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 RESPONDENTS' MOTION FOR RECONSIDERATION AND FOR LEAVE TO FILE

On October 15, 2021, Respondents filed a motion seeking the disqualification of the undersigned presiding Administrative Law Judge.[1] In support, Respondents averred the ALJ's inconsistent, irregular, and one-sided rulings reflect an apparent bias against Respondents,[2] the ALJ's statements criticizing Respondents' positions and prejudging the

[1] Respondents' Motion for Disqualification Based on Personal Bias and Other Disqualification under 5 U.S.C. § 556(b), dated October 15, 2021.

[2] *Id*. at 9-27.

facts reflect an apparent bias against Respondents,[3] that the ALJ's *ex parte* communications with Enforcement Counsel reflect an apparent bias against Respondents,[4] and that the ALJ has failed to effectively manage the proceedings.[5]

In framing their argument in support of disqualification, Respondents cited the federal judicial recusal statute, 28 U.S.C. § 455(a), for the proposition that the federal statute "likewise provides that "[a]ny … judge … of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[6] Respondents asserted, "[d]isqualification is appropriate when, among other things, a judge "has a personal bias or prejudice concerning a party."[7]

Respondents further relied upon the following language found in 28 U.S.C. § 144:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.[8]

In their Motion, Respondents made the following legal claim: that "Section 455, and corresponding federal case law applying that statute, 'applies with equal force to the disqualification of administrative judges.'"[9] Their legal premise, drawn from these authorities, is that "[u]nder both the APA and § 455, the relevant inquiry for determining whether disqualification is appropriate is not whether the judge is proven to have actual bias or prejudice, but only [whether] the facts 'might reasonably cause an objective observer to question the judge's impartiality.'"[10]

In an Order dated November 3, 2021, this Tribunal denied Respondents' Motion,

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[3] *Id*. at 27-37.

[4] *Id*. at 37-39.

[5] *Id*. at 39-47.

[6] Respondents Motion for Disqualification Based on Personal Bias and Other Disqualification under 5 U.S.C. § 556(b) at 4.

[7] *Id*. at 5, quoting 28 U.S.C. § 455(b)(1).

[8] Respondents Motion for Disqualification Based on Personal Bias and Other Disqualification under 5 U.S.C. § 556(b) at 5.

[9] *Id.* at 6, quoting *Chianelli v. Env't Prot. Agency*, 8 F. App'x 971, 980 (Fed. Cir. 2001); see also *Marcus v. Dir., Off. of Workers' Comp. Programs, U. S. Dep't of Lab*., 548 F.2d 1044, 1051 (D.C. Cir. 1976) (noting that "[t]he general rule[s] governing disqualification" are "applicable to the federal judiciary and administrative agencies alike").

[10] Respondents Motion for Disqualification Based on Personal Bias and Other Disqualification under 5 U.S.C. § 556(b) at 6, quoting *United States v. Microsoft Corp*., 56 F.3d 1448, 1463 (D.C. Cir. 1995) (per curiam) (alteration omitted).

upon a finding that the record reflected an insufficient factual basis to support a disqualification order.[11]

On May 27, 2022, Respondents filed a Motion for Reconsideration.[12] The Motion is predicated upon what Respondents aver is "newly discovered evidence concerning the Tribunal's actions before, during, and after the hearing conducted between September 13, 2021 and January 6, 2022, along with the evidence previously submitted".[13]

Enforcement Counsel submitted their opposition, asserting the Tribunal properly denied Respondents' Motion for Disqualification,[14] that the communications now being relied upon by Respondents regarded logistics of the hearing and not issues material to the litigation,[15] and that Respondents refused Enforcement Counsel's request to produce copies of Respondents' communications with the OCC.[16] Enforcement Counsel argue the communications presented through Respondents' Motion were not relevant to any fact in issue or to the merits of the adjudication;[17] that Respondents were not prejudiced by the communications presented through their Motion;[18] and that Respondents have failed to provide evidence justifying disqualification.[19]

Enforcement Counsel also argued that reconsideration motions must be based on new evidence that is material and not merely cumulative, and would probably have produced a different result;[20] that there is a presumption that the ALJ is fair and impartial (and that Respondents' Motion did not present facts that would overcome that presumption);[21] that Respondents' Motion misstated the legal standard for disqualification (which Enforcement Counsel asserted requires actual bias);[22] and that Respondents misstate the definition of "*ex parte* communication".[23]

Respondents aver, "sufficient factual evidence was presented with their original

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[11] Order Regarding Respondents' Motion for Disqualification Based on Personal Bias and Other Disqualification under 5 U.S.C. § 556(b).

[12] Respondents' Motion for Reconsideration, dated May 27, 2022, at 3.

[13] *Id*. at 1-2.

[14] Enforcement Counsel's Opposition to Respondents' Motion for Reconsideration, dated June 13, 2022.

[15] *Id*. at 3-4.

[16] *Id*. at 4-5.

[17] *Id*. at 10-13.

[18] *Id*. at 13-15.

[19] *Id*. at 15-17.

[20] *Id*. at 5.

[21] *Id*. at 5-6

[22] *Id*. at 6-8.

[23] *Id*. at 8-9.

motion to show either an appearance of bias or actual bias."[24] For the reasons set forth in the November 3, 2021 Order, this averment will not support the issuance of the Order proposed by Respondents.

Further, I find the factual averments and "newly discovered evidence" presented in the Reconsideration motion do not support an order granting the relief requested.[25]

Those factual averments include the following:

1. Counsel for the Office of Financial Institution Adjudication (OFIA) corresponded with the OCC regarding the length of the evidentiary hearing.[26]
2. Counsel for OFIA corresponded with the OCC regarding arrangements for the hearing venue.[27]
3. Counsel for OFIA corresponded with the OCC regarding the transmittal of exhibits using the Tribunal's secured file transfer protocol (SFTP) and regarding the labeling of proposed exhibits as being submitted either under seal or not under seal.[28]
4. During the hearing on December 8, 2021, Enforcement Counsel sent a text message to the ALJ stating the Zoom connection was lost.
5. During the hearing, when the OCC was addressing the need to have an overflow room for the hearing, the ALJ referred to Counsel for the OCC by his first name, which Respondents asserted demonstrated "an unusual level of friendliness".[29]
6. Through an email from OFIA, the Tribunal sought from the OCC a print copy along with an electronic version of the transcript of the hearing thus far.[30]
7. Counsel for OFIA sent an email to the OCC asking whether "there is any consensus among the parties as to whether they are amenable to [the Tribunal's] presiding remotely or would like to make alternate scheduling arrangements?"[31]
8. Counsel for OFIA sent an email to the OCC to confirm that OFIA has not

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[24] Respondents' Motion for Reconsideration at 3.

[25] See [Proposed] Order Granting Respondents' Motion for Reconsideration, finding that "a sufficient basis has been presented warranting the Tribunal's disqualification in this proceeding." *Id.* at 1.

[26] Respondents' Motion for Reconsideration at 6-7, citing Perla Declaration, Exhibit A at 1, and Exhibit B at 3.

[27] Respondent's Motion for Reconsideration at 7, citing Perla Declaration, Exhibit E at 1.

[28] Respondent's Motion for Reconsideration at 8, citing Perla Declaration, Exhibit H at 1-2, Exhibit I, Exhibit J at 1, Exhibit K at 1.

[29] Respondents' Motion for Reconsideration at 9, citing Perla Declaration, Exhibit M at 1-2, Exhibit N, Exhibit O at 3, Exhibit P at 1.

[30] Respondents' Motion for Reconsideration at 9-10, citing Perla Declaration, Exhibit N.

[31] Respondents' Motion for Reconsideration at 10, citing Perla Declaration, Exhibit O.

> missed a filing from Enforcement Counsel responsive to Respondents' Motion for Interlocutory Review.[32]

Coupled with the factual averments presented in the Motion for Disqualification, Respondents assert these factual premises "at the very least show an appearance of bias, if not actual bias, against Respondents."[33]

The legal premises advanced by Respondents in their Motion for Reconsideration reiterate those premises already addressed in the November 3, 2021 Order, which Order is incorporated by reference as if fully rewritten here. The legal premises relied upon by Respondents in the Motion for Disqualification and the Motion for Reconsideration are rejected for the reasons set forth in that Order, as supplemented herein.

Respondents alternatively assert they are entitled to further discovery "into the ex parte communications between the Tribunal and Enforcement Counsel."[34]

Specifically, they seek:

> all communication dated on or after January 23, 2020, between any agent or representative from the Office of Financial Institution Adjudication ("OFIA") (including the Tribunal and Mr. Cohen) and any person who is not an agent or representative of OFIA (including Enforcement Counsel for the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation) concerning In the Matter of Carrie Tolstedt, et al. before the U.S. Department of the Treasury Office of the Comptroller of the Currency, bearing case nos. OCC AA-EC-2019-82, OCC AAEC-2019-81, OCC AA-EC-2019-70, OCC AA-EC-2019-71, and OCC AA-EC-2019-72, that include no person who is a representative of WilmerHale LLP, Coblentz Patch Duffy & Bass LLP, or Kelley, Wolter & Scott, P.A. Respondents also request the issuance of discovery deposition subpoenas to the participants in ex parte communications between the Tribunal and Enforcement Counsel, including those described herein.[35]

In support, Respondents rely upon the Seventh Circuit's decision in *Edgar v. K.L.*[36] Plaintiffs in *Edgar* contended that the mental health care system of Illinois violates the Constitution of the United States.[37] Enforcement Counsel argued that no further discovery into such communication is justifiable because the communications cited by

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[32] Respondents' Motion for Reconsideration at 10, citing Perla Declaration, Exhibit P.

[33] Respondents' Motion for Reconsideration at 10.

[34] *Id.* at 13.

[35] *Id.*

[36] 93 F.3d 256 at 258-62 (7th Cir. 1996).

[37] *Id.* at 257.

Respondents "are not prohibited by applicable law and do not demonstrate" either actual bias or the appearance of bias by the Tribunal.[38]

Respondents' reliance on *Edgar* is misplaced, as the Court of Appeals' decision in that case would not support the requested discovery. The decision does, however, shed light on the issues raised by the parties in Respondents' Motion for Reconsideration.

With the consent of the parties, the district judge in *Edgar* appointed a panel of three experts to investigate the state's institutions and programs.[39] The panel's charge permitted its members and aides to meet with patients and state employees outside the presence of counsel, for otherwise they could not collect reliable data.[40]

Later the panel began to meet in private with the judge, without such a compelling reason.[41] When defendants learned that one of these meetings, which lasted three and a half hours on September 7, 1994, was dedicated to giving the judge a preview of the panel's conclusions, and to persuading the judge that the panel's methodology was sound, defendants asked the judge to disqualify himself under 28 U.S.C. § 455.[42]

The question for the Court of Appeals in this mandamus action was whether the district judge's actions in meeting *ex parte* with the panel of experts, who had been appointed to investigation the state's institutions and programs and who used the meetings to provide the judge with a preview of the investigative findings and to persuade the judge that their methodology was sound, were grounds for disqualification of the judge.

Applying the Code of Conduct for United States Judges (which do not apply in this proceeding but nevertheless provide guidance regarding the issues presented in Respondents' Motion) the Court of Appeals noted: "A judge should . . . except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding."[43]

The Court of Appeals noted that the district judge blocked discovery from other participants, invoking "judicial privilege" to shield what had been said during the *ex parte* meetings.[44] The Court of Appeals determined that it could not determine whether any meeting between the judge and experts touch the merits, or procedures affecting the merits, because the district judge had blocked discovery from other participants and has declined to state on the record his own memories of what happened. "The judge did not

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[38] Enforcement Counsel's Opposition to Respondents' Motion for Reconsideration at 17-18.

[39] 93 F.3d 256 at 257.

[40] *Id*.

[41] *Id*.

[42] *Id*.

[43] *Id*. at 258, citing Canon 3A (4) of the Code of Conduct for United States Judges.

[44] 93 F.3d at 258.

elaborate on the nature, extent, or legal support for his claim of 'judicial privilege,' but a phrase of that kind usually refers to the deliberative process."[45]

In determining that the matters discussed *ex parte* were material to the issues being determined through the litigation, the Court of Appeals wrote:

> No privilege covers arrangement of administrative details, such as where an expert witness will stay while doing research or who will provide computer time to analyze the data. To invoke a privilege is therefore to confess that the discussions covered the substance of potential testimony and the conduct of the litigation—and if this is not so in fact, it is nonetheless what we must assume, because no evidence in the record undermines the inferences naturally to be drawn from the outline for the September 7 meeting. The outline enumerates "three irreducible obligations of the modern state hospital" and ticks off (in a section captioned "General Findings") numerous ways in which the panel believes Illinois falls short. This outline covers subjects at the core of the litigation; indeed, it served the panel as the draft outline for its final report.[46]

The Court of Appeals found that these "off the record briefings in chambers . . . leave no trace in the record", particularly where the judge has "forbidden any attempt at reconstruction."[47] The Court of Appeals found the in-chambers discussions were "calculated, material, and wholly unnecessary" warranting disqualification of the judge under 28 U.S.C. § 455, where the judge had "personal knowledge of disputed evidentiary facts concerning the proceeding".[48]

The Court found disqualification was required under 28 U.S.C. § 455(a), which provides "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[49]

The Court held:

> A thoughtful observer aware of all the facts (the standard under § 455(a), see *Liljeberg*, 486 U.S. at 865, 108 S.Ct. at 2205; *In re Mason*, 916 F.2d 384 (7th Cir.1990); *In re National Union Fire Insurance Co*., 839 F.2d 1226 (7th Cir.1988); *New York City Housing Development Corp. v. Hart*, 796 F.2d 976 (7th Cir.1986)), would conclude that a preview of evidence by a panel of experts who had become partisans carries an unacceptable potential for

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[45] *Id*.

[46] *Id*.

[47] *Id*. at 259.

[48] *Id*. citing 28 U.S.C. § 455(b)(1).

[49] 93 F.3d at 259, citing 28 U.S.C. § 455(a).

compromising impartiality.[50]

Respondents have presented no comparable set of factual claims in support of their motion. They have not demonstrated the correspondence cited in their motion is material to any of the issues or defenses raised through the Notice of Charges or Respondents' Amended Answers, or that the evidence – had it been included in the Motion for Disqualification – would probably have produced a different result.[51]

The Seventh Circuit Court of Appeals in *Matter of Mason* provided this explanation of the issues presented and the allocation of burdens when a litigant under the federal judicial system seeks the recusal of a district judge:

> Section 455(a) asks whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits. This is an objective inquiry. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865, 108 S.Ct. 2194, 2205, 100 L.Ed.2d 855 (1988); *New York City Housing Development Corp. v. Hart*, 796 F.2d 976 (7th Cir.1986); *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir.1985). An objective standard is essential when the question is how things appear to the well-informed, thoughtful observer rather than to a hypersensitive or unduly suspicious person. Because some people see goblins behind every tree, a subjective approach would approximate automatic disqualification. A reasonable observer is unconcerned about trivial risks; there is always some risk, a probability exceeding 0.0001%, that a judge will disregard the merits. Trivial risks are endemic, and if they were enough to require disqualification we would have a system of preemptory strikes and judge-shopping, which itself would imperil the perceived ability of the judicial system to decide cases without regard to persons. A thoughtful observer understands that putting disqualification in the hands of a party, whose real fear may be that the judge will *apply* rather than disregard the law, could introduce a bias into adjudication. Thus the search is for a risk substantially out of the ordinary.[52]

As the Seventh Circuit Court of Appeals noted in *Mason*, Respondents' real fear may be that the ALJ will *apply* rather than disregard the law. In any event, the Court of Appeals for the Eighth Circuit has made it clear that a judge "is presumed to be impartial, and 'the party seeking disqualification bears the substantial burden of proving otherwise.'"[53]

Nothing in the documents supporting Respondents' motion identified a discussion

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[50] 93 F.3d at 260.

[51] See *Williams v. Hobbs*, 658 F.3d 842, 854 (8th Cir. 2011).

[52] *Matter of Mason*, 916 F.2d 384, 385–86 (7th Cir. 1990) (emphasis in original).

[53] *United States v. Denton*, 434 F.3d 1104, 1111 (8th Cir. 2006), quoting *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 664 (8th Cir.2003).

regarding either a fact in issue or a matter relevant to the merits of the adjudication.[54]

Finding Respondents have presented an insufficient factual and legal basis to support their Motion, the Motion for Reconsideration is DENIED. Respondents' Motion for Leave to File is denied as moot.

It is so ordered.

Date: July 5, 2022

U.S. Administrative Law Judge
Office of Financial Institution Adjudication

CERTIFICATE OF SERVICE

On July 5, 2022 I served by email transmission a copy of the foregoing Order Regarding Respondents' Motion for Reconsideration and for Leave to File 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

[54] See 5 U.S.C. § 554(d): "The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not-- (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate"; and 12 C.F.R. §19.9(a) and (b): (a) Definition - (1) Ex parte communication means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between: (i) An interested person outside the OCC (including such person's counsel); and (ii) The administrative law judge handling that proceeding, the Comptroller, or a decisional employee. (2) Exception. A request for status of the proceeding does not constitute an ex parte communication. (b) Prohibition of ex parte communications. From the time the notice is issued by the Comptroller until the date that the Comptroller issues his or her final decision pursuant to § 19.40(c): (1) No interested person outside the OCC shall make or knowingly cause to be made an ex parte communication to the Comptroller, the administrative law judge, or a decisional employee; and (2) The Comptroller, administrative law judge, or decisional employee shall not make or knowingly cause to be made to any interested person outside the OCC any ex parte communication.

Enforcement Counsel:
William Jauquet, Assistant Director
Jason E. Friedman
Zina Lapidus
Tarek Sawi
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
bkelley@kelleywolter.com
mtostengard@kelleywolter.com
psekus@kelleywolter.com
jsmith@kelleywolter.com

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

WILMER CUTLER PICKERING HALE AND DORR, LLP
1875 Pennsylvania Avenue NW Washington, DC 20006
franca.gutierrez@wilmerhale.com
matthew.martens@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
Derek.woodman@wilmerhale.com

Timothy Perla
Jessica Lewis
Margaux Joselow
Dan Willey
Sierra Shear
Kimberly Crowley
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
kim.crowley@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

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-exm@cpdb.com
ef-txl@cpdb.com

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