

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

In the Matter of

Carrie Tolstedt, Former Head
of the Community Bank

OCC AA-EC-2019-82

Claudia Russ Anderson,
Former Community Bank Group Risk
Officer

OCC AA-EC-2019-81

James Strother, Former General
Counsel

OCC AA-EC-2019-70

David Julian, Former Chief
Auditor

OCC AA-EC-2019-71

Paul McLinko, Former
Executive Audit Director

OCC AA-EC-2019-72

Wells Fargo Bank, N.A.
Sioux Falls, South Dakota

ALJ McNeil

ORDER REGARDING THE PARTIES' MOTIONS SEEKING ORDERS *IN LIMINE*

On September 3, 2021 the parties submitted motions seeking orders *in limine*. Responses in opposition were timely submitted to each motion. Upon review of the premises advanced through those motions and responses, the following orders *in limine* are entered:

1. Enforcement Counsel's Motion seeking an order *in limine* regarding the admission of certain certified Bank records

Averring that the OCC's Uniform Rules permit the admission of any document with or without a sponsoring witness, subject to the requirements of the Rules that the

document is relevant, material, and reliable and is not unduly repetitive, Enforcement Counsel seek the admission of certified Bank records which had been identified in their Supplemental List of Exhibits filed on August 6, 2021.¹ The Motion is supported by the declaration of Jenna Eason establishing that each document was obtained directly from Wells Fargo Bank, N.A. and that each document is a complete copy of the original record collected from the Bank from people and systems used and maintained by the Bank in the ordinary course of business, subject to privilege redactions.² The same declarant averred that the listed documents are not unduly repetitive as each document “pertains to different facts or events material to the claims remaining at issue.”³

Respondents argue that the certification did not satisfy the conditions of Federal Rule of Evidence 803(6)(A)-(C).⁴ Given that the parties have acknowledged this administrative enforcement proceeding is governed not by the Federal Rules of Evidence but by the OCC’s Uniform Rules of Practice and Procedure, I find Respondents’ objection to be without merit. Respondents also argue Enforcement Counsel have failed to establish the materiality of the documents, and failed to show they documents are not unduly repetitive. Having examined the proffered documents I find they are material and not unduly repetitive, and upon these findings overrule Respondents’ objection.

Upon finding that admitting the documents now will streamline the hearing and alleviate the burden on third-party witnesses while conserving the resources of all parties and this Tribunal and thereby promote administrative economy, the Motion is granted. Pursuant to 12 C.F.R. § 19.36(a)(3) and *In re Cavallari*, 1994 WL 533886, the Tribunal orders that:

(1) The certified Bank record identified in Ms. Eason’s Declaration (and in Appendix A filed with Enforcement Counsel’s Motion), as attested to by Ms. Eason, carry sufficient indicia of reliability to satisfy § 19.36(a)(1) and (a)(3)’s requirements; and

(2) The certified Bank record identified in Ms. Eason’s Declaration (and in Appendix A filed with the Motion) are admitted provisionally unless and until Respondents establish during the hearing that one or more of such documents are inadmissible under § 19.36(a)(1) and (a)(3).

2. Enforcement Counsel’s Motion seeking an order *in limine* regarding the admission of portions of sworn testimony of Bartley H. Deese, Jr. and Karl Byers

¹ Enforcement Counsel’s Motion *in limine* to Admit Certain Certified Bank Records, dated September 3, 2021, at 1-2.

² *Id.* at Appendix A, Declaration of Jenna Eason at ¶¶ 7–8.

³ Enforcement Counsel’s Motion *in limine* to Admit Certain Certified Bank Records, citing Appendix A to Enforcement Counsel’s Supplemental List of Exhibits to be Introduced at Hearing, filed August 6, 2021.

⁴ Respondents’ Omnibus Opposition to Enforcement Counsel’s Motions *in Limine* at 10.

In advance of the hearing, sworn testimony was taken of Bartley H. Deese, Jr. (by Enforcement Counsel and by Respondent Paul McLinko) and Karl Byers (by Enforcement Counsel).⁵ Mr. Deese died on July 29, 2021.⁶ Through counsel, Enforcement Counsel learned on July 30, 2021 that Mr. Byers was diagnosed with stage four esophageal cancer, was undergoing treatment for that condition, and would likely be unable to testify in this matter given the state of his health.⁷

Averring that under the OCC's Uniform Rules that permit the admission of relevant, material, and reliable evidence that is not unduly repetitive, Enforcement Counsel seek an order authorizing the admission of sworn testimony provided by Mr. Deese and Mr. Byers.⁸ Their Motion identified those issues remaining to be resolved regarding which Mr. Deese's testimony would be relevant (including (Julian and McLinko) No. 117 (Audit work from 2013-2016 regarding controls); SMF (Julian and McLinko) No. 419 (failure to identify sales practices misconduct and internal controls weaknesses); and other issues potentially not resolved through Summary Disposition (*e.g.*, civil money penalties and Respondents' recklessness).⁹

Enforcement Counsel further identified those remaining issues regarding which Mr. Byers' testimony would be relevant (including SMF (Russ Anderson) Nos. 333, 338-341 (April 2014 ERMC meeting); SMF (Russ Anderson) No. 319 (Respondent Russ Anderson's downplaying of negative information and inadequate response to sales practices misconduct); and other issues potentially not resolved through Summary Disposition (*e.g.*, civil money penalties, Respondents' recklessness); and SMF (Julian and McLinko) No. 419 (Audit's failure to identify systemic sales practices misconduct and significant risk management and controls weaknesses).¹⁰

Respondents argue that they did not have a "full and fair opportunity to ask" questions of the witnesses during the sworn statement proceedings.¹¹ There is in the record, however, no showing that such limitations existed, and the argument is supported by no reference to the record. Respondents also argue that Enforcement Counsel "have not shown that the Non-Party Sworn Statement transcripts are not unduly repetitive."¹² Should the testimony prove to be repetitive, Respondents may bring this to the Tribunal's

⁵ Enforcement Counsel's Motion *in limine* to Admit Portions of Bartley H. Deese Jr.'s and Karl Byers' Sworn Statement Transcripts, filed August 6, 2021, at 4-6.

⁶ *Id.* at 4.

⁷ *Id.* at 5.

⁸ *Id.* at 6, quoting 12 C.F.R. § 19.36(a)(1).

⁹ Enforcement Counsel's Motion *in limine* to Admit Portions of Bartley H. Deese Jr.'s and Karl Byers' Sworn Statement Transcripts at 6-7.

¹⁰ *Id.* at 7-8.

¹¹ Respondents' Omnibus Opposition to Enforcement Counsel's Motions in Limine at 24.

¹² *Id.* at 26.

attention.

Finding the proffered statements are supported by sufficient guarantees of trustworthiness – after considering the totality of circumstances under which they were made, and finding they are more probative on the point for which they are offered than any other evidence that Enforcement Counsel can obtain through reasonable efforts, the Motion is granted. The portions of Mr. Deese’s and Mr. Byers’ sworn statement transcripts identified in Appendix A (Deese Excerpts) and Appendix B (Byers Excerpts) attached to Enforcement Counsel’s Motion are hereby admitted.

3. Enforcement Counsel’s Motion seeking an order *in limine* regarding the admission of OCC Exhibit No. 2327

Averring that it is relevant, material, reliable and not unduly repetitive, Enforcement Counsel seek an order *in limine* admitting as evidence the Deferred Prosecution Agreement, the Statement of Facts that was incorporated within that Agreement, and the related press release, all regarding the agreement entered into by Wells Fargo Bank, NA on February 20, 2020.¹³ In support, Enforcement Counsel assert the OCC’s Uniform Rules “both allow and encourage” the admission of this evidence.¹⁴ They assert the Agreement and its related documents are relevant and material to, *inter alia*, the admissions the Bank made at the end of a lengthy criminal investigation into the Bank’s sales practices and related conduct as well as to the Bank’s payment of a \$3 billion criminal penalty, and they note that although the Agreement itself has not been admitted into evidence, many of the admissions appearing in the Agreement have already been entered into the record in this enforcement action.¹⁵

Respondents argue the DPA should be excluded as evidence because Enforcement Counsel “have not met their burden to show that the DPA is relevant, material, reliable, and not unduly repetitive” and because “the DPA contains unreliable hearsay and is not a reliable indicator of misconduct by any Respondent.”¹⁶ Finding the argument to be without merit it is rejected. Factual claims established through the summary disposition process include a substantial showing of the damage to the Bank caused by the proliferation of business practices misconduct at the Bank. The DPA describes the damage and is evidence of the damage.

Finding the DPA and its related documents identified through Enforcement Counsel’s Motion consists of admissions by the Bank that are reliable and are material and relevant to issues yet to be determined, the Motion is granted. OCC Exh. 2327 is hereby

¹³ Enforcement Counsel’s Motion *in limine* to Admit OCC Exhibit 2327, filed September 3, 2021.

¹⁴ *Id.*, citing 12 C.F.R. § 19.36(a)(1) and (a)(3).

¹⁵ Enforcement Counsel’s Motion *in limine* to Admit OCC Exhibit 2327 at 2, n. 2, citing Order Regarding Enforcement Counsel’s Motions For Summary Disposition, July 20, 2021 at 224-225, 359-360, 589-590, 596-597, 700-701, 722, 733-734.

¹⁶ Respondents’ Omnibus Opposition to Enforcement Counsel’s Motions *in Limine* at 23.

admitted.

4. Enforcement Counsel's Motion seeking an order *in limine* regarding the admission of summaries and the documents summarized therein

Through a Declaration dated August 19, 2021, OCC Deputy Comptroller for Large Bank Supervision Tanya K. Smith averred that she reviewed OCC Exhibit No. 2935, described as a summary of the compensation paid to Respondents Russ Anderson, Julian, and McLinko.¹⁷ Deputy Smith averred the documents summarized in the Exhibit are reliable and that she verified that the Summary presented through the Motion summarizes the underlying Bank documents accurately and correctly.¹⁸ She further averred that she reviewed OCC Exhibit No. 2936, described as a summary of reporting to the Board of Directors of the Bank in 2014 through 2017 by Respondents Julian, Audit, and the Enterprise Risk Management Committee.¹⁹ She declared the Summary summarizes information contained in the Bank documents that have been identified by the Bates numbers appearing in the Summary. She further averred the Summary summarizes the underlying Bank records accurately and correctly.²⁰

Through a Declaration dated August 31, 2021 National Bank Examiner Elizabeth Candy averred that she reviewed OCC Exhibit No. 2938, described as a summary of the statements in the May 19, 2015 Memorandum that was submitted to the Risk Committee of the Bank's Board and the OCC, along with related information conveyed to or known by Respondent Russ Anderson.²¹ Based on her own review of the underlying documents and experience as a National Bank Examiner, she averred that the documents summarized in the Summary are reliable; and that she and another hybrid fact-expert witness may refer to the Summary to help identify how the contents of the May 19, 2015 Memo that was presented to the Board's Risk Committee and the OCC contained false, misleading, and incomplete contents, along with Respondent Russ Anderson's responsibility for the May 19, 2015 Memo and its contents, and her knowledge of the underlying facts.²²

Examiner Candy further averred she reviewed OCC Exhibit No. 2942, described as a summary of information conveyed to or known by Respondent Russ Anderson during her tenure as the Group Risk Manager.²³ Examiner Candy averred she reviewed the

¹⁷ Enforcement Counsel's Motion *in limine* to Admit Summaries and the Documents Summarized Therein, dated September 3, 2021 at Declaration of Tanya K. Smith, dated August 19, 2021.

¹⁸ *Id.* at Declaration of Tanya K. Smith ¶5.

¹⁹ *Id.* at Declaration of Tanya K. Smith ¶6

²⁰ *Id.* at Declaration of Tanya K. Smith ¶6.

²¹ *Id.* at Declaration of Examiner Elizabeth Candy ¶5.

²² *Id.* at Declaration of Examiner Elizabeth Candy ¶5.

²³ *Id.* at Declaration of Examiner Elizabeth Candy ¶6.

underlying documents and verified that the Summary accurately and correctly summarized the underlying documents, noting and correcting two typographical errors.²⁴

Through a Declaration dated August 31, 2021, OCC Examiner-in-Charge Jennifer T. Crosthwaite averred she reviewed OCC Exhibit No. 2929, described as a summary of the sales practice misconduct-related EthicsLine Reports from 2008 through 2015, compared with the total EthicsLine Reports for that time period.²⁵ Based on her review of the underlying Bank documents supporting this summary she averred the Summary summarizes the Bank documents accurately and correctly.²⁶ Through this review she verified that the sales practices complaints comprised over half of the Bank's EthicsLine complaints from 2008 through 2015.²⁷

Examiner Crosthwaite also averred that she reviewed OCC Exhibit No. 2940, described as a summary of Audit and Enterprise Risk Management Assessments between 2011 through 2016.²⁸ Based on her review of the underlying documents, she averred the Summary summarizes the information contained in the Bank documents identified in the Summary, and that the documents summarized in the Summary are reliable, and help demonstrate that Audit failed to identify a systemic sales practices misconduct problem or significant control and risk management breakdowns in the Community Bank from 2011 to 2016.²⁹

She averred she reviewed OCC Exhibit No. 2944, described as a summary of information conveyed to or known by Respondent McLinko relating to sales practices misconduct. Noting one typographical error, and based on her own review of the underlying documents and on her experience supervising the Bank, Examiner Crosthwaite averred the documents summarized in the Summary are reliable and that the Summary accurately summarized the underlying Bank documents, deposition testimony, and sworn statements.³⁰

She averred she reviewed OCC Exhibit No. 2945, described as a summary of information conveyed to or known by Respondent Julian related to sales practices misconduct, declaring that upon her review of the documents, she determined that the underlying documents are reliable and that the summary accurately and correctly

²⁴ *Id.* at Declaration of Examiner Elizabeth Candy ¶6.

²⁵ *Id.* at Declaration of Examiner Jennifer Crosthwaite ¶5.

²⁶ *Id.* at Declaration of Examiner Jennifer Crosthwaite ¶5.

²⁷ *Id.* at Declaration of Examiner Jennifer Crosthwaite ¶5.

²⁸ *Id.* at Declaration of Examiner Jennifer Crosthwaite ¶6.

²⁹ *Id.* at Declaration of Examiner Jennifer Crosthwaite ¶6.

³⁰ *Id.* at Declaration of Examiner Jennifer Crosthwaite ¶7.

summarized the documents, testimony, and sworn statements.³¹

Enforcement Counsel seek an order *in limine* allowing for the admission of the summaries prepared by Deputy Smith and Examiners Candy and Crosthwaite, along with the documents summarized therein, invoking the authority 12 C.F.R. §§ 19.36(a)(1), (a)(3), and (c)(3) as well as § 19.36(a)(2).³² Describing the summaries as existing or newly created charts, exhibits, calendars, calculations, outlines or other graphic material being introduced to “summarize, illustrate, or simplify the presentation of evidence,” Enforcement Counsel aver each appended summary and the documents summarized therein are admissible because admitting them now “will help streamline or simplify the presentation of evidence.”³³ They assert the summaries each were prepared using primarily Bank records obtained directly from the Bank or from other presumably reliable sources – including Examiner supervisory letters, sworn statements and deposition testimony.³⁴

Respondents argue unpersuasively that the summaries “are not accurate and objective.”³⁵ Nothing in Respondents’ proffered argument establishes a basis to conclude the summaries are inaccurate. The premise that the summaries contain “subjective characterizations of purported audits”³⁶ does not establish cause to conclude the summaries are not admissible.

Upon sufficient cause shown, Enforcement Counsel’s Motion is granted. The Summaries and other documents summarized therein listed in Appendix A of Enforcement Counsel’s Motion in Limine are hereby admitted, specifically the following:

- OCC Exh. 2929, a Summary of EthicsLine Reports (2008-2015), and the documents summarized therein, i.e., OCC Exhs. 1201, 1345, 1346, 1347, 1348, 1349, 1350, and 1351. Because the materiality of evidence that precedes October 2013 has not been shown, Enforcement Counsel must be prepared to differentiate the reports and documents that were generated prior to October 2013 from those generated thereafter.
- OCC Exh. 2936, a Summary of 2014-2017 reporting to the Board of Directors by Respondent Julian, Audit, and the Enterprise Risk Management Committee, and the documents summarized therein, i.e., OCC Exhs. 0631, 0644, 0687, 0743, 0754, 0799, 0805, 1098, 1100, 1104, 1107, 1110, 1310, 1314, 1315, 1334, 1335, 1669, 1684, 1738, 1754, 1798, 1819, 1900, 1904, 1994, 2035, 2085, 2139, 2140, 2144, 2148, 2153,

³¹ *Id.* at Declaration of Examiner Jennifer Crosthwaite ¶8.

³² *Id.* at 4, also citing as analogous reference Federal Rule of Evidence 1006, which similarly authorizes the use of “summaries offered to prove the contents of other voluminous proof.”

³³ *Id.* at 3.

³⁴ *Id.* at 3.

³⁵ Respondents’ Omnibus Opposition to Enforcement Counsel’s Motions in Limine at 32.

³⁶ *Id.* at 34.

2157, 2158, 2162, 2179, 2180, 2183, 2220, 2223, 2225, 2227, 2228, 2231, 2232, 2233, 2252, 2272, and 2365.

- OCC Exh. 2938, a Summary of Statements in the May 19, 2015 Memorandum and Related Information Conveyed to or Known by Respondent Russ Anderson, and the documents summarized therein, i.e., OCC Exhs. 0056, 0065, 0080, 0081, 0158, 0196, 0273, 0274, 0280, 0295, 0296, 0306, 0312, 0313, 0314, 0315, 0316, 0655, 0777, 0778, 0825, 0930, 1033, 1035, 1036, 1053, 1143, 1196, 1231, 1232, 1263, 1299, 1339, 1359, 1360, 1363, 1366, 1382, 1383, 1384, 1385, 1393, 1394, 1438, 1483, 1488, 1489, 1546, 1681, 2843, 2862, 2915, 2369, and 2509.

- OCC Exh. 2940, a Summary of Audits & Enterprise Risk Management Assessments (2011-2017), and the documents summarized therein, i.e., OCC Exhs. 0123, 0697, 0701, 0960, 1080, 1093, 1247, 1328, 1661, 1692, 1709, 1736, 1755, 1848, 1869, 1944, 1954, 1955, 1990, 2003, 2004, 2008, 2009, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2099, and 2159. Because the materiality of evidence that precedes October 2013 has not been shown, Enforcement Counsel must be prepared to differentiate the assessments and documents that were generated prior to October 2013 from those generated thereafter.

- OCC Exh. 2942, a Summary of Some Information Conveyed to or Known by Respondent Claudia Russ Anderson, and the documents summarized therein, i.e., OCC Exhs. 0050, 0055, 0060, 0065, 0080, 0081, 0105, 0111, 0135, 0158, 0166, 0193, 0224, 0240, 0242, 0248, 0251, 0261, 0262, 0273, 0274, 0275, 0280, 0281, 0282, 0288, 0290, 0291, 0295, 0296, 0306, 0600, 0602, 0603, 0604, 0624, 0633, 0649, 0650, 0655, 0664, 0665, 0666, 0691, 0692, 0693, 0779, 0815, 0825, 0877, 0880, 0881, 0883, 0915, 0930, 0940, 1035, 1036, 1041, 1042, 1052, 1053, 1054, 1055, 1056, 1061, 1063, 1110, 1131, 1178, 1179, 1183, 1188, 1189, 1191, 1192, 1193, 1195, 1196, 1197, 1231, 1232, 1265, 1281, 1282, 1289, 1358, 1363, 1366, 1367, 1375, 1382, 1383, 1384, 1385, 1393, 1394, 1438, 1457, 1460, 1471, 1483, 1485, 1488, 1489, 1503, 1504, 1505, 1508, 1509, 1535, 1546, 1550, 1551, 1556, 1557, 1559, 2417, 1654, 1660, 1678, 1681, 2894, 2919, 2274 and 2509.

Because the materiality of evidence that precedes October 2013 has not been shown, Enforcement Counsel must be prepared to differentiate the reports and documents that were generated prior to October 2013 from those generated thereafter.

- OCC Exh. 2944, a Summary of Selection of Information Conveyed to or Known by Respondent McLinko Related to Sales Practices Misconduct, and the documents summarized therein, i.e., OCC Exhs. 0265, 0272, 0273, 0274, 0275, 0631, 0644, 0664, 0665, 0666, 0691, 0693, 0700, 0804, 0805, 2922, 2923, 0880, 0881, 0894, 0895, 0898, 0908, 0909, 0910, 0912, 0913, 0947, 0948, 0974, 0975, 0981, 0982, 0989, 0991, 0996, 0999, 1016, 1104, 1174, 1175, 1177, 1190, 1282, 2924, 1310, 1312, 1314, 1315, 1680, 1693, 1754, 2785, 1974, 1975, 1978, 1982, 1984, 1985, 1988, 1989, 1991, 1992, 2038, 2071, 2076, 2141, 2182, 2926, 2272, and 2273.

Because the materiality of evidence that precedes October 2013 has not been shown, Enforcement Counsel must be prepared to differentiate the reports and documents that were generated prior to October 2013 from those generated thereafter.

- OCC Exh. 2945, a Summary of Selection of Information Conveyed to or Known by Respondent Julian Related to Sales Practices Misconduct, and the documents summarized therein, i.e., OCC Exhs. 0216, 0218, 0229, 0230, 0231, 0236, 0612, 0613, 0622, 0631, 0641, 0644, 0674, 0676, 0680, 0686, 0700, 2943, 0751, 0795, 0796, 0797, 0798, 0804, 0805, 0833, 0884, 0885, 0886, 0894, 0895, 0898, 0947, 0948, 0981, 0982, 0986, 0987, 0991, 0996, 0999, 1050, 1092, 1104, 1190, 1206, 1282, 2924, 1283, 1285, 1310, 1312, 1314, 1315, 1390, 1438, 1563, 1564, 1565, 1567, 1568, 1569, 1570, 1571, 1572, 1573, 1574, 1575, 1576, 1577, 1578, 1584, 1585, 1586, 1587, 1588, 1589, 1590, 1591, 1592, 1593, 1594, 1595, 1596, 1597, 1598, 1680, 1689, 1754, 2772, 2023, 2141, 2222, 2223, 2227, and 2264.

Because the materiality of evidence that precedes October 2013 has not been shown, Enforcement Counsel must be prepared to differentiate the reports and documents that were generated prior to October 2013 from those generated thereafter.

Respondents oppose Enforcement Counsel’s motion to admit OCC Exh. 2935, a Summary of Respondents’ Compensation, and the documents summarized therein, i.e., OCC Exhs. 2055 and 2941.³⁷ In support, they argue Enforcement Counsel have not shown that the compilations are reliable. Finding a dearth of information about the provenance of the data upon which the summaries were made, Respondents’ opposition is well-taken and Enforcement Counsel’s motion is denied. This does not, however, preclude the presentation of the exhibit upon examination by Mr. Reep or any other qualified witness.

5. Enforcement Counsel’s Motion seeking an order *in limine* regarding the admission of Respondents’ Prior Statements

Each Respondent provided sworn statements, sworn testimony, and written responses to questions presented by the OCC prior to the hearing. Enforcement Counsel have identified certain prior statements made by each Respondent and seek an order *in limine* allowing for the admission of these statements.³⁸ Averring the prior statements are relevant, material, reliable, and not unduly repetitive of other evidence, Enforcement Counsel also aver the statements contain numerous admissions from each Respondent, which “in many cases are directly opposed to the made-for-litigation arguments Respondents are now advancing before this Tribunal.”³⁹

Respondents Julian and Russ Anderson report they do not oppose the admission of

³⁷ *Id.* at 40.

³⁸ Enforcement Counsel’s Motion *in limine* to Admit Respondents’ Prior Statements, dated September 3, 2021.

³⁹ *Id.* at 5.

their deposition transcripts.⁴⁰ Respondent McLinko reported that he “does not oppose admission of unobjectionable designated portions of his deposition transcript,” as set forth in more detail in Respondents’ Omnibus Opposition.⁴¹ As to the remaining documents reported in this part of Enforcement Counsel’s Motion, Respondents argue the Motion should be denied because “Enforcement Counsel have not carried their burden of showing that the 15-day Letter Responses and investigative transcripts are admissible.”⁴² They argue because courts “routinely exclude settlement evidence” the 15-day letters should be excluded. Finding the argument to be without merit I reject the same. The function of the 15-day letter is to permit the regulated individuals or institutions to provide responses to concerns being raised by the regulator – not to settle claims. I further find no legal basis has been presented to conclude, as Respondents argue, that “investigative transcripts are not presumptively reliable under the OCC’s rules.”⁴³ Given the conditions under which such transcripts are procured, I find sufficient indicia of reliability is present to admit the transcripts as evidence in this enforcement action.

Finding sufficient cause has been shown, the record will include as admitted evidence the written responses given by Respondents to the OCC’s 15-day letters: OCC Ex. Nos. 1937 – McLinko; 1938 – Julian; and 1943 – Russ Anderson; and Resp. Ex. No. 19335 – Russ Anderson; deposition transcript and video testimony: OCC Ex. Nos. 2509 and 2509A - Russ Anderson; 2529 and 2529A – Julian; 2707 and 2707A – McLinko; Resp. Ex. Nos. 00278, 19365, and 19600 – Russ Anderson; Resp. Ex. Nos. 00286 and 19366 – Julian; and Resp. Ex. Nos. 00285 and 19254 – McLinko; and transcripts from sworn statements: Respondent Julian sworn statement, redacted at OCC Ex. Nos. 2772, and 2874, sworn statement transcript; Respondent McLinko sworn statement, redacted at OCC Ex. No. 2785 and 2853, sworn statement transcript; Respondent Russ Anderson, sworn statement transcript at OCC Ex. No. 2840.

6. Enforcement Counsel’s Motion seeking an order *in limine* regarding the admission of reports related to the Bank’s sales practices

Enforcement Counsel aver that reports completed by the Independent Directors of the Board of Wells Fargo & Company, Accenture, PricewaterhouseCoopers, Grant Thornton and the Bank’s Corporate Risk – Sales Practices Oversight and Financial Crimes

⁴⁰ Respondents’ Omnibus Opposition to Enforcement Counsel’s Motions in Limine at 28.

⁴¹ *Id.* at 28, with objections presented at n. 20, where Respondent McLinko “does not contend that his deposition and sworn statement transcripts are per se inadmissible, but rather objects to Enforcement Counsel’s improper attempt to secure the wholesale admission of the entirety of his transcripts—without regard to objections that may properly be made as to certain questions in the transcripts and without regard to the relevance of portions of the transcript to the issues set for hearing.” He argues the entirety of the transcripts of his testimony “are not relevant or material to this proceeding, and portions are inadmissible because they lack foundation, call for Mr. McLinko to provide hearsay, or are otherwise subject to objection.”

⁴² Respondents’ Omnibus Opposition to Enforcement Counsel’s Motions in Limine at 28.

⁴³ *Id.* at 31.

Risk Management divisions be admitted in advance of the hearing.⁴⁴ In support, Enforcement Counsel refer to the OCC’s Uniform Rules of Practice and Procedure, which provides that the tribunal has the authority to “receive relevant evidence and to rule upon the admission of evidence and offers of proof,” “consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding,” and “do all other things necessary and appropriate to discharge the duties of a presiding officer.”⁴⁵

The record reflects that each of the cited reports is reliable – they are reports that Enforcement Counsel have demonstrated are either internally or externally created that are typical of reports relied upon by large banks to conduct, monitor, and reform their business.⁴⁶ As reflected in the record, Respondents and the OCC alike relied upon these reports.⁴⁷ The record also reflects that upon examination of the factual premises advanced by all of the parties through the summary disposition process, these reports consistently were found to be reliable and pertinent to the issues presented by the Notice of Charges.⁴⁸

As noted below, however, there is an insufficient evidentiary basis justifying the admission of the cited Reports, as those Reports duplicate evidence presented through the reports of the OCC’s Examiners. While Respondents have argued against the admission of these reports on the basis that “Enforcement Counsel have not met their burden to show that the Reports are reliable,”⁴⁹ Enforcement Counsel’s Motion to admit is being denied not for that reason, but because it appears their introduction would be repetitive of the findings of the OCC’s Examiners. Respondents’ Motion to exclude reports resulting from OCC-mandated reviews Reports drafted by Accenture, PricewaterhouseCoopers, Deloitte, Wells Fargo Financial Crimes Risk Management, and Grant Thornton LLP as a result of OCC-mandated reviews has been granted through this Order (see below), solely on the ground that such evidence is presently being perceived as unduly repetitive of evidence presented through the reports of the OCC’s Examiners; and Enforcement Counsel’s motion is denied. This Order does not, however, preclude the introduction of evidence that may be presented through the testimony of the OCC Examiners, including references made by the Examiners to information contained in the proffered reports. The admissibility of evidence of references by OCC Examiners to any such report – either in their testimony or in their reports – will be determined separately during the hearing. In the event cause is shown during the hearing to exclude some or all of the OCC Examiners’

⁴⁴ Enforcement Counsel’s Motion *in limine* to Admit Reports Related to the Bank’s Sales Practices, dated September 3, 2021.

⁴⁵ *Id.* at 2, quoting 12 C.F.R. § 19.5(b).

⁴⁶ Enforcement Counsel’s Motion *in limine* to Admit Reports Related to the Bank’s Sales Practice at 6.

⁴⁷ *Id.* at 7, citing OCC Ex. 0705 at 3-4, 7, 11; and OCC Ex. 2023 at 5.

⁴⁸ Enforcement Counsel’s Motion *in limine* to Admit Reports Related to the Bank’s Sales Practice at 7, citing Summary Disposition Order at 550.

⁴⁹ Respondents’ Omnibus Opposition to Enforcement Counsel’s Motions in Limine at 36.

reports, the ruling excluding the reports cited here may be revisited.

7. Enforcement Counsel’s Motion seeking an order *in limine* regarding the admission of OCC Supervisory Records and Publications

Enforcement Counsel aver that OCC exhibits that were prepared by OCC examination staff in the course of their supervisory activities, as well as expert reports prepared by OCC examiners in the course of this administrative enforcement action, and official OCC publications – each of which Enforcement Counsel aver have been produced to Respondents and are identified on Enforcement Counsel’s prehearing exhibit list – should be admitted into evidence.⁵⁰

In support, Enforcement Counsel rely on 12 C.F.R. § 19.23 and § 19.5(b)(3), (7), and (11), which, *inter alia*, provide for the admissibility of documents relevant to the unresolved issues in this proceeding provided the documents contain information that is material, reliable, and not unduly repetitive and will facilitate the efficient presentation of evidence during the hearing; and pursuant to 12 CFR § 19.36(c)(2), which provides for the admission of expert reports of the hybrid fact-expert examiners listed on Enforcement Counsel’s prehearing Witness List containing opinions about the Bank’s systemic sales practices misconduct problem and the conduct of each Respondent; containing non-public reports of supervisory activities in annual Reports of Examination of Wells Fargo Bank, as well as examination-specific Supervisory Letters issued by the OCC to the Bank bearing on the Bank’s sales practices, risk management, audit function, and internal control deficiencies; containing public OCC records in OCC Consent Orders based on the Community Bank’s sales practices, including cease and desist and civil money penalty orders issued to Wells Fargo Bank, N.A. in September 2016, and sales-practices-related orders issued to institution-affiliated parties including the former Bank CEO, executives within the Community Bank, and former heads of Bank control functions; and containing public OCC records in OCC publications, including Comptrollers’ Handbooks, interagency policy statements and interagency guidance, OCC Policies and Procedures Manuals (“PPMs”), and the Directors Book, setting forth OCC guidance and standards relating to risk management, compliance, safety and soundness, and the responsibilities of bank managers.

Respondents argue 12 C.F.R. § 19.36(c)(2) does not apply to the OCC expert reports. I find the argument to be without merit and reject the same. As Respondents have acknowledged, the Consent Orders “are public documents accessible on the OCC’s public-facing webpage,”⁵¹ 12 CFR § 19.36(c)(2) provides for the admission of expert reports of the hybrid fact-expert examiners listed on Enforcement Counsel’s prehearing Witness List, as OCC supervisory

⁵⁰ Enforcement Counsel’s Motion *in limine* to Admit OCC Supervisory Records and Publications, dated September 3, 2021.

⁵¹ Respondents’ Omnibus Opposition to Enforcement Counsel’s Motions *in Limine* at 10, citing *In re Tolstedt*, Enforcement Counsel’s Motion in *Limine* to Admit OCC Supervisory Records and Publications (Sept. 3, 2021), at 11,

documents. There is a clear possibility that the contents of these reports may contain duplicative information. Should that prove to be the case, Respondents will be well positioned to bring such duplication to the Tribunal’s attention during the hearing. Given the present record, however, I find unavailing Respondents’ assertion that the documents should be excluded because “the examiners had a motive to shift blame away from themselves toward Respondents, and all subsequent supervisory activity is accordingly unreliable for that reason.”⁵²

Finding the proposed exhibits to be reliable and material to issues material to the issues remaining, the Motion granted and the following documents are hereby admitted:

OCC Exh. 2394	OCC Exh. 1110	OCC Exh. 0631	OCC Exh. 1908
OCC Exh. 2340	OCC Exh. 2060	OCC Exh. 1669	OCC Exh. 1909
OCC Exh. 2332	OCC Exh. 1210	OCC Exh. 2318	OCC Exh. 1907
OCC Exh. 2330	OCC Exh. 0805	OCC Exh. 2299	OCC Exh. 1905
OCC Exh. 2415	OCC Exh. 1799	OCC Exh. 2280	OCC Exh. 2306
OCC Exh. 2335	OCC Exh. 1742	OCC Exh. 2312	OCC Exh. 2042
OCC Exh. 2392	OCC Exh. 2142	OCC Exh. 2302	OCC Exh. 0931
OCC Exh. 2338	OCC Exh. 1689	OCC Exh. 2303	OCC Exh. 1906
OCC Exh. 2407	OCC Exh. 1808	OCC Exh. 2313	OCC Exh. 1846
OCC Exh. 1752	OCC Exh. 1845	OCC Exh. 2307	OCC Exh. 2309
OCC Exh. 1791	OCC Exh. 1754	OCC Exh. 2278	OCC Exh. 2304
OCC Exh. 1898	OCC Exh. 1239	OCC Exh. 2041	OCC Exh. 1256

Because the materiality of evidence that precedes October 2013 has not been shown, Enforcement Counsel must be prepared to differentiate the reports and documents that were generated prior to October 2013 from those generated thereafter.

8. Enforcement Counsel’s Motion seeking an order *in limine* regarding the admission of OCC Exhibit No. 2156

OCC Exhibit No. 2156 is described as a report of the demand deposit accounts and savings accounts opened by Bank employees between May 1, 2002 and December 31, 2015 – identifying the subset that did not have any customer-initiated transactions through December 31, 2019.⁵³

Respondents argue that admission should be denied because “Enforcement Counsel do not explain how the analysis is materially relevant when it covers the period beginning May 1, 2002, about a decade before the tenure of Messrs. Julian and McLinko

⁵² Respondents’ Omnibus Opposition to Enforcement Counsel’s Motions in Limine at 22. Note that for reasons that are not at all clear, Respondents proposed that the quoted language be kept from the public, redacting it from the public version of their Omnibus Opposition. I find no basis in the law to treat this as beyond the view of the public.

⁵³ Enforcement Counsel’s Motion *in limine* to Admit OCC Exhibit 2156, dated September 3, 2021.

and the period covered in this action.”⁵⁴

Finding the proffer seeks to introduce evidence that is too remote in time and otherwise fails to establish that the document contains relevant and material information, the Motion seeking the admission of OCC Exhibit No. 2156 is denied.

9. Enforcement Counsel’s Motion seeking an order *in limine* regarding the admission of certain jurisdiction-related records

Enforcement Counsel seek an order *in limine* admitting into evidence copies of minutes of the Bank’s Board of Directors meetings from May 10, 2010, June 15, 2012, June 10, 2013, and June 26, 2014, along with a copy of the Directors’ Action by Unanimous Written Consent from December 2014, July 5, 2015, and December 23, 2016.⁵⁵ In support, Enforcement Counsel aver the documents are material to whether the OCC has jurisdiction to initiate these enforcement proceedings against Respondent Julian.⁵⁶

Respondents jointly argue the Motion should be denied because “Enforcement Counsel has [*sic*] failed to show that the exhibits are reliable.”⁵⁷ The argument is rejected as specious, akin to Respondent Julian’s assertion that the evidence does not already establish that he was an institution-affiliated person as that term is used in the Federal Deposit Insurance Act.

Finding the proposed exhibits to be relevant and material to issues raised by Respondent Julian, reliable, and not unduly repetitive, the Motion is granted. The following documents are hereby admitted:

1. Minutes from the May 10, 2010 Board of Directors meeting (OCC Exh. 1717, OCC-WF-SP-08698329 to OCC-WF-SP-08698351);
2. Minutes from the June 15, 2012 Board of Directors meeting (OCC Exh. 1713, OCC-WF-SP-08681122 to OCC-WF-SP-08681146);
3. Minutes from the June 10, 2013 Board of Directors meeting (OCC Exh. 1714, OCC-WF-SP-08682723 to OCC-WF-SP-08682748);
4. Minutes from the June 26, 2014 Board of Directors meeting (OCC Exh. 1715, OCC-WF-SP-08682936 to OCC-WF-SP-08682961); and
5. Directors’ Action by Unanimous Written Consent from December 2014 (OCC Exh. 2322, OCC-WF-SP-10862416 to OCC-WF-SP-10862427); and

⁵⁴ Respondents’ Omnibus Opposition to Enforcement Counsel’s Motions in Limine at 35.

⁵⁵ Enforcement Counsel’s Motion *in limine* to Admit Certain Jurisdiction Related Records, dated September 3, 2021.

⁵⁶ *Id.* at 3.

⁵⁷ Respondents’ Omnibus Opposition to Enforcement Counsel’s Motions in Limine at 38.

6. Unanimous Written Consents from July 5, 2015 and Dec. 23, 2016 of the Sole Member of the Officer Appointment Committee (OCC Exh. 2321, OCC-WF-SP-10862391 to OCC-WF-SP-10862415).

Enforcement Counsel's Motion is hereby granted. The Bank records identified in Appendix A of Enforcement Counsel's Motion in Limine to Admit Certain Certified Bank Records are hereby admitted.

10. Respondent McLinko's Motion seeking an order *in limine* to exclude evidence

Respondent McLinko seeks an order prohibiting the introduction of evidence or testimony offered by Enforcement Counsel at the hearing to prove that Mr. McLinko played some role in misleading the Board of Directors of Wells Fargo (the "Board").⁵⁸ In support, he avers the Notice of Charges "does not include an allegation that Mr. McLinko misled the Board."⁵⁹

Enforcement Counsel note that the Notice of Charges included averments that Respondent McLinko "failed to take actions consistent with their respective responsibilities to identify, correct, and/or escalate the sales practices misconduct problem."⁶⁰ Finding this language provided Respondent McLinko with sufficient notice that the charges against him, including that he misled the Bank's Board of Directors, the Motion is denied.

Respondent McLinko seeks an order prohibiting the introduction of evidence or testimony offered by Enforcement Counsel at the hearing regarding the heightened Civil Money Penalty as to Mr. McLinko.⁶¹ In support, Respondent McLinko averred that Enforcement Counsel gave notice of their intention to seek a higher penalty than the penalty announced through the Notice of Charges only after discovery was concluded, so that he "was prevented from questioning the OCC experts as to the rationale and evidentiary bases for increasing CMP amount or from conducting written discovery or depositions into the allegations that purportedly support the increase."⁶²

Respondent McLinko acknowledges that the Notice of Charges gave notice that the issued assessment could be changed – specifically noting that "the ALJ may recommend and the Comptroller may decide to increase the amount of the civil money penalties assessed herein, consistent with the law and the evidence presented during the

⁵⁸ Respondent Paul McLinko's Motion *in limine* to Exclude Evidence, dated September 3, 2021, at 9, and Proposed Order accompanying the Motion.

⁵⁹ *Id.* at 9.

⁶⁰ Enforcement Counsel's Consolidated Response in Opposition to Respondents' *in Limine* Motions at 6.

⁶¹ Respondent Paul McLinko's Motion *in limine* to Exclude Evidence at 9, and Proposed Order accompanying the Motion.

⁶² Respondent Paul McLinko's Motion *in limine* to Exclude Evidence at 9.

proceeding”.⁶³ The record reflects that evidence supporting an increase in the penalty includes evidence that *did not exist* at the time the Notice of Charges was issued – because some of that evidence came from Respondent himself in the form of the Answers he filed in response to the Notice of Charges – answers that *materially misrepresented the extent of Respondent’s knowledge* regarding the factual averments presented through the Notice. The true extent of Respondent’s knowledge was made clear only when he filed his Amended Answer on August 7, 2020. Enforcement Counsel proffered the Declaration of Examiner Smith, which is dated March 23, 2021, and which identified the information made available to the OCC only after the filing of the Notice of Charges – including Respondent’s Amended Answer.⁶⁴

For these reasons, Respondent McLinko’s Motion seeking an order prohibiting the introduction of evidence or testimony offered by Enforcement Counsel at the hearing regarding the heightened Civil Money Penalty as to Mr. McLinko is denied.

Respondent McLinko seeks an order prohibiting the introduction of evidence or testimony offered by Enforcement Counsel at the hearing to prove that Mr. McLinko failed to identify risk management or internal controls weaknesses.⁶⁵ In support, Respondent McLinko averred that the Notice of Charges “does not allege in addition that Mr. McLinko failed to identify control weaknesses or risk management issues,” and that in the absence of such allegation “he was not on notice that he would need to seek written documents or ask questions at depositions concerning the issues.”⁶⁶

Enforcement Counsel argue in opposition that the Notice of Charges included sufficient information as to put Respondent McLinko on notice that he failed to identify control weaknesses or risk management issues. In support, they quote from the Notice the following:

The systemic sales practices misconduct persisted for years due to the failures of Bank senior executives and failures in the checks and balances that were supposed to be provided by . . . Audit. . . . Audit—that is, Respondents . . . Julian, and McLinko—had a responsibility to ensure incentive compensation plans were designed and operated in accordance with Bank policy, evaluate risk and ensure it was adequately managed and escalated, advise whether the Community Bank was operating in conformance with laws and regulations, or identify and detail significant or systemic problems in audit reports. None of the Respondents who held leadership roles in those departments adequately performed their responsibilities with respect to the sales practices

⁶³ Respondent Paul McLinko’s Motion *in limine* to Exclude Evidence at 9, quoting the Notice at 2.

⁶⁴ MSD-231 (Decl. of Examiner Smith) at ¶9.

⁶⁵ Respondent Paul McLinko’s Motion *in limine* to Exclude Evidence at 9, and Proposed Order accompanying the Motion.

⁶⁶ Respondent Paul McLinko’s Motion *in limine* to Exclude Evidence at 10.

misconduct problem.⁶⁷

Finding that the Notice of Charges did provide sufficient notice to Respondent McLinko that was being charged with the failure to identify control weaknesses or risk management issues, the Motion is denied.

Respondent McLinko seeks an order prohibiting the introduction of evidence or testimony offered by Enforcement Counsel at the hearing to prove that Mr. McLinko failed to identify the Community Bank's systemic Sales Practices Misconduct in any Enterprise Risk Management Assessment.⁶⁸ In support, he averred that he "was given no notice that his work on Community Bank ERMA's was at issue in this case until Enforcement Counsel's MSD."⁶⁹

Arguing in opposition, Enforcement Counsel note that Respondent McLinko repeatedly referred in his Amended Answer to his work on Community Bank's Enterprise Risk Management Assessment, referred to it again through his deposition of Bartley Deese, and addressed his work on the Bank's ERMA's throughout his brief in opposition to Enforcement Counsel's summary disposition motion. The record thus does not support Respondent McLinko's assertion that he had been given no notice that his work on the Bank's ERMA's would be raised as an issue in this case. Upon this record, Respondent McLinko's Motion is denied.

Respondent McLinko seeks an order prohibiting the introduction of evidence or testimony offered by Enforcement Counsel at the hearing to prove that Mr. McLinko lacked independence prior to 2015.⁷⁰ In support, he averred that he "was given no notice that Enforcement Counsel sought to pursue a theory that Mr. McLinko lacked independence from the Community Bank in the 2012 to 2014 time period," and thus "was precluded from seeking discovery on this issue including from members of the Community Bank who observed his independence and OCC examiners who, despite supervising WFAS, never raised any questions as to Mr. McLinko's independence."⁷¹

Arguing in opposition, Enforcement Counsel assert that both through his January 19, 2021 deposition and his August 7, 2020 Respondent McLinko repeatedly provided details referencing audit independence. Upon this record, I find no basis for prohibiting the introduction of evidence or testimony offered by Enforcement Counsel at the hearing to prove that Mr. McLinko lacked independence prior to 2015; and accordingly the

⁶⁷ Enforcement Counsel's Consolidated Response in Opposition to Respondents' *in Limine* Motions at 5-6, quoting Notice of Charges at ¶ 16.

⁶⁸ Respondent Paul McLinko's Motion *in limine* to Exclude Evidence at 10, and Proposed Order accompanying the Motion.

⁶⁹ Respondent Paul McLinko's Motion *in limine* to Exclude Evidence at 10.

⁷⁰ *Id.*, and Proposed Order accompanying the Motion.

⁷¹ Respondent Paul McLinko's Motion *in limine* to Exclude Evidence at 10

Motion is denied.

11. Respondents' Motion to exclude the Board Report and related materials⁷²

Included in Enforcement Counsel's exhibit list is the April 10, 2017 Sales Practices Investigation Report, which was produced by the Independent Directors of the Bank's Board.⁷³ Having been drafted by a law firm retained by the non-employee directors of the Bank, the Report is described as being based on out-of-court interviews of over 100 Wells Fargo employees and thousands of documents, where neither the employees nor the documents are identified.⁷⁴

Respondents assert the Report's admission would constitute "quadruple hearsay" and would thus violate the Administrative Procedure Act as a denial of Respondents' right to cross-examine witnesses "as may be required for a full and true disclosure of the facts."⁷⁵ They also assert the Report's admission would "violate the principle that the attorney-client privilege may not be used as both a sword and a shield."⁷⁶ They also assert that admitting the Report would delay the hearing under the presumption that admitting the Report would entitle Respondents to a continuance to allow them to take discovery from Shearman and Sterling (the firm producing the Report).⁷⁷ They also assert the Report is unreliable hearsay, such that its admission would raise "a severe fairness concern."

Enforcement Counsel argue in opposition that the Report and related materials are relevant and admissible, notwithstanding the hearsay contained therein.⁷⁸ They assert Respondents were given the OCC examiner notes related to the interviews of these witnesses but chose not to depose the witnesses – deposing instead the OCC Examiners.⁷⁹

Having examined the Report and having considered its contents in relation to the whole of the record, I find an insufficient evidentiary basis has been presented justifying its admission, as the Report duplicates evidence presented through the OCC's Examiners. Respondents' Motion to exclude the Board Report and related materials is granted solely on the ground that such evidence is unduly repetitive of evidence presented through the

⁷² Respondents' Omnibus Motion *in limine*, dated September 3, 2021.

⁷³ *Id.* at 6, citing OCC Exhibit No. 1819.

⁷⁴ Respondents' Omnibus Motion *in limine* at 6

⁷⁵ *Id.* at 7, citing APA § 556(d).

⁷⁶ Respondents' Omnibus Motion *in limine* at 7, citing *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 145 (D.C. Cir. 2015) (privilege may not be used "as a tool for manipulation of the truth-seeking process") (citing *In re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir. 1982)).

⁷⁷ Respondents' Omnibus Motion *in limine* at 8, citing *Calhoun v. Bailar*, 626 F.2d 145, 150 (9th Cir. 1980) ("the more central the hearsay is to the agency's case, the more serious the question of basic fairness ... may become").

⁷⁸ Enforcement Counsel's Consolidated Response in Opposition to Respondents' *in Limine* Motions at 9.

⁷⁹ *Id.* at 10.

reports of the OCC's Examiners. There is no finding that the cited Report or related material is unreliable or inadmissible for any reason other than its repetitive nature. The April 10, 2017 Sales Practices Investigation Report prepared by Shearman & Sterling, Shearman & Sterling's interview notes, and exhibits summarizing the Board Report's conclusions⁸⁰ shall be maintained in the record as a proffer only. This Order does not, however, limit the introduction of evidence that may be presented through the testimony of the OCC Examiners, including references made by the Examiners to information contained in the proffered reports. The admissibility of evidence of references by OCC Examiners to any such report – either in their testimony or in their reports – will be determined separately during the hearing.

12. Respondents' Motion to exclude reports resulting from OCC-Mandated Reviews⁸¹

Respondents have identified reports reviewing the Community Bank's sales practices that were mandated by the OCC. Five such reports were identified for this Motion: by Accenture, PricewaterhouseCoopers, Deloitte, Wells Fargo Financial Crimes Risk Management unit, and Grant Thornton.⁸² Respondents aver Enforcement Counsel seek to offer these reports "to support their assertion that there was widespread sales practices misconduct at the Bank."⁸³

Respondents assert these mandated reviews are compilations of out-of-court statements that were produced without the opportunity for cross-examination; that the reviews do not support the propositions for which they are being offered; that the contents are unreliable hearsay; that the reports were neither independent nor routinely prepared but were instead "mandated and directed by the very same litigant that seeks to use them against Respondents now"; and that they contain improper opinion evidence.⁸⁴

Enforcement Counsel argue the reports Respondents seek to exclude "reflect what was happening in the Community Bank with respect to sales practices, the causes of the problem, its scope, the extent of customer harm and potentially impacted accounts, and the extent of risk management and control deficiencies."⁸⁵

Having examined the Reports and having considered their contents in relation to

⁸⁰ A list of the Board Report and related exhibits is included in Appendix A to In re Tolstedt, Respondent David Julian's Omnibus Motion *in limine* (August 23, 2021).

⁸¹ Respondents' Omnibus Motion *in limine* at 14.

⁸² *Id.* at 15.

⁸³ *Id.*, citing OCC Exh. 2930 ("Multiple reviews and analyses corroborate that the Community Bank had a serious and systemic problem with sales practices misconduct"); see also In re Tolstedt, Enforcement Counsel's Supplemental Prehearing Statement (Aug. 6, 2021) at 162.

⁸⁴ Respondents' Omnibus Motion *in limine* at 14-25.

⁸⁵ Enforcement Counsel's Consolidated Response in Opposition to Respondents' *in Limine* Motions at 17.

the whole of the record, I find an insufficient evidentiary basis has been presented justifying the admission of the cited Reports, as those Reports duplicate evidence presented through the reports of the OCC's Examiners. Respondents' Motion to exclude reports resulting from OCC-mandated reviews Reports drafted by Accenture, PricewaterhouseCoopers, Deloitte, Wells Fargo Financial Crimes Risk Management, and Grant Thornton LLP as a result of OCC-mandated reviews is granted, solely on the ground that such evidence is unduly repetitive of evidence presented through the reports of the OCC's Examiners.⁸⁶ This Order does not, however, limit the introduction of evidence that may be presented through the testimony of the OCC Examiners, including references made by the Examiners to information contained in the proffered reports. The admissibility of evidence of references by OCC Examiners to any such report – either in their testimony or in their reports – will be determined separately during the hearing.

13. Respondents' Motion to exclude documentation of Wells Fargo Settlements⁸⁷

Respondents identify four classes of documents related to settlements entered into by Wells Fargo relating to the Bank's sales practices misconduct: (1) the February 20, 2020 Deferred Prosecution Agreement (DPA) between Wells Fargo & Co., Wells Fargo Bank, N.A., and the Department of Justice;⁸⁸ (2) the September 8, 2016 CFPB Consent Order;⁸⁹ (3) the September 6, 2016 OCC Consent Order,⁹⁰ and Order for Civil Money Penalty;⁹¹ and (4) settlement agreements with individual Wells Fargo executives that Enforcement Counsel did not disclose as witnesses in their prehearing submissions, including James Strother,⁹² Kenneth Zimmerman;⁹³ Tracy Kidd;⁹⁴ and Hope Hardison.⁹⁵

Taken as a group, Respondents assert the documents should be excluded as unreliable.⁹⁶ Evaluating them as a group, the assertion is without merit and is rejected. Respondents' reliance on case law construing the need to prove "each element of a given

⁸⁶ A list of the OCC-mandated reviews and related exhibits is included in Appendix A to *In re Tolstedt*, Respondent David Julian's Omnibus Motion *in limine* (August 23, 2021).

⁸⁷ Respondents' Omnibus Motion *in limine* at 25.

⁸⁸ OCC Exh. 2327.

⁸⁹ OCC Exh. 0632.

⁹⁰ OCC Exh. 0631.

⁹¹ OCC Exh. 1669.

⁹² OCC Exh. 2299.

⁹³ OCC Exh. 2312.

⁹⁴ OCC Exh. 2313.

⁹⁵ OCC Exh. 2318.

⁹⁶ Respondents' Omnibus Motion *in limine* at 25.

hearsay exception”⁹⁷ is inapt here, as the proceedings are governed by the OCC’s Uniform Rules regarding the admissibility of evidence, not the Federal Rules cited by Respondents.⁹⁸

Respondent correctly note that the DPA concerns sales practices misconduct covering 2002 to 2016 – a period of time that far exceeds the period of time material to the issues to be determined during the hearing. Through the summary disposition process the record establishes that each Respondents became undeniably aware of the sales practices misconduct described in the DPA by no later than October 3, 2013, when the Los Angeles Times reported that “the pressure to meet sales goals was intense at Wells Fargo. At times, managers required workers to stay in the branch after the close of business, calling their friends and family members, if they failed to open enough accounts during the day.”⁹⁹ Whether the news report was accurate or not, each Respondent had an affirmative duty from that point forward to escalate any issues related to the news report.

Evaluating the DPA for indicia of reliability, five factors appear pertinent: (1) whether the statement has equivalent circumstantial guarantees of trustworthiness to the other hearsay exceptions; (2) whether the statement is offered as evidence of a material fact; (3) whether the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; (4) whether the interests of justice will best be served by its admission; and (5) whether adequate notice has been given to the opposing party.¹⁰⁰

The record establishes the DPA was the result of an arm’s length negotiation between the Bank and federal law enforcement authorities conducted under circumstances that carry with them substantial guarantees of trustworthiness and reliability; that it was entered into intending for it to be used to describe the Bank’s sales practices misconduct that even the Bank acknowledged to be true; that the substance of the Agreement is probative of the nature of the Bank’s sales practices misconduct and Respondents’ role in such misconduct; that the interests of justice would be served if the Agreement’s terms were made part of the record of this administrative enforcement action; and that

⁹⁷ *Id.* at 25, quoting *United States v. Day*, 789 F.2d 1217, 1221 (6th

Cir. 1986) and citing *Wright & Miller*, 30B Fed. Prac. & Proc. Evid. § 6803 (2021 ed.)

⁹⁸ See 12 C.F.R. § 19.36(a)(3).

⁹⁹ Enforcement Counsel’s Statement of Material Fact (Russ Anderson) No. 200: “Respondent Russ Anderson read both the October 2013 and December 2013 Los Angeles Times articles.” MSD-266 (Russ Anderson Dep. Tr.) at 160:20-23; Russ Anderson Amended Answer ¶ 102; Enforcement Counsel’s Statement of Material Fact (Julian and McLinko) No. 159: “Respondents Julian and McLinko were both aware of the October 2013 and December 2013 Los Angeles Times articles about the Community Bank’s sales practices.” Julian Amended Answer ¶ 55, 102; McLinko Amended Answer ¶ 55, 102; MSD-531 (a colleague warning Respondent McLinko that “it poses reputation risk to the firm”).

¹⁰⁰ *Est. of Thompson v. Kawasaki Heavy Indus., Ltd.*, 933 F. Supp. 2d 1111, 1135 (N.D. Iowa 2013), quoting *United States v. Peneaux*, 432 F.3d 882, 891 (8th Cir.2005).

Respondents each have had significant notice that the terms of the Agreement would be presented in the course of the evidentiary hearing each Respondent has requested.

As Enforcement Counsel convincingly argue in opposition to the exclusion of the DPA and the Consent Orders, Respondents have offered no factual basis to suggest that any of the facts contained within the exhibits are inaccurate or that the Bank's acknowledgements are somehow unreliable.¹⁰¹

Evidence contained in the DPA describing sales practices misconduct that occurred prior to October 3, 2013 is not clearly shown to be material to the issues to be determined through the hearing, and thus such evidence will not be admitted in the absence of sufficient cause shown during the hearing. The DPA itself, however, will be admitted for the reasons set forth in response to Enforcement Counsel's Motion for the admission of the DPA (shown above). Respondents' Motion to exclude the DPA is denied.

Substantially the same reasoning applies in equal force to the contents of (2) the September 8, 2016 CFPB Consent Order;¹⁰² (3) the September 6, 2016 OCC Consent Order,¹⁰³ and Order for Civil Money Penalty.¹⁰⁴ Accordingly, Respondents' Motion to exclude these exhibits is denied.

The record supports Respondents' Motion with respect to settlement agreements with individual Wells Fargo executives that Enforcement Counsel did not disclose as witnesses in their prehearing submissions, including James Strother,¹⁰⁵ Kenneth Zimmerman,¹⁰⁶ Tracy Kidd,¹⁰⁷ and Hope Hardison.¹⁰⁸ Accordingly, Respondents' Motion for the exclusion of settlement agreements with individual Wells Fargo executives (OCC Exhs. 2299, 2312, 2313, 2318) is granted.

14. Respondents' Motion to exclude investigative transcripts and declarations¹⁰⁹

Respondents seek to exclude investigative transcripts and declarations for more than 80 witnesses, "most of whom are not on Enforcement Counsel's witness list" for the

¹⁰¹ Enforcement Counsel's Consolidated Response in Opposition to Respondents' *in Limine* Motions at 21.

¹⁰² OCC Exh. 0632.

¹⁰³ OCC Exh. 0631.

¹⁰⁴ OCC Exh. 1669.

¹⁰⁵ OCC Exh. 2299.

¹⁰⁶ OCC Exh. 2312.

¹⁰⁷ OCC Exh. 2313.

¹⁰⁸ OCC Exh. 2318.

¹⁰⁹ Respondents' Omnibus Motion *in limine* at 29.

hearing.¹¹⁰ They assert that admitting these documents would violate their right to cross-examine the source of the transcript or declaration, aver that the transcripts are unreliable, aver that the documents should be excluded as all “were submitted after the close of discovery”, and some contain statements from Carrie Tolstedt, “whom Respondents were barred from contacting”.¹¹¹

The record does not support this last factual assertion. Respondents were not barred from contacting Ms. Tolstedt. The referenced Order provided as follows:

[T]he stay will suspend the administrative enforcement action against Respondent Tolstedt; and within that stay Respondent Tolstedt will no longer be *copied on filings* with OFIA or the Comptroller in connection with the OCC’s ongoing administrative enforcement proceedings against Respondents Claudia Russ Anderson, James Strother, David Julian, or Paul McLinko; she will be prohibited from *requesting or subpoenaing documents from the OCC or third parties* in connection with the OCC’s administrative enforcement proceeding against her; she will be prohibited from *being permitted access to any documents received in discovery in this matter*, obtained by Respondents after the issuance of the stay; she will be prohibited from participating with the Non-Stay Respondents in the *identification of witnesses to be deposed by Respondents Russ Anderson, Strother, Julian, or McLinko or participating in the preparation for or conduct of discovery depositions* in any manner; she will be prohibited from participating in the *identification of expert witnesses, the preparation of expert reports, or the preparation of expert witnesses for depositions* in this administrative enforcement action; she will be prohibited from *participating in the identification of witnesses to be called by Respondents Russ Anderson, Strother, Julian, or McLinko at hearing or participating in the preparation for or conduct of direct or cross examination of witnesses at the hearing in any manner*; and will be prohibited from otherwise participating *as a party* in the OCC’s ongoing proceedings against Respondents Russ Anderson, Strother, Julian, or McLinko, including *as a party* to any joint defense agreement with Respondents Russ Anderson, Strother, Julian, or McLinko.¹¹²

As reflected in the above Order, the prohibitions posted in the Order were directed at Ms. Tolstedt, such that she could not participate with the Non-Stay Respondents in the identification of witnesses to be deposed by Respondents Russ Anderson, Strother, Julian, or McLinko, and could not participate in the preparation for or conduct of discovery depositions in any manner. Nothing in this provision prohibited Respondents Russ

¹¹⁰ *Id.* at 29.

¹¹¹ *Id.* at 34.

¹¹² Order Regarding Enforcement Counsel’s Motion to Stay the OCC’s Enforcement Action Against Respondent Carrie Tolstedt, issued September 9, 2020, at 8 (emphasis *sic*).

Anderson, Julian, or McLinko from seeking Ms. Tolstedt's discovery deposition.

Enforcement Counsel argue that the contents of the investigative transcripts bear sufficient indicia of reliability to be admissible in this administrative proceeding.¹¹³ I agree. Having examined each of the documents presented by all of the parties through the course of determining the merits of the summary disposition motions presented by Enforcement Counsel (and before them by Respondents), I have no basis to question the reliability of the sworn testimony that has been presented thus far.

Examining the list of documents within the scope of this part of Respondents' Motion,¹¹⁴ I find an insufficient basis has been presented to support Respondents' Motion to exclude investigative transcripts and declarations. The list includes declarations of Respondents Russ Anderson, David Julian, and Paul McLinko, each of whom have been listed as witnesses and have been available for cross-examination. I find no legal or factual basis has been presented to support the averment that the transcripts are unreliable. I further find no legal basis to exclude investigative transcripts or declarations that were submitted after the close of discovery, in the absence of a sufficient demonstration that the documents were within the scope of requests presented during discovery but were nonetheless withheld. Appendix B, which is the list of documents within the scope of this part of Respondents' Motion is not sufficiently detailed to permit a blanket determination regarding the Motion, and as such the Motion is denied.

15. Respondents' Motion to exclude EthicsLine Complaints and Reporting¹¹⁵

Respondents seek to exclude evidence in the form of the Bank's EthicsLine complaints and the reporting that was based on those complaints, on the basis that the complaints and reports are anonymous and unsworn, and thus are "not materially relevant and are unreliable hearsay."¹¹⁶ In support, Respondents note that Michael Bacon, who at one point oversaw the EthicsLine reporting process, "told the Ethics Committee in April 2012 that 85% of EthicsLine Complaints were cleared."¹¹⁷ Given how remote in time this declaration is, the averment will not support a finding that the reporting process as it existed between October 2013 and September 2016 was unreliable or not materially relevant to the issues yet to be determined in this enforcement action.

Respondents offer *United States v. Jones* for the proposition that "[c]ourts have

¹¹³ Enforcement Counsel's Consolidated Response in Opposition to Respondents' *in limine* Motions at 26.

¹¹⁴ Respondents' Omnibus Motion *in limine* at 29, n. 10, indicating a list of these exhibits is provided as Appendix B to Respondents' Motion.

¹¹⁵ Respondents' Omnibus Motion *in limine* at 35.

¹¹⁶ *Id.* at 35.

¹¹⁷ *Id.*, citing OCC Exhibit No. 2456 at 238:16-20.

recognized that unsubstantiated complaints are ‘inherently unreliable.’”¹¹⁸ Pursuant to Ninth Circuit Rule 36-3(a), “unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.” As the case was not selected for publication in the Federal Reporter, no weight is given to the court’s holding.

Establishing the relevance of this evidence, Enforcement Counsel argue with some force that “[i]f each Respondent a) disregarded EthicsLine complaints altogether or b) disregarded unsubstantiated EthicsLine complaints, then each ignored the function of the EthicsLine and rendered it ineffective as a detective control.”¹¹⁹ The record establishes that it was the Bank’s established practice (although clearly not the practice of Respondent Russ Anderson¹²⁰) to investigate complaints, and maintain the complaints in the ordinary course of business, warranting a finding that the records are admissible under 12 C.F.R. § 19.36(a)(1) and (a)(3).

For the reasons set forth above in determining the merits of Enforcement Counsel’s Motion seeking the admission of summaries and the documents summarized therein pertaining to EthicsLine complaints and reports, Respondents’ Motion to exclude these reports is denied.

16. Respondents’ Motion to exclude late-disclosed witnesses and documents¹²¹

Enforcement Counsel propose to offer testimony from Anthony Augliera, regarding his responsibilities as corporate secretary, including attending and drafting minutes of all meetings of the Board of Directors of the Company. In particular, he would testify as a fact witness about the May 19, 2015 meeting of the Risk Committee of the Board of Directors and his notes and recollections thereof.¹²²

Respondents seek to exclude Mr. Augliera’s testimony, averring he was not identified on August 4, 2020 when preliminary witness disclosures were due, and averring that given Mr. Augliera worked for Wells Fargo “for years while the OCC was onsite” there could be “no real dispute that these witnesses were known to Enforcement Counsel at that time.”¹²³ Respondents assert that an untimely disclosed witness should be excluded

¹¹⁸ Respondents’ Omnibus Motion *in limine* at 35, quoting *United States v. Jones*, 123 Fed. Appx. 773, at *2 (9th Cir. 2005).

¹¹⁹ Enforcement Counsel’s Consolidated Response in Opposition to Respondents’ *in Limine* Motions at 31.

¹²⁰ See Order Regarding Enforcement Counsel’s Summary Disposition Motions at Statement of Material Fact (Russ Anderson) No. 173: “While thousands of employees flooded the EthicsLine warning senior leadership for years about the retail branch environment of significant pressure to meet unreasonable sales goals and resulting misconduct, Respondent Russ Anderson ‘did not make a habit of reading the EthicsLine allegations that came in. I had a pretty busy job. That would have been not a wise use of my time.’”

¹²¹ Respondents’ Omnibus Motion *in limine* at 37.

¹²² Enforcement Counsel’s Supplemental Witness List at 3.

¹²³ Respondents’ Omnibus Motion *in limine* at 38.

from testifying at trial in order to prevent a “sneak attack,” citing in support *Corner Pocket of Sioux Falls*.¹²⁴ In *Corner Pocket*, in affirming the District Court’s summary judgment order, the court of appeals noted that the withheld witness’s affidavit could be rejected on procedural grounds because plaintiffs disclosed neither the witness as a witness nor the substance of his affidavit during discovery.¹²⁵ The court of appeals held that plaintiffs “inexcusably concealed [the witness] during discovery and then sprung his affidavit testimony during the summary judgment briefing process. Despite years to perfect this sneak attack, presumably with the aid of [the witness’s] business records, plaintiffs submitted an affidavit in which every verifiable detail was incorrect.”¹²⁶

There has been no showing of a comparable “sneak attack” here. In their response in opposition to Respondents’ Motion, Enforcement Counsel clarified the role the witness is expected to play during the hearing: That as Secretary of Wells Fargo & Company, Mr. Augliera would testify about his own handwritten notes from the May 19, 2015 meeting of the Risk Committee of the Board of Directors.¹²⁷ Enforcement Counsel aver the authenticity of these handwritten notes has been called into question by Respondents, who have “gone so far as to call [the notes] ‘altered.’”¹²⁸ Respondents’ Motion to exclude Mr. Augliera is denied, and testimony from the witness will be permitted for the limited purposes disclosed by Enforcement Counsel through their Supplemental Witness List.¹²⁹

Enforcement Counsel propose to take testimony from Richard Reep, who is a Compensation Senior Consultant on Executive Compensation in the Compensation and Performance Management Team at the Bank.¹³⁰ Mr. Reep would testify regarding the equity and non-equity compensation information he compiled with respect to Respondents, and which reflected in spreadsheets (OCC-WF-SP-10538337 and OCC-WF-SP-06679571) that were produced to Respondents in this proceeding and which they used in their filings in this proceeding.¹³¹

Positing the same arguments as with Mr. Augliera, Respondents assert that they have not had “the opportunity to test the reliability of the witnesses’ potential

¹²⁴ Respondents’ Omnibus Motion *in limine* at 39, quoting *Corner Pocket of Sioux Falls, Inc. v. Video Lottery Techs., Inc.*, 123 F.3d 1107, 1113 n.5 (8th Cir. 1997).

¹²⁵ *Corner Pocket of Sioux Falls, Inc. v. Video Lottery Techs., Inc.*, 123 F.3d 1107, 1113 (8th Cir. 1997).

¹²⁶ *Id.*

¹²⁷ Enforcement Counsel’s Consolidated Response in Opposition to Respondents’ *in Limine* Motions at 34.

¹²⁸ *Id.*, quoting OCC Exh. 2529 (Julian Tr.) at 227:3-21 and citing Respondent Julian’s Objections to Enforcement Counsel’s Exhibits Submitted in Support of Motion for Summary Disposition (Apr. 30, 2021) at 13, 31.

¹²⁹ See p. 2-3 (Aug. 6, 2021).

¹³⁰ Enforcement Counsel’s Supplemental Witness List at 38.

¹³¹ Respondents’ Omnibus Motion *in limine* at 39

testimony.”¹³² The record reflects, however, that Respondents have had the opportunity to test the reliability of Mr. Reep’s analysis through the analysis advanced by Respondents’ own expert, Bruce Deal.¹³³ Finding an insufficient legal basis has been advanced in support, the Motion to exclude the proposed testimony of Mr. Reep is denied.

Enforcement Counsel propose to take testimony from Steven Shogren, an Assistant Secretary of the Company and the Bank.¹³⁴ He would testify about the February 20, 2020 Deferred Prosecution Agreement the Company and the Bank entered into with the United States Attorney’s Offices for the Northern District of California and the Western District of North Carolina. Mr. Shogren submitted a declaration dated June 23, 2021 and Enforcement Counsel expect Mr. Shogren’s testimony to cover material related to his declaration.¹³⁵

Respondents seek an order excluding Mr. Shogren’s testimony for the reasons set forth above. Enforcement Counsel argue against excluding the witness on the premise that as the Assistant Secretary for Wells Fargo & Company and the Bank, he would authenticate the February 2020 Deferred Prosecution Agreement the Bank entered into with the U.S. Department of Justice, in which the Bank made numerous admissions.¹³⁶ Having examined Enforcement Counsel’s description of the proposed testimony, I find sufficient cause to anticipate that such testimony would duplicate similar testimony from other witnesses, and finding that an insufficient basis has been presented warranting Mr. Shogren’s testimony. Upon that basis Respondents’ Motion seeking to exclude this testimony is granted with respect to Mr. Shogren.

Enforcement Counsel propose to take testimony from John Snincak, an Analytic Manager for Consumer & Small Business Banking in the Bank’s Deposit Products Group’s Analytics Team.¹³⁷ Mr. Snincak worked on the analysis that identified more than 18.2 million DDA and Savings accounts that were opened between May 1, 2002 and December 31, 2015 that did not have any customer-initiated transactions.¹³⁸ It should be noted that it is not clear that any testimony regarding the opening of accounts from 2002 to 2013 would be relevant with respect to the issues remaining to be determined in this enforcement action.

¹³² Respondents’ Omnibus Motion *in limine* at 40.

¹³³ See MSD-283A at appendix C-17, indicating as one of his sources OCC-WF-SP-06679571 (Spreadsheet of Executive Compensation), dated November 20, 2020.

¹³⁴ Respondents’ Omnibus Motion *in limine* at 43.

¹³⁵ *Id.*

¹³⁶ Enforcement Counsel’s Consolidated Response in Opposition to Respondents’ *in Limine* Motions at 35, citing OCC Exh. 2327 at 30-31 and OCC Exh. 2928 (Shogren Dec.).

¹³⁷ Enforcement Counsel’s Supplemental Witness List at 45.

¹³⁸ *Id.*

Respondents seek an order excluding Mr. Snincak’s testimony for the reasons set forth above.¹³⁹ Having examined Enforcement Counsel’s description of the proposed testimony, and finding sufficient cause to anticipate that the relevant part of such testimony would duplicate similar testimony from other witnesses, I find an insufficient basis has been presented warranting Mr. Snincak’s testimony, and solely upon that basis the Motion is granted with respect to Mr. Snincak.

Enforcement Counsel propose to take testimony from Jeff Gregory. Mr. Gregory joined the OCC in 2014 as an industry hire and in 2015 joined the OCC’s resident examination staff for Wells Fargo on the Enterprise Risk Management team.¹⁴⁰ He is expected to testify about Wells Fargo Audit Services’ coverage of sales practices, and specific audits including but not limited to the 2016 Regional Bank Account Opening Audit. Mr. Gregory also would testify about his knowledge of WFAS (including Respondent McLinko) placing audits under attorney-client privilege and of allowing other departments and lines of business to influence the scope of audits; that WFAS’s audits of the Community Bank failed to identify systemic sales practices misconduct and continually rated each audit effective; and that the 2014 and 2015 Enterprise Risk Management Assessments found the Community Bank “Satisfactory.”¹⁴¹

Respondents seek an order excluding Mr. Gregory’s testimony, first on the basis that he likely was known to Enforcement Counsel as a potential witness and should have thus been identified with the parties’ initial witness disclosures (which were due on August 4, 2020); and in order to prevent a “sneak attack” by Enforcement Counsel.¹⁴² Given that Mr. Gregory had been identified and listed as a potential witness for Respondents,¹⁴³ the possibility of such an attack seems speculative at best. Respondents’ Motion regarding Mr. Gregory is denied.

Enforcement Counsel propose to take testimony from Arvin Grover. Mr. Grover is a National Bank Examiner who was assigned to the OCC’s resident examination staff for Wells Fargo from 2009 through 2018 and was the OCC’s Audit Team Lead from April 2011 through July 2015, reporting to NBE Jennifer Crosthwaite.¹⁴⁴ He is expected to explain how the OCC leverages and relies on Audit’s work in its supervision.¹⁴⁵ He would testify about meetings and calls he attended with Respondents Russ Anderson and McLinko in which topics related to sales practices, cross sell, incentive compensation,

¹³⁹ Respondents’ Omnibus Motion *in limine* at 43.

¹⁴⁰ Enforcement Counsel’s Supplemental Witness List at 15.

¹⁴¹ *Id.*

¹⁴² Respondents’ Omnibus Motion *in limine* at 38.

¹⁴³ See Enforcement Counsel’s Consolidated Response in Opposition to Respondents’ *in Limine* Motions at 35, citing OCC Exh. 2441 (Gregory Tr.).

¹⁴⁴ Enforcement Counsel’s Supplemental Witness List at 16.

¹⁴⁵ *Id.*

were discussed during the February and May 2015 OCC Exams; and about emails listing all audits performed or planned by WFAS related to sales practices (what WFAS itself communicated were audits related to sales practices); and about Respondent Julian's explanations to NBE Grover regarding Audit's methodology for its coverage of sales practices in the Community Bank.¹⁴⁶

Respondents seek an order excluding Mr. Grover's testimony for the reasons set forth above.¹⁴⁷

Having examined Enforcement Counsel's description of the proposed testimony, and finding sufficient cause to anticipate that the testimony would duplicate similar testimony from other witnesses (including Examiner Crosthwaite), I find an insufficient basis has been presented warranting Mr. Grover's testimony, and solely upon that basis the Motion is granted with respect to Mr. Grover.

Respondents also seek to exclude the testimony of certain witnesses on the ground that Enforcement Counsel's August 6, 2021 supplemental witness summary includes untimely disclosures such that they include testimony not disclosed in Enforcement Counsel's preliminary witness list that was due on August 4, 2020 or in their original prehearing submissions that were due on June 25, 2021.¹⁴⁸ Although averring that Enforcement Counsel have made notable changes to "at least ten witnesses more than a year after their initial disclosure,"¹⁴⁹ the Motion itself identified the following: Michael Bacon, Michael Loughlin, James Richards, Martin Weber, Jennifer Crosthwaite, Enrique Hernandez, Matthew Raphaelson, Timothy Sloan, Yvette Hollingsworth, and David Otsuka.¹⁵⁰

Upon review of the disclosures presented through Enforcement Counsel's Supplemental Witness List, finding an insufficient basis has been presented warranting the testimony of the following witnesses, the Motion is granted with respect to Michael Bacon, Martin Weber, and Matthew Raphaelson.

Enforcement Counsel argue that the "notable changes" disclosed in the August 6, 2021 witness lists are "generally rearticulations of testimony that was already timely described in Enforcement Counsel's June 25, 2021 prehearing filings."¹⁵¹ They described Mr. Bacon's expected testimony to be that "he personally and repeatedly informed each

¹⁴⁶ Enforcement Counsel's Supplemental Witness List at 16.

¹⁴⁷ Respondents' Omnibus Motion *in limine* at 38.

¹⁴⁸ *Id.* at 42.

¹⁴⁹ *Id.* at 43.

¹⁵⁰ *Id.* at 43-44.

¹⁵¹ Enforcement Counsel's Consolidated Response in Opposition to Respondents' *in Limine* Motions at 43.

Respondent of the sales practices problem, its seriousness, and root cause.”¹⁵²

Much of Mr. Bacon’s testimony appears to concern events occurring prior to 2013 and thus is of marginal relevance to the issues remaining to be determined at the hearing. Having examined Enforcement Counsel’s description of the proposed testimony, and finding sufficient cause to anticipate that the relevant part of such testimony would duplicate similar testimony from other witnesses, I find an insufficient basis has been presented warranting Mr. Bacon’s testimony, and solely upon that basis the Motion is granted with respect to Mr. Bacon.

Mr. Weber is identified as a former Investigation Manager in Corporate Investigations, who would testify as a fact witness regarding the 2004 Investigation Report, sales integrity working groups, the root cause, scope, magnitude, and duration of sales practices misconduct, its systemic nature, and controls.¹⁵³ He would testify about the 2004 Investigation Report that he authored on behalf of Corporate Investigations regarding the seriousness of sales practices misconduct and its root cause.¹⁵⁴

Much of Mr. Weber’s testimony appears to concern events occurring prior to 2013 and thus is of marginal relevance to the issues remaining to be determined at the hearing. Having examined Enforcement Counsel’s description of the proposed testimony, and finding sufficient cause to anticipate that the relevant part of such testimony would duplicate similar testimony from other witnesses, I find an insufficient basis has been presented warranting Mr. Weber’s testimony, and solely upon that basis the Motion is granted with respect to Mr. Weber.

Mr. Raphaelson is identified as the former Community Bank Head of Strategic Planning and Finance, whom Enforcement Counsel proposed to have testify as a fact witness regarding the role of annual sales growth, the run rate, cross-sell, incentive compensation plans, pressure, and controls in sales practice issues.¹⁵⁵ He would testify about his communications and interactions with Bank personnel, including but not limited to Respondent Russ Anderson, and her participation in meetings with regional leaders related to sales planning.¹⁵⁶ He would testify about concerns expressed by regional leaders to Respondent Russ Anderson regarding sales goals. Mr. Raphaelson would also testify about audits of the Community Bank, including the October 2012 Regional Banking Compensation audit. Enforcement Counsel expect Mr. Raphaelson, to whom the audit report was addressed, will testify that the October 2012 Regional Banking Compensation audit report did not identify the systemic sales practices misconduct problem or the significant sales practices risk management and internal controls weaknesses related

¹⁵² *Id.* at 43, citing Enforcement Counsel’s Witness List at 3.

¹⁵³ Enforcement Counsel’s Preliminary Fact and Hybrid Fact- Expert Witness List (August 4, 2020) at 50.

¹⁵⁴ Enforcement Counsel’s Supplemental Witness List (August 6, 2021) at 49.

¹⁵⁵ Enforcement Counsel’s Preliminary Fact and Hybrid Fact- Expert Witness List (August 4, 2020) at 43.

¹⁵⁶ *Id.*

thereto.¹⁵⁷

Much of Mr. Raphaelson's testimony appears to concern events occurring prior to 2013 and thus is of marginal relevance to the issues remaining to be determined at the hearing. Having examined Enforcement Counsel's description of the proposed testimony, and finding sufficient cause to anticipate that the relevant part of such testimony would duplicate similar testimony from other witnesses, I find an insufficient basis has been presented warranting Mr. Raphaelson's testimony, and solely upon that basis the Motion is granted with respect to Mr. Raphaelson.

With respect to the Motion concerning Michael Loughlin, James Richards, Jennifer Crosthwaite, Enrique Hernandez, Timothy Sloan, Yvette Hollingsworth, and David Otsuka, upon finding the supplemental summaries do not represent substantial departures from the descriptions provided in Enforcement Counsel's prior disclosures, the Motion is denied.

Respondents seek an order excluding documents produced after the discovery deadline.¹⁵⁸ In support, they aver the deadline for discovery was October 23, 2020; that notwithstanding this "Enforcement Counsel produced 18,500 documents halfway through discovery depositions on December 24, 2020, another 750 documents on June 4, 2021, and another five on August 9, 2021," after depositions were over and after motions for summary disposition were filed.¹⁵⁹

Having offered no justification for raising the claim regarding untimely delivery of discoverable documents until a week before the start of the scheduled hearing, the Motion is denied.

17. Respondents Motion to exclude evidence that Respondents were prevented from testing¹⁶⁰

Respondents seek an order excluding evidence predating 2010, on the grounds that the evidence would be unreliable and irrelevant.¹⁶¹ They identify within Enforcement Counsel's exhibit list 175 pre-2010 documents covering topics including sales goals and incentive programs, sales quality standards, and escalation and scope of sales practices issues.¹⁶² They aver that Enforcement Counsel "likewise intend to rely on testimony

¹⁵⁷ Enforcement Counsel's Supplemental Witness List at 37 (August 6, 2021), citing SMF (Julian and McLinko) No. 419.

¹⁵⁸ Respondents' Omnibus Motion *in limine* at 45

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 47.

¹⁶¹ *Id.*

¹⁶² *Id.* at 48-49.

regarding such pre-2010 evidence.¹⁶³

As was reflected in the July 20, 2021 Order Regarding Enforcement Counsel's Summary Disposition Motion, evidence predating 2010 was not shown to be material to the issues presented by the Notice of Charges and Respondents' Amended Answers.¹⁶⁴ Similarly, certain evidence presented in support of Enforcement Counsel's Motions for Summary Disposition that consisted of documents pre-dating the October 3, 2013 article in the Los Angeles Times (which each Respondent admitted to having read) likewise was examined to determine if it was too remote in time to constitute material evidence. Where the evidence was deemed too remote and tangential to the material issues it was excluded.¹⁶⁵ Upon these premises, Respondents Motion is granted, and documents predating 2010 will be excluded, to be retained in the record as a proffer only.¹⁶⁶

The October 3, 2013 date is significant in this analysis because at that point the record is uncontroverted regarding knowledge that can properly be attributed to each of the Respondents: by that date, each Respondent acknowledged being aware of the business practices problems that were a threat to the Bank's safety and soundness. If evidence establishes that each Respondent was an institution-affiliate as that term is used in the Federal Deposit Insurance Act, then as a matter of law they had undisputed fiduciary duties relating to the scope of their employment with the Bank, including the duty to act in response to the information presented to the public through the article. In order to avoid confusion and minimize the presentation of immaterial evidence, the admission of documentary or testimonial evidence regarding the conduct of any actor, not only Respondents, between 2010 and October 3, 2013 will require a particular showing of materiality.

Respondents seek to exclude evidence concerning communications with or activities involving or supervised by Carrie Tolstedt.¹⁶⁷ In support, they assert such

¹⁶³ *Id.*

¹⁶⁴ See, e.g. Order Regarding Enforcement Counsel's Motions for Summary Disposition at 175, Enforcement Counsel's Statement of Material Fact (Russ Anderson) No. 37 and (Julian and McLinko) No. 21, "Beginning no later than 2002 until October 2016, the Community Bank had a systemic sales practices misconduct problem" held to be "too remote in time to constitute evidence material to the issues presented in the Notice of Charges."

¹⁶⁵ See, e.g. Order Regarding Enforcement Counsel's Motions for Summary Disposition at 234, Enforcement Counsel's Statement of Material Fact (Julian and McLinko) No. 73, "There was an expectation of cross-sell growth in every region of the retail branch network. For example, in 2012, the Head of the Community Bank Carrie Tolstedt wrote: "As set out in our vision and values, 'the core of our vision and our strategy is cross selling'" held to be too remote in time and too tangential to the material claims when compared with Exhibits that are more closely related in time, and given the potential for confusion that admitting the evidence presented here.

¹⁶⁶ A list of pre-2010 exhibits is included in Appendix D to *In re Tolstedt*, Respondent David Julian's Omnibus Motion *in limine* (August 23, 2021).

¹⁶⁷ Respondents' Omnibus Motion *in limine* at 52.

exclusion is warranted because of what they refer to as a “gag order” that “interfered with Respondents’ right to defend themselves and communicate with relevant witnesses.”¹⁶⁸ (The relevant text of that Order has been presented above.)

As reflected in the cited Order, the prohibitions posted in the Order were directed at Ms. Tolstedt, such that she could not participate with the Non-Stay Respondents in the identification of witnesses to be deposed by Respondents Russ Anderson, Strother, Julian, or McLinko, and could not participate in the preparation for or conduct of discovery depositions in any manner.

Respondents acknowledged they had the authority to take Ms. Tolstedt’s deposition, but aver they were limited by this Tribunal’s March 17, 2020 Order “that limited each Respondent to five depositions.”¹⁶⁹ This averment is misleading and materially incomplete. The relied upon provision in the Tribunal’s Order is as follows:

No more than five non-expert witness (or hybrid fact/expert witness) depositions per party shall be permitted without leave of the ALJ, and leave will be granted only upon sufficient cause shown through a memorandum filed in support of such request.

Respondents’ Counsel are cautioned against falsely representing to any court or to the Comptroller that they were limited to deposing only five fact or hybrid witnesses during the discovery phase of this enforcement action.

Nothing in the “gag order” prohibited Respondents Russ Anderson, Julian, or McLinko from seeking Ms. Tolstedt’s deposition.¹⁷⁰ Enforcement Counsel argue with some force that under the Tribunal’s extant orders, “[d]uring deposition, Respondents could have asked Ms. Tolstedt about anything relevant and material.”¹⁷¹ Without more, there is no basis to separately treat the introduction of exhibits and testimony relating to Ms. Tolstedt. Accordingly, Respondents’ Motion to exclude the otherwise admissible documentary or testimonial evidence related to Carrie Tolstedt is denied.

18. Respondents’ Motion to exclude OCC Examiner testimony and reports¹⁷²

Respondents seek an order excluding OCC Examiner testimony and reports, on the ground that through the discovery process they were prohibited from asking the Examiners “questions about adverse personnel actions in connection with their employment at the

¹⁶⁸ *Id.* at 53.

¹⁶⁹ *Id.* at 55, n. 23, citing Notice of Hearing, Scheduling Order, and Supplemental Prehearing Orders (March 17, 2020) at 3.”

¹⁷⁰ Order Regarding Enforcement Counsel’s Motion to Stay the OCC’s Enforcement Action Against Respondent Carrie Tolstedt, issued September 9, 2020, at 8 (emphasis *sic*).

¹⁷¹ Enforcement Counsel’s Consolidated Response in Opposition to Respondents’ *in Limine* Motions at 47, citing 12 C.F.R. § 19.170.

¹⁷² Respondents’ Omnibus Motion *in limine* at 56.

OCC.”¹⁷³

Respondents’ assertions regarding the limitations on discovery are the same as were raised in the parties’ prehearing motion pertaining to the disclosure of sensitive OCC personnel information.¹⁷⁴ The merits of that Motion were determined in an Order issued November 2, 2020, the contents of which are incorporated by this reference, as if rewritten in full here.¹⁷⁵

Upon the premises presented by the parties here, Respondents’ Motion to exclude OCC Examiner testimony and reports is denied for the reasons set forth in the Order of November 2, 2020.

Respondents assert the OCC Examiner witnesses “*ipse dixit*” opinions are “irrelevant, immaterial, and unreliable, and the witnesses are not qualified to render opinions on the standard of care applicable to a senior auditor,” and should be excluded under *Daubert v. Merrell Dow Pharm., Inc.*¹⁷⁶ They assert Enforcement Counsel’s case “is premised on their assertion that, in serving as Chief Auditor and a Senior Audit Director of the Bank, Messrs. Julian’s and McLinko’s conduct fell below the generally accepted standards of prudent operation.”¹⁷⁷

Having examined the credentials submitted with the OCC Examiners’ reports, and having reviewed their proposed testimony, I find an insufficient basis has been presented to exclude the testimony described in Enforcement Counsel’s prehearing submissions, and upon this finding deny Respondents’ Motion.

Ipse dixit is a Latin phrase that translates to “he said it himself.” *Ipse dixit* refers to a person’s own assertion without relying on any authority or proof. It usually implies that an assertion (such as those factual claims in the Notice of Charges) is true based wholly on the speaker’s authority and nothing else. In a legal setting the term is archaic, and usually is used to criticize allegations that the speaker claims have been based solely upon authority and not backed by any proof. For an example of usage: “An expert’s simple *ipse dixit* is insufficient to establish a matter; rather, the expert must explain the basis of his

¹⁷³ *Id.* at 56.

¹⁷⁴ Enforcement Counsel’s Motion for Protective Order Regarding Sensitive OCC Personnel Information, dated October 15, 2020; Respondents’ Opposition to Enforcement Counsel’s Motion for Protective Order Regarding Sensitive OCC Personnel Information, dated October 30, 2020; See Order Regarding Enforcement Counsel’s Motion to Strike Portions of Respondent Julian’s et al. Fourth Request for Production of Documents (Oct. 28, 2020) at 11-13; Order Regarding Enforcement Counsel’s Motion for Protective Order Regarding Sensitive OCC Personal Information (Nov. 2, 2020) at 5.

¹⁷⁵ Order Regarding Enforcement Counsel’s Motion for a Protective Order Regarding Sensitive OCC Personnel Information, issued November 2, 2020.

¹⁷⁶ Respondents’ Omnibus Motion *in limine* at 59, citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

¹⁷⁷ Respondents’ Omnibus Motion *in limine* at 59.

statement to link his conclusions to the facts.”¹⁷⁸

From my review of the record, the findings, conclusions, and opinions presented through the reports of the OCC Examiners rely on authority and proof, and through this are found to be reliable, material, and admissible.

Upon these findings, Respondents’ Motion to exclude the testimony and reports of the OCC Examiners is denied.

Respondents assert the documents identified as the expert reports of the OCC Examiners must be presented through a sponsoring witness because they “were not created in the course of regulatory business” and thus do not meet the definition of reports admissible pursuant to 12 C.F.R. § 19.36(c)(2).¹⁷⁹ That regulation permits the introduction, without a sponsoring witness, of “any document, including a report of examination, supervisory activity, inspection or visitation, prepared by an appropriate Federal financial institutions regulatory agency or by a state regulatory agency”.

Finding that the reports identified by Respondents in this part of their Motion to fall within the scope of the above-quoted regulation, Respondents’ Motion is denied.

19. Respondents’ alternate Motion to limit Examiner testimony¹⁸⁰

Upon the denial of the prior part of the Motion, Respondents seek as an alternative an order that would limit the testimony of the OCC’s Examiners to 1) expert opinions disclosed in their expert reports; and 2) lay testimony to facts as to which the examiners have personal knowledge.¹⁸¹ In support, Respondents aver the Examiners’ supplemental disclosures “suggest that, absent such limitation, they intend to offer testimony outside of these boundaries”.¹⁸² They offer as examples the proposed testimony of Examiners Crosthwaite and Smith, where both propose to “testify regarding the IIA Standards & Guidance”, Examiner Smith would offer opinion testimony regarding the monetary civil penalty proposed in Enforcement Counsel’s summary disposition motions, and unidentified Examiners would testify “regarding audit workpapers.”¹⁸³

As Enforcement Counsel and the courts have noted, “[e]ach examiner receives extensive training and goes through a lengthy apprenticeship and careful evaluation before being accorded the substantial examination and reporting powers granted in 12 U.S.C.A. §

¹⁷⁸ *Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999).

¹⁷⁹ Respondents’ Omnibus Motion *in limine* at 67.

¹⁸⁰ *Id.* at 69.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 70-71.

1820(b).”¹⁸⁴ I have no reason – certainly not based on the role IIA Standards & Guidance will play in determining the merits of issues remaining in this enforcement action – to find the OCC’s Examiners lack the credentials to testify regarding those Standards.

Having considered the import of Respondents’ averment, and having examined the credentials of each of the OCC’s Examiner witnesses, I find no basis to conclude the witnesses lack the credentials required to qualify them as expert witnesses, including with respect to the audit principles, IIA Standards & Guidance, and principles applicable to determining civil money penalties associated with the claims presented in the Notice of Charges. Respondents will have the ability to conduct an appropriate *voir dire* of any expert or hybrid fact/expert witness. The Motion, however, is without merit and is denied.

20. Respondents’ Motion to exclude Enforcement Counsel’s Summary Exhibits as unreliable¹⁸⁵

Respondents seek an order excluding summary documents prepared by Enforcement Counsel on the basis that the exhibits are unreliable.¹⁸⁶ They note that the OCC’s Uniform Rules provide that “[w]itnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines or other graphic material to summarize, illustrate, or simplify the presentation of testimony.”¹⁸⁷ They counter that by relying Federal Rule of Evidence 1006, upon a claim that the reports summarize evidence and are not accurate and objective.¹⁸⁸ They also identify sixteen proposed exhibits Enforcement Counsel have listed, each of which were newly created for the purposes of summarizing, illustrating, or simplifying the presentation of testimony.¹⁸⁹

Respondents assert that those reports summarizing EthicsLine complaints and reporting are inadmissible “because they are unsubstantiated and unreliable hearsay.”¹⁹⁰ Enforcement Counsel counter persuasively by noting the OCC’s Uniform Rules expressly permit a witness to use existing or newly created charts, exhibits, calendars, calculations, outlines or other graphic material to summarize, illustrate, or simplify the presentation of testimony.¹⁹¹

¹⁸⁴ Enforcement Counsel’s Consolidated Response in Opposition to Respondents’ *in Limine* Motions at 57, quoting *Sunshine v. Federal Deposit Insurance Corporation*, 783 F.2d 1580,1583 (11th Cir. 1986).

¹⁸⁵ Respondents’ Omnibus Motion *in limine* at 74.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*, quoting 12 C.F.R. § 19.36(c)(3).

¹⁸⁸ Respondents’ Omnibus Motion *in limine* at 75.

¹⁸⁹ *Id.* at 74, citing OCC Exhs. 2929, 2930, 2931, 2932, 2933, 2934, 2935, 2936, 2937, 2938, 2939, 2940, 2941, 2942, 2944, 2945.

¹⁹⁰ Respondents’ Omnibus Motion *in limine* at 75.

¹⁹¹ Enforcement Counsel’s Consolidated Response in Opposition to Respondents’ *in Limine* Motions at 50 quoting 12 C.F.R. § 19.36(c)(3).

Finding that Federal Rule of Evidence 1006 is not applicable here and finding an insufficient showing has been made to indicate the summary exhibits are either inaccurate or not objective, the objection is overruled. Because the materiality of evidence that precedes October 2013 has not been shown, Enforcement Counsel must be prepared to differentiate the reports and documents that were generated prior to October 2013 from those generated thereafter.

21. Respondents' Motion to exclude Michael Bacon's March 12, 2013 presentation to the Institute of Internal Auditors Mid-Atlantic District Conference (OCC Exhibit No. 0675)¹⁹²

By prior determination through this Order, testimony will not be taken from Mr. Bacon. Upon this determination, Respondents' Motion in this regard is granted with respect to the exhibit itself, and with respect to Mr. Bacon the Motion is denied as moot. Neither Mr. Bacon nor the exhibit will be admissible, although the exhibit will remain in the record as a proffer.

22. Respondents' Motion to admit deposition transcript designations¹⁹³

Identifying the depositions of all deposed OCC Examiners as "statements of party opponents," and citing Federal Rule of Civil Procedure 32(a)(3), Federal Rule of Evidence 804(b)(1), and 12 C.F.R. § 19.36(a)(2) in support, Respondents seek the admission of deposition transcripts of the National Bank Examiners include: R Exh. 18825, R Exh. 18945 (Elizabeth Candy); R Exh. 18845, R Exh. 18859 (Gregory Coleman); R Exh. 18794, R Exh. 18813 (Jennifer Crosthwaite); R Exh. 18942 (Michael DeClue); R Exh. 18778 (Mark Dey); R Exh. 19175 (Jeff Gregory); R Exh. 19218 (Arvin Grover); R Exh. 18882, R Exh. 18883 (Karin Hudson); R Exh. 19545 (Bradley Linskens); R Exh. 19333 (Christine Moses); R Exh. 18984 (Dianne Sirek); R Exh. 19347 (Kevin Swanson); R Exh. 18887, R Exh. 18941 (Tanya Smith); and R Exh. 19146 (Scott Wilson).

After averring that "[a]dmission of this clearly admissible deposition testimony of representatives of Respondents [*sic*] adversary will promote efficiency at the hearing," Respondents first assert that "[t]o the extent there are portions of the depositions that are based on the examiner's firsthand knowledge of the subject to which they testified, that testimony should be admitted," but then assert that portions of the depositions "are replete with conclusions lacking in firsthand knowledge or the requisite skill, experience, training or education to qualify as proper expert testimony," such that those portions of the depositions "are not admissible because they are unreliable and constitute improper opinion testimony."¹⁹⁴

Respondents through this part of their Motion make no attempt to establish that the

¹⁹² Respondents' Omnibus Motion *in limine* at 79.

¹⁹³ *Id.* at 82.

¹⁹⁴ *Id.* at 84.

contents of these reports are singular and not duplicative or repetitive. While the OCC's rules permit the admission of evidence that is relevant, material, and reliable, evidence that is unduly repetitive is inadmissible.¹⁹⁵ Upon finding the Motion fails to show that the reports are unduly repetitive, the Motion is denied.

Respondents seek admission of Bart Deese's deposition transcript.¹⁹⁶ For the reasons set forth above, Respondents' Motion is granted.¹⁹⁷

It is so ordered.

Date: September 9, 2021

Christopher B. McNeil
U.S. Administrative Law Judge
Office of Financial Institution Adjudication

CERTIFICATE OF SERVICE

On September 9, 2021 I served by email transmission a copy of the foregoing Order Regarding the Parties' Motions Seeking Orders *in Limine* upon:

Hearing Clerk:
Office of the Controller of the Currency
400 7th Street, S.W.
Washington, D.C. 20219
By email to: hearingclerk@occ.treas.gov

Enforcement Counsel:
William Jauquet, Assistant Director
Jason E. Friedman
Zina Lapidus
Tarek Sawi

¹⁹⁵ 12 C.F.R. § 19.36(a).

¹⁹⁶ Respondents' Omnibus Motion *in limine* at 84.

¹⁹⁷ See *supra*, Order regarding Enforcement Counsel's Motion seeking an order *in limine* regarding the admission of portions of sworn testimony of Bartley H. Deese, Jr.

Lauren R. Snook
Melinda Barnes
Sean Young
Lee Perla
Quinn Nguyen
Gary Spencer
Office of the Comptroller of the Currency
400 7th St SW
Washington, DC 20219
william.jauquet@occ.treas.gov
jason.friedman@occ.treas.gov
zina.lapidus@occ.treas.gov
tarek.sawi@occ.treas.gov
lauren.snook@occ.treas.gov
melinda.barnes@occ.treas.gov
sean.young@occ.treas.gov
lee.perla@occ.treas.gov
quinn.nguyen@occ.treas.gov
gary.spencer@occ.treas.gov

Treana D. Bennett
Western District Office
Office of the Comptroller of the Currency
1225 17th Street, Suite 300
Denver, CO 80202
treana.bennett@occ.treas.gov

Anna K. Mills
Northeastern District Office
Office of the Comptroller of the Currency
340 Madison Avenue, 5th Floor
New York, NY 10173
Anna.mills@occ.treas.gov

Respondents' Counsel:

Respondent Claudia Russ Anderson

c/o Douglas A. Kelley
Daniel M. Scott
Stacy L. Bettison
Brett D. Kelley
Michael J. Tostengard
Perry F. Sekus

Jeffrey D. Smith
KELLEY, WOLTER & SCOTT, P.A.
Centre Village Offices
431 S. Seventh Street, Suite 2530
Minneapolis, MN 55415
dkelley@kelleywolter.com
dscott@kelleywolter.com
sbettison@kelleywolter.com
bkelly@kelleywolter.com
mtostengard@kelleywolter.com
psekus@kelleywolter.com
jsmith@kelleywolter.com

Respondent David Julian
c/o Franca Harris Gutierrez
Matthew T. Martens
Gannam Rifkah
Michael Carpenter
Rafael J. Gallardo Hevia
Charlie Johnson
Emily Gomez
Karin Dryhurst
Mikayla Foster
Sharon Kelleher
Kirsten Johansson

WILMER CUTLER PICKERING HALE AND DORR, LLP
1875 Pennsylvania Avenue NW Washington, DC 20006
franca.gutierrez@wilmerhale.com
matthew.martens@wilmerhale.com
Gannam.Rifkah@wilmerhale.com
Michael.Carpenter@wilmerhale.com
Rafael.GallardoHevia@wilmerhale.com
Charlie.Johnson@wilmerhale.com
Emily.Gomez@wilmerhale.com
Karin.Dryhurst@wilmerhale.com
Mikayla.Foster@wilmerhale.com
Sharon.Kelleher@wilmerhale.com
Kirsten.Johansson@wilmerhale.com

Timothy Perla
Jessica Lewis
Margaux Joselow

Dan Willey
Sierra Shear
WILMER CUTLER PICKERING HALE AND DORR, LLP
60 State Street
Boston, MA 02109
timothy.perla@wilmerhale.com
jessica.lewis@wilmerhale.com
Margaux.Joselow@wilmerhale.com
Dan.Willey@wilmerhale.com
Sierra.Shear@wilmerhale.com

Laura Goodall
WILMER CUTLER PICKERING HALE AND DORR, LLP
One Front Street, Suite 3500
San Francisco, CA 94111
Laura.Goodall@wilmerhale.com

Jose R. Valenzuela
WILMER CUTLER PICKERING HALE AND DORR, LLP
2600 El Camino Real Suite 400
Palo Alto, CA 94306
Jose.Valenzuela@wilmerhale.com

Respondent Paul McLinko

c/o Timothy P. Crudo
Rees F. Morgan
Benjamin C. Pulliam
Daniel M. Bruggebrew
Katharine Van Dusen
Mark Hejinian
Thomas Harvey
David Beach
Charles Z. Weiss
Emily Margolis
Tom Lin
COBLENTZ PATCH DUFFY & BASS LLP
One Montgomery Street, Suite 3000
San Francisco, CA 94104
ef-tpc@cpdb.com
ef-rfm@cpdb.com
ef-bcp@cpdb.com

ef-dmb@cpdb.com
ef-ktv@cpdb.com
ef-mlh@cpdb.com
ef-tah@cpdb.com
ef-dcb@cpdb.com
ef-czw@cpdb.com
ef-exm@cpdb.com
ef-txl@cpdb.com

U.S. Administrative Law Judge
Office of Financial Institution Adjudication
ofia@fdic.gov (e-mail)
(703) 562-2740 (telephone)