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 RESPONDENT'S MOTION TO DISMISS AMENDED NOTICE OF CHARGES

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On August 11, 2020, the Office of the Comptroller of the Currency ("OCC") filed an Amended Notice of Charges ("ANOC" or "Amended Notice") against Respondent Richard Usher ("Respondent"), seeking an order of prohibition and the imposition of a $1.5 million civil money penalty pursuant to Section 8(e) of the Federal Deposit Insurance ("FDI") Act, 12 U.S.C. §§ 1818(e) and (i). Specifically, the Amended Notice alleges that Respondent, in his capacity as an institution-affiliated party ("IAP") of JPMorgan Chase Bank, N.A. (variously "JPMC," "JPM," or "the Bank"), engaged in actionably unsafe or unsound practices and breached his fiduciary duties to the Bank when he agreed to coordinate his trading in the spot foreign exchange market ("FX Spot Market") with "traders at competitor banks . . . in an attempt to influence prices" over the course of several years.[1] ANOC ¶ 23.

In furtherance of this ongoing agreement, the ANOC alleges that Respondent regularly "used code words to share confidential, commercially sensitive Bank information" with those competitor traders in an electronic chat room ("the Cartel chat room") and sought to "avoid detection by the Bank's compliance department." *Id.* ¶ 27. The ANOC alleges that Respondent acted "[c]ontrary to the Bank's policies" in multiple respects, including by disclosing "the size and direction of customer fix orders for the purpose of informing the Bank's competitors' trading and coordinating his trading with the Bank's competitors." *Id.* ¶ 36. The ANOC further alleges that the Bank ultimately incurred approximately $1.5 billion in fines, penalties, settlement payments, and expenses as a result of Respondent's conduct. *See id.* ¶¶ 49-52.

[1] 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." ANOC ¶ 5; *see id.* ¶¶ 6-17 (describing aspects of the FX Spot Market).

On October 9, 2020, Respondent moved to dismiss the Amended Notice on the grounds that it does not adequately allege any of the statutory elements pled by the OCC and necessary to sustain an enforcement action under 12 U.S.C. § 1818 ("Section 1818"):

- ***misconduct*** (specifically, that Respondent engaged in unsafe or unsound practices or breached his fiduciary duty), *see* ANOC ¶¶ 54(a), 55(a);
- ***effect*** (that the Bank suffered financial loss or other damage as a result of Respondent's conduct), *see id.* ¶¶ 54(b), 55(b);[2] and
- ***culpability*** (that Respondent acted with the necessary willfulness, recklessness, or personal dishonesty), *see id.* ¶¶ 54(c), 55(a).

See Respondent's Motion to Dismiss Amended Notice of Charges ("Motion") at 4-6. Enforcement Counsel for the OCC ("Enforcement Counsel") filed an Opposition to Respondent's Motion on October 30, 2020, and Respondent sought and was granted leave to file a Reply in support of his Motion three weeks later, on November 20, 2020.[3] For the reasons set forth below, Respondent's Motion to Dismiss the Amended Notice of Charges is denied.

The undersigned notes at the outset that the OCC's Uniform Rules of Practice and Procedure ("Uniform Rules") contain no specific provision regarding the mechanics of this tribunal's consideration of dispositive motions other than motions for summary disposition.[4] Consequently, in addressing Respondent's motion, the undersigned will adopt and apply as

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[2] As discussed *infra*, the Amended Notice pleads two additional and (if adequately alleged) independently sufficient grounds on which Respondent's conduct satisfies the "effect" element of Sections 1818(e) and 1818(i)—namely, that Respondent received financial gain or other benefit as a result of his conduct and that the alleged conduct was part of a pattern of misconduct, *see* ANOC ¶¶ 54(b), 55(b).

[3] Respondent also sought and was granted leave to file an "Assented-To Submission on Foreign Law in Support of His Motion to Dismiss Amended Notice of Charges" ("Resp. Submission on Foreign Law") on October 30, 2020, which is addressed as appropriate *infra*.

[4] *See* 12 C.F.R. § 19.23 (providing that "[d]ispositive motions are governed by §§ 19.29 and 19.30"); *see also id.* §§ 19.29 (summary disposition), 19.30 (partial summary disposition).

appropriate the standards set forth with respect to motions to dismiss under Rule 12 of the Federal Rules of Civil Procedure. In particular, the undersigned "must accept all the well-pleaded factual allegations in the [Amended Notice] as true" for the purpose of Respondent's motion, and "draw all reasonable inferences from those allegations in the [OCC's] favor."[5] Moreover, the undersigned "may consider only the facts alleged in the [Amended Notice], any documents either attached to or incorporated in the [Amended Notice], and matters of which the court may take judicial notice."[6] In evaluating the Amended Notice's sufficiency, the undersigned may consider any document that the Amended Notice "specifically references," even if it is not quoted, as long as the document in question "forms the basis for a claim or part of a claim."[7]

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."[8] 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."[9] Further, "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."[10] 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

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[5] *Hurd v. Dist. of Columbia*, 864 F.3d 671, 678 (D.C. Cir. 2017); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (allegations may not be purely conclusory or "[t]hreadbare recitals of the elements of a cause of action").

[6] *Hurd*, 864 F.3d at 678 (internal quotation marks and citation omitted); *see also Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 273 (D.C. Cir. 2018) ("Public records are subject to judicial notice on a motion to dismiss when referred to in the complaint and integral to the plaintiff's claim.").

[7] *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1133 (D.C. Cir. 2015) (internal quotation marks and citation omitted); *see id.* ("A pleading's reference *to even part of* a fully integrated and authentic contract thus incorporates the contract as a whole into the complaint.") (emphasis added).

[8] *Iqbal*, 556 U.S. at 678 (internal quotation marks and citation omitted).

[9] 12 C.F.R. § 19.18(b)(2).

[10] *Iqbal*, 556 U.S. at 679.

alleged"[11]—that is, that all elements of the given cause of action are well-pleaded and can plausibly be proven at the appropriate stage of the proceedings.

I. Background and Procedural History

The OCC originally initiated this action against Respondent on January 10, 2017. In addition to the claims set forth in the Amended Notice, the original Notice of Charges ("Notice") alleged that Respondent's coordination of his foreign exchange ("FX") spot trading with competitor traders to influence prices in the FX Spot Market violated Section 1 of the Sherman Antitrust Act ("Sherman Act"). *See* Notice ¶ 23. Respondent moved to dismiss the original Notice on numerous grounds, including that (1) Respondent, as a foreign national trading from London, did not have the requisite relationship with the Bank for the OCC to have enforcement authority over his alleged misconduct, April 2, 2020 Renewed and Omnibus Motion to Dismiss ("Omnibus Motion") at 45-46; (2) the Notice did not adequately allege a violation of the Sherman Act, particularly in light of Respondent's 2018 acquittal on criminal price-fixing conspiracy charges under that Act, *id.* at 26-31; and (3) the purported lack of a Sherman Act violation fatally undermined the Notice's allegations that Respondent had engaged in unsafe or unsound practices and breached his fiduciary duties, *id.* at 29-30, 54-55.

On July 28, 2020, the undersigned issued an Order denying Respondent's Omnibus Motion in all respects. In relevant part, the Order concluded that, as pled, Respondent was an agent of the Bank and thus subject to the OCC's authority, *see* July 28, 2020 Order Denying Enforcement Counsel's Motion for Default and Respondent's Omnibus Motion to Dismiss ("July 28 Order") at 45-46; that Respondent's criminal acquittal did not preclude the OCC from alleging a violation of the Sherman Act or from contending that the fines, penalties, and settlement payments incurred by

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[11] *Id.* at 678.

the Bank prior to the acquittal were caused "by reason of" Respondent's alleged conduct, *see id.* at 49-52; that the Notice adequately alleged that Respondent had both breached his fiduciary duties to the Bank and engaged in unsafe or unsound banking practices "by, among other things, disclosing confidential and commercially sensitive information . . . to the Bank's competitors in the course of a conspiracy to coordinate trading," *id.* at 49 (internal quotation marks omitted); and that the Notice's allegations of unsafe or unsound practices and breach of fiduciary duty were not contingent on a violation of the Sherman Act but were each "an independent and sufficient basis for an enforcement action," *id.* at 51.[12]

One further aspect of the July 28 Order bears mention here. Respondent had argued, in his Omnibus Motion, that the original Notice should be dismissed because this tribunal was not the proper forum in which to adjudicate alleged criminal violations of the Sherman Act and because the OCC had no statutory authority to institute actions based upon such alleged criminal violations. *See* Omnibus Motion at 32-33. In considering this argument, the undersigned noted "that this tribunal is not a natural fit for the adjudication of criminal violations, whether of the Sherman Act or otherwise." July 28 Order at 54. The undersigned further observed that this "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." *Id.* And the undersigned cautioned Enforcement Counsel that it "may well find it more difficult to make the requisite showing of a criminal Sherman Act violation," as opposed to unsafe or unsound practices or a breach of fiduciary duty, "considering that the agency with exclusive enforcement authority

[12] *See also* July 28 Order at 50 (finding that "[t]he Notice is not 'based upon' only an alleged criminal violation of the Sherman Act, but upon allegations that the same acts that constituted criminal antitrust conspiracy also caused Respondent to breach his fiduciary duty to the Bank and engage in unsafe or unsound practices").

in the first instance has already tried and failed to establish such a violation, albeit under a higher burden of proof." *Id.* at 57. Nevertheless, the undersigned concluded, based on the statutory language as well as agency precedent, that an "alleged criminal violation[] of the Sherman Act may reasonably be the basis for a non-criminal administrative enforcement action under Section 1818(e) or (i)." *Id.* at 58.

A. The Amended Notice

The allegations in the OCC's Amended Notice largely mirror those in the original Notice, with three exceptions. First, the Amended Notice no longer alleges a violation of the Sherman Act. *See* ANOC ¶¶ 54(a), 55 (alleging only unsafe or unsound practices and breach of fiduciary duty). Second, the Amended Notice seeks only a $1.5 million civil money penalty, rather than the original $5 million. *See id.* at 1. Third, the Amended Notice identifies a May 2019 payment of €228 million to the European Commission as another way in which the Bank suffered loss as a result of Respondent's conduct. *Id.* ¶ 49. The gravamen of Respondent's allegedly actionable misconduct in the Cartel chat room, however, is essentially unchanged in the Amended Notice.

Like the original Notice, the Amended Notice alleges that Respondent and several traders at competitor banks ("the Cartel") established a permanent electronic chat room in which they agreed to coordinate trading of the euro/U.S. dollar ("EUR/USD") currency pair in an attempt to influence prices in the FX Spot Market and increase their own personal profitability. ANOC ¶¶ 23, 26. Specifically, Respondent and the others in the Cartel chat room allegedly coordinated their trading "in connection with the [European Central Bank ("ECB") and World Markets/Reuters ("WM/R")] spot benchmarks . . . [including] by withholding certain bids and offers when one

trader in the chat room had an open risk position . . . [and] by disclosing, discussing, and coordinating currency pair spreads to be quoted to customers."[13] *Id.* ¶ 23.

The Amended Notice repeatedly alleges that, in furtherance of this agreement, Respondent "disclosed confidential, commercially sensitive information, such as information on customer orders and currency pair spreads," to the other traders in the Cartel chat room. *Id.* ¶ 24; *see also id.* ¶¶ 27-28, 33 (alleged disclosure of "confidential bank information regarding customer fix orders"). Among other things, Respondent and the other traders allegedly "agreed to disclose their customer fix orders in the chat room prior to the ECB and WM/R fixes so that they could ensure that they did not trade against each other leading up to and during the fix window." *Id.* ¶ 30. The ANOC alleges that the chat room participants "disclosed the size and direction of their fix orders to facilitate the coordination of their trading strategies." *Id.* ¶ 35. The ANOC further alleges that Respondent's disclosure of this confidential and commercially sensitive Bank information to traders at competitor banks was contrary to the Bank's policies, contrary to prudent banking practices, and in breach of Respondent's fiduciary duties. *See id.* ¶¶ 24, 33, 37.

The Amended Notice alleges that participants in the Cartel were expected "to share confidential information with each other and keep the contents of the chat room confidential even from other traders within their own respective banks." *Id.* ¶ 28. The ANOC alleges that Respondent and the other traders consistently acted "to place the interests of the Cartel above those of their own bank." *Id.* (quoting one Cartel participant asking whether a prospective new member would

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[13] See ANOC ¶¶ 14-17 for an explanation of the WM/R and ECB benchmarks and FX spot benchmarks (or "fixes") in general, and see the rest of the Amended Notice (as well as *infra*) for specific allegations regarding Respondent's collusive activity. The Amended Notice provides examples of Respondent and the other chat room participants coordinating their trading to manipulate the ECB and WM/R fix rates in their favor. *See id.* ¶¶ 31, 34, 38-39. The ANOC also offers instances of the chat room traders allegedly withholding bids during each other's open risk positions and coordinating the spreads quoted to customers—that is, each presenting the same price quotes for the spread between a given currency pair at a particular time and for a particular requested volume—"in an attempt to influence prices in the FX Spot Market." *Id.* ¶ 44; *see id.* ¶¶ 12-13 (detailing process of providing quotes on the "bid-ask spread"), 41-43, 45-48.

"protect us like we protect each other against our own branches"). Similarly, the ANOC alleges that Respondent acted contrary to Bank policy by "help[ing] the Bank's competitors manipulate the ECB fix rate . . . to the detriment of the Bank's customers who agreed to trade with the Bank at the fix price." *Id.* ¶ 36. And the ANOC alleges that "[t]hroughout the Relevant Period, Respondent and the traders in the Cartel chat room used code words to share confidential, commercially sensitive Bank information and avoid detection by the Bank's compliance department." *Id.* ¶ 27.

The Amended Notice alleges that the Bank suffered loss as a result of Respondent's conduct in six respects. First, the ANOC alleges that "the Bank and the Bank's parent company agreed to pay approximately €228 million to the European Commission because the Bank violated European law on anticompetitive conduct based upon Respondent's conduct." *Id.* ¶ 49 ("European Commission settlement"). Second, the ANOC alleges that the Bank paid $99.5 million in civil settlements to resolve claims that the Bank violated the Sherman Act, based "in part" on Respondent's conduct. *Id.* ¶ 50 ("civil litigation settlements"). Third, the ANOC alleges that the Bank incurred an unspecified amount in "litigation expenses defending against and settling civil lawsuits" as a result of Respondent's conduct. *Id.* ¶ 51 ("civil litigation expenses"). Fourth, the ANOC alleges that the Bank's parent company pled guilty to a violation of the Sherman Act and agreed to pay a $550 million criminal penalty to the Department of Justice ("DOJ") "based largely on Respondent's conduct within the Cartel chat room while employed at the Bank." *Id.* ¶ 52(a) ("DOJ settlement"). Fifth, the ANOC alleges that the Bank paid approximately $352 million to the U.K. Financial Conduct Authority ("FCA") "to resolve charges that the Bank failed to implement adequate internal controls, as well as the misconduct in the FX Spot Market by the Bank's traders, including Respondent, attempting to manipulate FX spot benchmarks." *Id.* ¶ 52(b) ("FCA

settlement”). Sixth, the ANOC alleges that the Bank paid $310 million to the Commodity Futures Trading Commission (“CFTC”) “to settle allegations that it violated the Commodity Exchange Act based largely on Respondent’s conduct in the Cartel chat room.” *Id.* ¶ 52(c) (“CFTC settlement”). These alleged losses in total exceed $1.5 billion.

Finally, the Amended Notice also alleges that “Respondent received financial gain or other benefit” as a result of his conduct in the Cartel chat room. *Id.* ¶ 54(b); *see also id.* ¶ 55(b) (alleging that Respondent’s conduct “resulted in pecuniary gain or other benefit to Respondent”). In support, the ANOC cites Respondent stating in a chat room message that he has “made so much money” due to coordinating his trading with the other chat room traders. *Id.* ¶ 26. The ANOC further alleges that Respondent “noted that his profitability for the month was the best that he could ever remember because of his participation in the Cartel chat room.” *Id.* And the ANOC alleges that Respondent’s conduct, as pled, constituted an actionable “pattern of misconduct.” *Id.* ¶ 55(b).

B. The Instant Motion

Respondent now moves to dismiss the Amended Notice, arguing that it fails to satisfy the necessary statutory elements for an enforcement action because the OCC no longer alleges that Respondent’s conduct “violated the Sherman Act, or indeed any law, regulation, rule, or order.” Motion at 5. In particular, Respondent argues that in the absence of an alleged violation of law, the OCC can no longer prove that Respondent “caused” the Bank to enter into any settlements predicated on its potential liability for legal violations. *See id.* Rather, Respondent contends that any losses suffered by the Bank “stem not from [Respondent’s] conduct, but solely from the Bank’s own settlement decisions,” which were prompted by the Bank’s “desire to avoid litigation” and founded at least in part on the resolution of “various risks and allegations wholly unrelated to [Respondent].” *Id.* at 5-6.

In addition to challenging whether the Bank's settlements occurred "by reason of" Respondent's conduct, Respondent argues that the OCC's "withdrawal of the allegation that [he] violated a law" renders the Amended Notice unable to adequately allege that Respondent engaged in unsafe or unsound practices, that he acted in breach of any fiduciary duty to the Bank, or that he possessed the requisite "culpable state of mind" to justify a prohibition action or a civil money penalty. *Id.* Without the Sherman Act allegations, Respondent asserts that the Amended Notice does nothing more than describe Respondent "engaging in productive, commonplace practices for FX market makers, complying with all applicable standards, and intending in good faith only to *benefit* the [B]ank." *Id.* (emphasis in original). And Respondent maintains that he had no reason to believe that the conduct at issue was contrary to Bank policy or that it otherwise could have been seen as risky or improper. *See id.* at 29-30. The undersigned takes each argument in turn.

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

Any evaluation of Respondent's Motion must begin with the statutory elements that undergird the OCC's claims, with respect to which Respondent contends the allegations of the Amended Notice are insufficient. The OCC brings this action against Respondent as an IAP of the Bank 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).[14] *See* ANOC ¶¶ 2, 54-55.

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,

[14] *See* July 28 Order at 45-46 (holding that Respondent is an IAP of the Bank), 53-54 (holding that the OCC has enforcement authority over Respondent).

or practice which constitutes a breach of such party's fiduciary duty."[15] 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 depositors' interests "have been or could be prejudiced," or that the charged party "has received financial gain or other benefit."[16] And the culpability element may be satisfied when 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."[17]

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,"[18] 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.[19] Second, the agency must 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."[20]

It is a central aspect of this statutory scheme that only one of the potential triggering conditions is necessary for the satisfaction of each element of Sections 1818(e) and 1818(i). That is, the "misconduct" element of Section 1818(e) is fulfilled if an IAP has breached a fiduciary duty

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[15] 12 U.S.C. § 1818(e)(1)(A).

[16] *Id.* § 1818(e)(1)(B).

[17] *Id.* § 1818(e)(1)(C).

[18] 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 id.* §§ 1818(e)(1)(A)(i), (i)(2)(A). The OCC does not allege any such violations in this case.

[19] *Id.* § 1818(i)(2)(B)(i).

[20] *Id.* § 1818(i)(2)(B)(ii).

to the institution, regardless of whether the IAP has also violated any laws or engaged in unsafe or unsound practices, and vice versa. Likewise, a second-tier civil money penalty may be assessed (assuming misconduct can be shown) if the misconduct has resulted in pecuniary gain to the IAP, even if it has not caused loss to the institution and is not part of an actionable pattern. Each component of the "misconduct" element is an independent and sufficient basis on which to ground an enforcement action if the other elements have also been shown. The same is true of the "effect" element and the "culpability" element. The OCC need only prove—and, at this stage, need only plausibly allege—one component of each.

Finally, although the misconduct elements 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 which 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 the Financial Institutions Supervisory Act of 1966, 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 be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds."[21] This so-called Horne Standard has long guided federal banking agencies, including the OCC, in bringing and resolving enforcement actions.[22] It has also been recognized as "the authoritative definition of an unsafe or

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[21] *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).

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

unsound practice" by federal appellate courts.[23] 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.

III. <u>Argument and Analysis</u>

Many of Respondent's arguments for dismissal of the Amended Notice rest on the premise that the OCC's decision to withdraw its Sherman Act claim materially affects the viability of its unsafe or unsound practices and breach of fiduciary duty claims or its ability to prove that Respondent's conduct caused actionable loss to the Bank. This premise is incorrect. As noted above, the underlying conduct alleged in the Amended Notice is the same conduct alleged in the original Notice. To the extent that the OCC's unsafe or unsound practices claim and breach of fiduciary duty claims were adequately pled in the original Notice, as the undersigned held they were, they are no less adequately pled now. Likewise, the sufficiency of the OCC's pleading that Respondent's conduct caused the Bank to suffer loss in the form of settlement payments and penalties is not contingent on whether the Amended Notice asserts the same legal theories that underlaid one or more of the settlement agreements, but on whether the alleged conduct that forms the basis of this action was also, in whole or in part, alleged to be the factual basis for those agreements. If the underlying conduct has not changed, then the adequacy of the OCC's allegations in this respect has not changed either.

Furthermore, the undersigned agrees with Enforcement Counsel that Respondent's Motion at several points raises issues of fact that are more appropriately treated at a later stage of this proceeding. *See*, *e.g.*, OCC's Opposition to Respondent's Motion to Dismiss Amended Notice of Charges ("Opposition") at 24, 29-30, 32. The only relevant inquiry at this point is whether the

[23] *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).

Amended Notice offers "well-pleaded factual allegations" that, taken as true, "plausibly give rise to an entitlement to relief."[24] In addressing Respondent's arguments for dismissal, the undersigned will therefore highlight those that prematurely challenge the allegations of the Amended Notice on a factual basis rather than challenging the legal sufficiency of the OCC's facts as alleged.

A. <u>The Amended Notice's Allegations of Effect</u>

Respondent contends that the OCC cannot prove that the Bank's settlements occurred as a result of Respondent's alleged conduct, now that the OCC no longer itself alleges that Respondent violated any law or regulation. *See* Motion at 11-16. Respondent further argues that the settlements could not be used to show causation in any event, because they signify nothing more than the Bank's strategic decisions to resolve claims against it, based on its own incentives and appetite for risk, entirely unrelated to any real-world liability for Respondent's conduct in the Cartel chat room. *See id.* at 16-25. And Respondent asserts that the OCC's alternative bases for satisfying the "effect" elements of Sections 1818(e) and 1818(i)—namely, that Respondent benefited financially from his actions and that he engaged in a pattern of misconduct—are purely conclusory and unsupported by any of the agency's allegations. *See id.* at 11 n.4.

In response, Enforcement Counsel argues that the settlement agreements demonstrate on their face that the Bank incurred losses because of Respondent's alleged conduct. *See* Opposition at 6-10. Enforcement Counsel maintains that it need not prove that Respondent in fact committed the legal violations on which the settlement agreements were founded, as long as the agreements arose from the same conduct at issue in the Amended Notice, and as long as Enforcement Counsel can otherwise show that Respondent's alleged conduct is actionable under Sections 1818(e) and 1818(i). *See id.* at 10-13. Enforcement Counsel also contends that a bank's decision to settle cannot

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[24] *Iqbal*, 556 U.S. at 679.

perforce absolve individuals from liability for the conduct that prompted that decision. *See id.* at 13-14. And Enforcement Counsel asserts that the Amended Notice plausibly alleges that Respondent engaged in a pattern of misconduct regardless of the outcome of Respondent's causation arguments. *See id.* at 3 n.1. As described more fully below, the undersigned agrees with Enforcement Counsel that the Amended Notice adequately alleges, at the very least, that one or more of the settlement agreements caused the Bank loss by reason of Respondent's conduct and that the OCC also plausibly alleges a pattern of misconduct by Respondent.

1. The Amended Notice Does Not Seek to Hold Respondent Strictly Liable for the Bank's Settlement Payments

It is Respondent's position that, by linking the Bank's settlement losses to Respondent's conduct, the OCC is seeking to hold him liable for violations of law that the agency does not allege and does not intend to prove. *See* Motion at 12. Respondent claims that "[e]ach of the actions that led to a settlement payment from JPMorgan was premised on an alleged violation of a specified statute." *Id.* at 11-12. According to Respondent, the allegations in the original Notice therefore rested on the notion that Respondent "actually and personally committed the violations of law that the settlements attributed to the Bank." *Id.* at 13. Now that the Amended Notice no longer alleges any violations of law, Respondent contends that any "causal link" between his conduct and the settlement payments has been severed. *Id.* at 5. To Respondent's way of thinking, the agency must effectively relitigate the legal merits of each settlement and prove that Respondent in fact committed the violations alleged by, variously, the DOJ, the European Commission, the FCA, and the CFTC before it can draw any line between the Bank's settlement payments and Respondent's conduct in the Cartel chat room. *See id.* at 12-13; Reply at 7-10.

This is a mischaracterization of both the applicable law and what the OCC is alleging. Sections 1818(e) and 1818(i) provide that an IAP is subject to a prohibition order and second-tier

civil money penalty, respectively, if he engages in actionable misconduct that causes loss to the institution with which he is affiliated.[25] While this misconduct can take the form of a violation of law, *it need not do so*. Unsafe or unsound banking practices, standing alone, are enough to justify a Section 1818 enforcement action even if no law has been violated, if those practices caused the institution to suffer loss within the meaning of the statute. The same may be said for an actionable breach of fiduciary duty. The fact that some other body, whether the European Commission, the DOJ, or class action plaintiffs, has successfully or unsuccessfully characterized the same conduct as violating one or more laws does not increase the agency's statutory burden, even if the Bank's loss was spurred by those other allegations.

Here, as Respondent repeatedly emphasizes, the Amended Notice does not allege a violation of the Sherman Act or any other law. Nor does the OCC intend to prove such a violation. It is unnecessary for it to do so. What the agency does allege, and ultimately must prove, is that Respondent engaged in actionable misconduct—that is, conduct amounting to unsafe or unsound practices or a breach of fiduciary duty under the applicable standards—and that this misconduct was the factual basis for loss to the Bank. *See* ANOC ¶¶ 54-55.

Put another way, if a bank executive surreptitiously transferred $1 million of depositor money into her personal account, the OCC would not need to allege or prove embezzlement or theft under a particular statute in order to maintain an enforcement action. It would be enough to show that (1) the transfer of bank funds for the executive's personal use was a breach of her fiduciary duty of loyalty to the bank (or, for example, unsafe or unsound banking practices) and

[25] *See* Part II, *supra*, for all statutory elements, including Section 1818(e)'s culpability prong. Section 1818(e) triggers when, among other circumstances, the institution suffers financial loss or other damage "by reason of" the actionable misconduct. 12 U.S.C. § 1818(e)(1)(B). Section 1818(i), in turn, permits the assessment of a second-tier money penalty when such misconduct "causes" the institution to suffer "more than a minimal loss." *Id.* § 1818(i)(2)(B).

(2) this breach caused the bank to suffer loss.[26] Likewise here, the OCC need not prove, or even allege, that Respondent in fact violated the Sherman Act or the Commodity Exchange Act or any of the UK or European laws charged in those respective actions (and described further below) in order to use the resulting settlements as evidence that Respondent caused loss to the Bank. It is sufficient that the allegedly violative conduct that formed the basis for the settlements is the same conduct that the Amended Notice alleges to be unsafe or unsound practices and a breach of fiduciary duty in this action. It is Respondent's underlying conduct, rather than any violation of law, that is alleged to have caused the Bank's loss.

Indeed, Respondent's argument fails to hold together even on its own terms. In moving to dismiss the original Notice, Respondent argued that the lack of an already-proven Sherman Act violation was fatal to the OCC's allegations that Respondent engaged in unsafe or unsound practices and that Respondent's conduct had caused the Bank's loss. *See* Omnibus Motion at 26-31. The undersigned rejected that argument, concluding that the validity of this action "is not contingent on a successful criminal prosecution" and that Respondent's acquittal on criminal Sherman Act charges did not preclude his conduct from having prompted the Bank's various settlements with the DOJ, the CFTC, the FCA, and civil plaintiffs. *See* July 28 Order at 50-52. Respondent now contends that the withdrawal of the Sherman Act allegations in the Amended Notice has created a "critical chasm" that submarines the OCC's ability to prove causation. Motion at 5. But as Respondent himself acknowledges, three of the five settlements at issue are premised entirely on the alleged violation of laws or regulations other than the Sherman Act, and one other only partly so.[27] If Respondent's Sherman Act acquittal has no bearing on the OCC's ability to

[26] Assuming, of course, that the agency also could show the requisite culpability as appropriate under Section 1818(e).

[27] *See* Motion at 12 (CFTC settlement premised on alleged violations of "the Commodity Exchange Act and specific CFTC regulations"), 12-13 (class action plaintiffs alleged violations of "the Sherman Act and the Commodity Exchange Act"), 13 (FCA and European Commission settlements premised on alleged violations of "the UK's

allege that these settlements were brought about by Respondent's conduct, and it does not, then the OCC's withdrawal of its Sherman Act allegations is equally irrelevant to whether, *e.g.*, the Bank's settlement of charges that it violated the UK's Financial Services and Markets Act occurred "by reason of" the misconduct alleged in the Amended Notice. What matters, instead, is whether the agency has articulated a plausible basis to believe that Respondent's conduct was an impetus for one or more of the alleged settlements, a question the undersigned now addresses.

2. The Settlement Agreements Arose From Respondent's Alleged Conduct And May Be Used To Demonstrate Causation

Respondent argues that the settlements identified in the Amended Notice are a product of business judgment or the Bank's mistaken and now-disproven belief that Respondent committed the violations at issue, rather than the result of any alleged misconduct by Respondent. *See* Motion at 14-18. Respondent also contends that connecting the Bank's settlement payments to his conduct in the chat room is impossible because each of the settlements "resolved myriad forms of liability, both explicit and implicit, for corporate failings and for the actions of individuals other than [Respondent]." *Id.* at 20; *see id.* at 18-20. And Respondent asserts that the settlement agreements are inadmissible as competent evidence of either his liability or any motivation for the Bank's settlement, particularly because Respondent is unable "to confront the [B]ank's reasons for settling the alleged violations of law" through the examination of settlement-related communications or the cross-examination of witnesses. *Id.* at 25; *see id.* at 20-25.

To begin with, the undersigned concludes that payments made by a bank in furtherance of a settlement or plea agreement may be used as evidence of bank loss to fulfill the effect elements of Section 1818, if the enforcement agency can show that the settlement occurred "by reason of"

Financial Services and Markets Act 2000 [and] various UK 'regulatory provisions'" and "the law of the European Union," respectively).

a respondent's actionable misconduct.[28] Of course, evidence of causation is not evidence of liability for the underlying violations of law (which the OCC is not alleging in any event), and the parties agree that the settlement agreements cannot and will not be used as proof of Respondent's misconduct. *See* Motion at 16-18; Opposition at 10-11. Rather, Enforcement Counsel will need to demonstrate separately that Respondent engaged in actionable misconduct—that is, unsafe or unsound practices or a breach of fiduciary duty—without adverting to the merits of any allegations or admissions made by non-parties such as the Bank, the CFTC, or the DOJ in connection with any settlement or plea. *See* Opposition at 16 (settlement agreements used only "to demonstrate that Respondent caused 'effect' to the Bank").

Moreover, it should be without question that Respondent can "cause" the Bank to incur loss through settlement or plea agreements even if Respondent's conduct has not been adjudicated to rise to the level of a particular legal violation. As Enforcement Counsel observes, to hold otherwise would effectively immunize IAPs from any liability for unsafe or unsound practices or breaches of fiduciary duty that exposed their institutions to significant legal or regulatory risk unless the IAP's institution chose to take its chances by contesting an enforcement action or prosecution until a final judgment is assessed against it.[29] *See* Opposition at 14. A bank's decision to settle claims for some certain loss now rather than risking a much greater loss later should not absolve from liability the individual on whose conduct such claims are based. No such restriction is apparent from the text of Section 1818, and the undersigned will not impose one. *See* July 28

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[28] *See In the Matter of Christopher Ashton*, No. 16-015-E-I, 2017 WL 2334473, at *5 (May 17, 2017) (FRB final decision) (on default, effect element satisfied when bank paid "$2.4 billion in criminal and civil fines in connection with the [alleged] conduct"); *In the Matter of Towe*, Nos. AA-EC- 93-42 & -43, 1997 WL 689309, at *3 (Oct. 1, 1997) (FRB final decision) ($20,000 settlement payment to Internal Revenue Service constituted loss to bank).

[29] In other words, by arguing that a bank's settlement payment cannot constitute "loss" under Section 1818 absent a preexisting adverse judgment against the bank concerning the conduct of the IAP, Respondent is essentially repackaging the argument, already rejected in the July 28 Order, that there can be no Section 1818 liability without some prior adjudication of a respondent's guilt. This is not the law. *See* July 28 Order at 50-56.

Order at 54-55. An IAP who transfers $1 million of a bank's money into her personal account has caused loss to the bank; an IAP whose conduct is the impetus for a $100 million settlement should be no less liable, if that conduct is actionable under Section 1818.

Here, the undersigned agrees with Enforcement Counsel that the four corners of the plea and settlement agreements, as incorporated by reference into the Amended Notice,[30] adequately allege that Respondent's conduct was the factual basis for some substantial portion of the Bank's settlement-related loss. *See* Opposition at 17-18. This is most clearly evident with respect to the European Commission settlement, which the agreement states is predicated *entirely* on Respondent's alleged conduct in the Cartel chat room. *See* Opposition, Ex. 1 at 2 (providing that settlement "is based on the participation of one of [the Bank's] traders (Mr. Usher) in the chatroom during the period in which the arrangements took place"). In this settlement, the Bank and its parent company and subsidiaries agreed to pay over €200 million[31] to resolve claims that Respondent "participated in a cartel" with other FX spot traders "who were direct competitors," in which the traders "coordinated trading activity" and exchanged "certain current or forward-looking commercially sensitive information about their trading." *Id.* at 1; *see id.* at 3 (describing the sharing of confidential information as "recurrent and extensive"). The settlement agreement goes on to mirror the allegations in the Amended Notice by describing in detail the ways in which Respondent

[30] *See Banneker Ventures*, 798 F.3d at 1133.

[31] The Amended Notice alleges that the amount of the European Commission settlement is "approximately €228 million." ANOC ¶ 49. The settlement agreement itself indicates that the settlement would result in the imposition of "a fine not exceeding [€]235.97 million." Opposition, Ex. 1 at 8. It is unnecessary to determine the precise amount paid by the Bank under the terms of this settlement, at least at this stage, because the alleged financial loss is considerably "more than . . . minimal" in either event. 12 U.S.C. § 1818(i)(2)(B)(ii)(II).

and the competitor traders in the chat room allegedly shared sensitive information and coordinated their trading to anti-competitive ends. *Compare id.* at 3-7 *with* ANOC ¶¶ 22-48.[32]

The European Commission settlement alone, then, is sufficient for the undersigned to conclude that the OCC has plausibly alleged a requisite effect of Respondent's alleged misconduct under Sections 1818(e) and 1818(i).[33] Furthermore, although the other settlements in question are all alleged to have encompassed conduct by other entities *as well as* conduct by Respondent, the undersigned finds that the Amended Notice has adequately alleged effect with respect to these losses as well.[34] *See* ANOC ¶¶ 50, 52. Specifically, Respondent concedes that the DOJ settlement, among other things, resolved charges regarding Respondent's participation in a "combination and conspiracy to fix . . . the [EUR/USD] currency pair exchanged in the [FX Spot Market]."[35] Motion, Ex. 1 at 2-3; *see* Motion at 12 (agreeing that DOJ settlement concerned Respondent's conduct). The CFTC settlement related to the conduct of multiple Bank FX traders, and addressed in part the Bank's alleged lack of controls to "detect and deter possible misconduct involving certain FX benchmark rates," but Respondent is prominently quoted and is certainly at the center of the CFTC's allegations. Motion, Ex. 2 at 3; *see id.* at 2 (trader misconduct "occurred primarily" at

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[32] Again, the undersigned does not take as true the allegations adverted to in the European Commission settlement agreement, but notes only that the conduct by Respondent that allegedly prompted the payment of over 200 million euro to the European Commission is the same conduct alleged in the Amended Notice.

[33] *See Iqbal*, 556 U.S. at 678-79.

[34] Respondent argues that "litigation expenses defending against and settling civil lawsuits," ANOC ¶ 51, cannot constitute loss to the Bank under Sections 1818(e) and 1818(i) because "[p]arties endure litigation expenses *whenever* adverse parties threaten suit, and *whenever* a regulator poses supervisory or enforcement-related inquiries." Motion at 13 n.10 (emphasis in original) (noting that such costs are "routine" and "part of the price of doing business"). Because the undersigned concludes that the Amended Notice sufficiently alleges that Respondent caused the Bank loss regardless by way of the settlements, it is unnecessary to decide whether litigation expenses alone could sustain the effect element of a Section 1818 enforcement action. Respondent may revisit this issue should Enforcement Counsel use the alleged litigation expenses as a basis for Respondent's liability at some later point in the proceedings.

[35] Enforcement Counsel points to one of the exhibits attached to Respondent's Motion as evidence that "the DOJ guilty plea was based entirely on Respondent's conduct in the Cartel chatroom." Opposition at 8 (citing Motion, Ex. 7 at 2). The exhibit in question is a March 16, 2020 letter to a Southern District of New York district court judge from various counsel, including counsel for the Bank. The Amended Notice does not incorporate this letter by reference, and its contents may therefore not be considered at this stage.

Bank's London trading desk); *compare id.* at 4 *with* ANOC ¶ 38 (identical quotes of Respondent coordinating trading in Cartel chat room). The settlement of the civil class action involved many allegations of trader misconduct across many chat rooms, many currency pairs, and many banks, Motion, Ex. 3 at 7-9, but Respondent is named as a "top-level trader[]" involved in the alleged misconduct. *Id.* at 7 (alleging that "Richard Usher ran The Cartel while he was JPMorgan's chief currency dealer in London"). And the FCA settlement concerned, *inter alia*, the Bank's alleged failure to adequately supervise "the activities of its G10 spot FX traders in London," including those traders' "[a]ttempts to manipulate the WM/R and ECB fix rates, alone or in collusion with traders at other firms," and their "[i]nappropriate sharing of confidential information with traders at other firms, including . . . information about client orders." Motion, Ex. 4 at 3.[36] The FCA settlement thus unquestionably related in part to Respondent's conduct as well.

Nor does it present an "insuperable barrier" to eventual proof of causation that these settlements (other than the European Commission settlement) also "resolved exposures unrelated to [Respondent]," as Respondent contends. Motion at 18. As the Federal Deposit Insurance Corporation ("FDIC") Board of Directors has held, a respondent in an enforcement action under Sections 1818(e) and 1818(i) "cannot escape liability simply because others have contributed to the bank's loss as well."[37] Similarly, interpreting a related statutory provision in *In the Matter of Grant Thornton LLP*, the Comptroller of the Currency ("Comptroller") concluded that an

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[36] The undersigned notes that Respondent only includes selective, sometimes non-sequential pages from the FCA settlement agreement and several of the other documents that he attaches as exhibits, rather than the documents in their entirety. This risks misleading by omission. In the future, both parties are directed to provide full copies of any documents attached as exhibits. If a document is too lengthy to be useful if attached in full, then the party shall attach the pertinent section, with all pages included sequentially, and shall be prepared to provide the full document upon request.

[37] *In the Matter of Michael R. Sapp*, Nos. 13-477(e) & 13-477(k), 2019 WL 5823871, at *15 (Sep. 17, 2019) (FDIC final decision); *see also Landry v. FDIC*, 204 F.3d 1125, 1139 (D.C. Cir. 2000) (IAP responsible for misconduct causing loss even if "others may have been more guilty"); *In the Matter of Jeffrey Adams*, No. 93-91(e), 1997 WL 805273, at *5 (Nov. 12, 1997) (FDIC final decision) (noting that "multiple factors, and individuals, may contribute to a bank's losses" without absolving respondent of liability).

independent auditor had caused actionable loss to a bank through its issuance of an unqualified audit opinion, even though it was the bank's actions in response to the opinion that arguably were more directly responsible for any loss suffered.[38] Similarly here, it is immaterial that alleged misconduct by individuals other than Respondent may have played a part in prompting the Bank to enter into the settlements alleged in the Amended Notice and thereby suffering loss, as long as some of the alleged loss is fairly attributable to Respondent's conduct as well.[39] The Amended Notice amply alleges that each of the claims being settled concerned Respondent's alleged misconduct in substantial part.

Finally, Respondent's repeated emphasis on the Bank's motivation for entering into the settlements is misplaced in several respects. *See* Motion at 15, 16-18, 20-25. To start, questions regarding the admissibility of the settlement agreements and the availability of witnesses and documentary evidence of the Bank's decision-making are premature at this stage. *See id.* at 23 (asserting that "no competent testimony shows a causal relationship between the settlements and Usher's conduct"), 24 (contending that "Usher has no practical opportunity to probe and confront head-on whatever evidence may exist concerning the bank's true reason for settling"). The undersigned therefore will not now entertain objections to the sufficiency of the Amended Notice that better resemble discovery disputes or are more appropriate grounds for a motion in limine than a motion to dismiss. *See id.* at 23.

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[38] *In the Matter of Grant Thornton LLP*, Nos. AA-EC-04-02 & -03, 2006 WL 5432171, at *25 (Dec. 29, 2006) (OCC final decision) (noting that under the auditor's theory of causation, "conduct of independent contractors could never be the cause of a loss or other adverse effect for purposes of [the applicable statute], because it would always be the financial institution's acts or omissions that led to the loss to, or adverse effect on, the bank").

[39] The parties disagree whether "proximate causation" or "but-for causation" is the appropriate standard for determining whether a respondent's conduct has resulted in loss to the financial institution under Section 1818. *See* Motion at 15; Opposition at 7. The undersigned need not resolve that issue at this juncture, as she agrees with Enforcement Counsel that the Amended Notice has adequately pleaded causation under either standard for purposes of the instant Motion. The undersigned also agrees with Enforcement Counsel that it is unnecessary to prove "the exact amount of harm" attributable to Respondent's conduct in order to satisfy the effects prong of Sections 1818(e) and 1818(i). *Dodge v. OCC*, 744 F.3d 148, 158 (D.C. Cir. 2014); *see* Opposition at 7.

In addition, Respondent appears to contend generally that "the causes of proposed or accepted settlements are insolubly ambiguous," *id.* at 16, and that therefore the OCC cannot as a matter of law show that the Bank's settlement losses were caused by Respondent's misconduct rather than some alternate business motivation, whether a "desire for peace," some pressure to cooperate with regulators, or another "non-guilt-based incentive[]." *Id.* at 14, 17. But this is simply a variation on the argument that settlements in the absence of a guilty verdict can never constitute bank losses for the purpose of Section 1818, which the undersigned has already rejected. *See supra* at 18-19; July 28 Order at 50-52. If Respondent thinks it will be fruitful to make the case, following discovery, that his conduct did not *in fact* lead to the Bank incurring losses through its settlement with, for example, the European Commission, he is welcome to do that.[40] For now, what matters is whether there is a plausible factual link between Respondent's alleged conduct and the losses allegedly suffered by the Bank. The Amended Notice easily clears that bar.

3. The Amended Notice Adequately Alleges a Pattern of Misconduct and Financial Gain to Respondent in Any Event

Even if the Amended Notice did not adequately allege that Respondent's conduct caused loss to the Bank, which it does, the undersigned finds that the effect elements of Sections 1818(e) and 1818(i) would nevertheless be satisfied as pled. The OCC may maintain an action for a second-tier money penalty, assuming the other statutory prerequisites are met, if it ultimately can show that the respondent's alleged conduct "is part of a pattern of misconduct."[41] The Amended Notice alleges that Respondent engaged in the same misconduct repeatedly over the course of several

[40] The undersigned cautions, however, that if Enforcement Counsel is able to prove that one or more of the Bank's settlement payments resolved claims relating specifically to Respondent's alleged conduct, as necessary to satisfy Section 1818's effect prongs, it will not be enough to rebut this for Respondent to show that the Bank's decision to settle those claims rather than litigate to an adverse judgment was motivated in part by pragmatic business judgment. *See supra* at 19-20.

[41] 12 U.S.C. § 1818(i)(2)(B)(ii)(I).

years, providing specific dates throughout the Relevant Period of December 2007 through January 2013 on which such conduct allegedly occurred. *See* ANOC ¶¶ 31, 34, 38-39, 42-43, 46, 48. Contrary to Respondent's characterization of these allegations as "completely conclusory," (Motion at 11 n.4), the Amended Notice plausibly describes a years-long pattern of misconduct that is actionable under Section 1818(i).[42]

Moreover, the effect prongs for both a second-tier civil money penalty and a prohibition order also are satisfied if the agency can show that Respondent's alleged misconduct resulted in Respondent "receiv[ing] financial gain or other benefit."[43] The Amended Notice pleads this effect and supports it with an allegation in which Respondent states that he has "made so much money haha" in the course of the alleged misconduct. *See* ANOC ¶¶ 26, 54(b). Respondent objects that the quoted conversation "had nothing to do with Usher's own finances" (Motion at 11 n.4), but this is a question of fact most appropriately addressed at a later stage in the proceeding. For now, the undersigned finds that this allegation suffices to plead actionable financial benefit for Respondent as well under Sections 1818(e) and 1818(i), in addition to financial loss to the Bank and a pattern of misconduct as described above.[44]

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[42] *See*, *e.g.*, *Blanton v. OCC*, 909 F.3d 1162, 1171-72 (D.C. Cir. 2018) (pattern of misconduct where respondent repeatedly honored overdrafts without adequate risk controls); *Dodge*, 744 F.3d at 161-62 (pattern of misconduct where respondent violated regulatory reporting requirements over multiple reporting periods); *In the Matter of Onyeacholem Moseri*, No. AA-EC-05-72, 2006 WL 5432052, at *3 (Mar. 30, 2006) (OCC final decision) (on default, pattern of misconduct where respondent misused multiple bank accounts "over a one-month period").

[43] 12 U.S.C. § 1818(e)(1)(B)(iii); *see also id.* § 1818(i)(2)(B)(ii)(III) (requisite effect if an IAP's misconduct "results in pecuniary gain or other benefit" for the IAP).

[44] On the other hand, Enforcement Counsel adverts in the Opposition to the Section 1818 effect prongs being satisfied by the Bank suffering loss in the form of reputational damage. *See* Opposition at 12, 13. While damage to reputation is not necessarily foreclosed as an actionable type of loss in OCC enforcement actions as a general matter, *see* 12 U.S.C. § 1818(e)(1)(B)(i) (valid effect where misconduct causes "financial loss or other damage"), the Amended Notice pleads only financial losses with specificity, *see* ANOC ¶¶ 49-52. Accordingly, the undersigned concludes that Enforcement Counsel cannot use reputational damage as a basis for loss to the Bank in this case, at least as presently pled.

B. The Amended Notice's Allegations of Misconduct and Culpability

Respondent also contends that the Amended Notice fails to plead the misconduct and culpability elements of Section 1818. Specifically, Respondent argues that the conduct alleged in the Amended Notice does not constitute unsafe or unsound practices under the relevant standard, *see* Motion at 25-31, that no fiduciary duty exists between Respondent and the Bank that could have been breached by Respondent's alleged conduct, *see id.* at 31-37, and that the Amended Notice does not plead that Respondent acted with personal dishonesty or that his conduct was willful or reckless, *see id.* at 37-39. The undersigned concludes that nothing has materially changed from when the undersigned found that these elements were adequately alleged in the original Notice, that several of Respondent's arguments raise premature questions of fact, and that those arguments that can be decided now fail on their merits regardless.

1. The Amended Notice Adequately Alleges That Respondent's Conduct Constituted Unsafe or Unsound Practices

For the purposes of Section 1818, "[a]n unsafe or unsound practice includes any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds."[45] The Amended Notice alleges that Respondent acted "contrary to prudent banking practices," and thus unsafely or unsoundly, when he "disclosed confidential, commercially sensitive information . . . to traders at competitor banks" in the Cartel chat room and "coordinated [his] trading [with those competitors] in an attempt to influence prices in the FX Spot Market." ANOC ¶¶ 24, 33; *see also id.* ¶ 40. Respondent argues that these allegations are insufficient to satisfy the Horne Standard as adopted by the Comptroller above, because the trading practices it describes are neither risky nor

[45] *Patrick Adams*, 2014 WL 8735096 at *11 (emphasis omitted).

uncommon, *see* Motion at 25-27, and because no guidance at the time, whether from the Bank or from the OCC, prohibited Respondent's alleged conduct or even identified it as imprudent or improper, *see id.* at 29-31. The undersigned finds that Respondent's conduct as pled is adequately alleged to meet the standards of unsafe or unsound banking practices.

Respondent is correct that the Amended Notice does not allege that he "exceeded JPMorgan's FX trading limits or engaged in risky FX trades" while in the Cartel chat room. Motion at 26. It does not need to do so. Nor, as Enforcement Counsel observes, is it relevant whether Respondent's trades were ultimately profitable for the Bank or whether "spot-trading is a low-risk activity" for banks in a general sense. Motion at 26; *see* Opposition at 20-21. The OCC does not allege that the act of FX spot trading is intrinsically and imprudently risky, or even that Respondent exposed the Bank to direct financial risk through the details of the trades themselves. Instead, the agency alleges that some of Respondent's *specific conduct* in his capacity as an FX spot trader—in particular, his alleged sharing of confidential, commercially sensitive information with traders from competitor banks and the coordination of trading between Respondent and those competitors for the purpose of influencing prices—was "contrary to prudent banking practices" and therefore actionably unsafe or unsound. ANOC ¶¶ 24, 33, 40. The undersigned has already held, and here reaffirms, that the detailed allegations regarding this conduct in the Cartel chat room "state a claim to relief that is plausible on its face" under the Horne Standard.[46] *See* July 28 Order at 49.

Respondent's new arguments do nothing to change that conclusion. Respondent recites various ways in which some coordination between traders "serves important and valid economic functions" in the ordinary course of FX spot trading. Motion at 27. He observes, for example, that "FX buying and selling inherently requires 'coordination'" between the buyer and the seller, "or

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[46] *Iqbal*, 556 U.S. at 678 (internal quotation marks and citation omitted).

there is no transaction." *Id.* Of course this is true. He also asserts that "exchanges of information" in the context of FX trading "are inherently pro-competitive and lawful," noting that "[c]ounterparties and even competitors are permitted to share information about market conditions, and even about specific transactions." *Id.* at 28. And he states that the act of doing business in electronic chat rooms was "common practice and appropriate" in the FX spot trading industry during the Relevant Period. *Id.* at 29.

To a large extent, these assertions touch upon questions of fact that are better left to a later point of these proceedings: how do FX traders typically coordinate? What level of coordination is necessary and appropriate for the functioning of the FX spot market? What information is shared between competitor traders? How do traders share information in a way that advances competition and benefits customers? How common were invite-only electronic chat rooms such as the Cartel? If Respondent wishes to aver that what he and the others in the Cartel chat room were doing was no different in kind than other traders at the time, and that their alleged coordination of trading and information sharing were in fact merely run-of-the-mill "transactions and communication among banks[] on which the entire economy relies," *id.* at 27, he must first adduce facts and offer some documentary evidence in support of his position. *See* 12 C.F.R. § 19.29. He has not and cannot do so in a motion that takes the allegations of the Amended Notice as true. *See* Motion at 7-9.

Even accepted at face value, moreover, Respondent's spirited defense of the importance of trader interactions and information sharing in the FX spot trading industry *generally* has little to no bearing on the sufficiency of the allegations against him. The Amended Notice does not allege that Respondent engaged in unsafe or unsound practices solely because he interacted with other FX traders to buy and sell currency pairs, but because that interaction was part of an alleged effort

to improperly influence prices.[47] *See* ANOC ¶¶ 23, 33, 40. Similarly, the Amended Notice does not charge Respondent with sharing "information about market conditions" or other information in the abstract, Motion at 28, but with sharing "confidential, commercially sensitive Bank information" with traders employed by the Bank's competitors. ANOC ¶ 27. The difference is material. And it is not the use of electronic chat rooms in the FX trading industry *per se* that the OCC alleges to be objectionable, but FX traders' alleged participation in "[i]nappropriate collusive activity and sharing of confidential information" within those rooms.[48] Opposition at 22. In all, from reading Respondent's Motion, one would presume that the OCC is charging Respondent for simply being an alleged FX spot trader. It is abundantly clear that this is not the case.

As for the lack of contemporaneous guidance from the Bank or from regulators specifically identifying Respondent's alleged conduct in the chat room as wrongful, imprudent, or risky, *see* Motion at 29-31, the Amended Notice likewise clears this bar. The Comptroller has held that a supervisory agency alleging unsafe or unsound practices need not demonstrate that formal guidance exists contravening the specific practices at issue, as long as the agency "can identify more general risks that cause those practices to depart from generally accepted standards of prudent operation even if the specific [alleged] practices . . . are novel."[49] Thus, "Enforcement Counsel must make some showing as to the relevant standards and the departure from those standards," but

[47] To take one example, Respondent asserts that his alleged conduct is presumptively proper because the practice of "netting off" or "matching off" customer orders between FX spot traders "was both prevalent and permissible." Motion at 28. The Amended Notice describes in detail, however, alleged conduct in which "[t]he traders in the Cartel chat room disclosed the size and direction of their fix orders in order to facilitate the coordination of their trading strategies, and not for the purpose of matching off." ANOC ¶ 35. With respect to allegations such as these, the prevalence or permissibility of "matching off" generally is not particularly germane.

[48] *See* Opposition at 30-31 (arguing that "the contents of the chat room communications—including the sharing of confidential customer information and the collusive agreement to coordinate trading to manipulate prices in the market—are the foundation of the charges against Respondent, not the use of the chat room itself").

[49] *Patrick Adams*, 2014 WL 8735096 at *6 (emphasis omitted).

"[t]he novelty of a given practice cannot be permitted to preclude such a showing so long as more general relevant standards apply."[50]

Here, Respondent argues that neither he nor any reasonable person "[could] have intuited independently the hazy boundaries that 'an extremely complex and economics-driven area of the law' may draw around permissible coordination among banks." Motion at 31 (citation omitted). The undersigned does not presume at this stage to mark out the contours of permissible and impermissible levels of coordination between competitors in the FX spot market; that is for Enforcement Counsel in the proof of its case, or at least for the parties in summary disposition. But there should be nothing hazy about the boundaries of disclosing "confidential, commercially sensitive Bank information" to traders at competitor banks (ANOC ¶ 27), as the Amended Notice repeatedly alleges Respondent to have done.[51] And, indeed, Respondent does not argue that he could not have known that it was wrong to share confidential information with competitors; rather, he simply does not directly acknowledge this aspect of the OCC's allegations at all throughout his Motion or Reply, despite its centrality to the agency's case against him.[52]

Respondent is welcome to argue, later, that the customer or bank information that was allegedly shared was not, in fact, confidential or commercially sensitive. He may also contend, if he likes, that sharing confidential Bank information with competitor traders is not "contrary to prudent bank practices" and would not expose the Bank to legal risk or liability, although the undersigned agrees with Enforcement Counsel that Respondent's alleged attempts "to evade detection by the Bank's compliance department" are indications to the contrary. Opposition at 24;

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[50] *Id.*

[51] *Cf. Heath v. SEC*, 586 F.3d 122, 141 (2d Cir. 2009) (holding, in affirming SEC enforcement action, that "[a]ny reasonably prudent securities professional would recognize that the disclosure of confidential client information violates the ethical norms of the industry") (internal quotation marks and citation omitted).

[52] *See* ANOC ¶¶ 24, 27-28, 30, 33, 37; *see also* Opposition at 22 ("Inappropriate collusive activity and sharing of confidential information . . . is the very essence of what the OCC alleges in the ANOC against Respondent.").

see ANOC ¶ 27. What Respondent may not successfully do, however, is argue that his alleged conduct in sharing confidential information with competitor traders in an electronic chat room was presumptively prudent merely because (assuming *arguendo*) there was no policy specifically forbidding it; such an argument is foreclosed both by Comptroller precedent and by a modicum of common sense.[53]

For similar reasons, the undersigned also rejects Respondent's due process-based argument that he lacked fair warning that his alleged conduct could expose him to regulatory sanctions and the instant action, or any related claim that the potential risk to the Bank here was not foreseeable as alleged. *See* Motion at 29-31. This tribunal has already concluded that, as the Bank's head of European FX spot trading, Respondent was responsible for "identifying, measuring, managing, and controlling risks of regulatory concern" for the Bank in that arena and would have understood that he was foreseeably subject to U.S. jurisdiction.[54] Furthermore, without judging the merits of any charges laid against Respondent or the Bank in venues outside of this tribunal, the undersigned takes official notice that Respondent's alleged conduct in the Cartel chat room prompted, in whole or in part, investigations and enforcement actions by regulatory bodies in the UK, Europe, and the United States. *See supra* at 21-23. And the undersigned agrees with Enforcement Counsel that Respondent's alleged attempts to keep his chat room activities confidential from his own Bank

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[53] In addition, as Enforcement Counsel notes, any argument that Respondent's conduct was "permissible under the Bank's policies and procedures" involves questions of fact to be raised later in the proceeding. Opposition at 24.

[54] July 28 Order at 41 (quoting OCC's April 23, 2020 Opposition to Omnibus Motion to Dismiss ("Omnibus Opp."), Ex. 6 § 2.4) (noting that U.S. regulatory exposure is an inherent risk of "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"); *see also* ANOC ¶ 20 (alleging that Respondent had "supervisory responsibilities over the Bank's FX spot trading desks in Europe").

(*see* ANOC ¶¶ 27-28) are a *prima facie* indication of Respondent's understanding that his actions in the Cartel chat room, at the very least, pushed the envelope of propriety.[55]

It is true, under constitutional standards of due process, that an agency may not levy administrative penalties based on conduct that would not fairly have been viewed as potentially sanctionable by the offending party. *See* Motion at 29-30 (citing cases). It is also true that conduct causing undue risk to a financial institution is only actionable under Section 1818's prohibition of unsafe or unsound practices if the risk to the institution was "reasonably foreseeable" at the time.[56] Enforcement Counsel will have the ultimate burden of proving that such risk was foreseeable in this context. For now, however, the undersigned finds that the Amended Notice has adequately alleged foreseeability and that Respondent had fair notice that the conduct alleged by the OCC foreseeably exposed the Bank to legal risk and liability.

2. <u>The Amended Notice Adequately Alleges That Respondent's Conduct Constituted a Breach of Fiduciary Duty</u>

The July 28 Order denying Respondent's Omnibus Motion to Dismiss concluded that the original Notice had pled facts sufficient to establish that Respondent was an agent of the Bank. July 28 Order at 46. The Order further held that the agency had plausibly alleged that Respondent, acting in this capacity, had breached a fiduciary duty to the Bank by "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.* at 49 (quoting Notice ¶¶ 23, 26). All relevant allegations in the original Notice are repeated in the Amended Notice. *See supra* at 7-10. Nevertheless, Respondent now argues that the allegations of

[55] *See* Opposition at 24-25; *see also Maynard v. Cartwright*, 486 U.S. 356, 361 (1988) ("Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know their conduct was at risk.").

[56] *Kaplan v. OTS*, 104 F.3d 417, 421 (D.C. Cir. 1997).

breach of fiduciary duty in the Amended Notice are inadequate because (1) Respondent's relationship with the Bank was governed by English law, under which he assertedly is not a Bank fiduciary, rather than federal common law; (2) only bank officers and directors have fiduciary duties to their institutions, and Respondent was neither; and (3) the Amended Notice does not allege facts amounting to a breach of the fiduciary duties or loyalty or care in any event. Motion at 32-36. Respondent's arguments miss the mark.

The undersigned first declines to hold that the existence and extent of Respondent's fiduciary duties to the Bank are governed by English law or that the location of the alleged conduct should be otherwise determinative of the appropriate standard applied. Although the Comptroller has not specifically decided the issue,[57] the FDIC Board of Directors has held that "[t]he fiduciary duties of institution-affiliated parties to a bank for the purposes of section 8(e) of the FDI Act are established by Federal law."[58] The Eighth Circuit, moreover, has concluded that because the relevant provisions of the FDI Act do not define fiduciary duty, the enforcement agencies should be accorded "substantial deference" in determining its scope.[59] In support of this conclusion, that court further noted that "[t]he concept of fiduciary duty may, in differing circumstances, require fiduciaries to exercise varying degrees of vigilance and care. The FDIC has special expertise in

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[57] *See In the Matter of William R. Blanton*, No. AA-EC-2015-24, 2017 WL 4510840, at *15 (July 10, 2017) (OCC final decision).

[58] *In the Matter of Michael D. Landry and Alton B. Lewis*, No. 95-65e, 1999 WL 440608, at *15 (May 25, 1999) (FDIC final decision), *aff'd on other grounds sub nom*, *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000). Respondent's two citations ostensibly to the contrary are not persuasive. *See* Motion at 31; Resp. Submission on Foreign Law at 1. In particular, Respondent badly misrepresents the D.C. Circuit's *Kaplan* decision, which specifically declined to address the arguments that Respondent claims it adopted. *Kaplan v. OTS*, 104 F.3d 417, 421 n.2 (D.C. Cir. 1997) (summarizing the petitioner's position, which Respondent quoted as the panel's own, and noting that "we do not address these arguments"). The D.C. Circuit made it clear, both in that decision and subsequently, that *Kaplan* did not decide whether breach of fiduciary duty is a matter of state or federal law in Section 1818 enforcement actions. *Landry*, 204 F.3d at 1138 (calling it "an issue we left open in *Kaplan* . . . as we do again today"). The undersigned expects Respondent's counsel to be more diligent about accurately reflecting the state of the law in future submissions.

[59] *Brickner v. FDIC*, 747 F.2d 1198, 1202 (8th Cir. 1984).

the banking area, and extensive experience with the duties and responsibilities of bank officers and directors."[60] The undersigned agrees. In the absence of some determination by the Comptroller that English law applies here, then, there is no basis for the undersigned to find that the scope of Respondent's fiduciary duties in this case is governed by anything other than the relevant body of law as developed by the applicable agencies in the bank enforcement context.

Next, the undersigned declines to conclude that only bank officers and directors are capable of owing and breaching fiduciary duties for the purpose of Sections 1818(e) and 1818(i). While enforcement actions alleging breaches of fiduciary duty are most frequently directed at the directors and officers of a depository institution—and while the Eighth Circuit opinion quoted above frames such duties in those terms—the statute itself contains no such limiting language,[61] and the agencies themselves have drawn things more broadly. In its *Landry* decision, for example, the FDIC Board observed that "[d]irectors, officers, and *institution-affiliated parties* of a bank owe duties of care and loyalty, which require that they exercise a high degree of vigilance and honestly and fairly deal with the bank."[62] Similarly, the Board of Governors of the Federal Reserve System has held that "the fiduciary duty of loyalty [is] owed by *all bank employees* to place the interests of their institution above their own personal interests."[63] And the Comptroller has stated that "bank directors, officers, *and employees*" are bound by fiduciary duties of care and loyalty to their institutions.[64] In practice also, the agencies have found that bank employees other than those at the

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[60] *Id.*; *see also*, *e.g.*, *In the Matter of Neil M. Bush*, No. AP 91-16, 1991 WL 540753, at *5 (Apr. 18, 1991) (OTS final decision) ("The federal government as regulator and insurer . . . may establish a regulatory and common law of fiduciary duties that does not depend on the location of the institution.").

[61] *See* 12 U.S.C. §§ 1818(e)(1)(A) (applying breach of fiduciary duty provision to "any institution-affiliated party"), 1818(i)(2)(B)(i) (same).

[62] *Landry and Lewis*, 1999 WL 440608, at *15 (emphasis added) (internal quotation marks omitted).

[63] *In the Matter of Elena Espiritu*, No. AA-EC-98-05, 1998 WL 672688, at *3 (Sep. 8, 1998) (FRB final decision) (emphasis added).

[64] *In the Matter of Steven J. Ellsworth*, Nos. AA-EC-11-41 & -42, 2016 WL 11597958, at *15 (Mar. 23, 2016) (OCC final decision) (emphasis added).

highest level have owed and breached fiduciary duties to their employing institutions,[65] including branch managers and loan officers.[66] Here, as evidenced by the Amended Notice and held in the July 28 Order, Respondent is paradigmatically an agent of the Bank, *see* July 28 Order at 46, a relationship that is widely recognized to be fiduciary in nature.[67] The undersigned therefore concludes that there is nothing preventing an agent of a depository institution from owing fiduciary duties to that institution within the meaning of the term in Sections 1818(e) and 1818(i), and the OCC adequately alleges a fiduciary relationship between Respondent and the Bank.

Furthermore, the undersigned finds that Respondent's conduct, as alleged, plausibly constitutes a breach of his fiduciary duties of care and loyalty to the Bank. According to Respondent, the Amended Notice fails to plead that Respondent breached any fiduciary duty of loyalty because he is not alleged to have engaged in self-dealing or to have taken "any action designed to benefit himself at the [B]ank's expense." Motion at 34. But "[t]he duty of loyalty includes a duty to avoid conflicts of interests and to act solely for the benefit of the bank,"[68] and the Amended Notice alleges that Respondent put the interests of the Cartel above those of the Bank

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[65] Respondent contends that "officers" in this context refers only to people "elected or appointed by the board of directors to manage the daily operations of a corporation." Motion at 33 (internal quotation marks and citation omitted). The undersigned takes no position on the comprehensiveness of this definition, nor does she now decide whether Respondent was a director or officer of the Bank when he served in a senior-level capacity as its Head of EMEA FX Spot Trading. *See* ANOC ¶ 20. To the extent these questions prove determinative, they are more properly considered issues of fact to be addressed at some future point in the proceedings.

[66] *See*, *e.g.*, *Espiritu*, 1998 WL 672688, at *1 (bank employee); *In the Matter of Tonya Denise Williams*, No. 11-553e, 2015 WL 3644010, at *9 (Apr. 21, 2015) (FDIC Final Decision) (branch manager); *In the Matter of Ramon M. Candelaria*, No. 95-62e, 1997 WL 211341, at *4 (Mar. 11, 1997) (FDIC Final Decision) (loan officer).

[67] *See*, *e.g.*, *Hollingsworth v. Perry*, 570 U.S. 693, 714 (2013) ("If the relationship between two persons is one of agency, the agent owes a fiduciary obligation to the principal.") (quoting 1 Restatement (Third) of Agency, Comment e (2005)) (internal ellipsis and quotation marks omitted); *Nat'l R.R. Passenger Corp. v. Veolia Transp. Svcs., Inc.*, 791 F. Supp. 2d 33, 47 (D.D.C. 2011) ("Generally, an agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship.") (quoting Restatement (Third) of Agency § 8.01 (2006)) (internal bracketing and quotation marks omitted); *see also Chemical Bank v. Sec. Pacific Nat'l Bank*, 20 F.3d 375, 377 (9th Cir. 1994) ("The very meaning of being an agent is assuming fiduciary duties to one's principal.") (citing Restatement (Second) of Agency § 1(1)).

[68] *Ellsworth*, 2016 WL 11597958, at *15.

and its customers, which surely suffices. *See* ANOC ¶ 28 (quoting chat room participant as characterizing the Cartel as protecting its members "against our own branches").

Respondent also contends that he cannot have breached any fiduciary duty of care because the focus of that duty "is on avoiding and preventing violations of established legal standards," Motion at 35, and the Amended Notice no longer alleges that Respondent violated any "law, regulation, rule, or order," *id.* at 36. Generally speaking, "[t]he standard of conduct for determining whether someone has breached [this] fiduciary duty is the level of care that ordinary prudent and diligent [persons] would exercise under similar circumstances."[69] As with the standard for engagement in unsafe or unsound practices, it cannot be the case that the only conduct that could constitute a breach of the fiduciary duty of care is that which would already be actionable under Section 1818 as a legal or regulatory violation. *See supra* at 16-18. The Amended Notice alleges that Respondent engaged "in an agreement to coordinate his trading with his competitors in the Cartel in an attempt to influence prices," an endeavor that involved "disclos[ing] confidential, commercially sensitive information, such as information on customer orders and currency pair spreads, to traders at competitor banks." Opposition at 29; *see*, *e.g.*, ANOC ¶¶ 23-24. Regardless of whether this conduct meets the standard of a particular violation of law or regulation, which the OCC does not allege and the undersigned does not decide, *see supra* at 17, these allegations plausibly reflect a lack of prudent and diligent care for the interests of the Bank on the part of Respondent that, if proven, could amount to the breach of his fiduciary duty.

Finally, Respondent asserts that any fiduciary duties he owed to the Bank were abrogated by the Bank's failure "to provide policies, training, and supervision calculated to educate its traders about the legal consequences of the practices at issue." Motion at 36. It is Respondent's position

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[69] *In the Matter of Donald V. Watkins, Sr.*, Nos. 17-0154e & 17-0155k, 2019 WL 6700075, at *7 (Oct. 15, 2019) (FDIC final decision).

that he was merely "engaging in prevalent practices that the [B]ank made no efforts to proscribe or prevent," and that if anything it is the Bank that violated a duty owed to him "by failing to warn him about the potential pitfalls of the work that the bank hired him to perform." *Id.* at 36-37. The merits of this line of reasoning aside,[70] it raises questions of fact unsuitable for disposition in the instant motion. The Amended Notice alleges that "Respondent *violated relevant Bank policies* when he helped Bank competitors manipulate the ECB fix rate to maximize the profitability of another Cartel trader's book and to the detriment of the Bank's customers who agreed to trade with the Bank at the fix price." Opposition at 30 (emphasis added); *see* ANOC ¶¶ 36-37. The agency will be afforded the opportunity to demonstrate the truth of these allegations, and if Respondent wishes to contest them by showing that, in fact, he breached no duties and his conduct was simply the result of a lack of adequate guidance from the Bank, he may do so at that time.

3. <u>The Amended Notice Adequately Alleges That Respondent Acted with the Requisite Culpability</u>

An agency that has satisfied the misconduct and effect elements of Sections 1818(e) and 1818(i) must also demonstrate that the party in question acted with a sufficient level of culpability. *See supra* at 12. For a prohibition order under Section 1818(e), it is necessary that the misconduct in question "involve[] personal dishonesty" on the part of the IAP or else reflect that party's "willful or continuing disregard . . . for the safety and soundness of [the] insured depository institution."[71] Any claim that a party engaged in unsafe or unsound practices for the purpose of assessing a second-tier civil money penalty under Section 1818(i), in turn, requires that the party

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[70] The undersigned notes once again that, as alleged and by his own attestation, Respondent was an experienced and sophisticated FX spot trader, senior manager, and head of the Bank's European FX spot trading business during the period at issue, responsible for "identifying, measuring, managing, and controlling risks of regulatory concern" for the Bank in the FX spot trading arena. July 28 Order at 9 (quoting Omnibus Opp., Ex. 6 § 2.4); *see also* ANOC ¶¶ 18-20; Omnibus Opp., Ex. 6 at 1 (noting that Respondent had "responsibility for management oversight of the firm's European activity in the region").

[71] 12 U.S.C. § 1818(e)(1)(C).

have acted "recklessly" while doing so. Respondent asserts that the agency will not be able to show "personal dishonesty" because Respondent is not alleged to have committed any crime, lied, or falsified or withheld information. *See* Motion at 37-38. In addition, Respondent maintains that he could not have acted "willfully" or "recklessly" because the Bank offered him "no guidance, training, or supervision" regarding the relevant risks and because he had no reason to believe that his conduct could have caused harm to the Bank. *See id.* at 38-39. Both of these arguments should be familiar from the foregoing pages, and they fail for familiar reasons.

The D.C. Circuit has held that "[t]he personal dishonesty element of [Section] 1818(e) is satisfied when a person disguises wrongdoing . . . or fails to disclose material information."[72] The Amended Notice alleges that Respondent took steps to conceal his activities from the Bank's compliance department through the use of code words and an agreement among Cartel members "to keep the contents of the chat room confidential even from other traders within their own respective banks." ANOC ¶ 28; *see id.* ¶ 27. The Amended Notice further alleges that Respondent failed to disclose to Bank customers that he was sharing their fix orders with competitor traders and working with those traders to manipulate the fix rate and coordinate prices quoted to the customers, to those customers' detriment. *See id.* ¶¶ 30, 33, 35-37, 44-48. The undersigned agrees with Enforcement Counsel that these allegations are sufficient to plead that Respondent's alleged misconduct involved some degree of personal dishonesty. *See* Opposition at 31-32.

As for the other potential indicia of culpability, "[w]illful disregard is shown by deliberate conduct which exposed the bank to abnormal risk of loss or harm contrary to prudent banking practices"[73]—in other words, conscious acts that satisfy the Horne Standard, such as "a willingness

[72] *Dodge*, 744 F.3d at 160.
[73] *Id.* (internal quotation marks and citation omitted).

to turn a blind eye to [the bank's] interests in the face of known risks."[74] Continuing disregard, by the same token, "requires conduct over a period of time with heedless indifference to the prospective consequences."[75] Both continuing disregard and recklessness require a level of scienter lower than willful disregard, but higher than mere negligence.[76]

The undersigned has already concluded that the Amended Notice adequately alleges that Respondent engaged in unsafe or unsound practices. *See supra* at 27-33. Given that these practices allegedly continued on many occasions over the course of several years, *see* ANOC ¶¶ 23, 26, it is of no great moment to further conclude that the Amended Notice evidences a continuing disregard for the safety and soundness of the Bank. As for willful disregard, the undersigned finds that the Amended Notice's allegations regarding the Cartel chat room participants' deliberate attempts to manipulate the fix rate and influence prices, their efforts to keep their activities confidential from their own banks, and their sharing of confidential, commercially sensitive information with each other in furtherance of their scheme is sufficient to plead that Respondent acted willfully (and thus, by extension, with recklessness at the least). *See* Opposition at 33; *see generally* ANOC ¶¶ 23-24, 26-28, 30-31, 33-48. Finally, and once again, to the extent that Respondent argues that he could not have had the requisite state of mind because he was not aware that the alleged conduct was in any way risky, *see* Motion at 38, such a conclusion is not supported by the allegations in the Amended Notice that this motion must take as true, *see* ANOC ¶¶ 27-28, and as such raises premature questions of fact.

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[74] *Cavallari v. OCC*, 57 F.3d 137 (2d Cir. 1995) (internal quotation marks omitted).

[75] *Dodge*, 744 F.3d at 160 (internal quotation marks and citation omitted).

[76] *See Kim v. OTS*, 40 F.3d 1050, 1054 (9th Cir. 1994); *Grubb v. FDIC*, 34 F.3d 956, 961-62 (10th Cir. 1994).

IV. Conclusion

For the reasons set forth above, the undersigned hereby denies Respondent's October 9, 2020 Motion to Dismiss Amended Notice of Charges.

SO ORDERED.

February 9, 2021

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Jennifer Whang
Administrative Law Judge
Office of Financial Institution Adjudication