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

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

ORDER DENYING RESPONDENT'S MOTION TO DISMISS THE NOTICE OF CHARGES FOR PROHIBITION AND ASSESSMENT OF CIVIL MONEY PENALTY AND ORDER GRANTING ENFORCEMENT COUNSEL'S MOTION TO STRIKE RESPONDENT'S FOURTH AFFIRMATIVE DEFENSE

The Office of the Comptroller of the Currency ("OCC") commenced this action against Respondent Rohan Ramchandani ("Respondent") on January 9, 2017, filing a Notice of Charges ("Notice") that seeks an order of prohibition and the imposition of a $5 million civil money penalty against Respondent pursuant to Section 8 of the Federal Deposit Insurance ("FDI") Act, 12 U.S.C. §§ 1818(e) and (i). Respondent has now moved to dismiss the Notice[1] on several statutory and constitutional grounds, including that the OCC lacks personal jurisdiction over a foreign national who resides and works in a foreign country, where that individual was employed by a U.S. bank during the relevant period and, in the course of that employment, made hundreds of millions of dollars of daily foreign exchange ("FX") spot trades with U.S. residents, exposing the bank to credit risk and potential liability, while engaging in the activity that forms the basis of the OCC's allegations against him. Enforcement Counsel for the OCC ("Enforcement Counsel") has moved

[1] The OCC's Uniform Rules of Practice and Procedure ("Uniform Rules") contain no specific provision regarding the mechanics of this tribunal's consideration of dispositive motions other that motions for summary disposition. Consequently, in addressing Respondent's motion, the undersigned will adopt and apply as appropriate the standards set forth with respect to motions to dismiss under Rule 12 of the Federal Rules of Civil Procedure.

in turn to strike Respondent's fourth affirmative defense regarding lack of personal jurisdiction. For the reasons set forth below, the undersigned will deny Respondent's March 30, 2020 Motion to Dismiss the Notice of Charges for Prohibition and Assessment of Civil Money Penalty ("Resp. Mot.") and grant Enforcement Counsel's March 30, 2020 Motion to Strike Respondent's Fourth Affirmative Defense ("OCC Mot.").

The undersigned notes at the outset that, in evaluating a motion to dismiss for lack of personal jurisdiction in accordance with federal court practice, this tribunal is not confined to the pleadings but "may receive and weigh affidavits and any other relevant matter to assist it in determining the jurisdictional facts."[2] While the OCC bears the burden of showing that personal jurisdiction exists in order to defeat the motion, it need only make a *prima facie* showing at this stage.[3] Moreover, "all factual discrepancies" relating to jurisdictional facts will be resolved in the agency's favor as the nonmoving party.[4] Finally, where they are not purely conclusory or "[t]hreadbare recitals of the elements of a cause of action," the undersigned will take all allegations in the Notice as true for the purpose of Respondent's motion.[5]

I. **Background**

Respondent is a citizen and resident of the United Kingdom. The parties agree that from December 2007 through January 2013 ("the Relevant Period"), Respondent worked in London, England at the London branch of Citibank, N.A. ("Citibank" or "the Bank"), first as an FX spot

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[2] *Scurlock v. Lappin*, 870 F. Supp. 2d 116, 121 (D.D.C. 2012) (internal quotation marks and citation omitted); *accord*, *e.g.*, *Pederson v. Frost*, 951 F.3d 977, 979 (8th Cir. 2020); *Mwani v. Bin Laden*, 417 F.3d 1, 7 (D.C. Cir. 2005).

[3] *Mwani*, 417 F.3d at 7; *see also Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 81 (2d Cir. 2018) (*prima facie* showing "entails making legally sufficient allegations of jurisdiction, including an averment of facts that, if credited, would suffice to establish jurisdiction over the defendant") (internal quotation marks and citation omitted).

[4] *Scurlock*, 870 F. Supp. 2d at 121.

[5] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

trader and then as Head of European FX Spot Trading on the Bank's London FX spot desk.[6] Notice ¶¶ 18-20, 26; *see* Resp. Mot. at 2. In this capacity, Respondent traded currency pairs—including the euro/U.S. dollar ("EUR/USD") currency pair—with counterparties in a decentralized electronic marketplace. *Id.* ¶¶ 6-7, 18. Upon his promotion in 2010, Respondent also assumed "supervisory responsibilities over the Bank's FX spot trading desks in Europe." *Id.* ¶ 19.

Citibank is an insured depository institution within the meaning of the FDI Act. *Id.* ¶ 1; *see also* OCC Mot., Ex. A (FDIC certification). The Bank's counsel has represented, and the undersigned takes as true for purposes of determining the jurisdictional facts, that the London branch of Citibank in which Respondent was employed is the Bank's place of business in the United Kingdom "and is not a separate corporate entity from the Bank." OCC Opposition to Motion to Dismiss ("OCC Opp."), Ex. 5 at 2. Among other things, this means that any liability or loss arising from Respondent's acts or omissions during the course of his employment—and any credit risk incurred as a result of Respondent's trades—was borne by Citibank rather than any European entity. *See id.* at 9.

Respondent began working for the Bank at the Bank's New York trading desk, OCC Opp. at 4, and his regular contacts with U.S. employees of the Bank continued after his transfer to London. For example, Respondent's direct supervisor as Head of European FX Spot Trading was located in New York. *Id.*; *see id.*, Exs. 3 & 4. Enforcement Counsel also asserts, and Respondent does not dispute, that Respondent "regularly communicated with other Bank employees located in New York," including "lengthy chatroom conversations with Simon Jones, the Bank's head of FX

[6] As the OCC explains, "[t]he foreign exchange market enables participants to buy, sell, exchange, hedge, and speculate on currencies. The [FX spot market] is the market where currencies are traded for one another in pairs for settlement generally within two days." Notice ¶ 5; *see also id.* ¶¶ 6-17. There appears to be no material dispute between the OCC and Respondent regarding the nature and mechanics of the FX spot market. *See* Resp. Mot. at 2.

spot in New York."[7] *Id.* at 4. There should be no question, then, that although he was located in London, Respondent understood that he was working for, and on behalf of, a U.S. financial institution, and that the exercise of his duties and responsibilities for that institution could foreseeably be governed by U.S. as well as U.K. law.

Moreover, Enforcement Counsel asserts that—in his capacity at the Bank's London FX spot desk during the Relevant Period—Respondent executed hundreds of trades involving hundreds of millions of dollars of currency with U.S. residents on a daily basis. *Id.* at 5-7; *see also id.*, Ex. 1 ("Swanson Decl.") ¶¶ 13-18. Enforcement Counsel concludes, for example, that on April 13, 2012, Respondent executed 348 trades of EUR/USD with U.S. residents for a total value of $555 million, comprising more than half of Respondent's trades on that date, and including $162 million in trades with U.S. residents "in the two seconds" prior to the European Central Bank ("ECB") fix point regarding which Respondent is alleged to engaged in collusive activity.[8] *Id.* at 6; *see* Swanson Decl. ¶¶ 13-14. Enforcement Counsel further avers that the trading activity on this date, and on the two other dates for which it provides data, "is representative of Respondent's trading patterns during the relevant period described in the Notice." OCC Opp. at 6; *see* Swanson Decl. ¶ 5.

In response, Respondent argues that because the electronic trading system utilized by Respondent was anonymous, he "did not know where his trading counterparties were located" at the time of any given trade. Reply in Support of Respondent's Motion to Dismiss ("Reply") at 3.

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[7] Respondent does dispute Enforcement Counsel's additional assertion that Respondent frequently traded with Bank customers located in the U.S. while working in London. *See* OCC Opp. at 5; Reply in Support of Respondent's Motion to Dismiss ("Reply") at 2-3. Given the multiple other indicia of Respondent's contacts with the U.S. forum as an employee of the Bank, as summarized in Part IV.A.2 *infra*, the undersigned finds that it is unnecessary to resolve this dispute in order to determine whether the OCC may validly assert personal jurisdiction over Respondent.

[8] *See* Notice ¶¶ 14-17 for a detailed explanation of the ECB fix, the World Market/Reuters ("WM/R") fix, and FX spot fixes (or "benchmarks") in general, and see the rest of the Notice (as well as *infra*) for specific allegations regarding Respondent's collusive activity.

This statement proves far too little, however. First, it does not refute Enforcement Counsel's assertion that such trades with U.S. residents in fact took place at the claimed volume and frequency. Second, and critically for purposes of personal jurisdiction, it says nothing about whether Respondent—as a trader or in his capacity as Head of the Bank's FX Spot Desk in London—was aware generally that a significant percentage of his trades were with U.S. residents, even if he could not know at the point of any particular trade the provenance of the particular counterparty with whom he was trading. Respondent makes no representation that he did not trade regularly with U.S. residents or that he was unaware of that fact. As such, the undersigned will take Enforcement Counsel's assertions in this regard as true at this stage and, further, conclude that if this is so, Respondent would have been generally aware—particularly with respect to his EUR/USD trading activities—that a large proportion of the trades he executed on behalf of the Bank during the Relevant Period were with entities domiciled in the United States.

II. Summary of Allegations and Relevant Procedural History

This action concerns alleged misconduct by Respondent in the course of his work trading EUR/USD currency pairs on behalf of the Bank during the Relevant Period. Specifically, the OCC alleges that Respondent engaged in a "conspiracy with EUR/USD traders at competing financial institutions . . . to suppress or eliminate competition and increase, decrease, fix, maintain, or stabilize prices in the FX Spot Market." Notice ¶ 23. According to the OCC, in furtherance of this conspiracy, Respondent "engaged in near daily conversations" with his alleged co-conspirators "in a permanent electronic chat room that on certain occasions referred to itself, and was known in the market, as the 'Cartel.'" *Id.* ¶ 26.

The OCC alleges that Respondent and the other traders in this chat room "(1) agreed to coordinate trading in the EUR/USD currency pair in connection with the ECB and WM/R FX spot

benchmarks; (2) agreed to withhold certain bids and offers when one trader . . . had an open risk position; and (3) disclosed, discussed, and coordinated currency pair spreads to be quoted to customers." *Id.* ¶ 24. The OCC further alleges that, as part of this conspiracy, "Respondent disclosed confidential, commercially sensitive information, such as information on customer orders and currency pair spreads, to the Bank's competitors in the Cartel chat room or elsewhere." *Id.* ¶ 25. The OCC alleges that Respondent's conduct violated Section 1 of the Sherman Antitrust Act ("Sherman Act"), caused the Bank likewise to violate the Sherman Act, constituted unsafe and unsound practices in connection with an insured depository institution, and breached Respondent's fiduciary duty to the Bank. *Id.* ¶¶ 22-25. Finally, the OCC alleges that, through his misconduct, Respondent caused the Bank to suffer significant losses from legal liability, including $394 million in settlement to resolve civil litigation, and an additional $1.6 billion in penalties to three government agencies. *Id.* ¶¶ 49-50.

<u>The Parallel Criminal Action</u>

These proceedings were initiated on January 10, 2017. On February 27, 2017, this matter was stayed by Administrative Law Judge ("ALJ") Christopher McNeil by request of the Attorney General pending the resolution of a parallel criminal proceeding arising from the same alleged misconduct that is the subject of the Notice. On August 21, 2018, the Comptroller of the Currency ("Comptroller") reassigned this matter to ALJ C. Richard Miserendino following the Supreme Court's decision in *Lucia v. SEC*.[9] On October 26, 2018, Respondent was acquitted of criminal antitrust conspiracy charges following a three-week jury trial. *See* Resp. Mot. at 3. On November

[9] 585 U.S. ___, 138 S. Ct. 2044 (2018); *see* Order in Pending Enforcement Cases in Response to *Lucia v. SEC* (August 21, 2018).

13, 2018, upon notification of the conclusion of the parallel criminal proceeding against Respondent, ALJ Miserendino lifted the stay in this action.[10]

The Instant Motions

On January 6, 2020, the Comptroller issued an Order reassigning this matter to the undersigned.[11] On February 28, 2020, the parties filed a joint status report indicating that the issue of whether the OCC could exercise personal jurisdiction over Respondent was pending and suitable for disposition. Joint Status Report at 3. Following a scheduling conference on March 11, 2020, the undersigned then directed the parties to file any preliminary dispositive motions by March 30, 2020, which they did. March 11, 2020 Scheduling Order at 2. In addition to contending that dismissal is merited because the OCC lacks personal jurisdiction over Respondent, Respondent's motion raises arguments regarding the ability of this tribunal to adjudicate the charges set forth in the Notice, the constitutionality of the statutory framework under which such charges have been brought, and the sufficiency of the OCC's allegations in pleading the necessary elements of its case. In turn, Enforcement Counsel moves to strike Respondent's assertion of the lack of personal jurisdiction as his fourth affirmative defense.

III. Applicable Statutes

Because several of Respondent's arguments for dismissal go to the scope of enforcement powers afforded the OCC, it is worth first discussing the statutory framework under which that agency brings this action. Section 8 of the FDI Act, as amended most pertinently by the Financial Institutions Supervisory Act of 1966 ("FISA") and the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), vests in "the appropriate Federal banking agency" the

[10] For a more detailed recitation of the procedural history of this proceeding, see Order Denying Respondent's Motion to Dismiss the Notice of Charges for Prohibition and Assessment of Civil Money Penalty (March 16, 2020).

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

authority to institute enforcement proceedings for the imposition of various sanctions against "institution-affiliated parties" who the agency alleges have engaged in actionable misconduct.[12] The OCC is the appropriate federal banking agency under the FDI Act for, among other institutions, "any national banking association."[13] 12 U.S.C. § 1813(q)(1)(A). The OCC alleges that the Bank is a national banking association and that Respondent is an institution-affiliated party ("IAP") of the Bank.[14] *See* Notice ¶¶ 1-2; 12 U.S.C. § 1813(u) (defining IAP). The OCC therefore asserts that it has the authority to bring this action against Respondent for a prohibition order under 12 U.S.C. § 1818(e) and a second-tier civil money penalty under 12 U.S.C. § 1818(i). *See* Notice ¶ 4.

To merit a prohibition order against an IAP under Section 1818(e), an agency must prove the separate elements of misconduct, effect, and culpability. The misconduct element may be satisfied, among other ways, by a showing that the IAP has (1) "violated any law or regulation," (2) "engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution," or (3) "committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty." 12 U.S.C. § 1818(e)(1)(A). The effect element may be satisfied, in turn, by showing either that the institution at issue thereby "has suffered or probably will suffer financial loss or other damage," that the institution's depositors' interests "have been or could be prejudiced," or that the charged party "has received financial gain or other benefit." *Id.* § 1818(e)(1)(B). And the culpability element may be satisfied

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[12] *See* FISA, Pub. L. 89-695, § 204, 80 Stat. 1028 (1966) (codified as amended at 12 U.S.C. § 1818(e)); FIRREA, Pub. L. 101-73, §§ 901, 903, 907, 103 Stat. 183 (1989) (codified as amended at 12 U.S.C. §§ 1813 and 1818(e), (i)); *see also* Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. 95-630, § 107(e)(1), 92 Stat. 3660 (1978) (codified as amended at 12 U.S.C. § 1818(i)).

[13] The statute provides that "more than one agency may be an appropriate Federal banking agency with respect to any given institution," if that institution so qualifies. 12 U.S.C. § 1813.

[14] Respondent does not dispute that he is an IAP of the Bank. *See* Resp. Mot. at 9.

that the alleged violation, practice, or breach either "involves personal dishonesty" by the IAP or "demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution." *Id.* § 1818(e)(1)(C).

The imposition of a second-tier civil money penalty under Section 1818(i) also requires the satisfaction of multiple elements. First, the agency must show misconduct, which can take the form of a violation of "any law or regulation,"[15] the breach of "any fiduciary duty," or the reckless engagement "in an unsafe or unsound practice in conducting the affairs" of the institution in question. *Id.* § 1818(i)(2)(B)(i). Second, the agency must additionally show some external consequence or characteristic of the IAP's alleged misconduct: (1) that it "is part of a pattern of misconduct"; (2) that it "causes or is likely to cause more than a minimal loss to such depository institution"; or (3) that it "results in pecuniary gain or other benefit to such party." *Id.* § 1818(i)(2)(B)(ii).

Although the misconduct prongs of both Sections 1818(e) and (i) may be satisfied by an IAP's engagement or participation in an "unsafe or unsound practice" related to the depository institution with whom he is affiliated, that phrase is nowhere defined in the FDI Act or its subsequent amendments. John Horne, Chairman of the Federal Home Loan Bank Board ("FHLBB") during the passage of FISA, submitted a memorandum to Congress that described such practices as encompassing "any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering

[15] The misconduct elements of both Section 1818(e) and (i) can also be satisfied by the violation of (a) an agency cease-and-desist order, (b) a condition imposed in writing by a federal banking agency, or (c) any written agreement between such an agency and the depository institution in question. *See* 12 U.S.C. §§ 1818(e)(1)(A)(i), (i)(2)(A). The OCC does not allege any such violations in this case.

the insurance funds."[16] This so-called Horne Standard has long guided federal banking agencies, including the OCC, in bringing and resolving enforcement actions.[17] It has also been recognized as "the authoritative definition of an unsafe or unsound practice" by federal appellate courts.[18] The undersigned accordingly adopts the Horne Standard, both for purposes of Respondent's instant motion and going forward in this proceeding, when evaluating allegations of unsafe or unsound practices under the relevant statutes.

IV. Argument and Analysis

Respondent makes three arguments in support of dismissal. First, he argues that the OCC has not made a *prima facie* showing of personal jurisdiction. *See* Resp. Mot. at 4-10. Second, he argues that Section 1818 is unconstitutional to the extent that it permits this tribunal to adjudicate claims that must be decided in an Article III court. *See id.* at 10-15. And finally, he argues that the Notice does not adequately allege facts to support the elements of the OCC's causes of action at the pleading stage. *See id.* at 15-19. The undersigned will address each argument in turn.

A. Personal Jurisdiction

Respondent contends that this tribunal cannot exercise personal jurisdiction over him under the Due Process Clause of the Fifth Amendment because he is a foreign national residing in a foreign country whose alleged actions while employed by a U.S. bank took place overseas and were not directed at the United States in any purposeful way. *See* Resp. Mot. at 4-6. The undersigned disagrees and concludes that Respondent has more than sufficient contacts with the

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[16] *Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before the House Comm. on Banking and Currency*, 89th Cong., 2d Sess. 49 (1966) (statement of John H. Horne, Chairman of the FHLBB), 122 Cong. Rec. 26,474 (1966).

[17] *See*, *e.g.*, *In the Matter of Patrick Adams*, Final Decision, No. AA-EC-11-50, 2015 WL 8735096 (OCC Sep. 30, 2014) (discussing Horne Standard in detail).

[18] *Gulf Federal Sav. & Loan Ass'n of Jefferson Parish v. FHLBB*, 651 F.2d 259, 264 (5th Cir. 1981); *see also Patrick Adams*, 2014 WL 8735096, at **14-17 (surveying application of Horne Standard by various circuits).

United States as a forum through his employment and conduct to make the exercise of personal jurisdiction over him in this matter appropriate.

1. The OCC Has Asserted Specific Jurisdiction Over Respondent Based On His Contacts with the United States

When determining whether the exercise of personal jurisdiction over a nonresident of a forum is appropriate, "[t]he question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct."[19] Moreover, where the operative statute provides "for nationwide or worldwide service," as Section 1818(l) does in this case, "the relevant inquiry is whether the respondent has had sufficient minimum contacts with the United States" as a whole, rather than any state in particular.[20] While such contacts can form the basis for either general or specific personal jurisdiction, Enforcement Counsel here asserts only the latter—that is, that the claims in the Notice arise out of, or relate to, Respondent's contacts with the United States.[21] *See* OCC Opp. at 10 n. 6.

The Supreme Court has held that for a forum to exercise specific jurisdiction over a nonresident defendant, "the defendant's suit-related conduct must create a substantial connection with [that forum]."[22] Further, the relationship between the defendant's conduct and the forum

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[19] *J. McIntyre Machinery, Ltd. v. Nicastro* ("*Nicastro*"), 564 U.S. 873, 884 (2011) (plurality opinion).

[20] *SEC v. Knowles*, 87 F.3d 413, 417 (10th Cir. 1996); *see also Waldman v. PLO*, 835 F.3d 317, 330 (2d Cir. 2016) ("[U]nder the Fifth Amendment[,] the court can consider the defendant's contacts throughout the United States."). Section 1818(l) provides that "[a]ny service required or authorized to be made by the appropriate Federal banking agency under this section may be made by registered mail, or in such other manner reasonably calculated to give actual notice as the agency may by regulation or otherwise provide." 12 U.S.C. § 1818(l). For further elaboration of the undersigned's conclusion that this statute provides for service internationally, please see the Order Denying Enforcement Counsel's Motion for Default and Respondent's Omnibus Motion to Dismiss that has been concurrently issued in a separate case arising from the same alleged FX trading chat room conspiracy, which this tribunal will furnish upon request. *In the Matter of Richard Usher*, OCC No. AA-EC-2017-3 (OFIA July 28, 2020).

[21] *See Charles Schwab Corp.*, 883 F.3d at 82; *see also Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984) (distinguishing between general and specific jurisdiction).

[22] *Walden v. Fiore*, 571 U.S. 277, 284 (2014).

"must arise out of contacts that the defendant *himself* creates with the forum State."[23] In the familiar formulation, "there [must] be some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[24] Specific personal jurisdiction may not be established "solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person."[25]

"By requiring that individuals have fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign, the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[26] Thus, the Supreme Court has "upheld the assertion of jurisdiction over defendants who have purposefully reached out beyond their State and into another by, for example, entering into a contractual relationship that envisioned continuing and wide-reaching contacts in the forum State."[27] As a general matter, when a foreign person "deliberately has . . . created continuing obligations between himself and residents of a forum, he manifestly has availed himself of the privilege of conducting business there."[28]

Once the moving party has demonstrated that a nonresident "who purposefully has directed his activities at forum residents" has had sufficient minimum contacts with the forum in question, the nonresident may seek to defeat jurisdiction.[29] To do so, "he must present a compelling case

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[23] *Id.* (internal quotation marks and citation omitted) (emphasis in original).

[24] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985) (internal quotation marks and citation omitted).

[25] *Id.* at 475 (internal quotation marks and citations omitted).

[26] *Id.* at 472 (internal quotation marks and citations omitted).

[27] *Walden*, 571 U.S. at 285 (internal quotation marks and citation omitted).

[28] *Burger King*, 471 U.S. at 475-76 (internal quotation marks and citation omitted).

[29] *Id.* at 477.

that the presence of some other considerations would render jurisdiction unreasonable."[30] Broadly speaking, these further factors to be evaluated speak to "whether the assertion of personal jurisdiction would comport with fair play and substantial justice."[31] They include "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, [and] the . . . judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies."[32] In considering these factors, a court may even conclude that they "serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."[33]

2. Respondent's Work for the Bank Constitutes Purposeful Availment of the U.S. Forum and Its Laws

The undersigned agrees with Enforcement Counsel that Respondent's course of conduct as the employee of a U.S. depository institution trading extensively with U.S. residents throughout the five-year Relevant Period amply demonstrates purposeful availment of the U.S. forum. *See* OCC Opp. at 11-12. As described more fully in Part I *supra*, Respondent does not dispute that he was a Bank employee who traded on behalf of the Bank, including as the head of the Bank's European FX spot trading. He does not dispute that he was supervised and directed exclusively by Bank personnel, including a direct supervisor based in New York. He does not dispute that he made hundreds of millions of dollars of daily currency trades with U.S. residents. And he does not dispute that the Bank bore the credit risk of loss on his trades and that his actions could expose the Bank to legal liability in the United States. Respondent is correct that the mere act of causing U.S.

[30] *Id.*; *see also Asahi Metal Indus. Co. v. Superior Court of Calif.*, 480 U.S. 102, 114-15 (1987).
[31] *Burger King*, 471 U.S. at 476 (internal quotation marks and citation omitted).
[32] *Id.* at 476-77 (internal quotation marks and citation omitted).
[33] *Id.* at 477 (citing cases).

dollars to be transferred to and from bank accounts in the United States will not necessarily suffice to establish personal jurisdiction. *See* Resp. Mot. at 9. He is right that foreseeable injuries suffered by a U.S. entity are not by themselves an adequate jurisdictional hook.[34] *See id.* at 7. But these things describe only a partial picture of the way in which Respondent's conduct and interactions brought him under the auspices of U.S. jurisdiction during the Relevant Period.

Respondent understood—or at least should reasonably have understood, and will be assumed for purposes of jurisdiction to have understood—that his trading activities carried with them certain risks. One of the risks inherent in trading extensively with U.S. residents on behalf of a U.S. bank operating in part under U.S. banking law and regulated in part by U.S. banking agencies is that Respondent foreseeably could be subject to U.S. jurisdiction, even as a foreign national working in the United Kingdom. Respondent exercised significant management functions for the Bank, a U.S. national banking association and insured depository institution; he cannot now credibly claim to be insulated and beyond reach of the U.S. agencies that oversee such institutions, if those agencies allege that his conduct while employed by the Bank has had actionable effects within their statutory purview in the United States.[35]

3. The Claims in the Notice Relate to Respondent's U.S. Contacts

Not only must a nonresident have sufficient contacts with a forum in order to be subjected to specific jurisdiction therein, but it must be the nonresident's "suit-related conduct" that

[34] *See Walden*, 571 U.S. at 290 ("[A]n injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State. The proper question is not where the plaintiff experienced a particular injury but whether the defendant's conduct connects him to the forum in a meaningful way.").

[35] *Cf. In the Matter of Ralli Brothers (Bankers) S.A.* ("*Ralli Brothers*"), No. 82-15, 1984 WL 48041, at *4 (CFTC Nov. 30, 1984) (Initial Decision on Summary Disposition) ("Congress intended the [Commodity Futures Trading] Commission to have, in effect, transactional jurisdiction over any person believed to be violating the Act, without regard to the person's nationality or location. Of course, any violation of the Act would necessarily involve some nexus between the person's activities and those activities regulated by the Commission.").

substantially connects him to the forum, rather than some other ancillary activity or relationship.[36] In other words, Respondent's extensive contacts with the U.S. forum as a result of his work on behalf of the Bank, as enumerated above, would be irrelevant to a personal jurisdiction analysis if a U.S. enforcement agency sought to exercise jurisdiction over Respondent for some entirely unrelated conduct: the Occupational Safety and Health Administration could not bring an enforcement action regarding Respondent's alleged violation of workplace safety regulations by virtue of Respondent's work for the Bank or his trading activity with U.S. residents. As the Supreme Court puts it, the jurisdictional inquiry "focuses on the relationship among the defendant, the forum, and the litigation"[37]—all three must interrelate to a substantial degree.

Here, there is no question that the OCC's claims against Respondent relate to his contacts with the United States as a forum. The Notice alleges that Respondent, in the course of his work as a trader for the Bank and then as the Bank's Head of European FX Spot Trading, engaged in manipulative and collusive trading in the FX Spot Market that caused the Bank to violate U.S. law, constituted unsafe and unsound practices in conducting the Bank's affairs, breached his fiduciary duty to the Bank, and ultimately caused the Bank to incur significant losses. *See* Notice ¶¶ 22-25, 52. Enforcement Counsel has further averred that Respondent executed hundreds of trades for hundreds of millions of dollars in currency with U.S. residents on the dates and during the times in which Respondent is alleged to have engaged in collusive activity. OCC Opp. at at 5-7; *see* Swanson Decl. ¶¶ 13-18. This is not a case where the alleged contacts with the forum are "random, fortuitous, or attenuated"[38]; rather, they are the underpinning of the OCC's asserted impetus for

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[36] *Walden*, 571 U.S. at 284.
[37] *Id.* (internal quotation marks and citation omitted).
[38] *Burger King*, 471 U.S. at 475 (internal quotation marks and citation omitted).

this action. Accordingly, the undersigned finds that it is Respondent's conduct that "form[s] the necessary connection with the forum State that is the basis for its jurisdiction over him."[39]

4. The OCC's Exercise of Personal Jurisdiction Over Respondent is Reasonable

Having concluded that Respondent's "suit-related conduct" has sufficient connection to the United States to satisfy the minimum contacts standard and justify an assertion of jurisdiction by the OCC, the undersigned must now determine whether the exercise of such jurisdiction would "offend traditional notions of fair play and substantial justice."[40] As Enforcement Counsel has made a *prima facie* case for jurisdiction, the burden falls to Respondent to articulate "the presence of some other considerations would render jurisdiction unreasonable."[41] Respondent does not attempt to do so, *see* Reply at 1-3, and a review of the relevant factors as elucidated by the Supreme Court reveals nothing that casts doubt upon the reasonableness of jurisdiction in this instance.[42] To the contrary, if indeed it is within the OCC's ambit to bring an enforcement action against a foreign national whose alleged extraterritorial misconduct while employed by a U.S. depository institution caused loss to that institution and otherwise fulfills the statutory elements of Sections 1818(e) and 1818(i)—a question that is addressed further *infra*—then those factors on balance weigh in favor of jurisdiction, not against it.

In particular, the U.S. forum's "interest in adjudicating the dispute" is significant if Respondent's conduct is in fact regulable,[43] because there is no alternative forum in which the agency could bring this action, and to deny jurisdiction would be to permit non-U.S. residents to

[39] *Walden*, 571 U.S. at 285.

[40] *Nicastro*, 564 U.S. at 880 (internal quotation marks and citation omitted).

[41] *Burger King*, 471 U.S. at 477.

[42] *See Asahi*, 480 U.S. at 114-15; *see also* OCC Opp. at 29-33 (discussing factors).

[43] *Burger King*, 471 U.S. at 477.

escape liability entirely for conduct for which U.S. residents could be held liable.[44] As Enforcement Counsel observes, the notion that Respondent could trade extensively with U.S. residents while working for a U.S. institution regulated by the OCC and thereby allegedly cause that institution to suffer significant financial losses without being at all subject to the agency's jurisdiction "would undermine the legitimate purpose of the FDI Act and the Comptroller's mandate to protect the safety and soundness of the national banking system." OCC Opp. at 31. For this reason and the rest, jurisdiction is therefore proper. Additionally, because the undersigned finds that this tribunal may exercise personal jurisdiction over Respondent in this matter, the undersigned agrees with Enforcement Counsel that Respondent's affirmative defense that the tribunal lacks personal jurisdiction over him is legally insufficient and may not be asserted at any later point in the proceedings. *See* OCC Mot. at 3-6.

B. <u>Public Rights and Non-Article III Tribunals</u>

Respondent argues that Section 1818's "sweeping reassignment of claims to an administrative tribunal violates Article III, sec. 1 of the Constitution, which vests 'the judicial power' to adjudicate the OCC's charges against Respondent exclusively in Article III courts." Resp. Mot. at 10. Respondent contends in particular that Sherman Act claims are not appropriately adjudicated in this tribunal given the OCC's lack of antitrust experience or expertise. *Id.* at 13-14. Respondent also asserts that in bringing its Sherman Act claim, the OCC is effectively stepping into the shoes of private parties by claiming that it has been injured by what amount to common law antitrust violations. *See id.* at 12-13. In response, Enforcement Counsel argues that both Section 1818 and the Sherman Act involve the adjudication of "public rights" that Congress may

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[44] *See Ralli Brothers*, 1984 WL 48041, at *4 ("[S]ubjecting United States residents to Commission jurisdiction while permitting non-U.S. residents to benefit from Commission regulation without being subject to its enforcement power would be manifestly unfair to the former, a circumstance presumably contrary to Congressional intent when the regulatory scheme was established.")

validly assign to agencies for resolution. OCC Opp. at 33-37. Enforcement Counsel further asserts that the OCC's relevant expertise for the purpose of enforcing Section 1818 is that of "safeguard[ing] the national banking industry by preventing unlawful conduct by banks and their employees, officers and directors." *Id.* at 34. And Enforcement Counsel notes that all final agency decisions in proceedings such as these are subject to "adequate and meaningful Article III review . . . by an appropriate United States Court of appeals." *Id.* at 37. The undersigned agrees with Enforcement Counsel that the OCC's claims involve the enforcement of public rights and may initially be adjudicated before this administrative tribunal.

Article III, Section I of the United States Constitution provides that "[t]he judicial power of the United States" is vested exclusively in the federal judicial branch—that is, in those entities whose existence arises from and conforms to Article III's contours.[45] It is generally established, then, that the other branches of the federal government may not confer Article III judicial power on non-Article III tribunals, so that the judiciary can "remain truly distinct from both the legislative and the executive."[46] Particularly where claims are "matters of private right, that is, of the liability of one individual to another under the law as defined," such as those traditionally decided at common law, federal jurisdiction may be conferred only to Article III judges in Article III courts rather than to agencies or otherwise.[47] In *Stern v. Marshall*, for example, the Supreme Court concluded that a non-Article III bankruptcy court had impermissibly exercised Article III judicial power when it adjudicated a petitioner's common law counterclaim for tortious interference, ultimately entering a final judgment for over $425 million dollars in compensatory and punitive

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[45] *See Stern v. Marshall*, 564 U.S. 462, 482-83 (2011) (noting that Article III "both defines the power and protects the independence of the Judicial Branch") (internal quotation marks and citation omitted).

[46] *Id.* at 483 (internal quotation marks and citation omitted).

[47] *Id.* at 489 (quoting *Crowell v. Benson*, 285 U.S. 22, 52 (1932)); *see also id.* at 488 ("Congress cannot 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.") (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1856)).

damages "on a common law cause of action" that did not "derive[] from [or] depend[] upon any agency regulatory regime."[48]

Yet the Supreme Court has recognized one area in which issues or claims over which Article III courts might normally have jurisdiction may nevertheless be heard in a non-Article III forum.[49] This "public rights exception" encompasses matters "arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments"[50]—*e.g.*, cases "where the Government is involved in its sovereign capacity under . . . [a] statute creating enforceable public rights,"[51] or when the right being adjudicated is otherwise "integrally related to particular Federal Government action" or "derives from a federal regulatory scheme" such that agency adjudication is appropriate.[52]

Although claims asserted by the government itself do not *always* fall within the public rights exception, courts have drawn a distinction between actions by the government as a sovereign in service of some public purpose, which need not be heard in an Article III court, and those in which the government "is vindicating a right which a private party was entitled to vindicate in his own right," which do.[53] Thus, in holding that OCC enforcement actions against a failed bank's IAP "clearly implicate[d] public rights," the Second Circuit distinguished between such actions pursuant to Section 1818 and an action taken against the same IAP by the FDIC as receiver for the

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[48] *Id.* at 494; *see also id.* at 471 (procedural history).

[49] *See Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 583 (1985) ("Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts.").

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

[51] *Atlas Roofing Co. v. Occupational Safety and Health Rev. Comm'n*, 430 U.S. 442, 458 (1977).

[52] *Stern*, 564 U.S. at 490-91; *see also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54-55 (1989) ("If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court.").

[53] *Occidental Life Ins. Co. of Calif. v. EEOC*, 432 U.S. 355, 381 (1977).

failed bank, finding that the former but not the latter could be heard by an administrative tribunal.[54] The Ninth Circuit, likewise, concluded that cease-and-desist proceedings by the Office of Thrift Supervision ("OTS") under the FDI Act constituted an enforcement of public rights, given that "[t]he purpose of enforcement of the thrift regulation laws is to safeguard the thrift industry, the depositors, and the federal insurance fund."[55]

Respondent argues that Section 1818 is unconstitutional to the extent that it "provides the OCC with authority to adjudicate," in a non-Article III tribunal, "alleged violations of '*any* law or regulation,' regardless of whether such laws and regulations implicate private rather than public rights and irrespective of whether the OCC has any experience or expertise adjudicating such rights." Resp. Mot. at 11 (quoting 12 U.S.C. § 1818(e)(1)(A)) (alteration in original). He further maintains that the public rights exception does not apply here because the Sherman Act codifies a common law right of action and the OCC "lacks any expertise or experience interpreting or applying" antitrust law. *Id.* at 13. He notes that to the extent Congress has provided for public enforcement of the Sherman Act, it has vested that enforcement authority exclusively in the Department of Justice to adjudicate in Article III courts. *Id.* at 13-14. Respondent thus contends that the Notice must be dismissed. *Id.* at 15.

These arguments fall short. To start, dismissal of the Notice as a whole would be inappropriate even if Respondent were correct that the OCC's Sherman Act claim must be adjudicated in an Article III court, because the OCC's charges are not premised solely, or even predominantly, on an alleged violation of the Sherman Act.[56] *See* Part IV.C.1 *infra*. Beyond that,

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[54] *Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995).

[55] *Simpson v. OTS*, 29 F.3d 1418, 1423 (9th Cir. 1994) (stating that "[b]y instituting the cease-and-desist proceedings, the OTS served a public purpose of the sort Congress envisioned in providing for administrative adjudication").

[56] Respondent argues that the OCC's allegation that his conduct breached his fiduciary duty to the Bank is likewise a common-law claim that the agency is asserting on behalf of the Bank and that must be adjudicated in an Article III court. Resp. Mot. at 15 n.6. This is incorrect. The OCC's ability to institute an enforcement action against

moreover, government enforcement of Sherman Act violations is not rooted in common law and does not concern a "private right of action." Resp. Mot. at 14. Rather, as Enforcement Counsel observes (OCC Opp. at 35), the Supreme Court has repeatedly recognized that the purpose of the Act is "to *protect the public* against evils commonly incident to monopolies and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition."[57] It is fair to say that an enforcement action premised on the Sherman Act is nearly a quintessential example of a case "where the Government is involved in its sovereign capacity under . . . [a] statute creating enforceable public rights."[58] Indeed, the Federal Trade Commission ("FTC")—as part of its core mission—adjudicates antitrust enforcement actions functionally identical to those based upon Section 1 of the Sherman Act.[59] This alone is powerful evidence against Respondent's contention that such claims are "traditional common law claims" that must be heard by an Article III court.

Nor is it dispositive of a public rights analysis of the OCC's Sherman Act claim that the agency lacks specific antitrust expertise. *See* Resp. Mot. at 13-14. Expertise in a particular topic area is not a necessary prerequisite for an agency to adjudicate a claim involving that topic in a non-Article III forum. While the *Stern* Court did state that the public rights exception applied to

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Respondent for an alleged breach of fiduciary duty "flow[s] from a federal statutory scheme" and wholly involves the "adjudication of a claim created by federal law." *Stern*, 564 U.S. at 493; *see* 12 U.S.C. §§ 1818(e)(1)(A) (authorizing enforcement action based on breach of fiduciary duty), 1818(i)(2)(B) (same).

[57] *United States v. Am. Linseed Oil Co.*, 262 U.S. 371, 388 (1923); *see also*, *e.g.*, *Wilder Mfg. Co. v. Corn Products Co.*, 236 U.S. 165, 174 (1915) (Sherman Act "founded upon broad conceptions of public policy" and "enacted to prevent . . . the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented").

[58] *Atlas Roofing Co.*, 430 U.S. at 458 (emphasis added).

[59] *See* 15 U.S.C. § 45(b) (empowering FTC to issue notice of charges against entities "using any unfair method of competition"); 16 C.F.R. § 3 *et seq.* (administrative adjudication of antitrust enforcement actions by FTC); *see also In the Matter of Polypore Int'l, Inc.*, 149 F.T.C. 486, 2010 WL 9434806, at *236 (March 1, 2010) (Complaint and Initial Decision) ("Although the Commission does not directly enforce the Sherman Act, conduct that violates the Sherman Act is generally deemed to be a violation of Section 5 of the FTCA Act as well, and principles of antitrust law developed under the Sherman Act apply to Commission cases alleging unfair competition.").

cases "in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority," it in no way purported to limit the exception to *only* those such cases.[60] The expertise of an agency relative to the courts may be salient to "the concerns that drove Congress to depart from the requirements of Article III,"[61] one of several nondeterminative factors weighed by the Supreme Court in its public rights cases, but the Court has been firm that there are no "formalistic and unbending rules" to when Congress may confer adjudicative power outside of Article III.[62]

Furthermore, Respondent's premise is faulty: the OCC is an agency with expertise enforcing the substantive regulatory regime under which these issues are being adjudicated and upon which the action depends.[63] The OCC's claims are "closely intertwined with a federal regulatory program" that it has been charged by statute to oversee.[64] And that agency's enforcement authority under Section 1818 directly advances its statutory mission to, *inter alia*, protect against losses to insured depository institutions, safeguard the interests of depositors and the Deposit Insurance Fund, and maintain public confidence in banks and the banking system.[65] Part of that mission is to institute enforcement proceedings against IAPs—that is, "persons subject to its authority in connection with the performance of [its] constitutional functions"[66]—who have violated laws or regulations, if the OCC determines that such violations have prejudiced the

[60] *Stern*, 564 U.S. at 490.

[61] *CFTC v. Schor*, 478 U.S. 833, 851 (1986).

[62] *Id.*

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

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

[65] *See Simpson*, 29 F.3d at 1423.

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

interests of an institution's depositors or caused loss to the institution itself, among other possible effects.[67] In other words, it is immaterial whether the OCC has substantive experience enforcing Sherman Act violations *per se*, because the extent of its enforcement authority over violations of "any law or regulation" in that regard is limited to the specific regulatory objectives within its charge as an "appropriate federal banking agency."[68] Respondent offers no rationale why the phrase "any law or regulation" should be read as "only some laws and regulations" when it comes to determining whether the OCC's exercise of its Section 1818 enforcement authority validly implicates "public rights" for purposes of adjudication in this tribunal.

Finally, Respondent argues that the adjudication of the OCC's assessment of a civil money penalty before this tribunal violates his Seventh Amendment right to a jury trial. Resp. Mot. at 14. But the Supreme Court has made it clear that in "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact[,] the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible."[69] This is one such case, and Respondent is therefore not entitled to a jury trial.

C. <u>Sufficiency of Pleading</u>

Respondent argues that the Notice fails to allege facts sufficient to state a claim under the relevant statutes. Specifically, Respondent contends that the Notice's allegations do not satisfy the "misconduct" prongs of 12 U.S.C. §§ 1818(e) and (i), in that they do not allege the "substantial effect in the United States" necessary to sustain a violation of the Sherman Act and do not

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[67] *See* 12 U.S.C. § 1818(e)(1)(B).

[68] *Id.* § 1818(e); *see also id.* § 1813(q).

[69] *Atlas Roofing Co.*, 430 U.S. at 450; *see also*, *e.g.*, *Simpson*, 29 F.3d at 1423 (rejecting Seventh Amendment challenge to Section 1818 administrative enforcement action); *Cavallari*, 57 F.3d at 145 (same).

otherwise adequately allege that Respondent engaged in unsafe or unsound practices or violated his fiduciary duty to the Bank. *See* Resp. Mot. at 15-19. Respondent also argues that his acquittal of criminal antitrust charges in October 2018 necessarily means that the OCC cannot validly allege here that Respondent violated Section 1 of the Sherman Act. *See id.* at 15-16. The undersigned finds that Respondent's arguments are meritless in each respect.

1. The OCC Has Adequately Pled the Misconduct Elements of Section 1818

Respondent argues that the Notice fails to adequately allege the requisite "misconduct" elements of Sections 1818(e) and 1818(i)—see Part III *supra*—and must therefore be dismissed. Respondent's argument is twofold: first, that the Notice does not allege the violation of "any law or regulation" because its allegations regarding the Sherman Act do not state that Respondent's conduct caused a "substantial effect in the United States,"[70] Resp. Mot. at 16-17, and second, that the Notice does not contain enough detail regarding Respondent's alleged breach of fiduciary duty or his alleged engagement in unsafe or unsound practices, *id.* at 18-19. The undersigned finds that each of these aspects of Section 1818's misconduct elements is adequately pled.

The Supreme Court has held that in order "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[71] The OCC's Uniform Rules likewise require that a notice of charges contain "[a] statement of the matters of fact or law showing that the OCC is entitled to relief."[72] Further, "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by

[70] Respondent also argues that the Notice fails to state a claim for violation of the Sherman Act because its allegations "tend to show there was no price-fixing among horizontal competitors that was not ancillary to procompetitive transactions or activities, as required under black-letter antitrust law." Resp. Mot. at 16. Respondent concedes that this argument is premature, however, and the undersigned therefore will not address it here. *See id.* ("Recognizing the factual nature of these issues, Respondent anticipates filing a dispositive motion on these issues at an appropriate time after discovery has occurred.").

[71] *Iqbal*, 556 U.S. at 678 (internal quotation marks and citation omitted).

[72] 12 C.F.R. § 19.18(b)(2).

factual allegations."[73] Thus, what matters to the sufficiency of a complaint is not "[t]hreadbare recitals of the elements of a cause of action," but rather whether its "well-pleaded factual allegations . . . plausibly give rise to an entitlement to relief."[74] And a claim is facially plausible, in turn, "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[75]

Here, the Notice offers detailed factual allegations to support its charge that Respondent violated the Sherman Act "by entering into and engaging in a combination and conspiracy with EUR/USD traders at competing financial institutions . . . to suppress or eliminate competition and increase, decrease, fix, maintain, or stabilize prices in the FX Spot Market." Notice ¶ 23; *see id.* ¶¶ 26-48 (allegations of violative misconduct). The Notice further alleges that the FX spot benchmark rates that Respondent is alleged to have manipulated "are important in U.S. and global finance because they are used by numerous parties in the valuation of global portfolios and financial derivatives traded in the U.S. and elsewhere." *Id.* ¶ 16.

Respondent, however, asserts that these allegations are deficient because they do not specifically state that the alleged misconduct "produce[d] some substantial effect in the United States," as required for Sherman Act liability based on foreign conduct.[76] While it is true that Enforcement Counsel ultimately will have to prove that Respondent's complained-of conduct "was meant to produce and did in fact produce" a substantial domestic effect in order to "avoid global overreaching" through the Sherman Act,[77] the undersigned finds that Notice sufficiently pleads facts that, taken as true, meet the *Iqbal* standard for facial plausibility. If Respondent wishes to

[73] *Iqbal*, 556 U.S. at 679.
[74] *Id.* at 678, 679.
[75] *Id.* at 678.
[76] Resp. Mot. at 17 (quoting *Hartford Fire Ins. Co. v. Calif.*, 509 U.S. 764, 796 (1993)).
[77] *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 438 (6th Cir. 2012) (internal quotation marks and citation omitted).

argue that his alleged conduct did not *in fact* produce a substantial effect in the United States, as it appears is his position (Resp. Mot. at 16-17), he may do so at a later stage in the proceeding.

Similarly, the undersigned concludes that the Notice adequately alleges that Respondent breached a fiduciary duty to an insured depository institution. To wit, the Notice alleges that Respondent traded on behalf of the Bank, including as "Head of European FX Spot Trading on the Bank's London FX spot desk with supervisory responsibilities over the Bank's FX spot trading desks in Europe." Notice ¶ 19. It alleges that he "breached his fiduciary duties to the Bank" by, among other things, disclosing "confidential and commercially sensitive information, such as information on customer orders and currency pair spreads, to the Bank's competitors" in the course of a conspiracy to coordinate trading. *Id.* ¶¶ 22, 25. Again, Respondent may choose to argue at some future point that he did not *in fact* have a fiduciary duty to the Bank during the Relevant Period, but the Notice's allegations amply support a plausible claim to relief on this score.

Finally, Respondent claims that the Notice does not adequately allege the "unsafe or unsound practices" prong of Section 1818(e)'s misconduct element because (1) it contains no allegations that Respondent's activities "threatened the financial integrity of any banking institution." Resp. Mot. at 18, and (2) it "does not allege facts sufficient to allow this Tribunal to determine that Respondent's conduct was contrary to accepted standards of prudent operation . . . [or] put the Bank at financial risk," *id.* As Enforcement Counsel observes, whether the alleged activities actually threatened the financial integrity of a given institution is not the correct standard for determining whether a party has engaged in unsafe or unsound practices. *See* OCC. Opp. at 42. Rather, the Comptroller has made it clear in his 2014 *Patrick Adams* decision that the Horne Standard governs whether a practice is unsafe or unsound for purposes of Section 1818: that is, that "unsafe or unsound practices" include those that could cause "abnormal risk" of loss or

damage to a bank, its shareholders, or the Deposit Insurance Fund, without more.[78] To be sure, Respondent also contends that even under the Horne Standard, the Notice is deficient. Yet the Notice describes conduct, such as sharing commercially sensitive information with the Bank's competitors, that is surely contrary to accepted standards of prudent operation, *see* Notice ¶ 25, and it alleges that the Bank suffered approximately $1.3 billion in losses as a result of Respondent's allegedly unsafe or unsound practices, *see id.* ¶¶ 49-50. These allegations are more than sufficient to defeat Respondent's motion to dismiss on this basis.

2. Respondent's Acquittal Does Not Preclude the OCC from Alleging a Sherman Act Violation

Pointing to his October 2018 criminal acquittal, Respondent argues that "[t]he Notice cannot properly rely on the allegation that [he] committed a crime that, as a matter of law, he did not commit." Resp. Mot. at 16. This is specious on its face, because a criminal acquittal does not mean that the charged individual did not, as a matter of fact, engage in the alleged conduct or activities. As the Supreme Court has stated, "an acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt."[79] The result of Respondent's criminal case does not immunize Respondent against non-criminal charges that arise from the same allegedly actionable misconduct. Indeed, a separate provision of the FDI Act expressly states that banking agencies can use alleged criminal violations as the "misconduct" required by Section 1818 even after prosecutors have failed to secure a conviction in the criminal case.[80]

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[78] *See Patrick Adams*, 2014 WL 8735096, at **12-31 (comprehensive discussion of applicability of Horne Standard); *see also* Part III, *supra*.

[79] *United States v. One Assortment of 85 Firearms*, 465 U.S. 354, 362-63 (1984).

[80] 12 U.S.C. § 1818(g)(1)(D)(ii) (providing that "a finding of not guilty" on charges in an indictment on which an agency has based a Section 1818(g) prohibition order "shall not preclude the agency from instituting proceedings after such finding . . . to prohibit further participation [by the IAP] in depository institution affairs, pursuant to [Section 1818(e)]").

Further, the Supreme Court has also held that "acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof."[81] Enforcement Counsel unquestionably must meet a lower burden of proof in these proceedings than the "beyond a reasonable doubt" standard considered by the jury at Respondent's criminal trial.[82] Even if the OCC was relying on identical evidence and identical allegations in this matter as the DOJ did, which it almost certainly is not, it would not be precluded from maintaining this action based on an alleged antitrust violation.

V. <u>Conclusion</u>

For the reasons set forth above, the undersigned hereby denies Respondent's March 30, 2020 Motion to Dismiss the Notice of Charges for Prohibition and Assessment of Civil Money Penalty and grants Enforcement Counsel's Motion to Strike Respondent's Fourth Affirmative Defense.

SO ORDERED.

July 28, 2020

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Jennifer Whang
Administrative Law Judge
Office of Financial Institution Adjudication

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[81] *Dowling v. United States*, 493 U.S. 342, 349 (1990); *cf. One Assortment*, 465 U.S. at 361 ("It is clear that the difference in the relative burdens of proof in [] criminal and civil actions precludes the application of the doctrine of collateral estoppel.").

[82] *See Patrick Adams*, 2014 WL 8735096, at *7 (allegations must be supported by a preponderance of the evidence in OCC enforcement action).