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

In the Matter of: **SAUL ORTEGA,** Former Chief Financial Officer, Director, President, Chief Executive Officer, and Chairman of the Board, and **DAVID ROGERS, JR.,** Former Chairman of the Board First National Bank Edinburg, Texas	Docket Nos.: AA-EC-2017-44 AA-EC-2017-45

ORDER DENYING RESPONDENTS' DEMAND FOR JURY TRIAL AND MOTION TO DISMISS

On June 13, 2022, Respondents Saul Ortega and David Rogers, Jr. ("Respondents") filed a Demand for Jury Trial ("Motion"), seeking the empanelment of "a jury of Respondents' peers to hear this case" or, in the alternative, dismissal of the action in its entirety. Enforcement Counsel for the Office of the Comptroller of the Currency ("Enforcement Counsel") opposed this Motion on June 28, 2022 ("Opposition"). For the following reasons, Respondents' Motion is hereby denied on both procedural and substantive grounds, and the issues raised within are preserved—if Respondents are so determined—for subsequent agency review.

I. Respondents' Demand for Jury Trial and Motion to Dismiss Are Procedurally Improper

On January 26, 2021, the undersigned issued an order amending the procedural schedule in this case and establishing the deadline for the submission of dispositive motions as May 7, 2021. On May 6, 2021, the undersigned granted the parties' Joint Motion to Extend Dispositive Motion

Deadlines to establish May 14, 2021 as the new deadline for dispositive motions. A virtual administrative hearing was held from January 31, 2022 to February 15, 2022.

As a procedural matter, neither the Uniform Rules of Practice and Procedure that govern these administrative enforcement proceedings[1] ("Uniform Rules") nor the underlying statutory scheme set forth in 12 U.S.C. § 1818 provide for the empanelment of juries in connection with a hearing before this Tribunal, and the undersigned has no authority to grant such relief. Respondents' demand for a jury trial seeks an impossible remedy and must therefore be denied, even had it not been filed four months after the conclusion of the hearing itself.

Additionally, Respondents' Motion to Dismiss in the alternative, which was filed over a year after the extended deadline of May 14, 2021 for dispositive motions, is untimely.[2] Respondents have cited no authority or good cause to amend by reference any previous filing to incorporate the issue of Respondent's Seventh Amendment rights. As such, Respondents' Motion is hereby denied on this independent ground as well.

II. Respondents Are Not Entitled to a Jury Trial

Respondents argue that the Fifth Circuit's recent decision in *Jarkesy v. SEC*[3] entitles them to a jury and request that the undersigned enter an order submitting the evidence to a properly empaneled jury for factual findings. *See* Motion at 1-2. In the alternative, Respondents contend that this case should be dismissed pursuant to *Jarkesy* because the in-house adjudication of this matter by the Office of the Comptroller of the Currency ("OCC") violates their Seventh Amendment right to a jury trial. *See id.* at 2.

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[1] *See* 12 C.F.R. § 19.1 *et seq.*

[2] The Uniform Rules contain no specific provision regarding this Tribunal's authority to hear and rule upon dispositive motions other than motions for summary disposition in any event. Rather, agency rules provide that only the Comptroller of the Currency ("Comptroller") "shall have the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the proceeding." *Id.* §§ 19.5(b)(7), 109.5(b)(7).

[3] 34 F.4th 446 (5th Cir. 2022).

In response, Enforcement Counsel argues that *Jarkesy* does not apply in this proceeding because the OCC's statutory scheme falls within the "public rights" exception to the Seventh Amendment. *See* Opposition at 4-9. Enforcement Counsel distinguishes the securities fraud claims at issue in *Jarkesy* with the claims at issue here and contends that Supreme Court precedent makes it clear that OCC enforcement actions under 12 U.S.C. § 1818 seek to safeguard public rights, "relate integrally to the OCC's public purpose," and are otherwise suited for adjudication before this Tribunal. *Id.* at 6. The undersigned agrees with Enforcement Counsel.

Even assuming that *Jarkesy* binds this Tribunal in some fashion, which Respondents have not in fact established,[4] that case sets forth a two-step analysis to determine whether the Seventh Amendment has been violated by administrative adjudicative proceedings. "First, a court must determine whether an action's claims arise 'at common law' under the Seventh Amendment. Second, if the action involves common-law claims, a court must determine whether the Supreme Court's public rights cases nonetheless permit Congress to assign it to agency adjudication without a jury trial."[5] These proceedings satisfy that analysis in both respects.

First, through the enforcement provisions of 12 U.S.C. §§ 1818(e) and 1818(i), Congress has explicitly created new claims that were unknown to common law. *See* Opposition at 5-9

[4] Where the Supreme Court and the Comptroller have not squarely addressed an issue, the undersigned gives deference to the law of the D.C. Circuit and the circuit in which the home office of the depository institution in question is located as the twin fora to which a respondent is entitled to appeal any final decision of the Board. *See* 12 U.S.C. § 1818(h)(2). While it is true that the Fifth Circuit is the circuit in which the depository institution in question was located prior to its failure, the undersigned agrees with the dissent in *Jarkesy* and finds that the conclusion that Respondents are not entitled to a jury trial in OFIA proceedings is the one best and most clearly supported by Supreme Court precedent. *See Oil States Energy Svcs. v. Greene's Energy Grp. LLC*, 138 S. Ct. 1365, 1373 (2018); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53-55 (1989); *Atlas Roofing v. Occup. Health & Safety Comm'n*, 430 U.S. 442, 449-50 (1977); *see also Jarkesy v. SEC*, 34 F.4th at 467-473 (Davis, J., dissenting). Furthermore, another of OFIA's constituent agencies, the Board of Governors for the Federal Reserve System, has held in a different case before this Tribunal that respondents in Section 1818 enforcement proceedings are not entitled to a jury trial under the Seventh Amendment. *See* Determination on Request for Interlocutory Appeal, *In the Matter of Fang Fang*, Nos. 17-006-E-I & -CMP-I, 2018 WL 3006183, at *3 (FRB Jan. 30, 2018) (finding that the public rights exception applies to OFIA proceedings). In light of that precedent, and until such time as the Court or the Comptroller conclude differently, the undersigned accords the conclusions of the *Jarkesy* panel no special deference or regard.

[5] *Jarkesy*, 34 F.4th at 453 (internal citations omitted).

(noting, *inter alia*, that "the claims at issue in this proceeding arise from the federal regulatory scheme created specifically to ensure the safety and soundness of the national banking industry"). There exist no private rights analogous to these Section 1818 enforcement provisions at common law, and Respondents have pointed to none. Therefore, the OCC enforcement scheme satisfies *Jarkesy*'s test at step one.

Further, even if analogous common law claims did exist, the OCC's enforcement authority clearly derives from, and is integral to, a federal regulatory scheme and would thus satisfy the public rights exception at step two.[6] According to the Supreme Court, the public rights exception encompasses matters "arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments"[7]—for example, cases "where the Government is involved in its sovereign capacity under . . . [a] statute creating enforceable public rights,"[8] or when the right being adjudicated is otherwise "integrally related to particular Federal Government action" or "derives from a federal regulatory scheme" such that agency adjudication is appropriate.[9]

Here, the OCC is an agency with expertise enforcing the substantive regulatory regime under which these issues are being adjudicated and upon which the action depends.[10] The OCC's claims are "closely intertwined with a federal regulatory program" that it has been charged by

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[6] *See also id.* at 468 (Davis, J., dissenting) (noting that federal courts of appeal "routinely hold that an enforcement action by the Government for violations of a federal statute or regulation is a 'public right' that Congress may assign to an agency for adjudication without offending the Seventh Amendment") (citing cases).

[7] *Oil States*, 138 S. Ct. at 1373 (internal quotation marks and citation omitted).

[8] *Atlas Roofing*, 430 U.S. at 458.

[9] *Stern v. Marshall*, 564 U.S. 462, 490-91 (2011); *see also*, *e.g.*, *Granfinanciera*, 492 U.S. at 54-55 ("If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court.").

[10] *Compare Stern*, 564 U.S. at 493 (no public rights exception where the party's "claimed right to relief does not flow from a federal statutory scheme . . . [and] is not completely dependent upon adjudication of a claim created by federal law") *with CFTC v. Schor*, 478 U.S. 833, 855 (1986) (public rights exception where non-Article III jurisdiction over a claim "mak[es] effective a specific and limited federal regulatory scheme" as to which the agency possesses "obvious expertise").

statute to oversee.[11] And that agency's enforcement authority under Section 1818 directly advances its statutory mission to, *inter alia*, protect against losses to insured depository institutions, safeguard the interests of depositors and the Deposit Insurance Fund, and maintain public confidence in banks and the banking system.[12] Part of that mission is to institute enforcement proceedings against institution-affiliated parties—that is, "persons subject to its authority in connection with the performance of [its] constitutional functions"[13]—who have violated laws or regulations, if the OCC determines that such violations have prejudiced the interests of an institution's depositors or caused loss to the institution itself, among other possible effects.[14] As Enforcement Counsel notes, moreover, "enforcement actions under Section 1818 embed agency expertise in their statutory elements, requiring determinations of whether banks and their affiliated parties have engaged in 'unsafe or unsound practices,' the very definition of which term is committed to the expertise of the Federal banking agencies."[15] There can be no real doubt that public rights are at issue here, and Respondents' reliance on *Jarkesy* is therefore misplaced.

SO ORDERED.

July 7, 2022

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Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication

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

[12] *Simpson v. OTS*, 29 F.3d 1418, 1423 (9th Cir. 1994); *see also* Opposition at 5-7 (citing cases).

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

[14] *See* 12 U.S.C. § 1818(e)(1)(B).

[15] Opposition at 8 (internal quotation marks, citation, and bracketing omitted); *see In the Matter of Patrick Adams*, No. AA-EC-11-50, 2014 WL 8735096, at *35 (Sep. 30, 2014) (OCC final decision) (observing that the safety and soundness determinations of OCC examiners are entitled to deference based on the examiners' "unique experience") (internal quotation marks and citation omitted); *see also*, *e.g.*, *Brickner v. FDIC*, 747 F.2d 1198, 1202 (8th Cir. 1984) (concluding that federal banking agencies should be accorded "substantial deference" in determining the scope of fiduciary duty under Section 1818, given the agencies' "extensive experience with the duties and responsibilities of bank officers and directors").

CERTIFICATE OF SERVICE

On July 7, 2022, I served a copy of the foregoing **Order** upon the following individuals via email:

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