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

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

ORDER MODIFYING SECTIONS A2, B2, AND B3
OF THIS TRIBUNAL'S OCTOBER 16, 2020 ORDER

The Office of the Comptroller of the Currency ("OCC") commenced this action against Respondent Laura Akahoshi ("Respondent") on April 17, 2018, seeking an order of prohibition and the imposition of a $50,000 civil money penalty under 12 U.S.C. § 1818 against Respondent for alleged violations of 12 U.S.C. § 481 and 18 U.S.C. § 1001 as well as allegedly unsafe or unsound practices in managing the affairs of Rabobank, N.A. ("the Bank"). *See* April 17, 2018 Notice of Charges for Order of Prohibition and Notice of Assessment of a Civil Money Penalty ("Notice") at 1.

On October 16, 2020, the undersigned issued an Order Recommending the Grant in Part and Denial in Part of Respondent's Initial Dispositive Motion ("October 16 Order") in which she, *inter alia*, recommended the dismissal of the OCC's claims that Respondent had repeatedly and continuously violated 12 U.S.C. § 481 ("Section 481 claims") during March and April 2013, on the grounds that these claims were not timely filed under 28 U.S.C. § 2462, which is the five-year statute of limitations governing OCC enforcement actions. The undersigned now revisits the October 16 Order in light of a December 18, 2020 order ("Comptroller's Order") issued by the

Comptroller of the Currency ("Comptroller") in a separate action pending before this tribunal (the "*Ortega and Rogers* action").[1] Based in part on the Comptroller's Order and in part on a *sua sponte* reconsideration of footnote 77 of the October 16 Order, and for the reasons set forth below, the undersigned concludes that the OCC's Section 481 claims against Respondent are not time-barred, that dismissal of those claims is unwarranted, and that Sections A2, B2, and B3 of the October 16 Order should therefore be modified in conformance with the instant Order.

Background

Broadly speaking, the OCC alleges that Respondent, in her capacity as the Bank's Chief Compliance Officer, "continuously concealed" from OCC examiners the existence of a third-party auditor's report ("the Crowe Report"), despite repeated requests, from sometime in March 2013 until April 18, 2013, when the report was produced.[2] Notice ¶ 40. Among other things, the agency alleges that this concealment of the Crowe Report constituted a violation of 12 U.S.C. § 481, which imposes an obligation on banks and their officers to provide prompt and complete access to any bank documents requested by OCC examiners in the course of an examination. *Id.*; *see* October 16 Order at 33-35. The agency also alleges that as a result of this misconduct, "the Bank suffered financial loss or other damage and Respondent received financial gain or other benefit."[3] Notice ¶ 48(b). Specifically, the OCC alleges that Respondent benefited by her misconduct "through her continued employment at the Bank until the Bank became aware of the extent of Respondent's

[1] *See* Order Granting Cross-Motions for Interlocutory Review and Vacating and Reversing In Part April 9 Order, *In the Matter of Saul Ortega and David Rogers, Jr.*, Nos. AA-EC-2017-44 and -45 (OCC Dec. 18, 2020) ("Comptroller's Order"). While it is the undersigned's understanding that Respondent has had access to a copy of the Comptroller's Order in connection with this briefing, the undersigned takes official notice that, two months after its issuance, the Comptroller's Order does not appear to be publicly available on the OCC's website or on any public-facing legal database.

[2] For a more detailed summation of the OCC's allegations, *see* the October 16 Order at 5-11.

[3] *See* 12 U.S.C. §§ 1818(e)(1)(B), 1818(i)(2)(B); October 16 Order at 14-16 (discussing independent and sufficient components of "effect" element necessary to state claim for prohibition order under 12 U.S.C. § 1818(e) and second-tier civil money penalty under 12 U.S.C. § 1818(i)).

concealment from, and false statements to, the OCC in August of 2015."[4] *Id.* ¶ 45. The OCC further alleges that Respondent's misconduct "resulted in the Bank's guilty plea to conspiracy to obstruct an OCC examination[,] . . . entered on February 7, 2018," which in turn caused the Bank to suffer loss in the form of the Bank's forfeiture of over $368 million, the assessment of a $50 million civil money penalty, and "significant reputational harm." *Id.* ¶ 46.

The October 16 Order

Following Respondent's motion to dismiss all claims against her as untimely brought, the October 16 Order held that the OCC's 12 U.S.C. § 1001 and unsafe and unsound practices claims had accrued within five years of the action's commencement as required by 12 U.S.C. § 2462, but that the agency's Section 481 claims, predicated on Respondent's refusal to provide the Crowe Report upon request, were time-limited and should be dismissed. In reaching this latter conclusion, the undersigned in the Order undertook the following analysis:

First, the Order observed that 28 U.S.C. § 2462 requires agencies to commence proceedings within five years of "the date when the claim first accrued." October 16 Order at 18. In this instance, because the action commenced on April 17, 2018, the agency's claim must have "first accrued" no earlier than April 17, 2013 to be timely. The Order then noted that the "standard rule" for claim accrual, as articulated by the Supreme Court in its *Gabelli* decision, is that a claim accrues, and the limitations period begins to run, as soon as a complainant "has a complete and present cause of action."[5] *Id.* at 19. The Order emphasized that when a statute has multiple elements that must be met before an agency can bring action—as is the case here with Section 1818's misconduct, effect, and culpability prongs—then the agency's cause of action is not

[4] *See also* Notice ¶ 45 (alleging that "Respondent received financial gain and other benefit from her misconduct in the form of salary and bonuses for over two years," from April 2013 until her termination in September 2015).

[5] *Gabelli v. SEC*, 568 U.S. 442, 448 (2013) (internal quotation marks and citation omitted).

"complete and present" for accrual and limitations purposes until all elements of an actionable claim have been satisfied. *See id.* at 21-23.

Second, the Order noted that the OCC had alleged multiple effects of Respondent's alleged misconduct, each of which on its own could suffice to complete a cause of action under Sections 1818(e) and 1818(i) and allow the agency to institute proceedings—financial gain or other benefit to Respondent, financial loss to the Bank, and reputational damage to the Bank. *See id.* at 25-27. Because "[t]he same misconduct can produce different effects at different times,"[6] and given the importance of allowing agencies discretion in pursuing their enforcement goals, the Order found that an agency's five-year period in which to bring an action should not be calculated based on some theoretical cause of action that the agency *could have* brought but did not. *See id.* at 28-29. Rather, crediting the emphasis placed in *Gabelli* on "predictability and certainty in the determination of when a limitations period begins and ends,"[7] the Order concluded that a balance was best struck by starting the limitations clock "based upon the earliest-occurring effect *that is alleged as part of the cause of action*." *Id.* at 30 (emphasis in original). That is, if an agency determines that the most appropriate enforcement strategy in a given case is to plead multiple qualifying "effects" for the same cause of action, it cannot then "pick and choose among them" once they have been pleaded "to create for itself the most favorable limitations period." *Id.*

Third, the Order applied this conclusion to the facts alleged in the Notice, finding that of the three alleged "effects" of Respondent's misconduct, the financial benefit she ostensibly gained in concealing the Crowe Report by way of her continued employment at the Bank was alleged to have manifested the earliest—as early as March 2013, according to the OCC. *See id.* at 30-31;

[6] *Proffitt v. FDIC*, 200 F.3d 855, 863 (D.C. Cir. 2000).

[7] October 16 Order at 28 (internal quotation marks and citation omitted); *see also Gabelli*, 568 U.S. at 448 (underlining the importance of "set[ting] a fixed date when exposure to . . . specified [g]overnment enforcement efforts ends") (internal quotation marks and citation omitted), 449-52.

Notice ¶ 45. The Order further found that the OCC's cause of action was therefore complete, and the limitations clock started, when Respondent first allegedly received this benefit as a result of her misconduct. *See* October 16 Order at 30-31. In so doing, the Order expressed skepticism that the agency had articulated a basis for how the alleged misconduct could have "caused" Respondent to remain employed at the Bank, but ultimately concluded that "the OCC's allegations on this topic are sufficient to state a claim." *Id.* at 31 n.77.

Finally, the Order determined that the agency's Section 481 claims against Respondent had accrued prior to April 17, 2013 and did not constitute "continuing violations" that extended into the putative five-year limitations period. *See id.* at 35-42. In contrast to claims of a continuing scheme of concealment under 12 U.S.C. § 1001 or some "prolonged course of conduct" of unsafe or unsound banking practices,[8] the Order concluded that for purposes of Section 481, the Notice alleged only discrete instances of refusal to produce the Crowe Report upon request, none of which allegedly occurred on or after April 17, 2013. *See id.* at 35-38. The Order further held that Respondent's failure to produce the Crowe Report until April 18, 2013 did not constitute a continuing violation of Section 481, given the nature of that statute. *See id.* at 39-42. The Order accordingly recommended the dismissal of the Section 481 claims as untimely.

The Comptroller's Order

On December 18, 2020, the Comptroller issued an Order in the *Ortega and Rogers* action that addressed similar questions of claims accrual in Section 1818 enforcement actions when construing the five-year limitations period under 28 U.S.C. § 2462. In relevant part, the Comptroller's Order held, contrary to the undersigned's conclusions in that action, that (1) the Supreme Court's *Gabelli* decision was inapposite to an interpretation of Section 2462 here because

[8] *United States v. Toussie*, 397 U.S. 112, 121 (1970); *see also* October 16 Order at 44-47, 53-57.

it involved the fraud discovery rule, *see* Comptroller's Order at 13; (2) a claim could "first" accrue for purposes of starting the Section 2462 limitations clock "based on a subsequent occurrence of the same type of effect" that earlier could have completed the agency's cause of action, *id.* at 14; and (3) the *per diem* nature of civil money penalties under Section 1818(i) means that "any violation of [any] law or regulation" can be considered a continuing violation under that statute, rendering agency action timely as long as the violation has not been remedied within five years of the commencement of proceedings, *id.* at 17.

Recognizing that the Comptroller's Order implicated certain aspects of the October 16 Order, the undersigned directed Enforcement Counsel for the OCC ("Enforcement Counsel") and Respondent to make submissions regarding the specific extent to which the Comptroller's Order compelled the modification of the October 16 Order in this case, which the parties duly did. Having considered both parties' submissions and revisited *sua sponte* her previous conclusion that the OCC has adequately pleaded that Respondent benefited from her alleged misconduct, the undersigned now withdraws her recommendation that the Section 2462 claims asserted against Respondent have been untimely brought and should be dismissed, albeit on slightly different grounds than those proposed by Enforcement Counsel in its January 29, 2021 submission.

The October 16 Order Is Largely Compatible With The Comptroller's Order

To begin with, nothing in the Comptroller's Order disturbs, or purports to disturb, the settled premise that a claim accrues for the purposes of 28 U.S.C. § 2462 when a claimant "has a complete and present cause of action."[9] Nor does the undersigned take the Comptroller's Order to mean that an agency may disregard Section 2462's five-year limitations period or have carte blanche to itself decide when that five-year period should begin. Such a conclusion would certainly

[9] *Gabelli*, 568 U.S. at 448 (internal quotation marks and citation omitted).

be out of keeping with the repeated emphasis placed by the Supreme Court in *Gabelli* on preserving "the basic objective of repose underlying the very notion of a limitations period."[10] And the undersigned cannot agree that this aspect of *Gabelli* has no application here merely because it addressed Section 2462 in the context of the fraud discovery rule.[11]

The undersigned also notes that while the Comptroller's Order held that the "first" accrual of a Section 1818 cause of action could occur for purposes of 28 U.S.C. § 2462 even upon the second, third, or fifteenth instance of the same actionable effect, something that was centrally at issue in the *Ortega and Rogers* action, the Order did not speak to the core conclusion regarding claims accrual in the October 16 Order—namely, that where multiple *different* effects are alleged in the notice of charges, the limitations period should be premised on whichever of those different effects accrued the earliest. *See* October 16 Order at 30. It was this conclusion, not the conclusion addressed by the Comptroller's Order, that anchored the beginning of the limitation period earlier than April 17, 2013, rendering the Section 481 claims untimely. *See id.* at 30-32. Yet the undersigned finds that this latter holding is, if anything, strengthened by the concerns expressed on page 15 of the Comptroller's Order regarding the risk of "gamesmanship" by the parties: To hold otherwise would risk incenting the agency to allege a later-accruing effect for limitations purposes while only seeking to prove a different alleged effect that accrued well outside of any cognizable limitations period. *See* October 16 Order at 30 (holding that "agencies should not be given free rein to allege effects that will extend the limitations period but that ultimately they might not be required to prove").

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[10] *Id.* at 452 (internal quotation marks and citation omitted); *see also, e.g.*, *id.* at 448-51.

[11] Indeed, it is the undersigned's continued view that *Gabelli*'s holding that the government is not entitled to an expansive or flexible interpretation of the five-year limitations period *even when the elements of an actionable claim have been concealed from the enforcing agency*, *see id.* at 451, should apply with even greater force where, as here, there is no allegation that the OCC was not aware both of Respondent's alleged misconduct and the allegedly actionable effects of that misconduct at or around the time they occurred.

The OCC's Section 1818(e) Claims First Accrued in February 2018

Happily, there is no such risk of gamesmanship here, as the actionable effects alleged by the OCC that are nearer in time to the commencement of this action are also more plausibly alleged. In the October 16 Order, the undersigned concluded that, although logically curious, the OCC's allegations that Respondent's misconduct had benefited her in March and April 2013 were nonetheless adequate to meet the requisite pleading standard when resolving all reasonable inferences in the agency's favor. *See* October 16 Order at 31 n.77. The opportunity provided by the parties' instant briefing regarding the effect of the Comptroller's Order on the October 16 Order, however, has prompted the undersigned to revisit this conclusion.

The Notice alleges that, *as a result of her misconduct*, Respondent benefited "through her continued employment at the Bank until the Bank became aware of the extent of Respondent's concealment from, and false statements to, the OCC in August of 2015." Notice ¶ 45. In particular, the Notice alleges that "Respondent received financial gain and other benefit from her misconduct in the form of salary and bonuses for over two years," beginning "throughout March 2013" and continuing until her termination in September 2015. *Id.* It was this benefit that was allegedly an independent and sufficient basis to satisfy the effect prongs of Sections 1818(e) and 1818(i) and thereby complete the agency's cause of action, arguably starting the five-year limitations period. *See* Notice ¶¶ 48(b), 50(b).

According to the Notice, then, Respondent's alleged misconduct both benefited her by keeping her from losing her job—that is, in salary and other benefits gained "through her continued employment at the Bank"—*and* was then the cause of her termination when the Bank discovered its existence. There is an intractable logical inconsistency here. In addressing this issue initially, the undersigned noted simply that "if the agency wishes to carry its burden with respect to this

allegation at the appropriate stage of the proceeding, it will have to show that absent Respondent's misconduct, she would have been terminated earlier than 2015." October 16 Order at 31 n.77. But, as the Supreme Court set forth in *Ashcroft v. Iqbal*, the undersigned is not required to accept purely conclusory statements as true when assessing the sufficiency of a pleading, if those statements are not "plausible on [their] face."[12] As stated in the October 16 Order, "if Respondent would have remained employed at the Bank simply by *not engaging in the alleged misconduct to begin with*, then it cannot be said that the alleged misconduct resulted in her continuing to receive salary and bonuses for two years." *Id.* (emphasis added).

At the time, the undersigned concluded that the allegation that Respondent had benefited from her misconduct by remaining in a job that was not alleged to have been in jeopardy *prior* to the misconduct was nevertheless plausible enough to be tested at the next stage of the proceedings, but upon reflection, this is not correct. There is no reasonable inference that may be drawn to support the assertion that Respondent engaging in allegedly unsafe or unsound behavior and violating multiple statutes by refusing to provide OCC examiners access to a document to which they were indisputably entitled could have *benefited* Respondent by increasing her job security. Yet this, without more, is precisely what the Notice alleges. *See* Notice ¶ 45. Consequently, the undersigned now holds *sua sponte* that the allegation that Respondent received financial or other benefit "by reason of" her alleged misconduct, as Sections 1818(e) and 1818(i) require, does not satisfy the *Iqbal* pleading standard.

As a result, and as described in greater detail in the October 16 Order, the earliest-occurring alleged effect under Section 1818(e) that is adequately pled in the Notice is the Bank's forfeiture of $368 million and assessment of a $50 million civil money penalty arising from its February

[12] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted); *see also id.* at 678-79 (allegations may not be purely conclusory or "[t]hreadbare recitals of the elements of a cause of action").

2018 guilty plea to obstruct an OCC examination. *See* October 16 Order at 11, 30-31; Notice ¶ 46. And because this action commenced only shortly after that alleged loss was incurred, the undersigned finds that the OCC's Section 481 claims against Respondent, like the agency's other claims against Respondent, have been timely asserted under 28 U.S.C. § 2642, at least with respect to the portion of the action seeking a Section 1818(e) prohibition order.

The OCC's Section 481 Claims Constitute a Continuing Violation Under Section 1818(i)

In contrast to Section 1818(e), one of the qualifying "effect" triggers when seeking the assessment of a second tier civil money penalty is that the alleged misconduct "is part of a pattern of misconduct." 12 U.S.C. § 1818(i)(2)(B)(ii)(I). The OCC alleges that this trigger was satisfied in the instant action in addition to alleging that Respondent's misconduct resulted in her "pecuniary gain" and caused the Bank "more than a minimal loss." Notice ¶ 50(b); *see* October 16 Order at 26-27. In the October 16 Order, the undersigned held that the Section 481 claims against Respondent did not amount to a pattern of misconduct that extended into the limitations period because "the refusal to produce a document upon request is most naturally characterized as a discrete act rather than an ongoing circumstance, and Respondent is not alleged to have refused to produce anything within the limitations period." October 16 Order at 38.

Even if this is true, however, the undersigned now finds that the Comptroller's Order compels the conclusion that Respondent's failure to produce the Crowe Report prior to April 17, 2013 is a continuing violation that alone renders timely brought the agency's assessment of a civil money penalty based on violations of Section 481. *See* Comptroller's Order at 17 (failure to remedy a violation of law constitutes a continuing violation under Section 1818(i) based on the per diem nature of the assessment of civil money penalties). As a result, the OCC's Section 481 claim for a civil money penalty is timely regardless of whether that claim first accrued in February

2018, when the Bank is first alleged to have suffered more than a minimal loss, or in April 2013, when Respondent's alleged failure to provide the Crowe Report following repeated direct requests by OCC examiners extended into the limitations period.

Conclusion

For the reasons above, the undersigned modifies her recommendation that the Section 481 claims against Respondent be dismissed as untimely, finding that the claim for a prohibition order under Section 1818(e) first accrued when the Bank allegedly suffered loss in February 2018 and that the claim for a second-tier civil money penalty under Section 1818(i) alleges a continuing violation in which Respondent failed to comply with Section 481 until April 18, 2013. The conclusions of the relevant sections of the October 16 Order are hereby modified as well.

SO ORDERED.

Dated: March 1, 2021

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Jennifer Whang
Administrative Law Judge
Office of Financial Institution Adjudication