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

In the Matter of: **FANG FANG,** A former institution-affiliated party of J.P. Morgan Securities (Asia Pacific) Limited, Central, Hong Kong, China (A non-bank subsidiary of a registered bank holding company)	Docket Nos. 17-006-E-I 17-006-CMP-I

ORDER DENYING RESPONDENT'S MOTION TO TERMINATE

On March 9, 2017, the Board of Governors of the Federal Reserve System (the "FRB" or "Board") commenced this enforcement action against Respondent Fang Fang ("Respondent"). Pursuant to the Federal Deposit Insurance Act ("FDI Act") and the Board's Uniform Rules of Practice and Procedure ("Uniform Rules"), such actions are initially adjudicated before an administrative law judge ("ALJ") at the Office of Financial Institution Adjudication ("OFIA").[1] This matter was originally assigned to OFIA ALJ Christopher McNeil. On September 11, 2018, the Board issued an Order reassigning the case from ALJ McNeil to ALJ C. Richard Miserendino in response to the Supreme Court's decision in *Lucia v. SEC*, which held that ALJs at the Securities and Exchange Commission ("SEC") were "inferior officers of the United States" subject to the strictures of the Appointments Clause of the United States Constitution.[2] Judge Miserendino then retired and the matter was reassigned to the undersigned by the Board on January 13, 2020.[3]

[1] *See* 12 U.S.C. § 1818(h); 12 C.F.R. § 263.54.

[2] 585 U.S. __, 138 S.Ct. 2044 (2018); *see* September 11, 2018 Order Reassigning Case to Judge Miserendino and Remanding the Above-Captioned Case for Further Proceedings.

[3] *See* January 13, 2020 Order Reassigning Case to Administrative Law Judge Jennifer Whang ("January 13, 2020 Board Order").

Respondent now moves to terminate this action,[4] arguing that the statutory processes by which OFIA ALJs are appointed and removed are inherently unconstitutional under *Lucia*, that the undersigned herself has not been constitutionally appointed, and that these defects together and individually require "a complete restart of proceedings with a judge who can satisfy constitutional requirements."[5] Respondent's Motion to Terminate Proceedings ("Motion") at 1. For the reasons set forth below, this motion is denied.

Respondent makes three broad arguments. First, he argues that the Board cannot constitutionally appoint ALJs to hear the instant enforcement action under the existing statutory structure, because the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA")[6] "requires joint appointment" of ALJs by OFIA's constituent federal banking agencies, and several of those agencies are not "Departments" whose heads may appoint inferior officers—which, following *Lucia*, ALJs are deemed to be—under the Appointments Clause. Motion at 3. Second, he argues that that the undersigned, and OFIA ALJs generally, enjoys multi-level statutory protections from removal that the Supreme Court has held to be unconstitutional for inferior officers in *Free Enterprise Fund v. Public Company Accounting Oversight Board*

[4] The Uniform Rules contain no specific provision regarding the mechanics of this tribunal's consideration of dispositive motions other than 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.

[5] Due to the procedural posture of the case, this is the third motion to terminate that Respondent has filed and the first to be considered on its merits. An initial motion to terminate was filed by Respondent and then-Respondent Timothy Fletcher (collectively "Respondents") on July 13, 2018, arguing that the procedure by which ALJ McNeil had been appointed was constitutionally defective. Following reassignment of the case, Respondents again moved to terminate proceedings on November 21, 2018, arguing that neither ALJ Miserendino nor ALJ McNeil could constitutionally preside over this action due to the inherent structure of OFIA's appointment process. Respondent Fletcher subsequently entered into a settlement and dismissal from this action on February 25, 2019. *See* Joint Notice of Settlement and Notice of Voluntary Dismissal as to Respondent Timothy Fletcher, FRB Nos. 17-007-E-I, 17-007-CMP-I (Feb. 25, 2019). In a telephonic scheduling conference held on April 2, 2020, Respondent agreed to file a revised motion to terminate encompassing his objections to the constitutionality of the undersigned's appointment and superseding the two prior motions. This he did on April 30, 2020.

[6] Pub. L. 101-73, Title IX, 103 Stat. 486, 12 U.S.C. § 1818 (1989).

("*Free Enterprise Fund*").[7] *Id.* Finally, he argues that the Board failed to comply with *Lucia* when it directed that newly reassigned ALJs reconsider and modify the actions taken by prior ALJs in a given matter rather than restarting all enforcement proceedings in their entirety. *Id.* at 13-14. Yet even presuming that OFIA ALJs are sufficiently similarly situated to the SEC ALJs at issue in *Lucia* as to be subject to the same constraints on the manner of their appointment, a question which has not been determined by the Board and which is not for this tribunal to decide,[8] each of Respondent's arguments must fail.

The Board May Unilaterally Appoint OFIA ALJs to Preside Over Its Enforcement Actions

OFIA is the initial forum for the adjudication of certain enforcement actions brought by the FRB, the Federal Deposit Insurance Corporation ("FDIC"), the Office of the Comptroller of the Currency ("OCC"), and the National Credit Union Administration ("NCUA"), as provided by each agency's respective Uniform Rules.[9] Respondent contends that FIRREA requires joint appointment of OFIA ALJs by all four of these agencies, which in turn violates the constitutional mandate that inferior officers be appointed by the President, by "the Courts of Law," or by "the Heads of Departments,"[10] because the OCC is a bureau within the Department of the Treasury rather than a "Department" itself. *See* Motion at 6-9. Indeed, Respondent asserts that "until Congress does away with the joint appointment requirement under this statutory scheme, the Board

[7] 561 U.S. 477 (2010).

[8] In an interlocutory decision in a Federal Deposit Insurance Corporation ("FDIC") case issued prior to *Lucia*, the Fifth Circuit concluded that OFIA ALJs likely were inferior officers within the meaning of the Appointments Clause, but did not have occasion to rule upon the constitutionality of their prior method of appointment. *Burgess v. FDIC*, 871 F.3d 297, 301-04 (5th Cir. 2017); *contra Landry v. FDIC*, 204 F.3d 1125, 1132-34 (D.C. Cir. 2000) (holding that OFIA ALJs are not inferior officers). To the undersigned's knowledge, the question has not been addressed by a court since *Lucia* was decided.

[9] *See* 12 C.F.R. §§ 19.101 (OCC), 263.54 (FRB), 308.103 (FDIC), 747.404 (NCUA); *see also id.* § 263.3(i) (defining OFIA as "the executive body charged with overseeing the administration of administrative enforcement proceedings for the Board" and the other constituent agencies).

[10] U.S. CONST., Art. II, § 2, cl. 2; *see also Lucia*, 138 S. Ct. at 2051-52.

cannot constitutionally appoint ALJs." *Id.* at 9. This is a misreading of the statute, the Constitution, and the FRB's appointment authority.

Section 916 of FIRREA directed that "the appropriate Federal banking agencies," including the FRB, "jointly[] establish their own pool of administrative law judges" and "develop a set of uniform rules and procedures for administrative hearings."[11] As succinctly explained by Enforcement Counsel in its May 28, 2020 opposition to the instant motion ("Opposition"), this provision "required the federal banking agencies [to] set up on a permanent basis (*i.e.*, 'establish') a pool of ALJs from which each of the federal banking agencies could choose to assign an ALJ to adjudicate enforcement cases." Opposition at 4. According to the FDIC Board of Directors, the impetus for this new requirement was Congress's recognition "that the banking agencies needed ALJs who had banking law and expertise and that each agency may not have sufficient enforcement work to maintain its own staff of ALJs."[12] Prior to FIRREA, the federal banking agencies borrowed ALJs from nonbanking agencies on an ad hoc basis.[13] With the creation of OFIA, the banking agencies could instead share an identified set of ALJs with appropriate experience and expertise by drawing from a common pool.[14]

The undersigned agrees with Enforcement Counsel that nothing in Section 916 addresses or prescribes how ALJs are to be appointed once this interagency pooling arrangement has been established, nor does it confer any appointment power itself. Rather, the Administrative Procedure Act ("APA"), the FDI Act, and the Federal Reserve Act together vest the FRB, as a federal banking

[11] FIRREA, Pub. L. 101-73, title IX, § 916, 103 Stat. 486, 12 U.S.C. § 1818 note (1989) (Improved Administrative Hearings and Procedures). The banking agencies in question at that time were the FDIC, FRB, NCUA, OCC, and the now-defunct Office of Thrift Supervision ("OTS"). *See id.*; *see also* Pub. L. 101-73, title II, § 204(f), 103 Stat. 192, 12 U.S.C. § 1813(q) (1989).

[12] *In the Matter of Michael D. Landry*, FDIC No. 95-65e, 1999 WL 440608, at *29, Final Decision (May 25, 1999).

[13] *See id.* at *27 n.36.

[14] *See id.*

agency, with the indisputable authority to appoint an ALJ unilaterally to preside over its enforcement actions.[15] An administrative arrangement to share the administration and costs of a dedicated pool of ALJs suitable for such enforcement actions does not abrogate this authority.[16] Moreover, to the extent that OFIA ALJs are deemed inferior constitutional officers for purposes of the Appointments Clause, Respondent does not dispute that the FRB—an independent agency—is a "Department" of which the Board is the "Head."[17] The undersigned was appointed by the Board in that capacity and thereby "authorized to conduct administrative adjudications consistent with the Board's Uniform Rules[], subject to *de novo* review and final decisions by the Board."[18] As Respondent himself notes, "the available evidence shows that the Board unilaterally appointed" the undersigned, Motion at 7, as it is empowered to do. With respect to Respondent's instant argument that the undersigned cannot constitutionally preside over this matter, the fact of that appointment ends the inquiry.[19]

Finally, the undersigned observes that the Constitution would not preclude the OFIA agencies from coordinating in the hiring and joint appointment of ALJs in any event, as long as

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[15] *See* 5 U.S.C. § 3105 (providing that "[e]ach agency shall appoint as many administrative law judges as are necessary" to preside over its administrative proceedings); 12 U.S.C. §§ 248(k) (authorizing the FRB to delegate "any of its functions," with certain non-pertinent exceptions, "to one or more administrative law judges"), 1818(h) (requiring the FRB to conduct administrative enforcement proceedings in accordance with the APA).

[16] *See In the Matter of Michael D. Landry*, FDIC No. 95-65e, 1999 WL 440608, at *27 n.36 (noting that constituent agencies "agree on the annual budget for OFIA and share the costs" of OFIA ALJs).

[17] *See Free Enterprise Fund*, 561 U.S. at 510-11 (agencies that are "freestanding component[s] of the Executive Branch, not subordinate to or contained within any other component," are "Departments" for Appointments Clause purposes).

[18] January 13, 2020 Board Order at 1.

[19] Respondent asserts that the January 13, 2020 Board Order is not itself sufficient to "demonstrate that the new ALJ appointment by the Board complies with the Appointments Clause." Motion at 5. The undersigned disagrees. As such, the undersigned will not entertain Respondent's requests for discovery on the appointments issue or "an affidavit from the Board Secretary fully explaining the process." *Id.* at 5 n.9. Respondent is free, however, to continue to pursue his Freedom of Information Act requests for "applicable Board resolutions related to appointments of Board ALJs," *id.* at 5, and the undersigned expects the agency to take steps to process those requests with all due speed.

those ALJs are appointed in conformance with the Appointments Clause.[20] Respondent asserts that any joint appointments of ALJs among the agencies would necessarily be made by "sub-department heads as well as department heads," Motion at 8 n.14, but there is no reason why this is so. The OCC, for example, is indeed "a bureau within the Department of the Treasury" rather than a free-standing department.[21] *Id.* at 8. All this means, however, is that the Secretary of the Treasury, not the Comptroller of the Currency, is the head of the department of which the OCC is a constituent part.[22] The appointment of an ALJ by both the Board and the Treasury Secretary as two Heads of Departments following a joint selection process should pose no greater constitutional problem than if the ALJ was separately appointed by each of those department heads for the FRB and OCC respectively without prior coordination.[23] Respondent offers no reason why the APA and other authorizing statutes cannot and should not be read, in the wake of *Lucia*, to delegate to "each agency" the authority to appoint ALJs in a manner that would be constitutional—that is, to the extent that those ALJs are inferior officers, through the Head of Department for the agency in question and by no other method.[24] Section 916's mere direction, thirty years ago, that these agencies together "establish" a pool of ALJs does not compel any different conclusion.

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[20] *See In the Matter of Michael D. Landry*, FDIC No. 95-65e, 1999 WL 440608, at *27 n.36 (noting that the first two OFIA ALJs were appointed by OTS in August 1991 "at the conclusion of a process in which all the banking agencies participated and concurred in the selections").

[21] *See* 31 U.S.C. § 307 (OCC is part of the Department of the Treasury).

[22] *See id.* § 301(b) (Secretary of the Treasury is head of that department).

[23] Respondent argues that "the Appointments Clause does not permit a joint appointment by multiple Heads of Departments" because "it requires each of the 'Heads of Departments' to appoint its own officers." Motion at 8 (emphasis omitted). Even if this proposition were true—and Respondent provides no direct support—it would be inapposite where, as here, the Board's appointment of the undersigned to preside over FRB proceedings is distinct and separate from any appointment by the Treasury Secretary on behalf of the OCC, for example, or by the FDIC Board of Directors on behalf of the FDIC. *See* January 13, 2020 Board Order at 1 ("The Board of Governors of the Federal Reserve System ('Board'), in its capacity as head of a department, has appointed Administrative Law Judge Jennifer Whang as an administrative law judge for the Board.").

[24] *See Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) ("When a serious doubt is raised about the constitutionality of an Act of Congress, it is a cardinal principle that [the] Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.") (internal quotation marks and citation omitted).

The APA's Removal Restrictions for ALJs are Not Foreclosed by *Free Enterprise Fund*

Respondent argues that the undersigned and other OFIA ALJs are improperly insulated from Executive Branch authority due to the multiple levels of protection from removal provided by the APA. Motion at 9-11. In support of this position, Respondent cites *Free Enterprise Fund*, in which the Supreme Court held that members of the Public Company Accounting Oversight Board ("PCAOB") were unconstitutionally appointed as a result of their multi-layered removal restrictions.[25] Respondent asserts that the APA "provides at least as much, if not greater, insulation from executive removal [for ALJs] as the Court found unconstitutional in *Free Enterprise Fund*." *Id.* at 11. Specifically, Respondent argues that (1) Board ALJs, like PCAOB members, are constitutional "Officers," and (2) the "good cause" removal provisions in the APA[26]—whereby Board ALJs may only be removed "for cause" by Board members following proceedings before the interagency Merit Systems Protection Board ("MSPB")—provides impermissible dual removal protection, given that both Board members[27] and MSPB members[28] also are insulated from executive removal. *Id.* at 10-11.

In response, Enforcement Counsel asserts that "unlike the statutory framework at issue in *Free Enterprise Fund*, the authority to terminate the employment of an ALJ is simply not necessary to assure a constitutionally sufficient degree of accountability and executive control." Opposition at 11. According to Enforcement Counsel, the members of the Board, who are all appointed by the President, "have ample authority to hold the ALJs who preside at hearings on behalf of the Board accountable for their actions, regardless of whether the ALJs' employment can be terminated at

[25] 561 U.S. at 484.
[26] 5 U.S.C. § 7521(a).
[27] 12 U.S.C. § 242.
[28] 5 U.S.C. § 1202(d).

will." *Id.* at 8. Enforcement Counsel notes that the Board has the authority to withdraw an ALJ appointment or delegate which ALJ may preside over hearings on behalf of the Board, which is precisely what the Board did in this matter twice—namely, when it reassigned the case from Judge McNeil to Judge Miserendino, and then again, when it reassigned the case from Judge Miserendino to the undersigned. *See id.* at 9. Enforcement Counsel maintains that *Free Enterprise Fund* is distinguishable because in that case, the PCAOB members were substantially insulated from the SEC's control, whereas here, ALJs only perform a limited adjudicatory function and are subject to the Board's plenary authority. *See id.* at 9-10. Enforcement Counsel points out that, unlike the PCAOB's independent enforcement powers, here ALJ decisions are not final; rather, they are only recommended decisions that are reviewed by the Board *de novo*. *See id.* at 10-11. Finally, Enforcement Counsel contends that the Supreme Court expressly declined to extend its holding in *Free Enterprise Fund* to ALJs. *See id.* at 11-12.

The undersigned is not persuaded by Respondent's argument that the removal provisions for ALJs, and OFIA ALJs in particular, violate the Appointments Clause. As the FDIC Board of Directors recently observed, the Supreme Court specifically excluded ALJs from the scope of its holding in *Free Enterprise Fund* because it recognized that ALJs exercise purely adjudicative powers that are far different from the significant enforcement and policymaking powers exercised by PCAOB members.[29] Put another way, *Free Enterprise Fund* did not hold that inferior officers can *never* enjoy multiple levels of statutory protection from removal; rather, it held that members of the PCAOB could not be thus protected given the particular nature of those positions and the authority they exercised.[30] Respondent has not shown that ALJs generally, let alone OFIA ALJs,

[29] *In re Michael R. Sapp*, Nos. 13-477(e) & 13-478(k), 2019 WL 5823871, *19 (FDIC Sept. 17, 2019) (citing *Free Enterprise Fund*, 561 U.S. at 501 n. 10).

[30] *See Free Enterprise Fund*, 561 U.S. at 498 (finding statute unconstitutional under Appointments Clause where it granted PCAOB members "executive power without the Executive's oversight").

are similarly situated to PCAOB members such that *Free Enterprise Fund* controls. There is therefore likewise no showing that the removal provisions for ALJs violate the separation of powers principles identified in *Free Enterprise Fund*.

Furthermore, while the *Lucia* Court addressed the issue of whether SEC ALJs are "Officers of the United States," it specifically did *not* address the constitutionality of ALJ removal provisions.[31] That issue was, however, addressed extensively in the partial concurring opinion of Justice Breyer, who noted *inter alia* that "[t]he substantial independence that the Administrative Procedure Act's removal protections provide to administrative law judges is a central part of the Act's overall scheme."[32] Given that *Lucia* itself left undecided the question of whether SEC ALJs' status as inferior officers means that their removal protections are unconstitutional, it cannot be the case that a conclusion as to officer status necessarily compels a conclusion as to multilayer statutory protections from removal. The undersigned agrees with Enforcement Counsel that even if OFIA ALJs are inferior officers within the meaning of the Appointments Clause, the APA's removal provisions and the wholly recommendatory nature of OFIA ALJs' authority strike a balance between ALJ independence and accountability to executive oversight that is fully in keeping with constitutional aims. *See* Opposition at 12-14.

The Proceeding Should Not be Terminated or Reinitiated Before Another ALJ

Respondent argues that the undersigned should recommend that the Board terminate this proceeding, discard entirely the prior record in the case, and reissue its Notice of Intent against Respondent "before a properly appointed ALJ."[33] Motion at 14. Respondent's argument is founded

[31] *Lucia*, 138 S. Ct. at 2051 n.1 (declining to address "whether the statutory restrictions on removing the Commission's ALJs are constitutional").

[32] *Id.* at 2060 (Breyer, J., concurring in part); *see generally id.* at 2057-64.

[33] In the alternative, Respondent asks that the undersigned stay this action "until FIRREA is amended to comport with *Lucia* and the Appointments Clause." Motion at 13. Because the undersigned concludes *supra* that FIRREA does not require amendment in this fashion, Respondent's stay request is denied.

on two independent premises: first, that neither the undersigned nor any other ALJ could constitutionally be appointed to preside over this matter under the current statutory scheme (*id.* at 11-12); and second, that the Board cannot remedy an earlier unconstitutional appointment by directing that a newly reassigned and properly appointed ALJ review and reconsider the actions of the prior ALJ in the case, because *Lucia* requires the voiding of proceedings and the institution of an entirely fresh enforcement action (*id.* at 13-14). The undersigned has already rejected Respondent's challenge to the Board's ALJ appointment process and to the constitutionality of the undersigned's appointment, and his contention that "the prior record must be discarded" and these proceedings restarted from scratch is meritless as well.

Lucia makes it clear that the "appropriate remedy" for an Appointments Clause violation of the kind found in that case is not dismissal of the proceedings and refiling of a notice of intent, but simply "a new hearing before a properly appointed official" in the extant action.[34] The remedial analysis in *Lucia* centered on whether the previous ALJ could continue to hear the case upon remand if he were to be constitutionally appointed in the interim; the Court concluded he could not.[35] At no point did the *Lucia* Court appear to entertain the possibility that the action itself was invalid and should be terminated and brought anew, or that respondents before an unconstitutionally appointed tribunal are entitled to have their proceedings dismissed in full.[36] Rather, the Court took for granted that the existing case would be remanded and that proceedings

[34] *Lucia*, 138 S. Ct. at 2055 (internal quotation marks and citation omitted).

[35] *See id.* at 2055 n.5.

[36] In this regard, the undersigned notes that the Comptroller of the Currency has likewise recently concluded "that the Supreme Court's decision in *Lucia* leaves little ground for any reasonable dispute as to what is required to cure an administrative action tainted by a violation of the Appointments Clause"—namely, not "fully voiding the proceedings," but reassignment of the existing case to "a properly appointed official." Order Denying Respondents' Motion for Interlocutory Review, *In the Matter of Saul Ortega and David Rogers, Jr.*, OCC Nos. AA-EC-2017-44 & -45 (June 18, 2020) at 7-8. To the extent that this order is not readily accessible to the parties, this tribunal will furnish copies upon request.

would continue, albeit upon assignment to a different ALJ or before the agency itself.[37] So too, here, is it both unnecessary and inappropriate for the Board to void the entire action and start again in order to correct whatever Appointments Clause deficiencies may have existed previously; it is enough for the case to be reassigned to an ALJ who has been properly appointed and can examine the record of the case *de novo*, as the undersigned has and did.[38]

Conclusion

For the reasons set forth above, Respondent's Motion is hereby DENIED. Furthermore, Respondent offers no reason to conclude that the undersigned has the jurisdiction in the first instance to decide arguments regarding the constitutionality of the limitations on the removal of ALJs and those arguments are accordingly preserved for appeal. As such, the case will proceed with the undersigned as the assigned ALJ and Respondent's motion for a stay is DENIED.

SO ORDERED.

Issued: August 4, 2020

Jennifer Whang
Administrative Law Judge
Office of Financial Institution Adjudication

[37] *See Lucia*, 138 S. Ct. at 2055 n.5 (framing the remedy in terms of what constitutionally appointed officials would be "available to hear th[e] case on remand"); *see also id.* at 2055 n.6 (discussing to whom the agency "intends to assign Lucia's case on remand").

[38] *See* April 17, 2020 Order Reviewing Prior ALJs' Prehearing Actions. The undersigned also specifically considered and ruled upon Respondent's objections to a wide swath of orders issued by the initial ALJ in this case, finding in multiple instances that Respondent's objection was justified and granting relief to Respondent accordingly. *See, e.g.*, April 17, 2020 Order Granting Respondent's Motion for Additional Time to Depose Marin and Kwan (granting deposition time rejected by prior ALJ); April 17, 2020 Order Regarding Respondent's Objections to the Prior Administrative Law Judge's Orders Denying Respondents' Applications for Subpoenas to Depose Witnesses Unavailable for Hearing (granting additional deposition subpoenas rejected by prior ALJ); April 17, 2020 Order Regarding Respondent's Objections to the Prior Administrative Law Judge's Scheduling Orders (granting additional time for limited discovery).