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

In the Matter of: **LAURA AKAHOSHI,** Equal Access to Justice Applicant	Docket No.: AA-EC-2018-20

ORDER DENYING RESPONDENT'S APPLICATION FOR AN AWARD OF ATTORNEY'S FEES AND COSTS PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT

The Office of the Comptroller of the Currency ("OCC") commenced this action against Respondent Laura Akahoshi ("Respondent"), a former OCC examiner, on April 17, 2018, seeking an order of prohibition and the imposition of a $50,000 civil money penalty under 12 U.S.C. § 1818 for alleged violations of 12 U.S.C. § 481 and 18 U.S.C. § 1001 as well as allegedly unsafe or unsound practices in managing the affairs of Rabobank, N.A. ("the Bank"). Specifically, the Notice of Charges (or "Notice") alleged that Respondent, in her capacity as the Bank's Chief Compliance Officer, had "continuously concealed" from OCC examiners the existence of a third-party auditor's draft report ("the Crowe Report") regarding deficiencies in the Bank's Bank Secrecy Act and Anti-Money Laundering ("BSA/AML") compliance program, despite the agency's "unambiguous, repeated, and direct requests" for that document, which was in Respondent's possession at the time. The Notice also alleged that Respondent demonstrated an actionably culpable state of mind and that her misconduct ultimately resulted in the Bank suffering financial loss and "significant reputational harm" as the result, *inter alia*, of its February 2018 entry of a guilty plea to conspiracy to obstruct an OCC examination.

On February 10, 2022, the undersigned issued a Recommended Decision concluding that Enforcement Counsel for the OCC ("Enforcement Counsel") had established all elements of its case by at least a preponderance of the evidence and recommending that a prohibition order and a $30,000 civil money penalty be assessed against Respondent. The Acting Comptroller of the Currency ("Comptroller") then issued a Final Decision on April 5, 2023, declining to adopt the undersigned's recommendations and terminating all charges against Respondent for reasons discussed further below.

On the heels of that Final Decision, Respondent has filed an application for a monetary award pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, contending that she is entitled to approximately $4.2 million in attorney's fees and costs expended defending herself against the OCC's "defective and unfounded" enforcement action.[1] EAJA Application at 1. Following a joint motion for clarification by Respondent and Enforcement Counsel ("the Parties") regarding the proper forum for Respondent's Application, the Comptroller referred the Application to the undersigned for her determination as the presiding officer in the underlying adjudication.[2] Now, upon consideration of this May 5, 2023 Application, Enforcement Counsel's June 5, 2023 Response in opposition, the Comptroller's Final Decision, and the administrative record as a whole, the undersigned finds that the agency's position in this matter was (more than) substantially justified, and Respondent's Application is therefore DENIED.

[1] Respondent concedes that it was the Bank's insurance company, rather than she herself, who paid for her defense in this action, although she nevertheless insists that she is entitled to the fees and costs that she did not pay. *See* EAJA Application at 40 (arguing that Respondent "is eligible for an EAJA reward even though insurance advanced the costs she incurred in defending herself"), 41 (contending that because insurance was part of her compensation package, "she effectively pre-paid for those fees and costs with the service she provided" as an officer of the Bank). Because the undersigned finds that Respondent does not meet the statutory standard for an EAJA award on other grounds, she does not need to address the merits of this argument.

[2] *See* May 26, 2023 Comptroller's Order on Joint Motion for Clarification at 1.

Procedural Background

The history of this case has been recounted at various points in prior orders,[3] but the pertinent details follow. On August 21, 2018, in the wake of the Supreme Court's *Lucia* decision,[4] Administrative Law Judge ("ALJ") C. Richard Miserendino replaced ALJ Christopher B. McNeil as presiding judge in this matter. ALJ Miserendino then retired, and the matter was reassigned to the undersigned on January 6, 2020 by Order of the Comptroller.

On January 8, 2020, the undersigned issued a Notice of Reassignment pursuant to the Comptroller's Order, directing the Parties to file whatever objections they wished to raise to the undersigned's appointment and to any previous actions taken by the prior ALJs by a certain date, to which the undersigned would then issue a decision on reconsideration of the objected-to actions. On March 6, 2020, Respondent filed objections to, among other things, the purported unconstitutionality of the undersigned's appointment and the appointment of the previous ALJs, the validity of the OCC signatory to the Notice of Charges, and the general structure of the Office of Financial Institution Adjudication ("OFIA") itself. On April 24, 2020, the undersigned issued an Order Reviewing Prior Administrative Law Judges' Prehearing Actions that considered and rejected Respondent's arguments on these issues in their entirety.

On May 28, 2020, Respondent filed an Initial Dispositive Motion in which she argued variously that (1) this action was untimely under the applicable statute of limitations; (2) the 12 U.S.C. § 481 and 18 U.S.C. § 1001 claims set forth in the Notice of Charges were legally deficient and should be dismissed; and (3) the Notice failed to state a claim for unsafe and unsound practices even if all of its allegations were taken as true. In orders issued on October 16, 2020 and March 1,

[3] *See* April 24, 2020 Order Reviewing Prior Administrative Law Judges' Prehearing Actions at 1-2; August 5, 2021 Order Regarding the Parties' Cross Motions for Summary Disposition ("SD Order"), *available at* 2021 WL 7906097, at 25-27; February 10, 2022 Recommended Decision, *available at* 2022 WL 1032840, at 27-28.

[4] *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

2021, the undersigned again rejected all of Respondent's arguments, concluding that the action was timely brought; that the Notice properly alleged violations of Sections 481 and 1001; and that "the Notice's allegations that Respondent knowingly and repeatedly lied to the OCC over a prolonged period and concealed a document central to the agency's examination of the Bank for which she acted as Chief Compliance Officer easily [met the] threshold" for a claim of unsafe or unsound practices.[5] In separate orders, the undersigned also granted in part Enforcement Counsel's June 25, 2020 Motion to Strike Respondent's Affirmative Defenses and declined to grant Respondent relief on her February 17, 2021 Motion to Prohibit Reliance on Secret Law.[6]

On June 1, 2021, following extensive discovery, the Parties filed cross-motions for summary disposition on all issues. In a 70-page order issued on August 5, 2021, the undersigned denied Respondent's motion in full and concluded that the undisputed material facts supported the grant of Enforcement Counsel's motion as to "certain aspects of the statutory elements of misconduct, culpability, and effect."[7] In so doing, the undersigned was guided (and, indeed, bound) by the Comptroller's articulation of the applicable standard in his 2017 *Blanton* decision:

> [I]t is reasonably well-settled that although a judge is barred from making credibility determinations, weighing evidence, and drawing inferences from facts at summary judgment, there is no genuine issue [of material fact] if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find for the non-movant. In other words, *in granting a motion for summary disposition[,] a trier of fact is not obliged to credit the non-moving party's factual assertions when they are not supported on the record.* When opposing parties tell two different stories, one of which is blatantly contradicted by the record, . . . a court should not adopt that version of the facts for purposes of ruling

[5] October 16, 2020 Order Recommending the Grant in Part and Denial in Part of Respondent's Initial Dispositive Motion, *available at* 2020 WL 13157348, at 51; *see also* March 1, 2021 Order Modifying Sections A2, B2, and B3 of this Tribunal's October 16, 2020 Order, *available at* 2021 WL 7906090.

[6] *See* October 27, 2020 Order Granting in Part and Denying in Part Enforcement Counsel's Motion to Strike Affirmative Defenses, *available at* 2020 WL 13157350; March 8, 2021 Order Regarding Respondent's Motion to Prohibit Reliance on Secret Law, *available at* https://www.ofia.gov/decisions.html.

[7] SD Order at 4.

> on a motion for summary judgment. *A court is not required to move a case past the summary judgment stage when inferences drawn from the evidence and upon which the non-moving party relies are implausible.* Finally, inferences may be drawn from underlying facts that are not in dispute, such as background or contextual facts, and assuming the existence of such underlying facts, an inference as to another material fact may be in favor of the non-movant only if it is rational and reasonable and permissible under the governing substantive law.[8]

With respect to the misconduct elements of Section 1818, the undersigned concluded as follows: First, that Respondent caused the Bank to violate its statutory duty under 12 U.S.C. § 481 "when she failed to provide the Crowe Report to OCC examiners upon request in March 2013, despite knowingly having that document in her possession and understanding it to be responsive to the OCC's inquiry."[9] Second, that Respondent violated 12 U.S.C. § 1001(a)(1) by "knowingly and willfully conceal[ing] material facts from OCC examiners regarding the nature of the Crowe work product provided to Bank officials in January and February 2013."[10] Third, that the information concealed by Respondent in her March 22, 2013 and March 25, 2013 emails had the propensity to influence "the OCC's actions and decision-making with respect to its examination of the Bank's BSA/AML program" and was therefore material.[11] Fourth, that Respondent's conduct constituted actionably unsafe and unsound practices that departed from an established standard of prudent operation and foreseeably exposed the Bank to an abnormal risk of loss or

[8] *In the Matter of William R. Blanton*, No. AA-EC-2015-24, 2017 WL 4510840, at *6 (July 10, 2017) (OCC final decision) ("*Blanton*"), *aff'd on other grounds*, *Blanton v. OCC*, 909 F.3d 1162 (D.C. Cir. 2018) (affirming recommended decision on summary disposition) (internal quotation marks and citations omitted) (emphases added); *see also* SD Order at 6, 59 n. 205 (citing *Blanton* for this proposition); Recommended Decision at 58 n. 247 (same).

[9] SD Order at 32; *see also id.* at 32-37.

[10] *Id.* at 37; *see also id.* at 39 (finding that if "Respondent is asked for a specific document that is in her possession, it is Respondent's duty to disclose the existence of that document rather than withholding it and contriving to create the impression that the document does not exist"), 40-43 (providing detailed examples of "Respondent's tendencies toward concealment" as reflected in underlying facts that are not in dispute).

[11] *Id.* at 48; *see also id.* at 46-49.

damage (and that the OCC examiner conclusions in this regard presented by Enforcement Counsel were based on "objectively verifiable facts" and entitled to significant deference).[12]

With respect to Section 1818's effect elements, the undersigned concluded that the Bank suffered actionable loss in February 2018 "by reason of" Respondent's misconduct when it pled guilty to obstructing the OCC's examination into its BSA/AML program and paid a $500,000 fine.[13] Specifically, the Bank's admission that it conspired with "Executive A" (an undisputed reference to Respondent) to make "false and misleading statements to the OCC regarding the existence of reports developed by a third-party consultant" during the OCC's 2013 examination undoubtedly linked the misconduct alleged in this action to the loss suffered by the Bank in connection with its guilty plea.[14] The undersigned also held that Respondent can cause the Bank to incur loss through payments made in furtherance of a plea agreement even if Respondent was not party to that prosecution, because "[a] bank's decision to plead guilty to a prosecution for some certain loss now rather than risking a much greater loss and more severe consequences later should not absolve from liability the individual on whose conduct such claims are based."[15] Finally, the undersigned applied case law from the Comptroller and OFIA's other constituent agencies to find that "as long as some of the loss as a result of that guilty plea is fairly attributable to Respondent," it is immaterial to the effect element that others may have also contributed to the Bank's loss through their misconduct.[16]

[12] *See id.* at 50-54.

[13] *See id.* at 55-59.

[14] *Id.* at 55 (internal quotation marks and citation omitted).

[15] *Id.* at 57.

[16] *Id.* at 58 (citing cases).

And with respect to the culpability element of 12 U.S.C. § 1818(e), the undersigned concluded that Respondent acted with personal dishonesty and willful disregard for the safety and soundness of the Bank based on the undisputed material facts of the case, even after resolving all reasonable inferences in favor of Respondent.[17] Although it is typically appropriate to resolve questions of culpability at the hearing stage rather than on summary disposition, the undersigned found that "[t]he extensive record of email evidence [did] not fairly admit to multiple interpretations of Respondent's actions other than that she knew that the Crowe Report and its contents were responsive to requests by [the OCC] and took steps to mislead the examiner, withhold the document, and convey the impression that it had not been provided to the Bank."[18] Respondent, moreover, offered no evidence in support of her position that she had responded to the OCC in good faith beyond an implausible post hoc characterization of her actions that was contradicted by the contemporaneous emails.[19] Bearing in mind *Blanton*'s maxim that "a trier of fact is not obliged to credit the non-moving party's factual assertions when they are not supported on the record," the undersigned therefore found that the culpability element had been met as to personal dishonesty and willful disregard.[20]

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[17] *See id.* at 59-63.

[18] *Id.* at 60.

[19] *See Blanton*, 2017 WL 4510840, at *6 ("A court is not required to move a case past the summary judgment stage when inferences drawn from the evidence and upon which the non-moving party relies are implausible.") (internal quotation marks and citation omitted); *see also*, *e.g.*, SD Order at 15-17 & n.62 (Respondent's contention that Bank management did not interpret the OCC examiner's March 25, 2013 request as encompassing the draft Crowe Report contradicted by "contemporaneous correspondence [that] reveals a clear understanding among Respondent and the Bank officials with whom she was communicating that the Crowe Report was the document to which [the examiner's] request most centrally referred"), 16-18 & n.69 (Respondent's litigation position that her reference to a "draft report" in her March 25, 2013 email to OCC examiner meant a PowerPoint deck rather than the Crowe Report contradicted by Respondent's correspondence immediately prior to that email in which she received multiple copies of "the draft Crowe Report" that she did not reference or share with the examiner), 35-36 (detailing additional ways in which Respondent's internal emails with her colleagues around the time of the OCC's requests are flatly inconsistent with her litigation position), 40-43 (same).

[20] *Blanton*, 2017 WL 4510840, at *6 (internal quotation marks and citation omitted); *see also In the Matter of Carl V. Thomas et al.*, Nos. 99-027-B-I, -CMP-I, & E-I, 2005 WL 1520020, at *7 (June 7, 2005) (FRB final decision) (finding Section 1818(e) culpability elements satisfied on summary disposition); *In the Matter of Charles F. Watts*,

There were a number of issues that were briefed but not resolved on summary disposition, including whether Respondent's misconduct constituted a violation of 18 U.S.C. § 1001(a)(2), whether the Bank suffered reputational harm as a result of that misconduct, and whether Respondent acted with continuing disregard for the Bank's safety and soundness.[21] However, because at least one aspect of each of the three necessary statutory elements of misconduct, effect, and culpability had been met, the Parties jointly agreed on August 16, 2021 to forgo a hearing on the outstanding prongs of those elements and to contest the lone remaining issue—that of the appropriateness of the proposed civil money penalty amount—on the papers.

The Parties briefed the civil money penalty issue on October 22, 2021, with responses filed on November 22, 2021. Respondent then requested and received leave to file a brief reply to the civil money penalty submissions on December 23, 2021. On February 10, 2022, the undersigned issued a 69-page Recommended Decision, which adopted the findings and conclusions of the summary disposition order and further concluded that $30,000, rather than the $50,000 sought in the Notice of Charges, was an appropriate monetary penalty for Respondent's misconduct.[22] The undersigned also rejected, once more, Respondent's argument that the proceedings were defective because the official who signed the Notice was unlawfully and unconstitutionally appointed.[23]

On April 18, 2022, Respondent filed her exceptions to the Recommended Decision pursuant to 12 C.F.R. § 19.39. These exceptions, which spanned 143 pages, reiterated all of

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Nos. 98-046e & -044k, 2002 WL 31259465, at *6 (Aug. 6, 2002) (FDIC final decision) (same); *cf. Brodie v. Dep't of HHS*, 715 F. Supp. 2d 74, 81-82 (D.D.C. 2010) (affirming ALJ's summary disposition against respondent where "the record . . . supported only one reasonable inference regarding [respondent's] state of mind: [that he] had been either knowing or reckless with regard to the falsification of information," and where respondent "had failed to offer any specific facts or evidence at the summary disposition stage that would support his claims of blamelessness or counter [the agency's] evidence").

[21] *See* SD Order at 69; Recommended Decision at 2 n.7.

[22] *See* Recommended Decision at 60-67.

[23] *See id.* at 67-69.

Respondent's constitutional and merits arguments from before this Tribunal as well as asserting, for the first time since a passing reference in her Answer, that her Seventh Amendment right had been violated due to the lack of a jury trial.[24] The Uniform Rules of Practice and Procedure that govern these proceedings do not provide Enforcement Counsel the opportunity to respond to a party's exceptions once they have been filed, *see generally* 12 C.F.R. § 19.39, and so Respondent's many arguments and selective characterizations of the factual record went unrebutted.

On April 5, 2023, the Comptroller issued his Final Decision, which concluded that the undersigned had misapplied the summary disposition standard by failing to appropriately credit Respondent's present-day denials of misconduct and culpability where they conflicted with contemporaneous record evidence.[25] Instead of remanding the case back to this Tribunal to act consistently with his instructions, the Comptroller opted to terminate the action against Respondent in its entirety "in the interest of adjudicatory efficiency and economy," citing the many years that had lapsed since the events that gave rise to the Notice's allegations, the prior delay in this action for reasons beyond the agency's control, and the difficulty inherent in asking "witnesses to accurately recall the events in question and their attendant states of mind."[26]

Notably, the Final Decision at no point reached the merits of the allegations against Respondent, concluded that the alleged conduct was not actionable, or suggested that the agency

[24] *See* Answer ¶ 12; Respondent's Exceptions to the Final Recommended Decision at 121-27. The Seventh Amendment issue was never substantively raised or addressed in this proceeding before the undersigned, who therefore had no occasion to rule on it. *See* 12 C.F.R. § 19.39(c)(1) ("All exceptions . . . must be confined to the particular matters in, or omissions from, the administrative law judge's recommendations to which that party takes exception.").

[25] *See* Final Decision, *available at* 2023 WL 2859144, at **8-9. The undersigned respectfully disagrees. *See* notes 8, 19, & 20 *supra* and supporting citations; *see also* Enforcement Counsel's Answer to Respondent's Application for an Award of Attorney's Fees and Costs Pursuant to the Equal Access to Justice Act ("EC Response") at 21 n.101 ("Self-serving statements by a party regarding elements of its case are generally entitled to so little weight that they are insufficient to survive a motion for summary judgment.") (citing cases).

[26] Final Decision at *11.

had been unjustified in bringing this action. To the contrary, the Comptroller repeatedly emphasized the seriousness of the Notice's allegations:

> The OCC should and must act when facts suggest that an Institution Affiliated Party ("IAP") is obstructing an examination or impeding a bank's response to an examiner's request for information.
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> [T]oday's decision in no way condones or vindicates Respondent's conduct.
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> The actions giving rise to the allegations of misconduct in this case are deeply troubling.
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> Based on the evidence in the current record, Rabobank executives appear to have demonstrated a troubling lack of responsiveness to OCC demands. The record shows that Respondent received a direct request from an OCC examiner to provide "a copy of the [Crowe] assessment report" on March 21, 2013. Instead of immediately furnishing all documents (i) within their possession and (ii) plainly responsive to the examiner's request, Respondent and her colleagues waited nearly a month before taking steps to hand them over. One plausible interpretation of the record is that Respondent and others adopted a strategy of deflection and delay designed to hinder the OCC's efforts (reflected by multiple written and oral requests) to collect these materials. This unacceptable delay—and, more troubling, possible lack of candor—is exactly the type of conduct that the OCC's enforcement ability is designed to deter.
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> It is certainly plausible that, after a hearing, a neutral factfinder could determine that Enforcement Counsel's interpretation of events is more credible than Respondent's. . . . The record evidence certainly suggests that, at minimum, the path to providing the OCC with the requested Crowe Report was not as straight as it should have been, and that Respondent played an important role in the deliberations within the Bank that resulted in the delay.[27]

[27] *Id.* at **2, 7, 9.

In other words, far from questioning the agency's decision to institute these proceedings or casting doubt upon Enforcement Counsel's legal theories or development of the factual record in any way, the Comptroller went out of his way to make it clear that the alleged misconduct was a valid predicate for an enforcement action and that it was, if nothing else, "certainly plausible" that Enforcement Counsel's version of the facts could ultimately prove to be the correct one, as the evidence already supported such a finding. Nonetheless, Respondent filed her EAJA application within the statutorily prescribed time, seeking $4.2 million in costs and fees on the grounds, *inter alia*, that "the OCC's legal and factual positions were egregiously wrong," that the enforcement action itself was "void from inception," and that Respondent was required to expend resources "to defend against the OCC's shifting tactics and theories seeking to salvage a case that should never have been brought."[28] It is to that application that the undersigned now turns.

EAJA Standard

The EAJA was enacted to "eliminat[e] financial disincentives for those who would defend against unjustified governmental action" and to "deter[] the unreasonable exercise of governmental authority."[29] In practice under 5 U.S.C. § 504,[30] this means that applicants who have been the "prevailing party" against an agency in an adversary adjudication and who meet other eligibility requirements are entitled to an award of reasonable costs and fees *unless*, upon review of the full administrative record, the official who presided at the adjudication finds that 1) "the position of the agency was substantially justified" or 2) "special circumstances make an award unjust."[31]

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[28] EAJA Application at 21, 28, 49.

[29] *Ardestani v. INS*, 502 U.S. 129, 130 (1991); *see also*, *e.g.*, *Sullivan v. Hudson*, 490 U.S. 877, 890 (1989).

[30] The EAJA comprises two statutory fee-shifting provisions that are similar but not identical: 28 U.S.C. § 2412, which covers civil judicial proceedings brought by or against the government, and 5 U.S.C. § 504, which applies to administrative proceedings such as the enforcement action at issue here.

[31] 5 U.S.C. § 504(a)(1). As noted *supra*, as the officer who presided at the adversary adjudication, the undersigned was referred Respondent's EAJA application for review by order of the Comptroller dated May 26, 2023.

With respect to the substantial justification requirement, it is unnecessary for the agency's position to be retrospectively deemed "correct" or even better-founded than the contrary arguments asserted by the respondent during the proceeding, so long as it—and the decision to commence and prosecute the action[32]—"was, on the whole, 'justified to a degree that could satisfy a reasonable person.'"[33] As the Supreme Court has observed, "[c]onceivably, the Government could take a position that is not substantially justified, yet win; even more likely, it could take a position that is substantially justified, yet lose."[34] For these purposes, then, "[a] position is substantially justified if the underlying agency action and the legal arguments in defense of the action had 'a reasonable basis both in law and fact.'"[35] In *Hill v. Gould*, for example, the D.C. Circuit found that the substantial justification standard had been met when the agency had taken "a reasoned position on a novel issue" and "a reasonable approach to [a] relatively unsettled area of administrative law," in contrast to a position that was "flatly at odds with the controlling caselaw" or pressed by the agency "in the face of an unbroken line of [contrary] authority or against a string of losses."[36]

Analysis

Here, there can be no doubt that the agency's position was substantially justified. Respondent describes this action as "a false statements case without false statements; a concealment case without concealment; and a case about failing to disclose documents that were

[32] The "position of the agency" is defined in the EAJA as both "the position taken by the agency in the adversary adjudication" as well as "the action or failure to act by the agency upon which the adversary adjudication is based." 5 U.S.C. § 504(b)(1)(E).

[33] *Hill v. Gould*, 555 F.3d 1003, 1008 (D.C. Cir. 2009) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)); *see also*, *e.g.*, *Pierce*, 487 U.S. at 566 n.2 ("[A] position can be substantially justified even though it is not correct, and we believe that it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct.").

[34] *Pierce*, 487 U.S. at 569.

[35] *Hill*, 555 F.3d at 1006 (quoting *Pierce*, 487 U.S. at 565).

[36] *Id.* at 1007-08.

disclosed on the exact timeframe to which the OCC agreed."[37] But this is the same argument, nearly to the letter, that Respondent made at the outset of her summary disposition briefing.[38] It was not persuasive before, and nothing has changed. Neither does Respondent's reiteration of any other merits arguments previously and unsuccessfully raised in this action yield any different result at this stage; the facts and law that led the undersigned, earlier in this proceeding, to agree with Enforcement Counsel regarding the materiality of the Crowe Report, for example, have equal force here and now.[39] To the extent that Respondent presently argues that Enforcement Counsel's theory of the case is not just wrong but *so wrong* that she is entitled to a multi-million dollar award, the many rulings against Respondent on merits issues throughout this proceeding are evidence, at the very least, that the undersigned does not share that view.

Likewise, with the exception of Respondent's newly-developed Seventh Amendment argument, the undersigned has already considered and rejected the many "tribunal objections" that Respondent again asserts as to the validity of the underlying action or the vindication of Respondent's right to due process. The undersigned has repeatedly concluded, for instance, that the individual who signed the Notice on behalf of the OCC, Deputy Comptroller for Special Supervision Michael Brickman, is a "mere employee" whose appointment was not subject to the

[37] EAJA Application at 2.

[38] *See* Respondent's Motion for Summary Disposition and Memorandum of Law in Support at 1.

[39] The undersigned notes that Respondent inaccurately characterizes the Recommended Decision as concluding that "the draft Crowe documents lacked materiality" for purposes of 18 U.S.C. § 1001. EAJA Application at 25. As both the summary disposition order and the Recommended Decision make clear, the undersigned unequivocally agrees with Enforcement Counsel's position that the information allegedly concealed by Respondent regarding the Crowe Report satisfies Section 1001's materiality threshold. *See* SD Order at 46-50; Recommended Decision at 45-50. Respondent's assertion to the contrary in her EAJA application misleadingly conflates a discussion of potential mitigating factors for the civil money penalty amount with the legal standard for materiality under Section 1001. *See* EAJA Application at 24-25; Recommended Decision at 64-65. The fact that "the concealment was brief and [] the examination itself was to all appearances unaffected in the end by Respondent's actions," Recommended Decision at 64, has no bearing on whether knowledge of the Crowe Report and its conclusions had the propensity to influence OCC examiners' decision-making for materiality purposes, which it undoubtedly did. *See id.* at 48.

Appointments Clause yet who could be validly delegated the authority to issue Notices of Charges.[40] Respondent may take as read, then, that the agency's position on that issue meets the substantial justification standard sufficient to rebuff an application for fees and costs under the EAJA.[41] And while Enforcement Counsel did not have occasion to take a position on Respondent's purported Seventh Amendment entitlement to a jury trial in this matter while it was before this Tribunal, the undersigned does not agree with Respondent (*see* EAJA Application at 37-39) that such a right attaches to Section 1818 enforcement actions.[42]

Nor does the Final Decision rescue Respondent's application. To the limited extent that the Comptroller there spoke to the substance of the underlying claims against Respondent, he took care to emphasize the seriousness of the Notice's allegations.[43] Furthermore, although the Comptroller did not rule on any merits issues and expressly declined to consider Respondent's numerous other exceptions to the proceeding,[44] the Final Decision also noted multiple times that the record evidence offered substantial support for Enforcement Counsel's legal position.[45] And

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[40] *See* Recommended Decision at 67-68; SD Order at 68; April 24, 2020 Order Reviewing Prior Administrative Law Judges' Prehearing Actions at 6; *see also* 12 U.S.C. § 4a (providing that the Comptroller "may delegate to *any duly authorized employee*, representative, or agent *any power* vested in the office by law") (emphases added); *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976) ("Employees are lesser functionaries subordinate to officers of the United States."); *Lucia*, 138 S. Ct. at 2051 (distinguishing between constitutional officers and "mere employees").

[41] *See* EAJA Application at 28-30 (arguing that "[t]here was no substantial justification for the agency to prosecute [Respondent] for years based on a void accusatory instrument issued by a non-constitutionally-appointed officer").

[42] *See*, *e.g.*, Order No. 4: Granting Requests for Hearing and Denying Demands for Jury Trial, *In the Matter of Robert S. Catanzaro et al.*, FDIC Nos. 22-0112e, -0113k, -0107e, -0108k, -0143b, -0109e, & -0110k, 2023 WL 2859145, at **1-3 (Mar. 21, 2023) (OFIA) (holding that "this action concerns the adjudication of public rights, for which the Seventh Amendment does not guarantee a jury trial"); Order Denying Respondents' Demand For Jury Trial and Motion to Dismiss, *In the Matter of Saul Ortega and David Rogers, Jr.*, OCC Nos. AA-EC-2017-44 & -45, 2022 WL 2668526, at **1-3 (July 7, 2022) (OFIA) (same).

[43] *See* Final Decision at **2 (stating that the agency "should and must act when facts suggest that an [IAP] is obstructing an examination or impeding a bank's response to an examiner's request for information"), 7 (noting that "[t]he actions giving rise to the allegations of misconduct in this case are deeply troubling").

[44] *See id.* at *11 (concluding that "[b]ecause this action is now dismissed, the remaining issues raised in the Parties' exceptions and any pending motions are moot").

[45] *See id.* at **7 ("Based on the evidence in the current record, Rabobank executives appear to have demonstrated a troubling lack of responsiveness to OCC demands. . . . This unacceptable delay—and, more troubling, possible lack of candor—is exactly the type of conduct that the OCC's enforcement ability is designed to deter."), 9 ("The record

certainly there is no suggestion that the arguments advanced by Enforcement Counsel were "flatly at odds with the controlling caselaw" or pressed "in the face of an unbroken line of authority."[46] From the Comptroller's apparent perspective as well as that of the undersigned, then, both "the underlying agency action and the legal arguments in defense of the action had 'a reasonable basis both in law and fact'" that easily clears the EAJA's substantial justification threshold.[47]

In summary, Respondent's contention that the agency's position in this case was not substantially justified—as necessary for an award under the EAJA—rests on factual and legal arguments that the undersigned has already considered and deemed non-meritorious over the course of the proceeding. Both the undersigned and the Comptroller, on the strength of the administrative record as a whole, also find it plausible, at minimum, that Enforcement Counsel's interpretation of the events at issue, and its legal theories regarding those events, would have prevailed had the matter proceeded to hearing.[48] In other words, as Enforcement Counsel puts it, "there is ample evidence that [Respondent] violated laws and engaged in unsafe and unsound practices, and that Enforcement Counsel satisfied the requisite elements of 12 U.S.C. §§ 1818(e) and (i)," even if in this instance the matter has been terminated for reasons unrelated to the merits of the underlying case.[49] Accordingly, Respondent's EAJA application does not meet the statutory criteria of 5 U.S.C. § 504(a)(1), and it is therefore DENIED.

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evidence certainly suggests that, at minimum, the path to providing the OCC with the requested Crowe Report was not as straight as it should have been, and that Respondent played an important role in the deliberations within the Bank that resulted in the delay.").

[46] *Hill*, 555 F.3d at 1007-08.

[47] *Id.* at 1006 (quoting *Pierce*, 487 U.S. at 565).

[48] *See* Final Decision at *9 (stating that "[i]t is certainly plausible that, after a hearing, a neutral factfinder could determine that Enforcement Counsel's interpretation of events is more credible than Respondent's")

[49] EC Response at 36.

Enforcement Counsel's Other Arguments

In addition to arguing that its position in this action was substantially justified, Enforcement Counsel contends that Respondent's EAJA application should be denied because Respondent is not a "prevailing party" within the meaning of the statute and because Respondent herself did not incur the fees and costs that she now seeks to recoup.[50] Enforcement Counsel also argues that "special circumstances would make an award unjust" and that the fees and expenses sought by Respondent are both unreasonable and unsupported.[51] Because the undersigned concludes, for the reasons above, that denial of Respondent's Application is warranted on the grounds that the agency's position was substantially justified, it is unnecessary to address any of Enforcement Counsel's additional arguments.

SO ORDERED.

Dated: June 14, 2023

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication

[50] *See id.* at 31-35.

[51] *Id.* at 35 (quoting 5 U.S.C. § 504(a)(1)) (alteration in original); *see id.* at 36-37 & Appendix A.

CERTIFICATE OF SERVICE

On June 14, 2023, I served a copy of the foregoing **Order** upon the following individuals via email:

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