UNITED STATES OF AMERICA
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
WASHINGTON, DC

In the Matter of: **JOSEPH JIAMPIETRO**, Individually and as a former institution-affiliated party of Goldman, Sachs & Co., New York, New York (A Non-Bank Subsidiary of a Registered Bank Holding Company)	Docket Nos.: 16-012-E-I 16-012-CMP-I

ORDER REGARDING RESPONDENT'S MOTION IN LIMINE

The above-referenced matter is set for hearing beginning on March 21, 2022 to address issues not resolved by the undersigned's December 7, 2021 Order Regarding Cross Motions For Summary Disposition, including whether Respondent Joseph Jiampietro ("Respondent") knowingly or recklessly obtained, used, and disseminated Confidential Supervisory Information ("CSI") from client banks without authorization while employed at Goldman Sachs ("Goldman") for a period of years beginning in 2012. *See* December 7, 2021 Order at 4 n.4.

On February 11, 2022, Respondent filed a Motion in Limine ("Motion") seeking to admit evidence that he claims is "highly relevant" to the question of whether, in receiving and using the alleged client CSI, he acted in good faith rather than with a requisite level of culpability or recklessness under 12 U.S.C. §§ 1818(e) and 1818(i).[1] Motion at 5. Specifically, Respondent

[1] As an aside, the undersigned notes that Respondent's Motion articulates the incorrect legal standard for an agency's burden of proof in enforcement actions before this Tribunal. *See* Motion at 4 (claiming that the agency must prove its charges "by substantial evidence"). The burden of proof in an administrative proceeding, unless otherwise provided by statute, is on the administrative agency to establish its charges by a preponderance of the evidence. *See* 5 U.S.C. § 556(d); *Steadman v. SEC*, 450 U.S. 91, 102 (1981). Under the preponderance-of-the-evidence standard, the party with the burden of proof—here, the Board of Governors of the Federal Reserve System—must adduce evidence making it more likely than not that the facts it seeks to prove are true. *See In the Matter of Patrick Adams*, Final Decision, No. AA-EC-11-50, 2014 WL 8735096, at *23 (OCC Sep. 30, 2014) (applying preponderance

proffers a series of letters and other materials drafted by Goldman's counsel, Sullivan & Cromwell LLP, in response to requests made by the Board of Governors of the Federal Reserve System ("Federal Reserve Board" or "the Board") in this case for documents and information in connection with its investigation into Respondent's alleged misconduct ("the GS Letters").[2] *See id.* at 3-4. These materials, Respondent claims, establish "that there was disclosure/transfer/use of CSI involving dozens of other individuals" besides Respondent during the alleged time period, and that these widespread practices were the result of Goldman employees, including Respondent, "not understanding that such conduct was improper or wrongful." *Id.* at 4. Respondent further states that "[t]he GS Letters are among the best evidence that [Respondent's] conduct was consistent with the conduct of other Goldman [] employees who received and/or internally distributed CSI for the purpose of advising client banks, and that [Respondent] did not have specific intent to act 'dishonestly' or in 'willful disregard' for [Goldman's] safety and soundness." *Id.* at 5.

Enforcement Counsel for the Federal Reserve Board ("Enforcement Counsel") opposed Respondent's Motion on February 18, 2022 ("Opposition"), arguing generally that the GS Letters do not, in fact, establish "widespread CSI misuse at Goldman, let alone demonstrate any common belief or understanding among others that such practices were condoned or otherwise appropriate."

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standard in bank enforcement action); *Concrete Pipe & Prods. of Calif. v. Constr. Laborers Pension Tr.*, 508 U.S. 602 (1993) ("The burden of showing something by a preponderance of the evidence . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.") (internal quotation marks and citation omitted). There is no requirement that the evidentiary showing made be "substantial," a standard that is applicable instead to judicial review of administrative agency factfinding and requires *less* of a showing than the preponderance-of-the-evidence standard in any event. *See Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) ("The phrase 'substantial evidence' is a 'term of art' used throughout administrative law to describe how courts are to review agency factfinding. . . . [T]he threshold for such evidentiary sufficiency is not high."); *Thomas v. CalPortland Co.*, 993 F.3d 1204, 1208 (9th Cir. 2021) (substantial evidence standard requires "more than a mere scintilla but less than a preponderance") (internal quotation marks and citation omitted).

[2] To be precise, the four exhibits that Respondent terms the GS Letters "consist of a settlement submission from Goldman Sachs [to the Federal Reserve Board] (RX 255), two sets of document production letters from Goldman Sachs to the New York State Department of Financial Services (RX250 and RX251a), and a compound exhibit containing dozens of production letters and other assorted correspondence (RX347)." February 18, 2022 Enforcement Counsel's Opposition to Respondent's Motion in Limine at 2.

Opposition at 4. Furthermore, Enforcement Counsel argues that even if the materials did show that the unauthorized receipt and use of client CSI was relatively commonplace at Goldman during the applicable period, such a showing says nothing about Respondent's state of mind—or, indeed, the state of mind of anyone else—and is therefore irrelevant to the question of "his purported good faith or his culpable intent." *Id.*

The undersigned largely agrees with Enforcement Counsel regarding the relevance of the proffered exhibits to Respondent's arguments regarding his culpability and state of mind. It appears undisputed that (1) Respondent received and used CSI from bank clients without proper regulatory authorization during the period in question and (2) others at Goldman did as well, at least to some extent, but the latter has no direct bearing on whether the former constituted culpable misconduct. That is, Respondent may present evidence indicating that he *personally* did not know that he was not allowed to use CSI provided to him by bank clients, including evidence that Goldman did not train its employees on the proper restrictions on CSI use;[3] this is pertinent to whether Respondent acted in good faith. *See* Motion at 3; Opposition at 5-6; December 7, 2021 Order at 11 n.33. Documents generally showing that the improper use of CSI was widespread at Goldman, however, do not constitute such evidence—it is too great an inferential leap to suggest that Respondent's culpability can be determined based on whether some, or all, or none of the others receiving and using client CSI at Goldman were actionably culpable in doing so, particularly where the mere fact that many people engaged in misconduct *reveals nothing about whether those people knew that what they were doing was wrong.*

Moreover, it is far from clear that Respondent's proffered exhibits show what he claims or bear any particular or cognizable relationship with his theory of defense. *See* Opposition at 2-3.

[3] *See* FRB-MSD-1 (Jiampietro Dep.) at 218:7-9 ("We were never educated within the investment bank as to what confidential supervisory information is."), 219:21 ("I was never trained on CSI.").

Exhibits 250 and 251a, for example, comprise five communications from Sullivan and Cromwell attorneys to the New York State Department of Financial Services ("DFS") on behalf of Goldman on October 17, 2014 and December 1, 2014. By and large, these communications convey no substantive information beyond lists of potential custodians or search terms and logistical details regarding the enclosure of CD-ROMs responsive to various DFS requests. The lone item of pertinence in these exhibits is Goldman's counsel's representation that senior management within the Legal and Compliance Groups at Goldman was "not aware of any prior incidents" of unauthorized disclosure of CSI, something that Respondent is free to establish by alternate means if he believes that it is crucial to his defense. Exhibits 250 and 251a are therefore precluded from admission during the hearing on relevance grounds.

Likewise, Exhibit 255 is a settlement submission dated June 9, 2016 and consisting almost entirely of legal argumentation seeking to minimize the scope of Goldman's exposure to the Federal Reserve Board's allegations of CSI-related misconduct. As Enforcement Counsel observes, there are only two passages in this submission that relate to Respondent's claimed defense. *See* Opposition at 2. The first passage asserts that an internal Goldman investigation had concluded that its clients had "introduced materials containing CSI without appropriate permission relatively sporadically over the nearly three-year period at issue." RX 255 (Goldman settlement submission) at 7. This is not directly relevant to Respondent's state of mind for the reasons discussed above. The second passage states that interviews conducted by Goldman revealed that "many [of its] employees were insufficiently familiar with the full scope of the legal protections applicable to CSI." *Id.* Respondent may seek to establish this proposition, which is relevant to his culpability to the extent that it bears on whether *he* understood at that time "the full scope of the legal protections applicable to CSI," through other documentary or testimonial evidence; a passing,

second-hand reference to information regarding a topic of relevance does not justify inclusion of an advocacy document drafted by counsel non-contemporaneously and rife with "legal analysis and argument." Opposition at 6. This exhibit is thus excluded on relevance grounds as well.

Finally, Exhibit 347 is made up of several hundred pages of production-related miscellanea and correspondence between Sullivan & Cromwell attorneys and both the Federal Reserve Board and the Federal Reserve Bank of New York. As with Exhibits 250 and 251a, the vast majority of the material in Exhibit 347 has no conceivable relevance to the issues at hand. Respondent does not try to justify how letters transmitting long-expired electronic passwords for long-completed document productions, for example, might be "highly relevant to explain [his] state of mind and Enforcement Counsel's allegations of culpability," Motion at 4, nor indeed could he do so. Further, with respect to any specific communications located somewhere in Exhibit 347 that might contain information relevant to Respondent's defense, Respondent makes no particularized showing that this is the case, and it is not the job of this Tribunal to wade through Respondent's submission searching for glints of usefulness. Respondent may separately seek to admit specific documents referenced in this exhibit at the appropriate time to the extent that he can demonstrate their relevance, materiality, and reliability for purposes of 12 C.F.R. § 263.36 and along the guidelines that the undersigned has set forth above, but Exhibit 347 itself is hereby excluded.[4]

Rule 36(d)(3) of the Federal Reserve Board's Uniform Rules of Practice and Procedure provides that exhibits that have been deemed inadmissible and excluded following objection, as with the four exhibits at issue here, will be retained and transmitted to the Board in conjunction with the administrative record of the case once the hearing has been completed and a recommended

[4] Because Exhibits 250, 251a, and 347 have been excluded, there is presently no basis for the issuance of hearing subpoenas requested by Respondent as to Steven Peikin and Christopher Dunne, the Sullivan & Cromwell attorneys who are principal signatories to the correspondence therein. *See* Motion at 4; February 17, 2022 Motion for Issuance of Hearing Subpoenas at 3-4.

decision issued. To the extent that Respondent wishes to proffer for the Board's consideration specifically what matters of relevance he would have sought to show through witness questioning regarding these particular documents had they not been excluded, he may make a representation to that effect at the hearing. *See* 12 C.F.R. § 263.36(d)(2).

SO ORDERED.

Issued: March 4, 2022

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication

CERTIFICATE OF SERVICE

On March 4, 2022, I served a copy of the foregoing **Order** upon the following individuals via email:

Board of Governors of the Federal Reserve System
Office of the Secretary
20th Street & Constitution Avenue, NW
Washington, D.C. 20551
OSEC-Litigation@frb.gov

Enforcement Counsel:

Timothy M. Kirby (timothy.m.kirby@frb.gov)
Thomas O. Kelly (thomas.o.kelly@frb.gov)
David Williams (david.williams@frb.gov)
Board of Governors of the Federal Reserve System
20th Street & Constitution Avenue, NW
Washington, DC 20551

Respondent's Counsel:

Adam C. Ford (aford@fordobrien.com)
Kevin J. O'Brien (kobrien@fordobrien.com)
Anjula Prasad (aprasad@fordobrien.com)
Ford O'Brien LLP
575 Fifth Avenue 17th Floor
New York, NY 10017

John Buckheit (buckheit@buckheitpartners.com)
Buckheit Partners LLP
198 Orange Avenue
Suffern, NY 10901

Jason Cohen
Office of Financial Institution Adjudication
3501 N. Fairfax Drive, Suite D-8111
Arlington, VA 22226-3500
jcohen@fdic.gov, (571) 216-5308