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-ED-2019-81
James Strother, Former General Counsel	OCC AA-ED-2019-70
David Julian, Former Chief Auditor	OCC AA-ED-2019-71
Paul McLinko, Former Executive Audit Director	OCC AA-ED-2019-72
Wells Fargo Bank, N.A. Sioux Falls. South Dakota	ALJ McNeil

ORDER REGARDING RESPONDENTS' INITIAL JOINT MOTIONS FOR SUMMARY DISPOSITION

In their motions seeking either partial or total summary disposition, Respondents present eight distinct claims, seven of which, if established, would lead to a recommendation that all of the claims against them would be dismissed, based solely on the pleadings and submissions that accompanied their motions.[1] The eighth claim, relying on the applicable statute of limitations, would result in partial disposition through dismissal of claims seeking punitive remedies based on conduct predating January 23, 2015.[2] Enforcement Counsel responded through two briefs in opposition,[3] making the matter ready for determination.

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[1] Respondents' Joint Motion for Summary Disposition on the Basis of their Article III, Seventh Amendment, and Due Process Defenses; and Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses, both dated May 12, 2020.
[2] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses, dated May 12, 2020.
[3] Enforcement Counsel's Opposition to Respondents' Joint Motions for Summary Disposition on the Basis of their Appointments, Removal, Improper Signatory, Article III, Seventh Amendment, and Due Process Defenses; and Enforcement Counsel's Opposition to Respondents' Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses, both dated June 2, 2020.

Summary disposition is appropriate:

> if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that:
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> (1) There is no genuine issue as to any material fact; and
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> (2) The moving party is entitled to a decision in its favor as a matter of law.[4]

The standard for motions for summary disposition under the Office of the Comptroller of Currency's Uniform Rules of Practice and Procedure is similar to that for motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.[5] When the nonmoving party[6] bears the burden of proof on an issue at trial, the party moving for summary judgment needs to "point[] out . . . that there is an absence of evidence to support the nonmoving party's case."[7] The nonmoving party must then point to evidence in the record, other than the pleadings, which could reasonably support a jury verdict in its favor.[8] Should the nonmoving party demonstrate the existence of a genuine issue of material fact in this manner, the entry of summary disposition will not be appropriate.[9] However, summary disposition must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Given the issues presented by Respondents' Motions, in order to prevail they must affirmatively demonstrate the absence of any material factual dispute with respect to the claims presented through at least one of these eight affirmative defenses, and that they are entitled to judgment as a matter of law.

If Respondents make such a showing, the OCC must then come forward with evidence sufficient to call into question inferences created by Respondents' evidence.[10] After introduction of Respondents' evidence, summary disposition is appropriate if, considering all the evidence and factual inferences in the light most favorable to Enforcement Counsel, no reasonable jury could find for the OCC at trial.[11] In such a situation, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the

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[4] 12 C.F.R. § 109.29(a).
[5] *Cf. In re Cirino,* FDIC-99-011e, 2000 WL 1131919, at *23 (FDIC May 10, 2000).
[6] As the proponent of the Notice of Charges, the OCC bears the burden of proving the allegations contained therein by a preponderance of the evidence. *See* 5 U.S.C. § 556(d); *Steadman v. Sec. Exch. Comm'n*, 450 U.S. 91 (1981). No portion of this discussion should be interpreted as relieving the OCC of its burden of proving its allegations at a hearing in this matter.
[7] *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).
[8] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Celotex*, 477 U.S. at 324.
[9] *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).
[10] *Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1116 (11th Cir. 1993); s*ee also, Anderson*, 477 U.S. at 249.
[11] *See Fitzpatrick,* 2 F.3d at 1116; s*ee also, Matsushita Elec. Indus. Co.*, 475 U.S. at 586-87.

nonmoving party's case necessarily renders all other facts immaterial."[12] "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of this enforcement action under the governing law will properly preclude the entry of summary disposition. "Factual disputes that are irrelevant or unnecessary will not be counted."[13]

Claim Based on Article III (Right to Independent Federal Adjudication of Claims within the Judicial Power of the United States)

The first claim is that this administrative enforcement action violates provisions of Article III of the Constitution because collectively, the Comptroller and the appointed ALJ exercise that range of jurisdiction and powers normally vested only in Article III courts.[14]

Respondents support this claim with a citation to *Schor*,[15] for the legal proposition that the administrative enforcement action taken through the Notice of Charges against Respondents "impermissibly threatens the institutional integrity of the Judicial Branch."[16] Respondents reason that Article III "preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States," and thus "safeguard[s] litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.'"[17] At issue in resolving the merits of this claim is whether the statutory scheme that authorized this enforcement action violates the "constitutional system of checks and balances" required under Article III.[18]

Respondents posit that through the OCC's claim of having "sweeping enforcement jurisdiction for the Tribunal to impose penalties for *any* violation of law,"[19] the ALJ and the Comptroller "exercise[] the range of jurisdiction and powers normally vested only in Article III courts."[20]

The question before the Court in *Schor* was whether the Commodity Exchange Act, 7 U.S.C. § 1 et seq., empowers the Commodity Futures Trading Commission to entertain state law counterclaims in reparation proceedings and, if so, whether that grant of authority violates Article III of the Constitution.[21] Article III, § 1, "directs that the 'judicial Power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may

[12] *Celotex*, 477 U.S. at 322-23; *see also In re Cirino*, 2000 WL 1131919, at *23 (explaining that "if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is 'no genuine issue for trial'").
[13] *Anderson,* 477 U.S. at 248.
[14] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 3-6.
[15] *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).
[16] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 3, quoting *Schor*, 478 U.S. at 851.
[17] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 3, quoting *Schor*, 478 U.S. at 850.
[18] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 3, quoting *Schor*, 478 U.S. at 850.
[19] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 3,(emphasis *sic*), citing *Schor*, 478 U.S. at 852.
[20] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 3, citing *Schor*, 478 U.S. at 851; 12 C.F.R. § 19.5(a), (b) (ALJ powers); id. § 19.4 (Comptroller powers);
[21] *Schor*, 478 U.S. at 835–36.

from time to time ordain and establish,' and provides that these federal courts shall be staffed by judges who hold office during good behavior, and whose compensation shall not be diminished during tenure in office."[22] Schor claimed that these provisions "prohibit Congress from authorizing the initial adjudication of common law counterclaims by the CFTC, an administrative agency whose adjudicatory officers do not enjoy the tenure and salary protections embodied in Article III."[23]

As noted by Respondents, Article III, § 1, serves both to protect "the role of the independent judiciary within the constitutional scheme of tripartite government," and to safeguard litigants' "right to have claims decided before judges who are free from potential domination by other branches of government."[24] The Court in *Schor*, however, continued its analysis by noting that "Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court."[25] When presented with claims that an administrative tribunal "impermissibly threatens the institutional integrity of the Judicial Branch," the Court "has declined to adopt formalistic and unbending rules" and found no Article III violation.[26]

Factors the Court found to be significant when dealing with such claims include "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III."[27] Thus, while "the power to adjudicate 'private rights'" must be vested in an Art. III court, "this Court has accepted factfinding by an administrative agency . . . as an adjunct to the Art. III court, analogizing the agency to a jury or a special master and permitting it in admiralty cases to perform the function of the special master."[28]

Such is the case here, as reflected by Respondents' reference to and reliance upon the regulations under which this enforcement action is being presented.[29] The enforcement action authorized under those regulations concern public, and not private, rights.[30] Respondents' assertion that the claims determined in this action are "classically the province of Article III courts" is not supported by their citation to *Schor*. Citing to *Thomas*, the Court in *Schor* held that

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[22] *Schor*, 478 U.S. at 847.
[23] *Id*.
[24] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 3, citing *Schor*, 478 U.S. at 850, quoting *United States v. Will*, 449 U.S. 200, 218 (1980).
[25] *Schor*, 478 U.S. at 848, citing *Thomas v. Union Carbide Agr. Prod. Co*., 473 U.S. 568, 580 (1985), *Crowell v. Benson*, 285 U.S. 22, 87 (1932).
[26] *Schor*, 478 U.S. at 851.
[27] *Id*. at 851, 587, 589–593; *N. Pipeline Const. Co. v. Marathon Pipe Line Co*., 458 U.S. 50, 76, (1982).
[28] *N. Pipeline Const. Co. v. Marathon Pipe Line Co*., 458 U.S. at 77–78, quoting *Crowell v. Benson*, 285 U.S. at 51–65, and citing *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442, 450 (1977).
[29] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 3, citing 12 C.F.R. § 19.5(a), (b) (ALJ powers); *id*. § 19.4 (Comptroller powers); Statement of Undisputed Material Facts in Support of Respondents' Joint Motion For Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses (hereinafter, ASUMF) ¶ 1.
[30] See *Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995); *Simpson v. OTS*, 29 F.3d 1418, 1423 (9th Cir. 1994); *Akin v. OTS*, 950 F.2d 1180, 1186 (5th Cir. 1992); *Paul v. OTS*, 763 F. Supp. 568, 573–74 (S.D. Fla. 1990), aff'd without opinion, 948 F.2d 1297 (11th Cir. 1991).

its focus in determining the merits of such claims is on "the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary.[31]

Respondents rely exclusively upon the structure of administrative review found in the regulations that authorize this Tribunal to perform its functions – including the power to decide evidentiary rulings, determine the merits of all procedural and other motions, and submit a recommended decision to the Comptroller.[32] As Enforcement Counsel persuasively point out, "'[D]ue process of law does not require that the courts, rather than administrative officers, be charged, in any case, with determining the facts upon which the imposition of [fines] depends. … Congress may choose the administrative rather than the judicial method of imposing them.'"[33]

Nothing in the authorities cited by Respondents establishes that this enforcement structure "impermissibly threatens the institutional integrity of the Judicial Branch."[34] Without more, Respondents' claim that this enforcement proceeding violates Article III is without a sufficient legal basis and will not support summary disposition in Respondents' favor.

Claim Based on the Seventh Amendment (the Right to a Jury Trial for a Suit at Common Law)

The second claim is that the adjudication of civil money penalties violates Respondents' Seventh Amendment right to a trial by a jury.[35] Respondents posit that "[t]he Seventh Amendment 'preserve[s]' the right to a jury trial a 'suit[] at common law, where the value in controversy shall exceed twenty dollars.'"[36]

In support, Respondents refer to the Court's holding in *Tull*,[37] for the proposition that "[t]he Seventh Amendment requires a jury in actions analogous to suits at common law, such as a civil money penalty action used to punish culpable individuals," distinguishing actions that either "extract compensation" or "restore the status quo" from actions "used to punish culpable individuals."[38]

The Court's decision in *Tull* does not, however, support Respondents' Seventh Amendment claim. "The assessment of civil penalties," the Court held, "cannot be said to

[31] *Schor*, 478 U.S. at 851, citing *Thomas*, 473 U.S. at 587: "If the identity of the parties alone determined the requirements of Article III, under appellees' theory the constitutionality of many quasi-adjudicative activities carried on by administrative agencies involving claims between individuals would be thrown into doubt. See 5 K. Davis, Administrative Law § 29:23, p. 443 (2d ed. 1984)."

[32] ASUMF ¶4.

[33] Enforcement Counsel's Opposition to Respondents' Joint Motions for Summary Disposition on the Basis of their Appointments, Removal, Improper Signatory, Article III, Seventh Amendment, and Due Process Defenses at 28, quoting *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329, 335 (1932).

[34] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 3, citing *Schor*, 478 U.S. at 851.

[35] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 6-7.

[36] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 6, quoting U.S. Const. amdt. VII.

[37] *Tull v. U.S.*, 481 U.S. 412 (1987).

[38] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 6, quoting *Tull*, 481 U.S. at 421-22.

involve the "substance of a common-law right to a trial by jury," nor a "fundamental element of a jury trial."[39]

Elaborating on this point, the Court held:

> Congress' assignment of the determination of the amount of civil penalties to trial judges therefore does not infringe on the constitutional right to a jury trial. Since Congress itself may fix the civil penalties, it may delegate that determination to trial judges. In this case, highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act. These are the kinds of calculations traditionally performed by judges. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 442–443, 95 S.Ct. 2362, 2384–2385, 45 L.Ed.2d 280 (1975) (REHNQUIST, J., concurring). We therefore hold that a determination of a civil penalty is not an essential function of a jury trial, and that the Seventh Amendment does not require a jury trial for that purpose in a civil action.[40]

Further articulation on this point is provided by the Court in *Atlas Roofing*:[41]

> The point is that the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases. It took the existing legal order as it found it, and there is little or no basis for concluding that the Amendment should now be interpreted to provide an impenetrable barrier to administrative factfinding under otherwise valid federal regulatory statutes. We cannot conclude that the Amendment rendered Congress powerless when it concluded that remedies available in courts of law were inadequate to cope with a problem within Congress' power to regulate to create new public rights and remedies by statute and commit their enforcement, if it chose, to a tribunal other than a court of law such as an administrative agency in which facts are not found by juries. Indeed, as the *Oceanic* [*Steam Nav. Co. v. Stranahan*, 214 U.S. 320 (1909)] opinion said, the 'settled judicial construction' was to the contrary 'from the beginning.' 214 U.S., at 339[]. That case indicated, as had *Hepner v. United States*, 213 U.S. 103, 29 S.Ct. 474, 53 L.Ed. 720 (1909), that the Government could commit the enforcement of statutes and the imposition and collection of fines to the judiciary, in which event jury trial would be required, see also *United States v. Regan*, 232 U.S. 37, 34 S.Ct. 213, 58 L.Ed. 494 (1914), but that the United States could also validly opt for administrative enforcement, without judicial trials. See also *Helvering v. Mitchell*, 303 U.S., at 402-403, 58 S.Ct., at 634-635, and Crowell v. Benson, 285 U.S., at 50-51, 52 S.Ct., at 292.[42]

From this body of law, I find no legal support has been presented establishing Respondents' claim that "the rights the Seventh Amendment was meant to protect" would be violated where "the government is pursuing a punitive enforcement action against private

[39] 481 U.S. at 426.
[40] *Tull*, 481 U.S. at 426-27.
[41] *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977).
[42] *Id.* at 460.

citizens in a proceeding in which the Executive will serve as prosecutor, judge, and jury."[43] Accordingly, Respondents' claim under the Seventh Amendment will not support summary disposition in Respondents' favor.

Claim Based on the Due Process Clause Regarding Multiple Roles Performed by the Comptroller of the Currency in the Administrative Enforcement Process

The third claim is that the structure of the OCC's administrative process violates due process because the OCC serves as both "accuser and adjudicator"[44] – that is, the process through which the agency combines investigative and adjudicative functions constitutes a due process violation.[45]

As presented in Respondents' Motion, this claim is less than fully clear: The initial legal claim is that "[i]n this action, the OCC serves as witness, investigator, prosecutor, and judge, and the Comptroller has complete discretion to determine both facts and legal outcome, even contrary to a recommendation from the ALJ."[46] The OCC is not the same as the Comptroller. The Office of the Comptroller of the Currency is an administrative agency, whereas the Comptroller is an individual. Given the nature of the claim, however, it may be assumed that the claim addresses not the agency, but the individual. That said, the claim is ambiguous because, relying on the Court's decision in *Williams v. Pennsylvania*,[47] Respondents assert that "it violates due process for an agency to serve all of these functions without any meaningful independent check."[48]

Under *Williams*, the Court had before it a case where, while serving as a district attorney and before becoming a judge, a jurist sought the death penalty against a defendant, and then, once on the bench, the same jurist adjudicated the defendant's petition to overturn that sentence.[49] Because the jurist, as district attorney, granted authorization to seek the death penalty against Williams amounted to "significant, personal involvement in a critical trial decision," the Court held that the jurist's failure to recuse himself from Williams's case presented an unconstitutional risk of bias and violated the Due Process Clause.[50]

The facts in this enforcement action are materially dissimilar to those presented in *Williams*. Respondents offer four sets of undisputed factual premises in support of their Due Process claim: (1) that Enforcement Counsel seek the imposition of $37,500,000 in civil money penalties and prohibition or cease and desist orders against Respondents;[51] (2) that the

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[43] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 6-7.
[44] *Id.* at 7, quoting *Williams v. Pennsylvania,* 136 S. Ct. 1899, 1905 (2016)
[45] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 7-8.
[46] *Id.* at 7, citing 12 C.F.R. §§ 19.4, 19.40; ASUMF ¶¶ 5, 7-8.
[47] *Williams*, 136 S. Ct. 1899 (2016).
[48] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 7, quoting *Williams*, 136 S.Ct. at 1905.
[49] *Williams*, 136 S. Ct. at 1905.
[50] *Id.* at 1907.
[51] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 7, citing Respondents' SMUF ¶2; Notice of Charges, Prayer for Relief.

Comptroller of the Currency has sole authority to decide dispositive motions,[52] and may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the administrative law judge, and final decisions on the merits are made by the Comptroller;[53] (3) that OCC Examination Staff are responsible for supervising Wells Fargo, have knowledge regarding the allegations in the Notice of Charges, and may serve as witnesses in this proceeding;[54] and (4) that OCC Enforcement Counsel were involved in the investigation of Wells Fargo and Respondents, filed the Notice of Charges, and are litigating this proceeding on behalf of the OCC.[55]

By failing to differentiate between duties performed by the individual, in contrast to the duties performed by the agency, Respondents present a set of facts unlike those presented in *Williams*. There is in this case, for example, no claim that the incumbent Comptroller performed any of the investigative functions that led to the issuance of the Notice of Charges filed against these five Respondents, nor that he had "significant, personal involvement in a critical trial decision". [56] As such, *Williams* does not support Respondents core Due Process claim.

Respondents make no claim that the cited regulations, on their face or as applied here, violate the relevant adjudicative sections of the Administrative Procedure Act,[57] which provide that no employee engaged in investigating or prosecuting may also participate or advise in the adjudicating function; and Respondents fail to recognize that the APA expressly exempts from this prohibition "the agency or a member or members of the body comprising the agency."[58] The facts presented by Respondents do not establish significant, personal involvement in a critical decision by the Comptroller at any stage of the investigation or prosecution of this enforcement action.

It also is fallacious to state, or to suggest, that these administrative proceedings are "without any meaningful independent check."[59] Respondents through their own Statement of Undisputed Material Facts acknowledge that "final decisions by the Comptroller are reviewable by a United States court of appeals under the standards of the Administrative Procedure Act. 5 U.S.C. § 706. 12 U.S.C. § 1818(h)."[60] Nothing in the authorities presented in Respondents' Motion demonstrates that a more meaningful independent check on these proceedings is constitutionally mandated.

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[52] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 7, citing Respondents' SMUF ¶5; 12 C.F.R. § 19.5(b)(7).
[53] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 7, citing Respondents' SMUF ¶5; 12 C.F.R. § 19.4; 12 C.F.R. § 19.40(c).
[54] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 7, citing Respondents' SMUF ¶7; 12 U.S.C. § 481; OCC Policies and Procedures Manual PPM 5000-7, Civil Money Penalties (Nov. 13, 2018)
[55] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 7, citing Respondents' SMUF ¶8; OCC Policies and Procedures Manual PPM 5310-3, Bank Enforcement Actions and Related Matters (Nov. 13, 2018); OCC Policies and Procedures Manual PPM 5000-7, Civil Money Penalties (Nov. 13, 2018).
[56] *Williams*, 136 S. Ct. at 1907.
[57] See 5 U.S.C. s 554(d).
[58] See *Withrow v. Larkin*, 421 U.S. 35, 52 (1975).
[59] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 7.
[60] Respondents' SMUF ¶6.

I do not conclude that this Tribunal should deny Respondents constitutional claims under Article III, the Seventh Amendment, or the Due Process Clause on the ground that "an administrative tribunal lacks 'the authority to declare unconstitutional the Act which it is called upon to administer," a position urged by Enforcement Counsel.[61] Instead, guided by cases cited by the District Court in *Lucia* (referenced by Respondents in their Joint Motion at 2, n. 1[62]), I find that under the OCC's Uniform Rules, a jurisdictional challenge or other dispositive motion may as a matter of law be made "at any time," and where dismissal is appropriate the ALJ "shall submit a recommended decision to that effect" to the Comptroller.[63] If through Respondents' motions and Enforcement Counsel's responses thereto I find a legal and factual basis to recommend the dismissal of all or any part of the claims appearing in the Notice of Charges, I shall (and must) recommend the same to the Comptroller.

Claim Based on the Due Process Clause Regarding a Closed Hearing

The fourth claim notes that by statute and rule, all hearings with respect to the OCC's Notice of Charges shall be open to the public, and that a closed hearing would violate due process.[64]

The claim, when addressed in Respondents' Joint Motion, appears to be based on speculation that is unwarranted: Citing to no facts in the record, Respondent Tolstedt's Affirmative Defense No. 23 advances the legal premise that "[a]ny proceeding pursuant to the Notice is invalid because it will be adjudicated in a forum that is not public as required by law."[65]

It is by legislative fact established that "[a]ll hearings on the record with respect to any notice of charges issued by a Federal banking agency shall be open to the public, unless the agency, in its discretion, determines that holding an open hearing would be contrary to the public interest."[66] There is nothing in the record expressing a determination by any party that the hearing to be held in this enforcement action will be closed to the public.

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[61] Enforcement Counsel's Opposition to Respondents' Joint Motions for Summary Disposition on the Basis of their Appointments, Removal, Improper Signatory, Article III, Seventh Amendment, and Due Process Defenses at 20, quoting *Buckeye Indus. v. Sec'y of Labor*, 587 F.2d 231, 235 (5th Cir. 1979) (citing *Mont. Chapter of Ass'n of Civilian Technicians v. Young*, 514 F.2d 1165, 1167-68 (9th Cir. 1975)); see also *Engineers Public Service Co. v. Sec. and Exch. Comm'n*, 138 F.2d 936, 952-53 (D.C. Cir. 1943), dismissed as moot, 332 U.S. 788 (1947); *Oestereich v. Selective Service Bd.*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring); *Public Utilities Comm'n of Cal. v. United States*, 355 U.S. 534, 539-40 (1958).

[62] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 2, citing 12 C.F.R. §§ 19.5(b)(7), 19.29(a); and *Raymond J. Lucia Cos. v. SEC*, No. 18-cv-2692, 2019 WL 3997332, at *2–3 (S.D. Cal. Aug. 21, 2019) "The [decisions] hold that [plaintiff] must make her constitutional arguments, no matter how meritorious they are, before the SEC and then before the applicable court of appeals."); *Morris & Dickson Co. v. Whitaker*, 360 F. Supp. 3d 434, 444 n.6, 447 (W.D. La. Dec. 28, 2018) ("[T]here is no reason to conclude that any strength of [plaintiff]'s Appointment Clause challenge [on the basis of *Lucia*] alters the question of jurisdiction.")." *Raymond J. Lucia Companies, Inc. v. U.S. Sec. & Exch. Comm'n*, No. 18-CV-2692 DMS (JLB), 2019 WL 3997332, at *3 (S.D. Cal. Aug. 21, 2019)

[63] 12 C.F.R. §§ 19.29(d); *cf* Determination on Requests for Interlocutory Appeal in the Matter of Frank E. Smith and Mark A. Kiolbasa, FRB Docket No. 18-036-E-1 dated March 9, 2020, at n.1 (copy attached).

[64] Respondents' Joint Motion for Summary Disposition on the Basis of Their Article III, Seventh Amendment, and Due Process Defenses at 8, citing 12 U.S.C. § 1818(u)(2) and 12 C.F.R. § 19.33(a).

[65] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses, at 8.

[66] *Id.*, citing 12 U.S.C. § 1818(u)(2); and 12 C.F.R. § 19.33(a) (same).

In order to more fully address the claim, I convened a prehearing conference on June 11, 2020, to provide the parties the opportunity to supplement the record in support of Respondents' joint request that oral argument on these motions was warranted.[67] During that conference, when asked whether oral argument would be needed to support this claim, Counsel for each Respondent (and Enforcement Counsel) responded in the negative.[68]

There being no factual basis establishing grounds to believe Respondents' due process rights have been threatened based on the availability of a public hearing, this claim will not support summary disposition in Respondents' favor.

This finding does not determine whether cause may exist to implement measures designed to protect against disclosure of information currently under seal, that may be introduced during the hearing. In a prior order, the parties were directed to take appropriate action in anticipation of the public hearing, to reduce the need to close any part of the public hearing. The relevant language in that Order provides:

> **Protocols for Preparing for a Public Hearing**
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> The parties have by their pleadings shown cause to suggest that portions of testimony may rely on confidential or otherwise restricted non-public information. Although all parties in this enforcement action had the opportunity to request a non-public hearing, no party did so. Accordingly, pursuant to the OCC's Uniform Rules of Practice and Procedure, the parties are deemed to have waived any objection regarding whether the hearing will be public or private.[69]
>
> In the event documents or testimony would reveal confidential or otherwise restricted information, where the proffer of such testimony would make a witness unavailable to give testimony at a public hearing, the proponent shall move for leave to proceed pursuant to 12 C.F.R. § 19.27, for a deposition of a witness unavailable for hearing. Such deposition would be authorized only to address that portion of the witness's testimony that involves restricted information (via testimony, documents, or both). Given this protocol, the parties should not anticipate that the potential release of confidential or otherwise restricted information (whether as testimony or through documentary evidence) will constitute sufficient cause for the closing of the public hearing.[70][71]

Those protocols provide sufficient guidance for the parties when preparing for the public hearing.

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[67] Order Regarding Respondents' Joint Request for Oral Argument on their Joint Motions for Summary Disposition issued June 11, 2020.
[68] *Id*. at 2. Respondents' Counsel are reminded that they have an affirmative obligation, as yet unfulfilled, to supply this Tribunal with an electronic copy of the transcript of the proceedings conducted on June 11, 2020.
[69] 12 C.F.R. § 19.33(a).
[70] Pursuant to 12 C.F.R. § 19.33(b), the administrative law judge has the authority to take "all appropriate steps to preserve the confidentiality" of documents maintained under seal. To this end, the ALJ may preside over a deposition ordered under 12 C.F.R. § 19.27 where doing so would preserve the public nature of the hearing while permitting the preservation of testimony that contains confidential or otherwise restricted information.
[71] Notice of Hearing, Scheduling Order, Supplemental Prehearing Orders at 6.

Claim Based on the Appointments Clause

The fifth claim is that the Notice of Charges should be dismissed because the ALJ's appointment was unconstitutional under the Appointments Clause, invoking the Supreme Court's holding in *Lucia v. SEC*.[72] The claim is based on the legal premise that this Tribunal has not been appointed by "either 'the President,' 'the Courts of Law,' or the 'Heads of Departments.'"[73] Respondents identify, through legislative facts, those duties common to administrative law judges who serve at the SEC and those who serve the OCC and persuasively establish that like the SEC ALJs in *Lucia*, ALJs serving the OCC qualify as '"inferior Officers' whose appointments must be made in a manner consistent with the Appointments Clause."[74]

Having sufficiently established the legal premise that the Court's Appointments Clause reasoning found in *Freytag* and *Lucia* applies with like force to ALJs serving the OCC, Respondents next assert that the steps taken by the OCC do not "cure the Appointments Clause problem in this case."[75]

In support of this part of the claim, Respondents present these facts:

1. On July 19, 2018, the Federal Deposit Insurance Corporation issued an order appointing Administrative Law Judge Christopher B. McNeil as administrative law judge for the FDIC.[76]

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[72] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses, at 8-13.

[73] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses, at 8, quoting U.S. Const. art. II, § 2, cl. 2.

[74] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses, at 9-10, noting that SEC Administrative Law Judges receive a career appointment that is created by statute, down to its duties, salary, and means of appointment; exercise significant discretion when carrying out important functions; have all the authority needed to ensure fair and orderly adversarial hearings, including the powers to take testimony, receive evidence, examine witnesses, take pre-hearing depositions, conduct trials, administer oaths, rule on motions, and generally regulate the course of' a hearing, as well as the conduct of parties and counsel; rule on the admissibility of evidence and thus critically shape the administrative record (as they also do when issuing document subpoenas); enforce compliance with discovery orders, including punishing violations of those orders by means as severe as excluding the offender from the hearing; issue decisions containing factual findings, legal conclusions, and appropriate remedies; and then noting that OFIA Administrative Law Judges possess the same relevant characteristics and powers, and thus also qualify as inferior officers under the Appointments Clause, noting that OFIA Administrative Law Judges hold career appointments and positions created by statute (5 C.F.R. § 930.204(a); 5 U.S.C. §§ 556–557, 3105, 5372); have "all the powers necessary" to conduct proceedings like this one in a fair and expeditious manner (quoting 12 C.F.R. § 19.5(a)); have the powers to "receive relevant evidence" and take depositions or cause them to be taken; administer oaths, rule upon motions, and generally regulate the course of the hearing and the conduct of the parties and their counsel; rule upon the admissibility of evidence and issue subpoenas; and issue orders directing compliance with discovery rules as well as sanction "contemptuous . . . conduct," including by excluding the offender from the proceeding" (quoting 12 C.F.R. §§ 19.5(b)(1)–(5), (7), 19.6(b), 19.25(h), 19.26(c)); may "prepare and present to the Comptroller a recommended decision." (quoting 12 C.F.R. § 19.5(b)(8)); and in sum, thus "exercise . . . 'significant discretion' when carrying out . . . 'important functions,'" (quoting *Lucia*, 138 S. Ct. at 2053), and "thus qualify as "inferior Officers" whose appointments must be made in a manner consistent with the Appointments Clause." Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses, at 10.

[75] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses, at 11.

[76] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses, at 10; Appointments Statement of Undisputed Material Facts [ASUMF] at ¶22; Appointments

2. On August 21, 2018, the Comptroller of the Currency issued an "Order in Pending Enforcement Cases in Response to *Lucia v. SEC*."[77] Through this Order, the Comptroller determined that the FDIC's July 19, 2018 Resolution "operate[d] to commission ALJs Miserendino and McNeil as 'inferior officers of the United States' in compliance with Article II, section 2, of the Constitution as interpreted by the Supreme Court in *Lucia*, with the result that they are qualified to perform all the functions of an ALJ as provided by statute and regulation".[78]

Upon the plenary findings set forth in his Order, the Comptroller then ordered that "[s]ince ALJs Miserendino and McNeil have now been properly appointed in conformance with the Supreme Court's decision in *Lucia* and Article II of the United States Constitution, the Comptroller of the Currency reaffirms his decision to utilize the [Office of Financial Institution Adjudication] ALJs as ALJs for the OCC" and directed that cases that had been assigned to Judge Miserendino at the time *Lucia* was decided would be re-assigned to Judge McNeil.[79] (The present case was not on the OFIA docket at this time and thus was not included in the Comptroller's August 21, 2018 Order.)

3. On November 15, 2018, the General Counsel of the Treasury Department prepared a memorandum for the Secretary of the Treasury requesting that he ratify the appointment of Administrative Law Judge McNeil and describing the proposed ratification order as a "document . . . which ratifies the appointment of two ALJs currently assigned to [the] OCC."[80]

Through the attachment to this Memorandum, the Secretary of the Treasury, Steven T. Mnuchin, ratified the assignment of C. Richard Miserendino and Christopher B. McNeil to the office of administrative law judge in the Office of the Comptroller of the Currency, under the terms and conditions prescribed in Pub. L. 101-73, § 916 (12 U.S.C. § 1818 note) and 12 C.F.R. §§ 19.101 and 109.101, and "approve[d] their appointment as my own action under the Constitution."[81]

With some force, Respondents argue that the FDIC's Order "is irrelevant" because the present enforcement action "is not before the FDIC."[82] Enforcement Counsel do not, however, rely exclusively on the FDIC appointment to establish the OCC's compliance with the Appointments Clause. In their opposition memorandum, Enforcement Counsel offer two independent bases for showing such compliance: first, they assert that Secretary Mnuchin's ratification of the Comptroller's appointment constitutes sufficient proof of compliance.[83]

Exhibits to Appointments Statement of Undisputed Material Facts [ASUMF Ex.] 2 (FDIC Resolution 085152 dated July 19, 2018 at 2).

[77] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses, at 11; ASUMF at ¶24; ASUMF Ex. 4 at 1 (November 15, 2018 Action Memorandum for Secretary Mnuchin approving the document titled "Ratification of Administrative Law Judge Appointments" signed on November 15, 2018 by Steven T. Mnuchin, Secretary of the Treasury.

[78] ASUMF Ex. 3 at 1.

[79] *Id*. at 2.

[80] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses, at 10-11; ASUMF at ¶24; ASUMF Ex. 3 at 1-2 (Comptroller's Order in Pending Enforcement Cases in Response to Lucia v. SEC, dated August 21, 2018).

[81] ASUMF Ex. 4 at 4; ASUMF Ex. 5 at 1.

[82] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses, at 11.

[83] Enforcement Counsel's Opposition to Respondents' Joint Motions for Summary Disposition on the Basis of their Appointments, Removal, Improper Signatory, Article III, Seventh Amendment, and Due Process Defenses at 3-6.

Independent of that basis, Enforcement Counsel assert that "[t]he FDIC Board's appointment of ALJ McNeil provides a separate and independent constitutionally valid basis for his assignment to this matter," arguing that the FDIC, as a "head of [a] department within the meaning of the Appointments Clause" is authorized to appoint ALJs under 5 U.S.C. § 3105 and 12 U.S.C. § 1819(a)(Fifth), and the OCC may utilize the services of ALJs appointed by the FDIC Board under Section 916 of FIRREA [Financial Institutions Reform, Recovery, and Enforcement Act of 1989,Pub. L. No. 101-73, 103 Stat. 183 (1989)].[84]

Under this second theory, Enforcement Counsel note that under *Free Enterprise Fund*, the FDIC is a freestanding component of the Executive Branch, not subordinate or contained within any other such component, and thus qualifies as a "head of a department," one whose appointment powers are sufficient under *Lucia* and the Appointments Clause.[85] Enforcement Counsel then reason that because the Federal Deposit Insurance Act (at 12 U.S.C. § 1819(a)(Fifth)) grants to the FDIC Board authority to appoint officers to preside over hearings conducted pursuant to 12 U.S.C. § 1818, and because the FDIC Board did in fact appoint ALJ McNeil as an ALJ on July 19, 2018, ALJ McNeil's appointment by the FDIC Board pursuant to 5 U.S.C. Section 3105 was valid.[86]

Enforcement Counsel note that "Section 916 of FIRREA directed that 'the appropriate Federal banking agencies,' including the FDIC and OCC, 'shall jointly . . . establish their own pool of administrative law judges . . . .'"[87] Further, in compliance with this Congressional requirement, the OFIA agencies entered into an agreement, most recently effective December 29, 2017, establishing a "governance and cost-sharing structure" that designated the FDIC to serve as the host agency for OFIA.[88]

According to Enforcement Counsel:

> Respondents' pronouncement that "this proceeding is not before the FDIC" does not render irrelevant ALJ McNeil's appointment by the FDIC Board. Appts. Motion, at 11. The Appointments Clause does not prevent Congress from requiring the OFIA agencies to establish a joint pool of ALJs, provided that there is a constitutional grant of authority to appoint such officers and a head of department makes the appointment. Under Section 1819(a)(Fifth), Congress validly granted the FDIC Board (the head of a department) the authority to appoint ALJs to conduct hearings under 12 U.S.C. § 1818. And by Section 916, Congress, consistent with its constitutional authority, required the federal banking agencies to create a

[84] Enforcement Counsel's Opposition to Respondents' Joint Motions for Summary Disposition on the Basis of their Appointments, Removal, Improper Signatory, Article III, Seventh Amendment, and Due Process Defenses at 6-9.

[85] Enforcement Counsel's Opposition to Respondents' Joint Motions for Summary Disposition on the Basis of their Appointments, Removal, Improper Signatory, Article III, Seventh Amendment, and Due Process Defenses at 6-7, quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 511 (2010); and citing *Lucia*, 138 S. Ct. at 2050 (citing *Free Enter. Fund*, 561 U.S. at 511-13).

[86] Enforcement Counsel's Opposition to Respondents' Joint Motions for Summary Disposition on the Basis of their Appointments, Removal, Improper Signatory, Article III, Seventh Amendment, and Due Process Defenses at 6-7.

[87] nforcement Counsel's Opposition to Respondents' Joint Motions for Summary Disposition on the Basis of their Appointments, Removal, Improper Signatory, Article III, Seventh Amendment, and Due Process Defenses at 8, quoting FIRREA Section 916, Pub. L. No. 101-73, 103 Stat. 183 (1989).

[88] Enforcement Counsel's Opposition to Respondents' Joint Motions for Summary Disposition on the Basis of their Appointments, Removal, Improper Signatory, Article III, Seventh Amendment, and Due Process Defenses at 8, citing Opposition Ex. 4 (Administrative Law Judge Agreement of 2018).

> pool of such ALJs. Once validly appointed by the FDIC (which is the "host agency" under the 2018 Agreement and has been since 2011), FDIC-appointed ALJs may serve as hearing officers for OCC proceedings consistent with the requirements of the Appointments Clause.
>
> Finally, 5 U.S.C. § 3344 ("Section 3344") authorizes the OCC to use the services of ALJs that have been appointed pursuant to 5 U.S.C. § 3105: An agency . . . which occasionally or temporarily is insufficiently staffed with administrative law judges appointed under section 3105 of this title may use administrative law judges selected by the Office of Personnel Management [OPM] from and with the consent of other agencies.
>
> Because the FDIC Board validly appointed ALJ McNeil pursuant to Section 3105, the OCC may utilize his services in its own proceedings pursuant to Section 3344. See *Bolton v. Pritzker*, NO. C15-1607 MJP, 2016 WL 4555467 at *7 (W.D. Wash. Sept. 1, 2016) (holding that a department may borrow a properly appointed ALJ under the APA without being reappointed by the borrowing agency's head). Nothing in the Appointments Clause prohibits OPM from assisting the head of department to identify qualified individuals.[89]

While it appears clear that OPM has (or had) the authority to assist the head of a department by identifying qualified individuals, I cannot conclude that the exercise of such authority is sufficient to establish the OCC's compliance with the mandate presented in *Lucia*. Nor do I find it necessary to determine whether an appointment by the FDIC constitutes proof of such compliance by the OCC in this enforcement action. The record establishes that Treasury Secretary Mnuchin's ratification of the OCC's appointment complies with the mandate that such appointments be made by the head of a department.

Upon these factual and legal premises, I find an insufficient basis has been advanced in support of Respondents' summary disposition claim under the Appointments Clause.

Claim Based on the Dual For-Cause Removal Protections (*Free Enterprise Fund*[90])

The sixth claim is that the Charges should be dismissed because the dual layers applicable to the process of the removal of the Tribunal's ALJ "contravene the Constitution's vesting of executive power solely in the President."[91] Building upon the established premise that the OCC's ALJs are "inferior Officers" as that term is used in the Appointments Clause, Respondents assert that "Article II vests in the President '[t]he executive Power' and assigns him the sole responsibility to 'take Care that the Laws be faithfully executed.' U.S. Const. art. II, § 1, cl. 1."[92] Further, Respondents posit that "[t]he President's 'general administrative control of those executing the laws' requires that he have 'some 'power of removing those for whom he can

[89] Enforcement Counsel's Opposition to Respondents' Joint Motions for Summary Disposition on the Basis of their Appointments, Removal, Improper Signatory, Article III, Seventh Amendment, and Due Process Defenses at 8-9.
[90] *Free Enter. Fund*, 561 U.S. 477 (2010).
[91] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses at 14-17.
[92] *Id.* at 14.

not continue to be responsible,''" citing in support the Court's decision in *Free Enter. Fund v. Public Co. Accounting Oversight Bd*.[93]

Central to this claim is Respondents' argument that through its decision in *Free Enterprise Fund*, the Court has held that "a statutory scheme that provided officers of the United States with 'multilevel protection from removal'" was constitutionally infirm "on the ground that it was 'contrary to Article II's vesting of the executive power in the President.'"[94] This claim focuses on what is referred to as '"dual for-cause limitations'" on the removal of inferior Officers.[95]

In *Free Enterprise Fund*, it was those officers who were members of the Public Company Accounting Oversight Board (PCAOB) – who could be removed by Commissioners of the SEC only for good cause, and where Commissioners of the SEC likewise could be removed (by the President) only for cause.[96] The legal premise relied upon by Respondents is that "[t]he 'diffusion of accountability' created by these limitations . . . 'subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgments on his efforts.'"[97]

The legislative facts Respondents present in support of this claim do not, however, permit the conclusion that the dual for-cause limitations that exist with respect to removal of the OCC's ALJs warrant the dismissal of the Notice of Charges.

In *Free Enterprise Fund*, the Court noted that when Congress enacted the Sarbanes–Oxley Act of 2002,[98] the Act introduced tighter regulation of the accounting industry under a new Public Company Accounting Oversight Board. Under that Act, the PCAOB would be composed of five members, appointed to staggered 5–year terms by the Securities and Exchange Commission. It was modeled on private self-regulatory organizations in the securities industry – such as the New York Stock Exchange – that investigate and discipline their own members subject to Commission oversight. Congress created the Board as a private "nonprofit corporation," and Board members and employees are not considered Government "officer[s] or employee[s]" for statutory purposes. 15 U.S.C. §§ 7211(a), (b). The Board can "thus recruit its members and employees from the private sector by paying salaries far above the standard Government pay scale."[99]

The Court noted, however, that unlike the private self-regulatory organizations like the NYSE, the PCAOB:

> is a Government-created, Government-appointed entity, with expansive powers to govern an entire industry. Every accounting firm – both foreign and domestic – that participates in auditing public companies under the

[93] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses at 14, quoting *Free Enter. Fund*, 561 U.S.477, 492–93 (2010) (quoting *Myers v. United States*, 272 U.S. 52, 117, 164 (1926)).
[94] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses at 14, quoting *Free Enter. Fund*, 561 U.S. at 483-84.
[95] Free Enterprise Fund, 561 U.S. at 503.
[96] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses at 14, quoting *Free Enter. Fund*, 561 U.S. at 492.
[97] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses at 14, quoting *Free Enter. Fund*, 561 U.S. at 497–98.
[98] 116 Stat. 745.
[99] *Free Enterprise Fund*, 561 U.S. at 484–85, citing §§ 7211(f)(4), 7219.1.

> securities laws must register with the Board, pay it an annual fee, and comply with its rules and oversight. §§ 7211(a), 7212(a), (f), 7213, 7216(a)(1). The Board is charged with enforcing the Sarbanes–Oxley Act, the securities laws, the Commission's rules, its own rules, and professional accounting standards. §§ 7215(b)(1), (c)(4). To this end, the Board may regulate every detail of an accounting firm's practice, including hiring and professional development, promotion, supervision of audit work, the acceptance of new business and the continuation of old, internal inspection procedures, professional ethics rules, and "such other requirements as the Board may prescribe."[100]

The functions of the PCAOB and the scope of its authority, the Court found, included promulgation of auditing and ethics standards, performing routine inspections of all accounting firms, the power to demand documents and testimony, and the authority to initiate formal investigations and disciplinary proceedings.[101] In his dissent at the Court of Appeals, Judge Kavanaugh "argued that 'the double for-cause removal provisions in the [Act] ... combine to eliminate any meaningful Presidential control over the [Board], [*Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667 (D.C. Cir. 2008)] at 697." Judge Kavanaugh "also argued that Board members are not effectively supervised by the Commission and thus cannot be inferior officers under the Appointments Clause." Id., at 709–712.[102]

The facts presented in this enforcement action are, however, starkly and materially different from those identified by the Court in *Free Enterprise Fund*. In the body of facts supporting their Removal claim, Respondents rely on two legislative facts:

1. OFIA Administrative Law Judges may be removed "only for good cause established and determined by the Merit Systems Protection Board".[103]

2 Members of the MSPB may be "removed by the President only for inefficiency, neglect of duty, or malfeasance in office."[104]

Without more, these facts do not permit the conclusion sought by Respondents, because the Court in *Free Enterprise Fund* expressly excluded from its decision ALJs serving pursuant to the Administrative Procedure Act. The Court in *Free Enterprise Fund* noted "our holding also does not address that subset of independent agency employees who serve as administrative law judges." [105] There has been no showing that the ALJs serving the OCC have authority that is materially similar to that of members of the PCAOB, nor that the ALJs have any role in setting executive policy. The concern of the Court in *Free Enterprise Fund* (and expressed earlier by Judge Kavanaugh in his dissent at the Court of Appeals) was that "[b]y granting the Board

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[100] *Free Enter. Fund*, 561 U.S. at 484–85, citing § 7213(a)(2)(B).
[101] *Free Enter. Fund*, 561 U.S. at 485, citing §§ 7213–7215 (2006 ed. and Supp. II)
[102] *Free Enter. Fund*, 561 U.S. at 487, citing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 709 (D.C. Cir. 2008), aff'd in part, rev'd in part and remanded, 561 U.S. 477 (2010).
[103] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses at 14-15; ASUMF at ¶19; 5 U.S.C. § 7521(a).
[104] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses at 14-15; ASUMF at ¶20; 5 U.S.C. §1202(d).
[105] *Free Enter. Fund*, 561 U.S. at 507 n.10, citing 5 U.S.C. §§ 556(c), 3105.

executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed."[106]

Respondents' claim is bereft of legislative facts that establish that the ALJs serving the OCC have *any* executive power. The powers presented in support of this claim, like those presented in support of the claim that the OCC's ALJs are inferior Officers, identify adjudicative, not policy-making, authority. Nothing in the legislative facts presented by Respondents demonstrates that the OCC's ALJs have "expansive powers to govern an entire industry."[107] In the absence of a substantial demonstration that the OCC's ALJs have significant executive power, Respondents' reliance on the holding in *Free Enterprise Fund* is misplaced. Respondents argue that "OFIA Administrative Law Judges should not be allowed to exercise 'executive power without the Executive's oversight."[108] There being an insufficient showing that the OCC's ALJs actually possess or exercise executive power, the claim is insufficient to support summary disposition based on the ALJ removal process.

Claim Based on the Signature Authority of Deputy Comptroller Coleman

The seventh claim is that the Notice of Charges should be dismissed because it was signed by a Deputy Comptroller, whom Respondents assert was not validly appointed.[109] Respondents offer evidence that the Deputy Comptroller who signed the Notice of Charges against them "was approximately the thirty-second Deputy Comptroller in the OCC" and "was also behind the six Senior Deputy Comptrollers in seniority."[110]

Respondents assert that Congress "expressly limited the number of Deputy Comptrollers that the OCC could have," and argue that this limitation "renders Mr. Coleman's signing of the Notice invalid, because there can be no proper delegation of signing authority to an individual whose appointment is invalid."[111] Presenting their argument under the separation of powers doctrine, Respondents aver that the Congressional limitation on the number of Deputy Comptrollers was "a means of limiting Executive Power" and serves "to limit the scope and

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[106] *Free Enter. Fund*, 561 U.S. at 498; *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 709-12 (Kavanaugh, J., dissenting)

[107] See Enforcement Counsel's Opposition to Respondents' Joint Motions for Summary Disposition on the Basis of their Appointments, Removal, Improper Signatory, Article III, Seventh Amendment, and Due Process Defenses at 11, quoting *Free Enter. Fund*, 561 U.S. at 485.

[108] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses at 16, quoting *Free Enter. Fund*, 561 U.S. at 498.

[109] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses, at 18-20.

[110] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses at 18, citing ASUMF ¶30 (Notice of Charges, bearing the signature of Deputy Comptroller Coleman); ASUMF ¶28 (effective August 11, 2015, there were thirty-one officers with the title Deputy Comptroller, of which six held the title Senior Deputy Comptroller), ASUMF Ex. 9 at 1-2 (OCC.treas.. gov/about/who-we-are/leadership/index-leadership.html effective September 5,2015); and ASUMF ¶ 29 (presently there are thirty-five officers at the OCC with the title Deputy Comptroller, eight of which hold the title Senior Deputy Comptroller), ASUMF Ex. 10 at 2-5 (occ.treas.gov/about/who-we-are/leadership/index-leadership.html bearing header date of 5/11/20).

[111] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses at 18, citing 12 U.S.C. § 4 ("[t]he Secretary of the Treasury shall appoint no more than four Deputy Comptrollers of the Currency, one of whom shall be designated First Deputy Comptroller of the Currency").

shape of an office."[112] They reason that as a structural defect, and under the separation of powers doctrine,

> Respondents "need not demonstrate prejudice in the first place if the alleged error is 'structural' in nature." [*SW Gen., Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015), aff'd, 137 S. Ct. 929 (2017)] at 79 (quoting *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000)). "In the agency context . . . 'issues of separation of powers' are structural errors that do not require a showing of prejudice because 'it will often be difficult or impossible for someone subject to a wrongly designed scheme to show that the design—the structure—played a causal role in his loss.'" *Id.* (alterations omitted; emphasis added) (quoting *Landry*, 204 F.3d at 1131). This rule follows from the principle that "separation of powers is a structural safeguard rather than a remedy to be applied only when a specific harm, or risk of specific harm, can be identified." *Landry*, 204 F.3d at 1131 (alterations and emphasis omitted).[113]

Respondents assert that while no prejudice to them need be shown under the separation of powers doctrine, prejudice is nonetheless present in this case because "[l]ike being indicted in the criminal context, being charged by the OCC and subjected to fines and an industry ban is a harm."[114]

Enforcement Counsel present persuasive evidence that Deputy Comptroller Coleman was duly authorized to sign and issue the Notice of Charges.[115] Respondents' factual premise is that Mr. Coleman's appointment was based on provisions found in 12 U.S.C. § 4, which provides that "[t]he Secretary of the Treasury shall appoint no more than four Deputy Comptrollers of the Currency, one of whom shall be designated First Deputy Comptroller of the Currency".[116] On the other hand, Enforcement Counsel posit that Mr. Coleman's appointment was made pursuant to authority found in 12 U.S.C. § 4a, which provides that "[t]he Comptroller of the Currency may delegate to any duly authorized employee, representative, or agent any power vested in the office by law."

Enforcement Counsel note that the provision relied upon by Respondents (12 U.S.C. § 4) "defines succession when there is a Comptroller vacancy, absence, or disability. The statute does not define the authority of other agency employees, including Mr. Coleman."[117] Enforcement Counsel distinguish between officers appointed under 12 U.S.C. § 4, who are directly appointed by the Secretary of the Treasury, and OCC employees who draw their authority pursuant to 12 U.S.C. § 4a – who are not directly appointed by the Secretary.[118] Substantial evidence now

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[112] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses at 20.
[113] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses at 19-20.
[114] *Id.* at 20, citing SW Gen., Inc. v. NLRB, 796 F.3d 67, 80 (D.C. Cir. 2015).
[115] Enforcement Counsel's Opposition to Respondents' Joint Motions for Summary Disposition on the Basis of their Appointments, Removal, Improper Signatory, Article III, Seventh Amendment, and Due Process Defenses at 17-19.
[116] Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses at 18.
[117] Enforcement Counsel's Opposition to Respondents' Joint Motions for Summary Disposition on the Basis of their Appointments, Removal, Improper Signatory, Article III, Seventh Amendment, and Due Process Defenses at 17.
[118] *Id.* at 18.

before me established that as a Deputy Comptroller for Large Bank Supervision, Mr. Coleman's appointment is of the latter category.[119]

Included in the record is the Declaration of Cassandra Cuffee-Graves, the OCC's Deputy Comptroller for Human Capital (who has chief responsibility for providing executive direction and setting policies for employment, human resources operation, employment policy, human resources information systems, and compensation and benefits), who stated: "A 'Deputy Comptroller for Large Bank Supervision' is different than a Deputy Comptroller of the Currency' as defined by statute. A 'Deputy Comptroller for Large Bank Supervision' is not an officer created by statute; rather, a Deputy Comptroller for Large Bank Supervision is an 'employee' appointed by the Comptroller under 12 U.S.C. § 482 ('Section 482 Employee')."[120]

In her Declaration, Ms. Cuffee-Graves stated there currently are two Deputy Comptrollers of the Currency who have been appointed pursuant to 12 U.S.C. § 4 and who would assume the position of the Comptroller in the event of vacancy, absence, or disability – and Mr. Coleman is not one of those two Deputies.[121] Instead, Mr. Coleman, as a Deputy Comptroller for Large Bank Supervision, "is responsible for managing the supervision of the largest banks by the OCC and overseeing a portfolio of those banks."[122] She further declared that Deputy Comptroller Coleman's authority comes from a delegation by the Comptroller of the Currency made pursuant to 12 U.S.C. § 4a, to Mr. Coleman as a Section 482 Employee.[123]

Upon this evidence, I find a properly authorized officer of the OCC issued the Notice of Charges in this administrative enforcement action. Upon this finding, I find no legal basis has been presented in support of summary disposition based on Respondents' claim regarding the signatory of the Notice of Charges.

Claim Based on the Statue of Limitations

In their eighth claim, Respondents assert that they are entitled to partial summary disposition based on limitations of actions found at 18 USC § 2462, which would bar remedies based on conduct predating January 23, 2015.[124] They assert that "any claims filed by

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[119] *Id.*

[120] Enforcement Counsel's Exhibits in Opposition to Respondents' Joint Motions for Summary Disposition on the Basis of their Appointments, Removal, Improper Signatory, Article III, Seventh Amendment, and Due Process Defenses at Ex. 5 at ¶¶1-9.

[121] *Id*. at ¶9.

[122] *Id*. at ¶¶ 8, 10.

[123] *Id*. at ¶¶11-12. See also Enforcement Counsel's Exhibits in Opposition to Respondents' Joint Motions for Summary Disposition on the Basis of their Appointments, Removal, Improper Signatory, Article III, Seventh Amendment, and Due Process Defenses at Ex. 5 (Declaration of Cassandra Cuffee-Graves) at Exhibit C (May 23, 2019 Memorandum re Delegation of Authority – Enforcement Authority for Major Matters by Joseph M. Otting, Comptroller of the Currency, at 3, including "[t]he signature authority to issue, modify, terminate, or withdraw notices of charges, documents, or orders entered into by stipulation or consent which are issued pursuant to this delegation, is delegated to the appropriate Deputy Comptroller," along with Exhibit 6 (SF-50, U.S. Office of Personnel Management, showing the Personnel Action identifying Greg J. Coleman as Large Bank Supervision Deputy Comptroller under 12 U.S.C. 481 and 482 effective January 5, 2020), and Exhibit 7 (OCC News Release 2015-112 dated August 11, 2015, reporting that Greg Coleman "today was named Deputy Comptroller for Large Bank Supervision at the Office of the Comptroller of the Currency").

[124] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 1, citing Julian Affirmative Defense 5; Tolstedt Affirmative Defense 1; Russ Anderson Affirmative Defense 2; McLinko Affirmative Defense 2; and Strother Affirmative Defense 2.

Enforcement Counsel on January 23, 2020 for punitive remedies" are "time barred to the extent they rely on conduct that allegedly occurred before January 23, 2015."[125]

Respondents note that the Notice of Charges seeks three remedies – first, the proposed implementation of a cease-and-desist order to be entered against Respondents Strother, Julian, and McLinko.[126] Second, the Notice proposes the implementation of prohibition orders barring Respondents Tolstedt and Russ Anderson from engaging in regulated banking activity.[127] And third, the Notice includes assessments of monetary penalties against all five Respondents.[128] Although Respondents refer to these collectively as "Punitive Remedies," there are material legal differences distinguishing the three remedies, and as such the analysis that follows will treat the three forms of remedies independent of one another.

Respondents posit that the Notice of Charges "alleges numerous specific instances of misconduct that purportedly occurred prior to the cutoff date, starting in 'the early 2000s' and extending for the 'entirety of the relevant period,' *i.e.*, 2002 to 2016."[129] They note these allegations bear legal weight, in that "the allegations contained in the NOC are binding judicial admissions on Enforcement Counsel," such that Respondents "are entitled to rely on the alleged timing of supposed misconduct as grounds for summary disposition."[130]

Respondents establish that 28 U.S.C. § 2462 imposes a five-year limitation period whenever "the government seeks to impose a "civil fine, penalty, or forfeiture, pecuniary or otherwise," as long as "no Act of Congress provides a superseding limitation period for the statute at issue".[131] They further establish that this statute applies whenever the government assesses a monetary penalty,[132] and whenever it seeks an order removing or prohibiting future participation in regulated banking activity.[133]

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[125] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 1,
[126] Notice of Charges for Orders of Prohibition and Orders to Cease and Desist and Notice of Assessment of a Civil Money Penalty at ¶¶377 (Strother); 436 (Julian); and 473 (McLinko).
[127] *Id.* at ¶¶239 (Tolstedt); and 291 (Russ Anderson).
[128] Notice of Charges for Orders of Prohibition and Orders to Cease and Desist and Notice of Assessment of a Civil Money Penalty at 100.
[129] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 2.
[130] *Id.* at 1-2, citing *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 876 (D.C. Cir. 2014) (holding "factual allegations in operative pleadings are judicial admissions of fact"); *L.L. Nelson Enters., Inc. v. County of St. Louis*, 673 F.3d 799, 806 (8th Cir. 2012) ("Allegations in a complaint are binding admissions."); 12 C.F.R. § 19.29(b)(2); Fed. R. Civ. P. 56(c)(1)(A) (party may stipulate to allegations "for purposes of the [summary judgment] motion only").
[131] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 4, quoting 28 U.S.C. § 2462.
[132] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 5, citing *Blanton v. OCC*, 909 F.3d 1162, 1171 (D.C. Cir. 2018).
[133] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 4, quoting *Kokesh v. SEC*, 137 S. Ct. 1635, 1644 (2017) (internal quotation marks omitted) ("Relief constitutes a 'penalty' if it 'cannot fairly be said solely to serve a remedial purpose' and instead 'also serv[es] either retributive or deterrent purposes."'; also citing *Johnson v. SEC*, 87 F.3d 484, 491 n.11 (D.C. Cir. 1996) ("It is clearly possible for a sanction to be 'remedial' in the sense that its purpose is to protect the public, yet not be 'remedial' because it imposes a punishment going beyond the harm inflicted by the defendant," finding six-month SEC suspension order was a penalty under § 2462); *Proffitt v. FDIC*, 200 F.3d 855, 860-61 (D.C. Cir. 2000); and d*e la Fuente v. FDIC*, 332 F.3d 1208, 1219 (9th Cir. 2003)).

Cease and Desist Orders

With regard to that part of the Notice of Charges seeking to impose cease and desist orders on Respondents Strother, Julian, and McLinko, Respondents acknowledge that whether such orders constitute a penalty "depends on [the] content of the order, which Enforcement Counsel have not yet specified here."[134]

The record reflects that nothing in the Notice of Charges provides details of the terms of a cease and desist order regarding the three Respondents.[135] That said, this form of remedy is, by its very nature, prospective only, and generally is not regarded by the courts as a penalty that is subject to the limitations presented in 28 U.S.C. § 2462.

Respondents advance the proposition that cease and desist orders should be regarded as penalties, citing to *Johnson v. SEC* in support. I cannot, however, conclude from this citation that the proposition is well-founded here. The Court of Appeals in *Johnson* determined that a *suspension* from engaging in regulated activity was a penalty and was therefore subject to the limitations statute, on the basis that "the SEC cites not a single piece of evidence in the record explicitly supporting its finding that suspension of Johnson was necessary due to Johnson's current unfitness to be a supervisor."[136] Rather than supporting a claim that the remedy had been based on the need to protect against *future* misconduct, the court determined that the SEC sought a "sanction solely in view of Johnson's past misconduct."[137]

Jurisprudence on this point establishes that while civil penalties and prohibition orders address wrongs "done in the past," injunctive relief like that found in cease-and-desist orders addresses "only ongoing or future violations" and thus such orders are not subject to the five year limitation found in 28 U.S.C. § 2462.[138]

Elaborating on this point, the Court of Appeals for the Eleventh Circuit in *Sec. & Exch. Comm'n v. Graham* held:

> Our precedent forecloses the argument that § 2462 applies to injunctions, which are equitable remedies. See *Nat'l Parks & Conservation Ass'n v. Tenn. Valley Auth.*, 502 F.3d 1316, 1326 (11th Cir. 2007) (noting, where the plaintiffs sought an injunction to enforce EPA standards, "the statute of limitations set forth in 28 U.S.C. § 2462 applies only to claims for legal relief; it does not apply to equitable remedies"); [*United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997)] ("[S]ection 2462 does not apply to equitable remedies."). In *Banks*, the government obtained an injunction against a landowner requiring that he stop discharging materials into the wetlands on his property and take steps to restore the wetlands to their undisturbed condition before he began discharging the materials. 115 F.3d at 918. Despite Banks's claim that the action was barred by § 2462, we upheld the injunction, observing that it was an equitable remedy and thus

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[134] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 5.
[135] See Notice of Charges for Orders of Prohibition and Orders to Cease and Desist and Notice of Assessment of a Civil Money Penalty at ¶¶377 (Strother); 436 (Julian); and 473 (McLinko).
[136] Johnson v. S.E.C., 87 F.3d 484, 490 (D.C. Cir. 1996).
[137] *Id.*
[138] *Sec. & Exch. Comm'n v. Graham*, 823 F.3d 1357, 1360–61 (11th Cir. 2016), quoting *Reich v. Occupational Safety & Health Review Comm'n*, 102 F.3d 1200, 1202 (11th Cir. 1997).

> beyond the reach of that statute. Id. at 919. An injunction requiring (or forbidding) future conduct is not subject to § 2462's statute of limitations.[139]

Under this analysis, I find the remedies in the Notice of Charges that would impose cease-and-desist orders against Respondents Strother, Julian, and McLinko are not subject to the five-year limitation period in 28 U.S.C. § 2462. As such, that statute will not support Respondents' Motion for Partial Summary Disposition with respect to cease and desist orders.

Prohibition Orders under Section 8(e) and Civil Money Assessments under Section 8(i)

Prohibition orders are proposed against Respondents Tolstedt and Russ Anderson.[140] As previously noted, Respondents have established the legal proposition that the five-year limitation in 28 U.S.C. § 2462 is applicable with respect to this remedy.

Prohibition orders are authorized pursuant to 12 U.S.C. § 1818(e) **Removal and prohibition authority**:

> (1) Authority to issue order
> Whenever the appropriate Federal banking agency determines that--
> (A) any institution-affiliated party has, directly or indirectly--
> (i) violated--
> (I) any law or regulation;
> (II) any cease-and-desist order which has become final;
> (III) any condition imposed in writing by a Federal banking agency in connection with any action on any application, notice, or request by such depository institution or institution-affiliated party; or
> (IV) any written agreement between such depository institution and such agency;
> (ii) engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution; or
> (iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty;
> (B) by reason of the violation, practice, or breach described in any clause of subparagraph (A)--
> (i) such insured depository institution or business institution has suffered or will probably suffer financial loss or other damage;
> (ii) the interests of the insured depository institution's depositors have been or could be prejudiced; or
> (iii) such party has received financial gain or other benefit by reason of such violation, practice, or breach; and
> (C) such violation, practice, or breach--
> (i) involves personal dishonesty on the part of such party; or
> (ii) demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution or business institution,

[139] *Graham*, 823 F.3d at 1360–61.
[140] Notice of Charges for Orders of Prohibition and Orders to Cease and Desist and Notice of Assessment of a Civil Money Penalty at ¶¶239 (Tolstedt); and 291 (Russ Anderson).

the appropriate Federal banking agency for the depository institution may serve upon such party a written notice of the agency's intention to remove such party from office or to prohibit any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution.[141]

Pursuant to Section 8(i), second tier **civil monetary assessments** are available when the following elements are established:

(2) **Civil money penalty**

(A) First tier

Any insured depository institution which, and any institution-affiliated party who--

(i) violates any law or regulation;

(ii) violates any final order or temporary order issued pursuant to subsection (b), (c), (e), (g), or (s) or any final order under section 1831o or 1831p-1 of this title;

(iii) violates any condition imposed in writing by a Federal banking agency in connection with any action on any application, notice, or other request by the depository institution or institution-affiliated party; or

(iv) violates any written agreement between such depository institution and such agency,

shall forfeit and pay a civil penalty of not more than $5,000 for each day during which such violation continues.

(B) **Second tier**

Notwithstanding subparagraph (A), any insured depository institution which, and any institution-affiliated party who--

(i)(I) commits any violation described in any clause of subparagraph (A);

(II) recklessly engages in an unsafe or unsound practice in conducting the affairs of such insured depository institution; or

(III) breaches any fiduciary duty;

(ii) which violation, practice, or breach--

(I) is part of a pattern of misconduct;

(II) causes or is likely to cause more than a minimal loss to such depository institution; or

(III) results in pecuniary gain or other benefit to such party,

[141] 12 U.S.C. § 1818(e).

> shall forfeit and pay a civil penalty of not more than $25,000 for each day during which such violation, practice, or breach continues.[142]

The salient difference between prohibition prosecutions pursuant to Section 8(e) and money assessments pursuant to Section 8(i) is described thus:

> The requirements to impose a second-tier civil monetary penalty are similar to the criteria for an order of prohibition. The only new misconduct element under 12 U.S.C. § 1818(i)(2)(B) requires evidence of "reckless" engagement in unsafe or unsound practices. The Comptroller may satisfy the effects prong on any of the following grounds: that the misconduct was "part of a pattern of misconduct," that it "causes or is likely to cause more than a minimal loss" to the Bank, or that it "results in pecuniary gain or other benefit." 12 U.S.C. § 1818(i)(2)(B)(ii).[143]

Respondents assert that "claims premised on misconduct that allegedly occurred prior to January 23, 2015, are time barred, because the NOC alleges that all three elements were in place more than five years before this action was filed."[144] They assert that the misconduct (in the form of violations of law, engaging in unsafe or unsound practices, or breaching fiduciary duties – or any combination thereof) that occurred before 2015 cannot constitute claims against them.[145] They assert the Notice of Charges describes sales practice misconduct '"that persisted for at least 14 years, beginning no later than 2002."'[146] Respondents note that the Notice includes references to news articles and audits that purportedly detailed sales practices misconduct by employees at Wells Fargo, including articles published in October and December 2013.[147]

From this, Respondents next assert that "culpability and misconduct must coincide in time (*i.e.*, the misconduct must have the requisite intent)," and as such, the Notice of Charges "necessarily asserts that culpability was present as of 2002."[148] They offer as examples allegations in the Notice that, with respect to the articles published in 2013, '"Respondents were well aware of the articles and by 2013 at the latest had no excuse not to take immediate and decisive action to address [sales practices misconduct'."'[149]

Respondents then note that for both prohibition orders and second-tier civil penalties, Enforcement Counsel must "also prove that the misconduct (with culpability) had a statutory 'effect'".[150] For civil penalties, Respondents note such "effects" evidence "must establish that the misconduct: (i) '[was] a part of a pattern of misconduct'; (ii) 'cause[d] or [was] likely to cause more than a minimal loss to [the bank]'; or (iii) 'result[ed] in pecuniary gain or other benefit to [the respondent].'"[151] They also note that for prohibition orders, the "effects" element

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[142] 12 U.S.C. § 1818(i).
[143] *Dodge v. Comptroller of Currency*, 744 F.3d 148, 161 (D.C. Cir. 2014).
[144] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 6.
[145] *Id.*
[146] *Id.*, quoting Notice of Charges at ¶3.
[147] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 7, citing, inter alia, Notice of Charges at ¶¶3, 28, 55, 62, 66, 72, 75, 82, 83, 87, 114, 120, 204, 249, 395, 413, and 448.
[148] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 7, quoting Notice of Charges at ¶¶55, 204, 249, 395, and 448.
[149] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 7, quoting Notice of Charges at ¶55.
[150] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 8.
[151] *Id.*, quoting 12 U.S.C. § 1818(i)(2)(B)(ii).

requires proof that '"(i) the bank 'has suffered or will probably suffer financial loss or other damage'; (ii) 'the interests of the [bank's] depositors have been or could be prejudiced'; or (iii) the respondent 'has received financial gain or other benefit by reason of such violation, practice, or breach.'"[152]

Respondents note that according to the Notice of Charges, the "pattern of misconduct" needed to support a civil penalty under 12 U.S.C. § 1818(i) is shown under the allegation that "the Community Bank had a "systemic" sales practices misconduct problem that "persisted for at least 14 years, beginning no later than 2002," and that Respondents' "massive failure" contributed to the problem "becom[ing] as severe and pervasive as it was and last as long as it did,"[153] and that "by 2013 at the latest [Respondents] had no excuse not to take immediate and decisive action to address a longstanding problem that plagued the largest line of business at the Bank.'"[154]

Respondents note that with respect to pecuniary gain (an element required for both prohibition orders and civil assessments), Respondents – according to the Notice of Charges – received annual incentive compensation that increased based on the "improper business model", so as to satisfy the "pecuniary gain" or "other benefit" element prior to 2015.[155]

Respondents note that with respect to loss to the Bank or its depositors – including reputational harm – the Notice of Charges "expressly alleges that the 'more than a minimal loss' (civil penalty) or 'financial loss or other damage' and 'prejudice to depositors' interest' (prohibition order) elements occurred prior to January 23, 2015."[156]

Drawing from the factual allegations presented in the Notice of Charges, and relying on the decision by the Ninth Circuit in *de la Fuente v. FDIC*,[157] Respondents assert that "the misconduct, culpability, and effects elements were all present prior to January 23, 2015. Thus, claims for Punitive Remedies based on alleged misconduct prior to January 23, 2015 are time barred, and Enforcement Counsel cannot rely on these allegations to prove any remaining claims," concluding that "any finding of liability must rest exclusively on acts that occurred within the limitations period."[158]

While *de la Fuente* is instructive here, it does not provide support for the conclusions urged by Respondents. In *de la Fuente*, the Court of Appeals "agree[d] with the D.C. Circuit that this statute of limitations is applicable to FDIC enforcement actions".[159] The case involved twelve loans and two loan-related transactions which occurred between 1990 and 1995.[160]

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[152] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 8, quoting 12 U.S.C. § 1818(e)(1)(B).
[153] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 8, quoting the Notice of Charges at ¶¶3, 28.
[154] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 9, quoting the Notice of Charges at ¶¶3, 55.
[155] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 9, quoting the Notice of Charges at ¶58.
[156] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 9, citing the Notice of Charges at, inter alia, ¶¶10-12, 55, 99-103, 121, 174, 177a-c.
[157] *de la Fuente v. F.D.I.C.*, 332 F.3d 1208 (9th Cir. 2003).
[158] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 9, quoting *de la Fuente*, 332 F.3d 1219.
[159] *de la Fuente*, 332 F.3d 1219, citing *Proffitt v. FDIC*, 200 F.3d 855, 862 (D.C.Cir.2000).
[160] 332 F.3d 1215.

Applying the reasoning from the Court of Appeals for the D.C. Circuit in *Proffitt*,[161] the Court in *de la Fuente* held that as the FDIC commenced this action on June 11, 1997, it "should not have prosecuted him for transactions that occurred before June 11, 1992."[162]

Thus, there was no reason for the Court of Appeals in *de la Fuente* to conclude that "any finding of liability must rest exclusively on acts that occurred within the limitations period," as argued by Respondents.[163] Specifically, the *de la Fuente* decision does not address *when* those claims meeting the requirements of Sections 8(e) and 8(i) accrued, nor does it address whether misconduct attributed to Respondents gives rise to enforcement actions under the *continuing violation* doctrine.

A claim "accrues 'when the factual and legal prerequisites for filing suit are in place.'"[164] In the context of enforcement actions seeking civil penalties under Section 8(i), "an actionable infraction consists of two elements: first, the bank official must "recklessly engage[ ] in an unsafe or unsound [banking] practice"; and second, the reckless practice must be "part of a pattern of misconduct."[165]

In *Blanton v. OCC*,[166] the OCC asserted that Blanton recklessly engaged in unsafe and unsound banking practices by allowing the Bank to honor several overdrafts in the accounts of a longstanding customer, without adequate controls. The customer had a longstanding relationship with the bank, and over the years, he made numerous transfers that caused substantial overdrafts in some of his accounts, and the Bank always honored the overdrafts. The OCC became aware of the practices in 2003, after the customer had incurred a $5.4 million overdraft at the Bank. The OCC decided against taking action after Campos corrected the 2003 overdrafts and paid attorney's fees to the Bank.[167]

Despite supervisory guidance warning against the practice, the bank continued to honor the overdrafts until the OCC issued a final report stating that the Bank's practice was unsafe and unsound, posing an "unwarranted and excessive credit risk" to the Bank.[168] When in 2015 the OCC filed a notice of assessment against Blanton, he argued that the OCC's claim concerning the customer's overdrafts was barred by the statute of limitations set forth in 28 U.S.C. § 2462. Because the OCC filed its original Notice of Assessment on June 30, 2015, Blanton argued that any claims must have "accrued" on or after June 30, 2010.[169]

The Court of Appeals determined that "a claim accrues each time a bank official recklessly engages in an unsafe or unsound banking practice as part of a pattern of misconduct."[170] Elaborating on this determination, the Court of Appeals held thus:

> Blanton contends that the OCC's overdraft claim accrued long before June 30, 2010, because the Bank's practice of honoring Campos's overdrafts

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[161] *Proffitt v. Fed. Deposit Ins. Corp.*, 200 F.3d 855 (D.C. Cir. 2000).
[162] 332 F.3d 1219.
[163] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 10.
[164] *Proffitt v. Fed. Deposit Ins. Corp.*, 200 F.3d 855, 862 (D.C. Cir. 2000) (quoting *3M Co. (Minnesota Min. & Mfg.) v. Browner*, 17 F.3d 1453, 1460 (D.C. Cir. 1994))
[165] *Blanton v. Office of the Comptroller of the Currency*, 909 F.3d 1162, 1171–72 (D.C. Cir. 2018), quoting 12 U.S.C. § 1818(i)(2)(B)(i)(II), (ii)(I).
[166] Blanton, 909 F.3d 1162.
[167] *Id.* at 1166.
[168] *Id*. at 1167.
[169] *Id*. at 1171.
[170] *Id*.

> began before Blanton assumed the CEO role. But the initial onset of the Bank's ongoing (and preexisting) pattern of honoring the overdrafts did not alone trigger the limitations clock. Rather, each instance of an unsafe or unsound practice triggers a new claim if part of a pattern of misconduct. See *Proffitt* [*v. Fed. Deposit Ins. Corp.*, 200 F.3d 855 (D.C. Cir. 2000)] at 863-64.
>
> As a result, each time the Bank, under Blanton's direction, honored a Campos overdraft without having imposed adequate risk controls, an unsafe or unsound banking practice occurred, continuing the pattern of misconduct and causing a new claim to accrue. It follows that each honored overdraft after June 30, 2010 (there were at least ten) constituted an actionable banking practice as part of a pattern of misconduct. And even though the OCC "might well have brought an action earlier," its "failure to do so" does not make the claims it elected to bring "untimely." *Id*. at 864.[171]

Applied to the facts presented by Respondents in their summary disposition motion, *Blanton* supports the legal premise that each time Respondents engaged in a pattern of misconduct as alleged in the Notice of Charges, a new claim accrued for the purposes of assessments made pursuant to Section 8(i). Similarly, with respect to prohibition orders sought pursuant to Section 8(e), new claim accrued each time Respondents "engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution" provided the misconduct involves "personal dishonesty on the part of such party or demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution or business institution".[172]

To the extent those claims accrued during the five year period preceding the filing of the Notice of Charges, those claims are actionable and are not time barred by the applicable statute of limitations. Further, even though the OCC may have taken action based on allegations in the Notice of Charges that preceded January 23, 2015, *Blanton*[173] and *Proffitt*[174] establish that the OCC' failure to do so does not make the claims that are within the five year period untimely.

Also significant here is the legal question of whether Respondents' conduct over time was of such character as to constitute continuing violations of the Federal Deposit Insurance Act. Respondents assert that the Notice of Charges makes the claim that the three essential elements of misconduct, culpability, and effect all existed prior to 2015.[175] Upon this premise, Respondents argue that because 'the misconduct, culpability, and effect elements were all present prior to January 23, 2015 . . . claims for Punitive Remedies based on alleged misconduct prior to January 23, 2015 are time barred, and Enforcement Counsel cannot rely on these allegations to prove any remaining claims."[176] If this premise is sound, then, Respondents argue, it follows that "any finding of liability must rest exclusively on acts that occurred within the

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[171] 909 F.3d at 1171–72.
[172] 12 USC §§1818(e)(1)(A)(ii); (e)(1)(C).
[173] 909 F.3d at 1171–72.
[174] 200 F.3d at 864.
[175] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 6-10 with citations to the record therein.
[176] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 10.

limitations period."[177] This premise, however, is not supported by the authorities presented in support of Respondents' Motion.

With respect to the remedies of prohibition and civil assessments, a finding of liability will stand if each of the elements appearing in Sections 8(e) or 8(i) are met. By their nature, some of those elements anticipate the passage of time – possibly a significant passage of time – elapsing between the time misconduct occurs and the time of harm to the bank.

Under Section 8(e), prohibition orders may be issued where the "effects" element is established through evidence showing that the bank "has suffered or will probably suffer financial loss". [178] The "culpability" element can be established through evidence showing Respondents' "willful disregard" or "continuing disregard" for the bank's safety or soundness.[179] Under these provisions, liability findings are not limited to those acts that occurred between 2015 and the filing of the Notice of Charges. "Section 1818(e)(1)'s use of 'willful disregard' and 'continuing disregard' present two distinct, alternative standards for removal. The use of the disjunctive 'or' between the words 'willful' and 'continuing' in the statute reveals a clear intent to make either one an offense."[180]

Jurisprudence on this point also establishes that the ability of the OCC to act if it finds a bank "will probably suffer financial loss" coexists with its ability to act after such a loss has occurred. Either condition will provide a basis for enforcement action.

As the Court of Appeals explained in *Proffitt*:

> Proffitt argues that because the FDIC could have brought a section 8(e) removal and prohibition action in 1990, it was required to do so under the statute. The statute, however, expressly authorizes the FDIC to take action "whenever" it determines that the statutory prongs are satisfied. Section 8(e)'s legislative history, spare as it is, supports an expansive view of the enforcement options available to the FDIC (and the other banking regulatory agencies). In 1966, when the Congress first gave banking regulators removal authority, it allowed them little latitude. See 112 Cong. Rec. 20,083 (1966) ((quoting Report of Senate Committee on Banking and Currency); *Anonymous v. FDIC*, 619 F.Supp. 866, 871–72 (D.D.C.1985) (summarizing section 8(e)'s legislative history). With the enactment of [the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub.L. 101–73 (FIRREA)], however, the Congress attempted to lift some of the restrictions it had originally imposed on banking regulators. Before FIRREA the banking regulatory agencies were required to demonstrate that the "bank has suffered or will probably suffer substantial financial loss or other damage or that the interests of its depositors could be seriously prejudiced." 12 U.S.C. § 1818(e) (1988). In FIRREA, the Congress changed the language to "such [bank] has suffered or will probably suffer financial loss or other damage; [or] the interests of the [bank's] depositors have been or could be prejudiced." 12 U.S.C. § 1818(e)(1)(B)(i), (ii). The Committee Report explained the legislative purpose in making the change: "[A]n

[177] *Id.*
[178] 12 USC §§1818(e)(1)(B)(i).
[179] 12 USC §§1818(e)(1)(C)(ii).
[180] *Proffitt v. F.D.I.C.*, 200 F.3d at 863, quoting *Brickner v. FDIC*, 747 F.2d 1198, 1202–03 (8th Cir.1984).

> agency [could] proceed with [a] removal or prohibition action where warranted, without having to quantify losses to the institution or the degree of prejudice to depositors....” H.R. Rep. 101–54, at 392, reprinted in 1989 U.S.C.C.A.N. 188. The change was intended to:
>
> > allow an agency to proceed with such an enforcement action whenever the institution has suffered any financial loss and has been harmed. The higher threshold found in current law has resulted in the FDIC losing cases at an early stage because the losses were not high enough ... or because the FDIC could not quantify the losses.... The regulators must be given the opportunity to proceed before losses become even greater.
>
> *Id*. The Conference Report iterated that the banking regulatory agencies should be able to take action “when an institution has been harmed or the interests of depositors have been prejudiced without requiring the agencies to quantify the harm or prejudice.” H.R.Rep. No. 101–222, at 439 (1989) H.R.Rep. No. 101–222, at 439 (1989), reprinted in 1989 U.S.C.C.A.N. 478. The legislative history also notes that FIRREA was enacted in part to “expand, enhance, and clarify enforcement powers of the financial institution regulatory agencies.” H.R.Rep. No. 101–54, at 311, reprinted in 1989 U.S.C.C.A.N. 107. If the FDIC were limited to acting within five years of determining that the Bank “will probably suffer financial loss,” its burden would have been greater (establishing probability) than if it is also authorized to wait until the Bank “has suffered financial loss” (establishing actuality). To require the FDIC to speculate whether the Bank “will probably suffer” harm or forfeit the removal action altogether would impose upon the FDIC the kind of quantification that the Congress sought to eliminate with FIRREA. While the FDIC might well have brought an action earlier under the “will probably suffer” language, its failure to do so does not render untimely, and therefore, unauthorized, its action based on the later occurring effect. Because the FDIC took action within five years of when the Bank in fact “suffered” financial loss in 1994, its section 8(e) action against Proffitt is not barred by section 2462's five-year statute of limitations.[181]

Respondents argue that *Proffitt* was “incorrectly decided” because “[a] claim under § 1818(i) properly accrues once the ‘effect’ element is satisfied – full stop – which would normally be at the time of the misconduct itself.”[182] They also argue that holding otherwise “would in effect read the statute of limitations out of existence.”[183] I cannot give weight to this interpretation of the jurisprudence on this issue. Applying the rationale in *Proffitt* to this

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[181] *Proffitt*, 200 F.3d at 864-65.

[182] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 12 n.3, citing *Proffitt*, 200 F.3d at 866-867 (Silberman, J. dissenting) (arguing that “actual and legal prerequisites” for enforcement action were in place at time of the respondent’s misconduct and that “a new and distinct FDIC removal action should not arise at every point that evidence of new consequences flowing from that misconduct is uncovered”).

[183] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 13.

enforcement action, I find no legal basis to hold that the finding of liability "must rest exclusively on acts that occurred within the limitations period," as urged by Respondents.[184]

Continuing Violation Doctrine

Correctly anticipating Enforcement Counsel's counter-argument on this point, Respondents assert that "the continuing violation doctrine does not apply to the particular claims alleged in this case."[185] They assert that "the focus of the continuing violations doctrine is on affirmative acts of the defendants," and argue that the claims raised in the Notice of Charges "consist of inaction – *i.e.*, alleged failure to adequately detect, escalate, and remediate sales practices misconduct within the Community Bank."[186]

It bears notice that the continuing violation doctrine has been applied in diverse settings, including claims involving workplace safety regulations,[187] and claims under 42 U.S.C. § 1983 and supplemental state claims of defamation and tortious interference with business relationships,[188] and Respondents note these cases in support.[189] Care must, however, be taken when comparing claims that are based on statutes providing for enforcement action expressly based on *continuing* conduct. Such is the case here, first with actions seeking money penalties, where claims may be based on misconduct that is "part of a pattern", or that "causes or is likely to cause" loss;[190] and second, in actions seeking prohibition orders, based on conduct where the bank "has suffered or will probably suffer financial loss or other damage," or where the depositors' interests "have been or could be prejudiced," or where the misconduct "demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution or business institution".[191]

It is true that, as the Seventh Circuit has observed, "[a] lingering effect of an unlawful act is not itself an unlawful act."[192] But the claims appearing in the Notice of Charges speak not to the lingering effects of conduct that occurred prior to 2015; rather, the claims allege breaches of fiduciary duties, violations of law, and unsafe banking practices arising during the limitations period, occasioned by both acts *and* the Respondents' material failure to act throughout the limitations period.[193]

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[184] *Id.* at 10.
[185] *Id*. at 14.
[186] *Id.,* quoting Cowell v. Palmer Township, 263 F.3d 286, 292 (3d Cir. 2001).
[187] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 14, quoting A*KM LLC dba Volks Constructors v. Sec'y of Labor*, 675 F.3d 752, 757–58 (D.C. Cir. 2012) (finding Section 657(c) which deals with record-keeping is not authorization for OSHA to cite the employer for a record-making violation more than six months after the recording failure).
[188] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 14, quoting *LRL Properties v. Portage Metro Hous. Auth*., 55 F.3d 1097, 1105 n.3 (6th Cir. 1995)
[189] Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 11-17 and citations therein.
[190] 12 USC 1818(i)(2)(B).
[191] 12 USC 1818(e)(1)(B)-(C).
[192] *Guerra v. Cuomo*, 176 F.3d 547, 551 (D.C. Cir. 1999), quoting *Dasgupta v. University of Wisconsin Bd. of Regents*, 121 F.3d 1138, 1140 (7th Cir.1997).
[193] See references to the record at Enforcement Counsel's Opposition to Respondents' Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 8-10.

The Court of Appeals explained the continuing violation doctrine in these terms:

> The continuing violation doctrine, on the other hand, is aimed at ensuring that illegal conduct is punished by preventing a defendant from invoking the earliest manifestation of its wrongdoing as a means of running out the limitations clock on a course of misconduct that persisted over time; the doctrine serves that end by treating the defendant's misconduct as a continuing wrong and deeming an action timely so long as the last act evidencing a defendant's violation falls within the limitations period. See *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 837 (7th Cir. 2005); *Shanoff v. Ill. Dep't of Human Servs.*, 258 F.3d 696, 703 (7th Cir. 2001); *Selan v. Kiley*, 969 F.2d 560, 564 (7th Cir. 1992); *Miami Nation of Indians of Ind., Inc. v. Lujan*, 832 F. Supp. 253, 256 (N.D. Ind. 1993), j. aff'd, 255 F.3d 342 (7th Cir. 2001); see also *O'Loghlin v. Cnty. of Orange*, 229 F.3d 871, 875 (9th Cir. 2000). Thus, where the violation at issue can be characterized as a continuing wrong, the limitations period begins to run not when an action on the violation could first be brought, but when the course of illegal conduct is complete. *Taylor v. Meirick*, 712 F.2d 1112, 1118 (7th Cir. 1983) ("the statute of limitations does not begin to run on a continuing wrong till the wrong is over and done with").[194]

Using the phrase coined in *Spectrum Brands*, Respondents in their statute of limitations motion would invoke "the earliest manifestation of [their] wrongdoing as a means of running out the limitations clock on a course of misconduct that persisted over time."[195] Applied to the facts presented by Respondents in support of their statute of limitations affirmative defense, the wrong alleged in the Notice of Charges constituted a continuing wrong until the systemic sales practices misconducted ended in 2016.[196] Guided by the foregoing analysis, I find an insufficient legal and factual basis has been presented by Respondents in support of their motion for partial summary disposition based on the applicable statute of limitations.

Upon the foregoing, Respondents' Joint Motion for Summary Disposition on the Basis of their Article III, Seventh Amendment, and Due Process Defenses, and Respondents' Joint Motion for Summary Disposition on the Basis of their Appointments, Removal, and Improper Signatory Defenses, and Respondents Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses, are DENIED.

SO ORDERED.

June 24, 2020

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Christopher B. McNeil
Administrative Law Judge
Office of Financial Institution Adjudication

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[194] *United States v. Spectrum Brands, Inc.*, 924 F.3d 337, 350–52 (7th Cir. 2019).

[195] *Id.* at 352.

[196] See Enforcement Counsel's Opposition to Respondents' Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses at 8-11 and references to the record therein.

CERTIFICATE OF SERVICE

On June 24, 2020 I served by email transmission a copy of the foregoing Order Regarding Respondents' Initial Joint Motions for Summary Disposition upon:

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UNITED STATES OF AMERICA
BEFORE THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
WASHINGTON, D.C.

In the Matter of	)	
FRANK E. SMITH and MARK A. KIOLBASA	)	Docket No. 18-036-E-I
Institution-affiliated parties of FARMERS STATE BANK Pine Bluffs, Wyoming, a state member bank	)	

DETERMINATION ON REQUESTS FOR INTERLOCUTORY APPEAL

On September 6, 2019, Respondents Frank E. Smith and Mark A. Kiolbasa filed a Motion for Interlocutory Review ("September Request") of the August 27, 2019 Order issued by the Honorable Christopher B. McNeil, presiding administrative law judge ("ALJ") of the Office of Financial Institutions Adjudication, entitled "Order Regarding Pending Prehearing Motions" (the "August Order"). On November 6, 2019, Respondents filed a second Motion for Interlocutory Review ("November Request") of the ALJ's October 24, 2019 Order Regarding Enforcement Counsel's Motion for Summary Disposition (the "October Order"). For the reasons set forth below, the Board of Governors of the Federal Reserve System ("Board") denies the November Request, and denies as moot the September Request.

Background

The Board initiated this proceeding against Respondents on December 11, 2018. *See* Notice of Intent to Prohibit Pursuant to section 8 of the Federal Deposit Insurance Act, as Amended ("Notice"). In the Notice, Enforcement Counsel allege that Respondents engaged in unsafe or unsound practices and breached their fiduciary duties to Central Bank & Trust—a state nonmember bank subject to regulatory oversight by the Federal Deposit Insurance Corporation

("FDIC")—and/or to state member bank Farmers State Bank. Notice ¶¶ 25-30. On August 2, 2019, Enforcement Counsel moved for summary disposition and sought a recommendation that the Board issue a final prohibition order against Respondents. As part of their August 22, 2019 opposition to this motion, filed more than eight months after the initiation of this action, Respondents asked the Court to dismiss the enforcement action for lack of jurisdiction.

The ALJ initially declined to evaluate the merits of the jurisdictional argument, ruling that he "lack[ed] the power to grant such a request" because an ALJ does not have "the authority to dismiss agency complaints" under 5 U.S.C. § 556(c). August Order at 2. Accordingly, he denied Respondents' motion to dismiss. *Id.* The Order did not consider the merits of Enforcement Counsel's motion for summary disposition. *See id.* On October 24, 2019, the ALJ issued a second order, granting in part and denying in part Enforcement Counsel's motion for summary disposition, finding that Respondents engaged in misconduct under section 8(e)(1)(A) of the FDI Act but that "the *effect* of Respondents' misconduct and . . . whether Respondents acted with the requisite *culpability*" remained a contested issue of fact. October Order at 1-2 (emphasis in original). In addition, the ALJ considered the jurisdictional issue and determined that the Board does have jurisdiction over the matter. *Id.* at 1.

Applicable Standard

The Board's regulations provide that the Board may exercise interlocutory review of an ALJ's ruling if the Board finds that:

(1) the ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) subsequent modification of the ruling would cause unusual delay or expense.

12 C.F.R. § 263.28(b). The Board's "[i]nterlocutory review is discretionary, and the scope within which such discretion should be exercised is extremely narrow." *In re Fang*, FRB No. 17-006-E-I, 2018 WL 3006183, at *2 (Jan. 30, 2018) (quotation omitted). "[W]hile a finding of one of the four circumstances identified in Rule 28 is a necessary precondition to interlocutory review by the Board, it is not alone sufficient to require such review. Rather, the Board will exercise its discretion to grant interlocutory review where at least one of the prerequisites is met, using all of the prerequisites as guideposts in the exercise of that discretion." *In re Incus Co.*, 86 Fed. Res. Bull. 246, 2000 WL 268047, at *2 (Mar. 1, 2000).

Discussion

Respondents' core argument is that they were institution-affiliated parties (IAPs) of a state nonmember bank at the time of their identified misconduct, making the FDIC the only federal banking agency with jurisdiction over that activity. November Request at 7-8. The Board rejects this argument.

The Board's jurisdiction is predicated on Respondents' relationship with Farmers State Bank, which is indisputably a state-member bank that currently employs Respondents. October Order at 11-12. Section 8(e)(1) of the FDI Act states that any IAP who has violated "*any* law or regulation," "engaged or participated in *any* unsafe or unsound practice in connection *with any insured depository institution or business institution*," or "engaged in *any* act . . . which constitutes a breach of such party's fiduciary duty" may be prohibited by "the appropriate Federal banking agency." 12 U.S.C. § 1818(e)(1) (emphasis added). The plain language of the statute does not limit prohibition to instances where the misconduct occurred at an institution subject to that particular Federal banking agency's purview, but applies more broadly to "any" insured depository institution or business institution. *See Hendrickson v. FDIC*, 113 F.3d 98,

102-03 (7th Cir. 1997) (upholding the FDIC's jurisdiction to prohibit a bank president due to a violation he committed while employed as comptroller at a coin and precious metal dealership). Indeed, the remedial purpose of section 8(e) would be frustrated if the Board was dependent on other banking agencies to remove bad actors from Board-supervised institutions, thereby hampering the Board's ability to protect the safety and soundness of the institutions it supervises.

In their August 22, 2019 request for dismissal, Respondents relied on two cases for the premise that the FDIC has exclusive jurisdiction to regulate unsafe and unsound practices at state nonmember banks, which would be disrupted if the Board has jurisdiction over Respondents. *See Bd. of Governors of Fed. Res. Sys. v. DLG Fin. Corp.*, 29 F.3d 993, 999 (5th Cir. 1994) ("section 1818 as a whole provides a detailed framework for regulatory enforcement and for orderly review of the various stages of enforcement" (quoting omitted)); *Inv. Co. Inst. v. FDIC*, 815 F.2d 1540, 1542 (D.C. Cir. 1986) ("Federal regulation effectively divides the United States commercial banking community into three major categories. . . . . [I]nsured state banks that are not members of the Federal Reserve System operate under the watchful eye of the FDIC."). But Respondents mistakenly conflate the FDIC's jurisdiction under 12 U.S.C. §§ 1813(q) and 1815 to regulate state nonmember insured *banks* with the Board's jurisdiction under 12 U.S.C. § 1818(e) over its own *IAPs* who may have once been affiliated with an FDIC-supervised institution, and the cases they cite do nothing to call the Board's jurisdiction into question.

Respondents also contend that the FDIC's six-year retention of jurisdiction over terminated or separated IAPs under section 8(i)(3) of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") bars concurrent jurisdiction by the Board over those IAPs' actions undertaken while at a state nonmember bank. *See* November Request at 8. But nowhere does section 8(i)(3) serve to limit the current "appropriate Federal banking

agency"—here, the Board—from entering a prohibition against IAPs simply because the misconduct may still be punishable by the agency that regulated the IAPs' prior employer. *See* 12 U.S.C. § 1818(i)(3). Rather, Congress passed section 8(i)(3) as a means of clarifying, in the wake of *Stoddard v. Board of Governors of the Federal Reserve System*, 868 F.2d 1308 (D.C. Cir. 1989), that federal banking agencies retain jurisdiction over IAPs who have departed. *See* *CityFed Fin. Corp. v. OTS*, 58 F.3d 738, 744 (D.C. Cir. 1995). The provision and its legislative history contain no discussion about or impact on the authority of a federal banking agency that *currently* employs an IAP. *See* 12 U.S.C. § 1818(i)(3); H.R. Rep. No. 101-54(I), at *469 (1989).

The Board finds that its jurisdiction to issue a prohibition order against Respondents for misconduct that took place at a state nonmember bank is not a question "as to which substantial grounds exist for a difference of opinion," 12 C.F.R. § 263.28(b)(1). Moreover, Respondents do not contest the Board's jurisdiction over alleged misconduct that impacted or occurred at Farmers State Bank, a state member bank that is supervised by the Board. *See* Notice ¶¶ 26-30; *see also* October Order at 15-16 ("[T]he record demonstrates that Central wasn't alone in sustaining damage: the threat of the lawsuit against Farmers as reflected in the averments contained in the Notice of Intent is a factor that gives rise to the Reserve Board's jurisdiction over such conduct. . . . Respondents disregard the fact that as alleged in the present Notice of Intent, misconduct attributed to Respondents in the charging document includes multiple allegations of misconduct occurring while Respondents were working at Farmers."). In light of these determinations, the Board finds that Respondents have similarly failed to establish the other factors set forth in 12 C.F.R. § 263.28(b).

The Board therefore declines to exercise its discretion to exercise interlocutory review of Respondents' November Request. As a result, the Board denies as moot Respondents'

September Request, which disputed the ALJ's determination that he lacked the power to dismiss the enforcement action on jurisdictional grounds.[1]

Conclusion

For the foregoing reasons, the Board declines Respondents' requests for interlocutory review.

By Order of the Board of Governors this 9th day of March, 2020.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

Ann E. Misback
Secretary of the Board

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[1] The ALJ grounded his denial of the September Request on a lack of authority. August Order at 2 ("a presiding administrative law judge lacks the power to grant such a request"). Although it is the case that "only the Board 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. § 263.5(b)(7), a jurisdictional challenge or other dispositive motion may as a general matter be made "at any time" and, where dismissal is appropriate, the ALJ "shall submit a recommended decision to that effect to the Board." *See id.* § 263.23(f) ("Dispositive Motions"); *id.* § 263.29(b)(1) ("Any party who believes that there is no genuine issue of material fact to be determined and that he or she is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding"); *id.* § 263.29(d) ("Decision on motion"). Although the Board's decision on the November Request moots the September Request, it bears mention that respondents are afforded an avenue to properly raise jurisdictional challenges where appropriate.