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

In the Matter of: **ROHAN RAMCHANDANI**, Former Head of European FX Spot Trading Citibank, N.A. Sioux Falls, South Dakota	Docket No.: AA-EC-2017-2

ORDER DENYING RESPONDENT'S MOTION TO DISMISS THE NOTICE OF CHARGES FOR PROHIBITION AND ASSESSMENT OF CIVIL MONEY PENALTY

Respondent Rohan Ramchandani ("Respondent") has moved to dismiss the Notice of Charges for Prohibition and Notice of Assessment of Civil Money Penalty ("Notice") brought against him by the Office of the Comptroller of the Currency ("OCC") on the grounds that these proceedings have been unreasonably delayed and that he has been prejudiced as a result. For the reasons set forth in this Order, Respondent's Motion is denied.[1]

Background

A summary of the proceedings thus far is in order, as it bears directly on the instant Motion. The OCC initiated this action by filing its Notice on January 10, 2017, seeking an order of prohibition and the assessment of a civil money penalty against Respondent. On February 27, 2017, this matter was stayed by Administrative Law Judge ("ALJ") Christopher McNeil by request

[1] Under the OCC's Uniform Rules of Practice and Procedure ("Uniform Rules"), "only the 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 merits of the proceeding." 12 C.F.R. § 19.5(b)(7). Thus, even if the undersigned were to determine that dismissal of this action on the grounds asserted by Respondent was justified, this tribunal could do no more than recommend to the Comptroller that such a request be granted (an action for which there exists no specific provision in the Uniform Rules). While such a limitation on this tribunal's authority is immaterial in this instance, as dismissal is not, in the undersigned's view, warranted, the undersigned cautions the parties against the liberal filing of motions that this tribunal lacks the power to grant.

of the Attorney General pending the resolution of a parallel criminal proceeding. On August 21, 2018, the Comptroller of the Currency ("Comptroller") reassigned this matter to ALJ C. Richard Miserendino following the Supreme Court's decision in *Lucia v. SEC*, which held that ALJs at the Securities and Exchange Commission were "inferior officers of the United States" subject to the strictures of the Appointments Clause of the United States Constitution.[2] The Comptroller explained that, in accordance with *Lucia*, "any pending proceedings [would] be reassigned, where practicable, to [a properly appointed] ALJ who had not been previously engaged in the case."[3]

In his August 24, 2018 Notice of Case Reassignment and Opportunity to File Objection and Response, consistent with the direction of the Comptroller's Order, ALJ Miserendino permitted the parties to file objections "[b]y no later than October 5, 2018" to any prior orders issued in this action by ALJ McNeil. Neither party filed any objection by the October deadline or, for that matter, sought to clarify the applicability of that deadline with the action still stayed.

On November 13, 2018, upon notification of the conclusion of the parallel criminal proceeding against Respondent, ALJ Miserendino lifted the stay in this action. Again, neither party filed objections pursuant to the August 24, 2018 Order or otherwise endeavored to move the matter immediately forward. One and a half months later, without any further filings in the case, ALJ Miserendino retired. Because ALJ McNeil was the only other ALJ at the Office of Financial Institution Adjudication ("OFIA") at that time,[4] and because he could not take the case again by

---

[2] 585 U.S. __, 138 S.Ct. 2044 (2018); *see* Order in Pending Enforcement Cases in Response to *Lucia v. SEC* (August 21, 2018) ("Order").

[3] Order at 1.

[4] *See* 12 C.F.R. §§ 19.101, 109.101 (all OCC enforcement proceedings to be conducted by OFIA ALJs); *see also* Financial Institution Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. 101-73, title IX, § 916, 103 Stat. 486, 12 U.S.C. § 1818 note (1989) (Improved Administrative Hearings and Procedures) (directing certain federal banking agencies, including OCC, to jointly establish pool of ALJs to hear enforcement actions).

the terms of the Comptroller's Order, this matter was for all intents and purposes, albeit not formally, stayed again in January 2019 until another ALJ could be appointed.

On November 14, 2019, Secretary of the Treasury Steven T. Mnuchin approved the appointment of the undersigned as an OFIA ALJ assigned to hear OCC administrative enforcement proceedings. On January 6, 2020, the Comptroller issued an Order reassigning this matter to the undersigned, who then promptly notified the parties of this reassignment and directed them to file, by February 14, 2020, any objections they may have to the reassignment or any actions taken in the case by either of the prior ALJs.[5] Between the time of ALJ Miserendino's retirement and the undersigned's assignment to this case, neither Respondent nor OCC Enforcement Counsel ("Enforcement Counsel") made any filing in this action or in any way sought to expedite proceedings before this tribunal.

Argument and Analysis

Respondent now objects to the pace of these proceedings and moves to dismiss the Notice against him on the grounds of unreasonable delay.[6] He contends that "the OCC has deprived [him] of a hearing on its charges for *well over a year*" from the point that the stay was lifted in November 2018, a failure of action that "reflects a total disregard for the procedural requirements mandated by Congress" in 12 U.S.C. § 1818(e)(4). Motion at 3-4 (emphasis in original). Respondent further claims that he has been significantly prejudiced as a result, "both in mounting a defense and in pursuing his professional career," and that dismissal of this matter is therefore warranted. *Id.* at 7. In response, Enforcement Counsel argues that the OCC has acted in good faith in prosecuting these proceedings, that the matter has been delayed for reasons largely beyond the OCC's control, that

---

[5] *See* Notice of Reassignment and Order Regarding the Comptroller of the Currency's Order in Pending Enforcement Cases, issued on January 8, 2020.

[6] *See* Motion to Dismiss the Notice of Charges for Prohibition and Assessment of Civil Money Penalty ("Motion"), filed on February 13, 2020.

dismissal would not be an appropriate remedy in these circumstances, and that Respondent has failed to demonstrate prejudice with respect to either his ability to mount a defense or his professional prospects.[7] The undersigned agrees with Enforcement Counsel.

Section 1818(e)(4) provides, in relevant part, that a hearing on a notice seeking an order of prohibition "shall be fixed for a date not . . . later than sixty days after the date of service of such notice, unless an earlier or later date is set by the agency at the request of (A) [the charged] party, . . . or (B) the Attorney General of the United States."[8] Here, Enforcement Counsel has certified that service was effected on Respondent's address in the United Kingdom on January 17, 2017, and on Respondent's counsel on February 1, 2017.[9] Thus, in the ordinary course of events, an adjudicatory hearing on the Notice against Respondent was required to have taken place no more than sixty days after the effective service date – for these purposes, assume Monday, April 3, 2017 at the latest – absent Respondent's consent to a later date or (as in fact occurred) the intervention of the Attorney General, who requested that the matter be stayed indefinitely.

In practice, however, Section 1818(e)(4)'s sixty-day timeframe is rarely observed in enforcement actions before this tribunal: not because the Attorney General typically intervenes or because the agencies routinely violate the statute, but because it is generally in respondents' interests to agree to a schedule allowing more time before the hearing so that they may, for example, conduct document discovery, file dispositive motions, and otherwise vigorously contest the charges against them in a way that would not be possible if both parties hurtled headlong into an adjudication two months after those charges had been served.

---

[7] *See* OCC's Opposition to Respondent's Motion to Dismiss ("Opposition"), filed on February 28, 2020.

[8] 12 U.S.C. § 1818(e)(4). As Enforcement Counsel notes, no similar statutory timeframe exists during which a hearing on the OCC's assessment of a civil money penalty must be fixed. *See* Opposition at 3.

[9] *See* Second Amended Certificate of Service, filed on January 17, 2017; Supplemental Certificate of Service, filed on February 1, 2017.

Indeed, it is almost certain that this matter would have extended long past the timeframe contemplated in Section 1818(e)(4), with Respondent's consent, even were it not for the Attorney General's stay request. On February 2, 2017, Respondent moved ALJ McNeil for an additional sixty days simply to file an answer in this matter, the very first step that the Uniform Rules required of Respondent on the road to a hearing.[10] ALJ McNeil denied this motion and ordered a telephonic scheduling conference on February 28, 2017, proposing a deadline of August 15, 2017 for the completion of discovery.[11] That parallel criminal proceedings prompted a stay of this action shortly before that scheduling conference does not obscure the reality that Respondent had sought and, had the action not been stayed, was poised to agree to a pre-hearing timeframe in this matter stretching well beyond the sixty-day default outer limit prescribed by Section 1818(e)(4).

Enforcement Counsel contends that once the Attorney General has requested a stay of an action seeking an order of prohibition, Section 1818(e)(4)'s time limits are no longer relevant even when the stay has been lifted, leaving the agency "with complete discretion to set a hearing date." Opposition at 12. It is unnecessary to resolve that question, because even if the sixty-day clock began to run anew upon the lifting of the stay on November 13, 2018, there is nothing to suggest that a violation of Section 1818(e)(4) – to the extent that one occurred – should perforce result in dismissal of the action, and dismissal is not merited here. In *Brock v. Pierce County*, the Supreme Court addressed whether the failure of the Secretary of Labor to issue a final determination regarding the recovery of misspent funds within the statutorily-mandated timeframe necessarily divested the Secretary of all further power to act in that case.[12] The Court concluded that it did not,

---

[10] *See* 12 C.F.R. § 19.19(c) (noting that "[f]ailure of a respondent to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice").

[11] *See id.* § 19.31(a) (scheduling conference to be held within thirty days of service of notice).

[12] 476 U.S. 253, 258-62 (1986).

"especially when important public rights are at stake . . . [and] there are less drastic remedies available for failure to meet a statutory deadline."[13] The *Brock* Court noted further that assuming that Congress intended such a deadline to be treated as jurisdictional, if it did not expressly say so, was particularly inappropriate when the statute requires that a "substantial task" such as the resolution of an entire dispute be completed within a specified timeframe, given that an agency's ability to timely complete that task may be "subject to factors beyond [its] control."[14]

As in *Brock*, the statute here directs that an agency "shall" complete a significant task – in this case, the pre-hearing process for an OCC enforcement action and adjudication, as governed by a uniform set of procedural rules established by direction of Congress[15] – in a certain amount of time. Important public rights are at stake, namely the protection of the federal banking system from unsafe or unsound practices or other violative conduct or breach of fiduciary duty that could jeopardize the stability of financial institutions or prejudice the interests of depositors.[16] Less drastic remedies for the agency's untimeliness are available, namely a reinstitution of proceedings upon petition of a respondent aggrieved by the delay. And the length of the enforcement proceeding is self-evidently subject to factors outside of the OCC's control, ranging in this case from the stay itself to ramifications of the *Lucia* decision to ALJ Miserendino's retirement.

In the Matter of First National Bank ("*First National Bank*"), a pre-*Brock* OCC decision discussed by both parties, also is instructive.[17] There, the Comptroller interpreted a related

---

[13] *Id.* at 260.
[14] *Id.* at 261.
[15] *See* FIRREA, Pub. L. 101-73, title IX, § 916, 103 Stat. 486, 12 U.S.C. § 1818 note (1989) (Improved Administrative Hearings and Procedures) (directing certain federal banking agencies, including OCC, to "develop a set of uniform rules and procedures for administrative [enforcement] hearings, including provisions for summary judgment rulings where there are no disputes as to material facts of the case").
[16] *See* 12 U.S.C. § 1818(e).
[17] *In the Matter of First National Bank of ***, ***, ****, Dkt. No. AA-EC-85-127, 1986 WL 236392 (May 13, 1986).

provision of 12 U.S.C. § 1818 with an identically mandatory sixty-day timeframe in which to hold a hearing in a cease and desist proceeding.[18] The enforcement counsel in that case argued that the OCC had "made a good faith attempt to hold the hearing within the statutory time limit, but due to factors beyond its control, was unable to comply."[19] Specifically, although the OCC had (in that pre-OFIA era) requested the use of an ALJ for the proceeding in November 1986, one was not appointed until two months later, and in the intervening time the statutory hearing deadline had passed.[20] While the respondent contended that the proper remedy for such untimeliness was dismissal of the action, the Comptroller disagreed, finding that the statute was "directory only," that delays resulting from the appointment of an ALJ were "not unusual," that "a good faith effort was made to obtain an [ALJ] in a timely manner," and that the respondent had not been substantively prejudiced.[21] The Comptroller also noted that dismissal would not serve the purpose of the statute, which was "to enhance the Comptroller's authority to promote and assure the financial stability of national banks."[22]

Brock and *First National Bank* demonstrate why Respondent's narrative of disregard and inaction by the OCC following the stay being lifted omits important context. Respondent contrasts this case with *First National Bank* by asserting that "the OCC pursued the matter diligently and missed the hearing deadline by only a few months" in that case, while here "the OCC allowed this matter to lie dormant for more than fifteen months" after resolution of the criminal proceedings in late October 2018. Motion at 5. Yet this sorely overstates the role of the OCC in prolonging or delaying proceedings against Respondent. Here, as in *First National Bank*, the agency found itself

---

[18] *See id.* at *1 (citing 12 U.S.C. § 1818(b)(1)).
[19] *Id.*
[20] *See id.*
[21] *Id.* at **2, 4, 5.
[22] *Id.* at *4.

without an ALJ to whom it could assign the matter. Here, as in *First National Bank*, the agency was ready to proceed as soon as an ALJ was appointed. The most material difference is that the process of finding and appointing an ALJ in *First National Bank* took two months, whereas here it took approximately one year – and the undersigned notes that the month and a half of that period between the undersigned's appointment in mid-November 2019 and her assignment to this matter in early January 2020 spanned the holiday season, a time when some sluggishness in the gears of government is both inevitable and understandable. Moreover, where in *First National Bank* the agency took steps to obtain an ALJ to preside over the proceedings by requisitioning one from the Office of Personnel Management,[23] here the process of replacing ALJ Miserendino required the coordination and agreement of four agencies,[24] with all the potential for delay that this entails, and it is unclear that the OCC could have sped up the appointment significantly even had it sought to do so. The undersigned will not penalize the OCC for the sometimes halting nature of the federal appointment process.

According to Respondent, the delay in this case "simply cannot be reconciled with" a good faith effort by the OCC "to adjudicate charges in a timely manner." Motion at 5-6. Indeed, Respondent returns to this point time and again with rhetorical flourish: "the OCC has left [Respondent] in limbo,"[25] "the OCC has done *nothing*,"[26] "the OCC's flouting of procedural requirements,"[27] "the OCC went dark."[28] But Respondent nowhere elaborates as to which specific points in the process he believes the OCC has dragged its feet and what more the agency could

---

[23] *See id.* at *1.
[24] *See* FIRREA, Pub. L. 101-73, title IX, § 916, 103 Stat. 486, 12 U.S.C. § 1818 note (1989) (Improved Administrative Hearings and Procedures) (directing that "appropriate Federal banking agencies . . . jointly establish their own pool of administrative law judges").
[25] Motion at 1.
[26] *Id.* at 3 (emphasis in original).
[27] *Id.* at 8.
[28] *Id.* at 9.

have done, given the circumstances. It is one thing to say that the OCC should have more actively prosecuted this enforcement action in the eleven months following ALJ Miserendino's retirement – and Respondent, somehow, does not say even that, as the retirement and the vacuum it created are not mentioned at all in the whole of the Motion – but the suggestion of bad faith rings hollow without supporting details as to how the agency has been remiss, let alone some acknowledgment that, largely, the delay in this case has been caused by external factors that neither the OCC nor Respondent had much power to alter.

Could the OCC have taken some action to restart these proceedings in the interregnum, sometime between January and November 2019, despite the absence of an ALJ? The Comptroller was certainly so empowered to take over the case entirely if he chose, although doing so would have required an affirmative and unusual step divergent from normal practice under the OCC's Uniform Rules.[29] But Respondent offers no reason why it should have been incumbent or expected, during the indeterminate period while a new ALJ was being found to replace ALJ Miserendino, for the Comptroller to assume an active adjudicative role in Respondent's case or any of the other then-pending enforcement actions that had temporarily been put on hold.

More to the point, there was no reason why Respondent himself could not have petitioned the Comptroller to restart proceedings, if the delay was causing him increasing prejudice. If nothing else, to prompt things along, Respondent could have sought leave to file his dispositive motion on the issue of personal jurisdiction, which – as the parties note in their February 28, 2020 joint status report – was "originally due by February 27, 2017, with responses due no later than March 27, 2017," before the stay interrupted proceedings. Joint Status Report at 3. Alternately,

[29] *Compare* 12 C.F.R. § 19.4 ("The Comptroller may, at any time during the pendency of a proceeding, perform . . . any act which could be done or ordered by the administrative law judge.") *with* 12 C.F.R. § 19.101 (requiring enforcement proceedings to be conducted by ALJs "[u]nless otherwise ordered by the Comptroller").

Respondent could have responded to the outstanding Order issued by ALJ Miserendino in August 2018, directing the parties to voice any objections to the post-*Lucia* reassignment or to any of the prior ALJ's actions. Yet Respondent likewise "went dark," filing nothing at all in the case from February 2017 until February 2020 save for the Joint Notice of Disposition of Criminal Prosecution on November 8, 2018 that led ALJ Miserendino to lift the stay. This is not to say that some further action was required of Respondent during this time, only that the decision not to speak out or seek to rouse the matter at any point *then* renders speculative assertions of prejudice and claims of unreasonable delay *now* considerably less persuasive.

In sum, the undersigned cannot conclude that it was bad faith or lack of diligence for the Comptroller to wait until ALJ Miserendino's replacement had been duly appointed before resuming proceedings in this action. The resultant delay, while unfortunate, appears predominantly to be the product of factors outside both parties' control, and Respondent has not demonstrated why dismissal, as opposed to an expeditious resolution of the matter through the normal processes, would be an appropriate remedy to the limbo in which he now assertedly finds himself. For these reasons, Respondent's Motion is hereby denied.

SO ORDERED.

March 16, 2020

____

Jennifer Whang
Administrative Law Judge
Office of Financial Institution Adjudication