

**FEDERAL DEPOSIT INSURANCE CORPORATION  
WASHINGTON, D.C.**

In the Matter of:

**CBW BANK**  
Weir, Kansas

(Insured State Nonmember Bank)

Docket No.:  
FDIC-22-0171k

**ORDER NO. 11: DENYING MOTION FOR RECOMMENDATION OF DISMISSAL  
AND STAY**

On February 25, 2025, CBW Bank (“Respondent”) filed a “Motion For Recommendation of Dismissal and Stay” (“Motion”), arguing that this Tribunal should stay the above-captioned enforcement proceeding and recommend to the Federal Deposit Insurance Corporation (“FDIC”) Board of Directors that it be dismissed with prejudice on the grounds that this Tribunal’s administrative law judges (“ALJs”) are “unconstitutionally insulated from presidential control” through two layers of “for-cause” removal protection. Motion at 2. On March 5, 2025, Enforcement Counsel for the FDIC (“Enforcement Counsel”) filed an opposition to the Motion (“Opposition”), contending among other things that Respondent’s desired relief is inappropriate regardless of the constitutionality of ALJ removal protections unless Respondent can show that “‘but for’ the allegedly unconstitutional removal provisions, the ALJ would have been removed or the proceedings would be different,” which it has not done. Opposition at 3. For the reasons below, the undersigned agrees with Enforcement Counsel and denies Respondent’s Motion.<sup>1</sup>

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<sup>1</sup> The Uniform Rules of Practice and Procedure (“Uniform Rules”) that govern these proceedings contain no specific provision regarding the mechanics of this Tribunal’s consideration of dispositive motions other than motions for summary disposition. *See* 12 C.F.R. § 308.23(f) (providing that “[d]ispositive motions are governed by §§ 308.29 and 308.30”); *see also id.* §§ 308.29 (summary disposition), 308.30 (partial summary disposition). Enforcement Counsel therefore asserts that Respondent’s Motion, being dispositive, should be treated as a summary disposition motion under the Uniform Rules—which would require, *inter alia*, that Respondent provide a “statement of material facts as to which the moving party contends there is no genuine issue,” *id.* § 308.29(b)(2)—and assessed under that standard. *See* Opposition at 2. The undersigned observes that the threshold nature of Respondent’s Motion more resembles a motion to dismiss under Rule 12 of the Federal Rules of Civil Procedure, which standards the undersigned has adopted and applied as appropriate in the past to those few and discouraged motions seeking dispositive relief other than

According to Respondent, this matter should be dismissed pursuant to a February 20, 2025 determination by the Department of Justice that “multiple layers of removal restrictions shielding [ALJs] are unconstitutional” and a subsequent filing by FDIC counsel in federal district court on February 24, 2025, notifying the district court judge—in an action involving a collateral attack on these proceedings by Respondent that has since been dismissed on jurisdictional grounds<sup>2</sup>—that the FDIC would no longer defend the constitutionality of ALJ removal restrictions as a result. Motion at 2 (quoting Motion, Ex. A). As Enforcement Counsel points out, however, constitutional defects in the removability of ALJs do not perforce render the underlying enforcement proceeding unconstitutional, even assuming such defects exist. *See* Opposition at 3-4. In *Collins v. Yellen*, the Supreme Court concluded that even where removal provisions for an officer are unconstitutional, “there is no reason to regard any of the actions taken by [that officer] as void” as long as the officer had been constitutionally appointed in the first instance.<sup>3</sup> And drawing on *Collins* in *Leachco, Inc. v. Consumer Product Safety Commission*, the Tenth Circuit held that parties challenging the validity of agency proceedings on the grounds of unconstitutional removability are not entitled to relief unless they can “demonstrate that the unconstitutional removal provision actually affected the agency’s decision or conduct against [them].”<sup>4</sup> The *Leachco* court thus made it clear that “mere

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summary disposition at the outset of a proceeding. *See, e.g.*, Order Denying Enforcement Counsel’s Motion for Default and Respondent’s Omnibus Motion to Dismiss, *In the Matter of Richard Usher*, No. AA-EC-2017-3, 2020 WL 13157345, at \*1 n.1 (OFIA July 21, 2020). In this instance, the distinction is largely immaterial, as the undersigned concludes that Respondent is not entitled to relief as a matter of law under either standard. The undersigned also notes that given the prescription in the Uniform Rules that only the FDIC Board of Directors is empowered “to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding,” 12 C.F.R. § 308.5(b)(7), any conclusion that Respondent was entitled to dispositive relief here (which, again, it is not) would be merely recommendatory in any event, just as the ALJ may only recommend, rather than grant, the entry of summary disposition in appropriate cases, *see id.* § 308.29(a).

<sup>2</sup> *See CBW Bank v. FDIC*, No. 24-2535-DDC-BGS, 2025 WL 671567 (D. Kansas Mar. 3, 2025) (dismissing case for lack of subject-matter jurisdiction under 12 U.S.C. § 1818(i)(1)).

<sup>3</sup> *Collins v. Yellen*, 594 U.S. 220, 257-58 (2021) (declining to grant relief voiding the actions of agency directors where, “[a]lthough the statute unconstitutionally limited the President’s authority to remove the confirmed Directors, there was no constitutional defect in the statutorily prescribed method of appointment to that office”).

<sup>4</sup> *Leachco, Inc. v. CPSC*, 103 F.4th 748, 756 (10th Cir. 2024); *see also Collins*, 594 U.S. at 260 (opining that unconstitutional removal provisions could cause “compensable harm” if “the President had attempted to remove [an

subjection to administrative proceedings before an agency whose officials possess unconstitutional removal protections” does not constitute a compensable harm or mandate the dismissal of those proceedings.<sup>5</sup>

Here, Respondent has not alleged that the undersigned, as an ALJ empowered to preside over these proceedings, has been unconstitutionally appointed. Nor, as with *Leachco*, has Respondent made “any showing that, but for the allegedly unconstitutional removal provisions, the [ALJ presiding over this matter] would have been removed, the [] proceedings against it would not be occurring, or the proceedings would be different in any way.”<sup>6</sup> Consequently, Respondent has not demonstrated that it is entitled to any relief here, let alone a recommendation of wholesale dismissal of the proceedings against it, and its Motion is **DENIED**.<sup>7</sup>

**SO ORDERED.**



Issued: March 21, 2025

Jennifer Whang, Administrative Law Judge  
Office of Financial Institution Adjudication

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officer protected by those provisions] but was prevented from doing so by a lower court decision holding that he did not have ‘cause’ for removal”); *accord Integrity Advance LLC v. CFPB*, 48 F.4th 1161, 1170 (10th Cir. 2022) (applying this aspect of *Collins*). This Tribunal looks to Tenth Circuit law because, as the circuit in which the home office of the depository institution in question—that is, Respondent—is located, it is one of two fora to which Respondent is entitled to appeal any final decision of the FDIC Board of Directors in these proceedings, the other being the D.C. Circuit. *See* 12 U.S.C. § 1818(h)(2).

<sup>5</sup> *Leachco*, 103 F.4th at 753. Further, the fact that *Collins* involved a challenge to past agency actions rather than an ongoing proceeding is of no moment, because the Tenth Circuit—along with the Second, Fifth, and Sixth Circuits—has held that the analysis in *Collins* “applies to both retrospective and prospective relief.” *Id.* at 757 (citing cases).

<sup>6</sup> *Id.*

<sup>7</sup> On March 20, 2025, Respondent filed a Request for Leave to File Reply in support of its Motion, which included six pages of argumentation seeking to distinguish *Collins* and otherwise respond to Enforcement Counsel’s Opposition. The undersigned’s Ground Rules provide that leave to file a reply is “reserved only for very limited situations in which . . . a reply is genuinely necessary to address a material misstatement of law or fact, a new argument raised in the opposing party’s response, or an intervening change in controlling authority.” Order No. 5: Issuance of Ground Rules at 5 n.14 (Jan. 20, 2025). Having reviewed Respondent’s Request for Leave, which in its lengthy arguments impermissibly doubles as a reply itself, the undersigned concludes that Respondent does not meet that standard. However, Respondent’s additional contentions regarding *Collins* and otherwise are noted and preserved for later review as warranted by the FDIC Board of Directors. (The Request for Leave curiously does not address *Leachco* in any way, despite it being a principal authority in Enforcement Counsel’s Opposition—although the case is mentioned in passing, and without engaging in the holding at issue here, in footnote 5 of Respondent’s Motion.)

## CERTIFICATE OF SERVICE

On March 21, 2025, I served a copy of this **Order** upon the following individuals via email:

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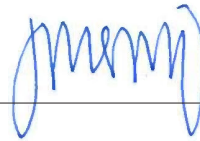
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