[201] Respondent asserts that although *Free Enterprise Fund* did not apply to ALJs *per se*, the Supreme Court's decision in *Lucia* that Securities and Exchange Commission ("SEC") ALJs were inferior officers subject to the Appointments Clause means that they, and all ALJs, "must be subject to" *Free Enterprise Fund*'s holding. *Id.* at 60 (citing *Lucia*, 138 S. Ct. at 2055).

[201] 561 U.S. at 484.

The undersigned is not persuaded by Respondent's position that the removal provisions for ALJs, and OFIA ALJs in particular, violate the Appointments Clause under *Free Enterprise Fund* and *Lucia*. 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.[202] Put another way, *Free Enterprise Fund* did not hold that inferior officers can *never* enjoy multiple levels of statutory protection from removal; rather, it held that members of the PCAOB could not be thus protected given the particular nature of those positions and the authority they exercised.[203] 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 identified in *Free Enterprise Fund*.

Furthermore, while the *Lucia* Court addressed the issue of whether SEC ALJs are "Officers of the United States," it specifically did *not* address the constitutionality of ALJ removal provisions.[204] That issue was, however, addressed extensively in the partial concurring opinion of Justice Breyer, who noted *inter alia* 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."[205] Given that *Lucia* itself left undecided the question of whether SEC ALJs' status as inferior officers means that their removal protections are unconstitutional, it cannot be

[202] *In re Michael R. Sapp*, Nos. 13-477(e) & 13-478(k), 2019 WL 5823871, *19 (FDIC Sept. 17, 2019) (citing *Free Enterprise Fund*, 561 U.S. at 501 n. 10).

[203] *See Free Enterprise Fund*, 561 U.S. at 498 (finding statute unconstitutional under Appointments Clause where it granted PCAOB members "executive power without the Executive's oversight").

[204] *Lucia*, 138 S. Ct. at 2051 n.1 (declining to address "whether the statutory restrictions on removing the Commission's ALJs are constitutional").

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

the case that a conclusion as to officer status necessarily compels a conclusion as to multilayer statutory protections from removal. Moreover, Respondent has not even endeavored to establish the necessary predicate to their argument—to wit, that OFIA ALJs are sufficiently similar to SEC ALJs as to be subject to the same constraints on the manner of their appointment, something which has not yet been determined by the Comptroller or otherwise by any court,[206] and which may not be within this tribunal's authority to decide.

V. <u>Conclusion</u>

For the reasons set forth above, the undersigned hereby denies in full Enforcement Counsel's July 14, 2017 Motion for Entry of an Order of Default and Respondent's April 2, 2020 Renewed and Omnibus Motion to Dismiss.

SO ORDERED.

July 28, 2020

Jennifer Whang
Administrative Law Judge
Office of Financial Institution Adjudication

[206] In an interlocutory decision in an 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 a court since *Lucia* was decided.