UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
COMPTROLLER OF THE CURRENCY
WASHINGTON, D.C.

In the Matter of **LAURA AKAHOSHI**, former Chief Compliance Officer Rabobank, N.A. Roseville, California	)	OCC AA-EC-2018-20

FINAL DECISION TERMINATING ENFORCEMENT ACTION

This is an administrative enforcement action commenced by the Enforcement Division ("Enforcement Counsel") of the Office of the Comptroller of the Currency ("OCC") against Laura Akahoshi ("Respondent") (collectively, "Parties"), a former OCC examiner and, during the period in which the events underlying this action occurred, the Chief Compliance Officer at Rabobank, N.A. (the "Bank"). Pursuant to 12 U.S.C. §§ 1818(e) and (i), Enforcement Counsel filed a Notice of Charges ("Notice") seeking a prohibition order and a civil money penalty ("CMP") against Respondent, alleging that she improperly withheld information from OCC examiners during an on-site examination at the Bank. Though this action largely stems from events that occurred during a short three-week period in 2013, its considerable and lengthy procedural history—replete with multiple changes in adjudicators following the issuance of *Lucia v. SEC*, 138 S. Ct. 2044 (2018), an intervening criminal investigation by the Department of Justice ("DOJ"), and substantial discovery taken by both sides, *see infra* at 10—has extended the matter to the present day.

After enduring these procedural hurdles, Enforcement Counsel and Respondent each filed cross-motions for summary disposition, with both parties contending that no material facts in dispute would preclude resolution of their respective motions in their favor as a matter of law. On August 5, 2021, Administrative Law Judge ("ALJ") Jennifer Whang issued an Order Regarding the Parties' Cross Motions for Summary Disposition, in which she concluded that at least one aspect of each of the statutory elements for a prohibition order under 12 U.S.C. § 1818(e) and first- and second-tier CMPs under 12 U.S.C. § 1818(i) had been met. 2021-08-05 Order at 69. On August 16, 2021, the Parties filed a Joint Status Report memorializing the Parties' agreement that, while contested issues remained, the only remaining issue requiring resolution for purposes of a recommended decision was the appropriate amount of the first- and second-tier civil money penalties. The Parties further agreed that such resolution did not require a hearing and should be resolved based on written submissions. 2021-08-16 Joint Status Report at 2. Accordingly, the ALJ adopted the Parties' recommendation and cancelled the scheduled hearing.

On February 10, 2022, following submission of the Parties' respective motions for summary disposition, the ALJ issued a Recommended Decision ("RD") granting summary disposition in favor of Enforcement Counsel and recommending that the Comptroller enter a prohibition order against Respondent and assess a second-tier CMP for $30,000. RD at 68-69. On April 18, 2022, Respondent and Enforcement Counsel filed with the Comptroller their respective exceptions to the Recommended Decision. On July 5, 2022, the Comptroller issued an Order on Supplemental Briefing in response to contemporaneous caselaw developments concerning issues that the Comptroller ultimately determines do not affect the disposition of this case.. 2022-07-05 Order at 1. On November 21, 2022, after additional briefing and a subsequent

motion filed by Respondent, the Comptroller certified that the record of the proceeding was complete. 2022-11-21 Order at 1.

Upon review of the entire record, the Comptroller hereby declines to adopt the ALJ's Recommended Decision. The ALJ's recommended findings of fact and conclusions of law are predicated upon a misapplication of the summary disposition standard and do not form an adequate basis for the Comptroller to assess a CMP or a prohibition order. Typically, this tribunal would cure such an issue by remanding this matter back to the ALJ for further proceedings and, most likely, a hearing. Given the serious charges in this case, that remedy is a tempting one. The OCC should and must act when facts suggest that an Institution Affiliated Party ("IAP") is obstructing an examination or impeding a bank's response to an examiner's request for information. Nevertheless, given the substantial delays that have taken place that were beyond the control of this tribunal (discussed *infra* at 10), the Comptroller concludes that the more appropriate course of action is to terminate the proceeding.

As set forth below, the Comptroller reluctantly orders that the action be terminated and the outstanding Notice of Charges and Assessment be dismissed. But today's decision in no way condones or vindicates Respondent's conduct. The OCC expects prompt, unrestricted access to a national bank's books, records, and documents of any type during any supervisory activity. Bank personnel are required to give any OCC examiner prompt and complete access to all such materials during examinations of any length, scope, or type. Nothing in this decision alters, lessens, or obviates these supervisory expectations.

FACTUAL BACKGROUND

Unless otherwise noted, the following facts are either undisputed or established by record evidence. Respondent joined the Bank as its Chief Compliance Officer ("CCO") in 2008. *See*

EC-SOF at 3. As the Bank's CCO, she was responsible for overseeing the Bank's BSA/AML program, supervising the Bank's BSA/AML officer, and advising the Bank's board of directors on compliance and regulatory matters, including BSA/AML. *Id.* In addition, Respondent was responsible for "ensuring clear communications between the Bank and national and international regulatory authorities" as well as for "providing advice to executive management and the board on matters that could impact how the Bank is perceived by its regulator." OCC-MSD-03 at 2.

Prior to joining the Bank, Respondent served as an OCC examiner for nearly ten years. *See* EC-SOF at 2-3. She earned her commission at the OCC in 2000 as a National Bank Examiner in the field of regulatory compliance and thereafter specialized in Bank Secrecy Act/Anti-Money Laundering ("BSA/AML") compliance. Respondent participated in approximately 150 bank examinations during her roughly decade-long tenure with the OCC, including approximately 75 BSA-related matters. In 2007, the OCC promoted Respondent to Compliance Lead Expert for the OCC's Western District, a position in which she bore responsibility for advising other OCC examiners on BSA/AML matters. *Id.*

In July 2012, Respondent was promoted to a Global Compliance Manager role with the Bank's parent company and moved to the Netherlands. EC-SOF at 5. Meanwhile, the Bank hired Respondent's replacement as CCO, Lynn Sullivan. Sullivan very quickly identified "serious deficiencies" in the Bank's BSA/AML program. Shortly thereafter—in November 2012—the OCC commenced a full-scope, on-site examination of the Bank's BSA/AML compliance program. *Id.* at 5-6.

In December 2012, the Bank engaged Crowe Horwath LLP ("Crowe") to perform a BSA/AML program assessment. *Id.* at 6. As part of this assessment, Crowe produced at least two significant pieces of written work product: a report, referred to throughout this litigation as

"the Crowe Report," and a PowerPoint deck that synthesized the report's findings. RD at 7. Both documents contained Crowe's own conclusions that there were significant deficiencies in the Bank's BSA/AML compliance program. Between January and February 2013, various draft versions of both documents circulated among Bank leadership. Crowe also presented the PowerPoint to Bank management on February 5, 2013. EC-SOF at 7.

On February 28, 2013, Respondent was called back to the Bank to support its response to the OCC examination; Sullivan, meanwhile, was placed on forced leave for reasons that are not entirely clear based on the current record. *Id.* at 11; *see also* Sullivan Dep. Tr. at 322:13-20. Now Acting CCO, Respondent assisted the Bank in responding to a draft OCC Supervisory Letter identifying deficiencies in the Bank's BSA/AML program. *Id.* at 11; *see also* Ryan Dep. Tr. at 213: 13-18; R-SOF at 5.

On March 18, 2013, Sullivan notified the OCC, from her personal email account, that the Bank had engaged Crowe to perform a BSA/AML assessment. *Id.* at 13. The ensuing communications between the OCC and Respondent are central to the dispute in this case.

On March 21, 2013, OCC examiner Shirley Omi emailed Respondent, asking her to "please provide us [the OCC] with a copy of the assessment report of the Bank's BSA program that Crowe LLC was engaged to perform in January 2013." OCC-MSD-47. Respondent then forwarded Omi's email to Bank General Counsel Dan Weiss, writing that "I think the right answer is that Crowe did not perform an assessment" and that "the project was shelved before any report could be issued." OCC-MSD-48 at 2. Weiss sent Respondent the following in response:

> To the best of my knowledge, Crowe never provided a final report. As you note, they were engaged to provide an assessment and road map. They did produce a draft that was shared with management and perhaps Terry [Schwakopf, another Bank official]? My guess

> is that copies of the draft are floating around although our intention was to not keep any draft documents. So I believe your statement is accurate, although should we say no "final report was issued"? The obvious concern is they then ask for the draft from Crowe.

Upon receiving this from GC Weiss, Respondent replied and said she would call him to discuss it further. *Id.* at 1.

On March 22, 2013, Respondent replied to OCC examiner Omi's request with the following:

> Crowe did not complete an assessment. While they were engaged to perform a market study/peer benchmark analysis for the benefit of management and the board, the project was suspended before any report was issued. The decision to suspend was made in light of information coming out of the internal investigation being done to develop the OCC response. In part, it became clear that Crowe had not been provided all facts necessary to understand the organization so the emerging observations and action plan were not tailored to our situation. Rather than move in a direction that wasn't reflective of the current state of affairs, management elected to take some time to more thoughtfully determine next steps.
>
> Having taken this time to better consider where we need to go in enhancing our program, we have recently asked Crowe to assist us on several projects, including the BSA/AML risk assessment. We anticipate having a draft in time for the next board meeting in early May. I'd be happy to send you a copy of the draft report.

OCC-MSD-52 at 2. Respondent then forwarded that email to Bank CEO John Ryan and GC Weiss. Ryan replied by asking, "I wonder where Shirley heard Crowe did a program assessment?" Respondent answered him the following day:

> Lynn mentioned it at the exit meeting in February in SF. What I don't know is whether she took it upon herself to share the draft report. If I hear back from Shirley indicating they have a draft report, I'll schedule a call to discuss with her why we reject the initial conclusions. I'll also make it clear to her that management did not accept the report and thus it is not considered an 'official bank document.'

CEO Ryan responded, "Ok let's hope she did not provide a draft report. If she did your approach with Shirley is a good one." *Id.* at 1.

On March 25, 2013, Omi sent another request to Respondent, this time asking for "a copy of what bank management received from Crowe, even if it was only preliminary or partial." OCC-MSD-53. Respondent then met with CEO Ryan and GC Weiss to discuss how to respond. In advance of this meeting, she asked GC Weiss for a copy of the Crowe document because she could not locate a copy. OCC-MSD-55 at 2. GC Weiss replied that he "never kept an electronic copy" but that "Sharon [Edgar] may have found a copy in Lynn's papers." Respondent then wrote back, "[a]ll the better if you don't have it as we can then tell Shirley, truthfully, that only Lynn was in receipt of the letter and we are unable to locate a copy." *Id.* at 1. Shortly after this, both Sharon Edgar—a Bank employee then in communication with Respondent—and GC Weiss sent Respondent a copy of the draft Crowe report. OCC-MSD-56 at 1; OCC-MSD-58.

After her meeting with CEO Ryan and GC Weiss, Respondent circulated a proposed response to Omi's second request, to which GC Weiss offered suggested edits. OCC-MSD-63. Respondent then replied to Omi later that day with the following:

> I've spoken with both John Ryan and Dan Weiss regarding the existence of a draft report coming out of the January BSA Program Review by Crowe Horwath. They each reported the same information which is that Crowe had a discussion with the board and members of executive management at the February 4th meeting. And while Crowe did utilize a PowerPoint presentation during the discussion, it was not provided to the Bank, as indicated by the fact that it was not included in the board packet. In this meeting and in subsequent conversations, both board members and executive management were very critical of the information being provided noting that there lacked foundation and that assumptions appeared to be based on inaccurate information. . . . [Respondent then identifies the specific concerns the Board had with the Crowe presentation].

> In all, the participants did not find the presentation particularly useful. It was this presentation that prompted management to suspend the work being done by Crowe around the BSA/AML Program Assessment until clearer instructions and parameters could be established with the goal of an end product that the board and management could rely upon to make decisions going forward. Crowe has since been provided with additional information and has, in fact, altered their recommendations on several fronts.
>
> Now that there is more effective sharing of information and clearer communication as to the direction of work, we have picked up where the work ended in mid-February and are utilizing Crowe resources to assist us in completing the BSA/AML Risk Assessment. . . . I've attached a copy of a proposal Crowe submitted to the Executive Oversight Committee on March 1, 2013, which outlines their recommendations for next steps, as described above, and which we've generally accepted. We're happy to discuss further and will certainly share the BSA/AML Risk Assessment when it comes out in draft near the end of April or early May.

OCC-MSD-64 at 1. Respondent attached to this email a copy of the aforementioned proposal, a seven-page document that did not contain conclusions referenced in the Crowe Report or in the PowerPoint presented to Bank management. She did not attach the Crowe Report or the PowerPoint. *Id.*; *see also* RD at 17.

After these two unsuccessful requests, OCC Assistant Deputy Comptroller ("ADC") Thomas Jorn called CEO Ryan on April 8, 2013 and verbally requested the Crowe documents directly from him. RD at 21. CEO Ryan agreed to provide the materials on the timeline ADC Jorn requested—by April 19, 2013—along with a cover letter explaining why the Bank believed the assessment was "inaccurate" and "misleading." OCC-MSD-66; OCC-MSD-67. On April 18, 2013, Respondent emailed ADC Jorn, attaching a draft of the Crowe Report, a copy of the PowerPoint, and the Bank's cover letter explaining why management rejected Crowe's conclusions. OCC-MSD-79-81.

Enforcement Counsel characterizes these communications as evasive and misleading, while Respondent characterizes them as reflecting an honest effort to summarize information gathered from Bank officers—such as CEO Ryan and GC Weiss—who had more direct knowledge of the Crowe engagement.

The record reflects that the OCC took no immediate formal action with respect to Respondent concerning this incident. Five years later, on February 7, 2018, the Bank entered into a plea agreement with the Department of Justice relating to a criminal investigation into the Bank's BSA/AML program. OCC-MSD-88. As a condition of the agreement, the Bank—which, on its own initiative, had previously terminated Respondent's employment at the institution—pled guilty to conspiring with its executive officers to "defraud the United States" and "corruptly obstruct and attempt to obstruct an examination of a financial institution." *Id.* Respondent was not a party to the plea agreement between the Bank and the DOJ, and she was not named personally, but the Parties do not dispute that the person identified as "Executive A" in the plea agreement is Respondent. The Bank's plea agreement carried a fine of $500,000 and a civil money forfeiture totaling $368,701,259. On the same day, the Bank also entered into a consent order with the OCC, agreeing to a $50 million civil money penalty based on the Bank's failure to address its BSA/AML deficiencies and its concealment of documents from OCC examiners. OCC-MSD-90.

Approximately two months later, on April 16, 2018, Enforcement Counsel filed the Notice of Charges against Respondent in this case. Almost immediately, these proceedings were subject to multiple false starts and delays stemming from unforeseen factors beyond the control of this tribunal. One month after Enforcement Counsel filed the Notice of Charges, the Attorney General requested that the OCC stay its enforcement proceedings against Respondent pending

the completion of the DOJ's "related, ongoing criminal investigation, as well as any additional criminal proceedings that may result from the investigation." *See* Attorney General Request, May 25, 2018. ALJ McNeil, who was the initial ALJ assigned to this case, issued an order staying discovery pending the completion of the criminal investigation. *See* 2018-06-20 Order. The next day, the Supreme Court issued its decision in *Lucia v. Securities & Exchange Commission*, holding that the SEC's ALJ's were "Officers of the United States" and therefore subject to the Appointments Clause of the Constitution. 138 S. Ct. at 2055. Respondent subsequently filed a motion on August 16, 2018, arguing, inter alia, that ALJ McNeil's assignment to the case violated the holding set forth in *Lucia*. The Office of Financial Adjudication acknowledged Respondent's request and stated that "all orders issued by [ALJ] McNeil in this case are null and void and effectively this matter is stayed" until the OCC could properly appoint a new ALJ. The OCC subsequently issued an order on August 21, 2018, reassigning the case from ALJ McNeil to ALJ Miserendino per *Lucia*'s remedial instructions. *See id.* (directing that to cure an Appointments Clause error, "another ALJ . . . must hold the new hearing to which [a Respondent] is entitled"). On September 7, 2018, the DOJ notified Respondent that it had completed its investigation and it would not seek to prosecute individuals associated with the Bank, effectively mooting the DOJ-related stay of the proceedings. The *Lucia*-related delays persisted, however, as ALJ Miserendino retired from federal service on December 31, 2018, leaving this case without an ALJ for a second time. The Secretary of the Treasury later appointed ALJ Miserendino's replacement—ALJ Jennifer Whang—as an officer for the OCC on November 14, 2019, and the OCC issued an order shortly thereafter assigning this case to her. *See* 2020-01-06 Order.

DISCUSSION

The actions giving rise to the allegations of misconduct in this case are deeply troubling. In accordance with 12 U.S.C. § 481, the OCC expects prompt, unrestricted access to a national bank's officers, directors, and employees, as well as to a national bank's books, records, and documents of any type during any supervisory activity.[1] Bank personnel are therefore required to give any OCC examiner prompt and complete access to all personnel and materials during on-site examinations of any length, scope, or type.

Based on the evidence in the current record, Rabobank executives appear to have demonstrated a troubling lack of responsiveness to OCC demands. The record shows that Respondent received a direct request from an OCC examiner to provide "a copy of the [Crowe] assessment report" on March 21, 2013. Instead of immediately furnishing all documents (i) within their possession and control and (ii) plainly responsive to the examiner's request, Respondent and her colleagues waited nearly a month before taking steps to hand them over. One plausible interpretation of the record is that Respondent and others adopted a strategy of deflection and delay designed to hinder the OCC's efforts (reflected by multiple written and oral requests) to collect these materials. This unacceptable delay—and, more troubling, possible lack of candor—is exactly the type of conduct that the OCC's enforcement authority is designed to deter.

Nevertheless, the current posture requires the Comptroller to consider whether it was appropriate, at the *summary disposition* stage, for the ALJ to make conclusive determinations regarding Respondent's culpability under 12 U.S.C. §§ 1818(e) and (i). Despite the extremely

[1] In addition, the Comptroller may call for special reports from any national bank whenever necessary for the Comptroller's use in the performance of the Agency's supervisory duties. *See* 12 U.S.C. § 161.

troubling nature of the allegations at the core of this case and the evidence adduced, the Comptroller concludes that summary disposition was improperly granted.

a. Summary Disposition Standard

The operative standard is set forth in 12 C.F.R. § 19.29(a), which states that summary disposition is warranted if there is "no genuine issue as to any material fact" and "the moving party is entitled to decision in its favor as a matter of law." This standard mirrors the summary judgment standard in the Federal Rules of Civil Procedure. *See In re Blanton*, OCC AA-EC-2015-24, 2017 WL 4510840, at *6 (OCC July 10, 2017). As the ALJ noted in her August 5, 2021 Order, the summary disposition standard requires the tribunal to evaluate all evidence "in the light most favorable to the non-moving party" and draw "all justifiable inferences" in favor of the non-moving party. 2021-08-05 Order at 5 (internal quotations removed).

As relevant to this decision, Respondent argues in her exceptions that the ALJ misapplied this standard by failing to draw the appropriate inferences in Respondent's favor and resolving genuine factual disputes against her. Upon review of the record, the Comptroller concludes that the ALJ committed reversible error by misapplying the summary disposition standard for both § 1818 charges.[2]

b. Misapplication of the Standard

The ALJ recommended that the Comptroller enter a prohibition order and assess a second-tier civil money penalty against Respondent. RD at 69. As the following analysis demonstrates, there are still material factual disputes surrounding the elements of both

[2] The Recommended Decision incorporated factual findings from the ALJ's Order Regarding the Parties' Cross Motions for Summary Disposition on August 5, 2021. Many of the issues surrounding the misapplication of the summary disposition standard originated in the August 5 Order. However, the analysis set forth in this Final Decision addresses errors in the ALJ's Recommended Decision, both because the Recommended Decision is the decision currently before the Comptroller for review and because the Recommended Decision incorporated any errors that may have originated with the prior order.

§§ 1818(e) and 1818(i). Accordingly, the Comptroller declines to adopt this finding of the Recommended Decision.

i. Prohibition

Entry of a prohibition order under 12 U.S.C. § 1818(e) requires a finding of misconduct, effect, and culpability. Most relevant here is the final prong, culpability. To demonstrate culpability, Enforcement must prove that Respondent's misconduct "involves personal dishonesty" or "demonstrates willful or continuing disregard . . . for the safety or soundness of such insured depository institution." 12 U.S.C. § 1818(e)(1)(C). The Recommended Decision determined that Respondent acted with both "personal dishonesty" and "willful disregard" within the meaning of § 1818(e). RD at 58.

As the ALJ noted in her Recommended Decision, "personal dishonesty" and "willful disregard" both require a finding that Respondent acted with scienter—that is, knowledge of the wrongfulness of her conduct. RD at 58-59; *see also Dodge v. Comptroller of the Currency*, 744 F.3d 148, 160 (D.C. Cir. 2014). The ALJ recognized that it is typically inappropriate to resolve questions of this nature at the summary disposition stage. RD at 58 (citing *Miller v. FDIC*, 906 F.2d 972, 974 (4th Cir. 1990) (noting "the general rule that summary judgment is seldom appropriate in cases wherein particular states of mind are decisive elements of a claim or defense") and *Gomez v. Trustees of Harvard Univ.*, 677 F. Supp. 23, 24 (D.D.C. 1988) (noting that "intent and state of mind [are] areas that are particularly ill-suited for summary disposition")). Nevertheless, the ALJ determined that "the undisputed facts" made it clear that Respondent acted with the requisite scienter to satisfy the culpability prong of § 1818(e). *Id.*

Upon scrutiny, it is evident that the ALJ did not fully address documents and testimony favoring Respondent on this point. The ALJ spent several pages of the Recommended Decision

discussing how Respondent's actions constituted, in her view, a lack of "transparency and seeming good faith." RD at 41. But, she declined to address record materials proffered by Respondent that challenged this conclusion. Respondent repeatedly stated in her deposition, for example, that she was not trying to conceal any information from the OCC. Akahoshi Dep. Tr. at 94:15-16 ("Knowing what I knew then, I believe I answered it in the most truthful and honest way I could"); *id.* at 287:20-23 (agreeing with suggestion that she was not "intending to conceal from the OCC that Crowe had created some draft documents"). Instead, Respondent testified that she believed that the Bank viewed the Crowe Report as "fraught with inaccuracies" and "unsubstantiated." *Id.* at 289:14-16. More importantly, Respondent testified that she believed her responses were consistent with what her superiors at the Bank believed to be the best course of action, given that they knew much more about the Crowe engagement than she did. *See id.* at 43:13-17 ("I relied on a lot of people [including CEO Ryan] to provide information—and especially given that I had been away from the program for over six months—so I needed their help to understand . . . the current condition of the BSA/AML program"); *id.* at 167:4-5 (stating that she didn't share other documents with OCC Examiner Omi "because Dan Weiss and John Ryan had not approved that"). CEO Ryan's testimony is consistent. He described a call with Respondent after she received Ms. Omi's March 25th email as an opportunity for him and General Counsel Weiss to "provide [Respondent] with information of what was actually presented, to the best of our knowledge . . . so she could appropriately respond to Shirley," especially given that Respondent "was not at that February meeting." Ryan Dep. Tr. at 97:1-5.

Equally problematic, the ALJ based her finding that Respondent had the requisite scienter on her conclusion that Respondent knew that Crowe's draft report—rather than the PowerPoint, or any other Crowe document—was the operative document that would be responsive to the

OCC's request. RD at 36. But Respondent proffered evidence sufficient to create a genuine dispute about this material fact. CEO Ryan testified that he believed the "official document" was the PowerPoint that was "presented to our board" on February 5. Ryan Dep. Tr. at 97:16-17, 98:18-20. Respondent's testimony similarly tends to support her assertion that she initially believed the PowerPoint was the operative document, or at the very least, that she did not *know* which was the operative document. *See* Akahoshi Dep. Tr. at 131:16-23 (discussing how, when she spoke with someone at Crowe, they discussed "the deck, and more specifically . . . the presentation to the board"); *id.* at 94:23-24 ("Shirley's request was a vague one, and on a subject matter that I was not familiar with.").

It is certainly plausible that, after a hearing, a neutral factfinder could determine that Enforcement Counsel's interpretation of events is more credible than Respondent's. It is also plausible that, after a hearing, a factfinder could conclude that Respondent acted with the necessary "personal dishonesty" and "willful disregard" for the safety and soundness of the Bank and thereby meet the culpability prong of 12 U.S.C. § 1818(e)(1)(C). The record evidence certainly suggests that, at minimum, the path to providing the OCC with the requested Crowe Report was not as straight as it should have been, and that Respondent played an important role in the deliberations within the Bank that resulted in the delay. But the summary disposition standard requires the tribunal to evaluate all evidence "in the light most favorable to the non-moving party" and draw "all justifiable inferences" in favor of the non-moving party. *See Blanton*, 2017 WL 4510840, at *6. Here, the ALJ made credibility determinations, weighed competing evidence, and drew inferences against Respondent at the summary disposition stage without a meaningful discussion of why she chose to discount the evidence supporting Respondent. Because there are still material factual disputes regarding Respondent's state of

mind, the Comptroller finds—in a decision that is limited to the specific facts of this case—that the ALJ erred in determining at this stage in the litigation that Enforcement Counsel had satisfied the culpability prong of 12 U.S.C. 1818(e).

ii. Second-tier civil money penalty

The Comptroller's conclusion regarding the summary disposition standard articulated above also precludes the Comptroller from imposing a civil money penalty at this stage. Assessment of a second-tier civil money penalty under 12 U.S.C. § 1818(i) requires a finding of misconduct and effect. Misconduct can take the form of a violation of law, breach of a fiduciary duty, or "reckless" engagement in an unsafe or unsound banking practice. 12 U.S.C. § 1818(i)(2)(B)(i). The Recommended Decision found that § 1818(i)'s misconduct prong could be premised on any of three alleged violations: (1) violation of 12 U.S.C. § 481;[3] (2) violation of 18 U.S.C. § 1001(a)(1);[4] or (3) reckless engagement in an unsafe or unsound practice. RD at 7.

The primary difficulty regarding the latter two predicate violations—18 U.S.C. § 1001(a)(1) and recklessly engaging in an unsafe or unsound practice—is that both types of misconduct require proof of Respondent's state of mind. Section 1001(a)(1) requires showing that Respondent's actions were "knowing and willful," and § 1818(i) requires that the unsafe or unsound practice be engaged in "recklessly." 18 U.S.C. § 1001(a); 12 U.S.C. § 1818(i)(2)(B)(i)(II). Viewing the record evidence in the light most favorable to Respondent—as this tribunal is required to do at this stage—the Comptroller recognizes that there are genuine factual disputes about what Respondent knew and whether, as a result, she acted in good faith

[3] As relevant here, this provision provides that OCC examiners "shall have power to make a thorough examination of all the affairs of the bank." 12 U.S.C. § 481.

[4] This provision provides that any person "within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States" commits an offense if they "knowingly and willfully falsif[y], conceal[], or cover[] up by any trick, scheme, or device a material fact." 18 U.S.C. § 1001(a)(1).

based on her understanding at the time. Under the current posture, it would therefore be improper for the Comptroller to uphold a civil money penalty premised on a disputed conclusion that Respondent acted "knowingly" or "recklessly."

This leaves the alleged violation of 12 U.S.C. § 481. Section 481 gives the OCC broad authority to "make a thorough examination of all the affairs of the bank," including the power to "administer oaths" and "examine any of the officer and agents" of the bank. 12 U.S.C. § 481. The statute also authorizes the OCC to impose penalties on banks and affiliates of banks who "refuse to give any information required in the course of any such examination." *Id.*

The Comptroller is not aware of any caselaw that squarely addresses the elements of § 481 for the purposes of upholding a violation of §§ 1818(e) or 1818(i). At minimum, however, a violation of § 481 would likely require a showing that an IAP, as an agent acting on behalf of an OCC-supervised institution, had a duty to furnish OCC examiners with certain information and that the IAP subsequently breached that duty. This theory of liability is consistent with the text of § 481 and its statutory purpose. *See In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 210, 215 (E.D.N.Y. 1979) (recognizing that § 481 enables the OCC to "collect the information necessary to perform [the] broader regulatory function" of "supervis[ing] the banking system for the protection of the public and the national economy as a whole"). It also aligns with a core premise underlying 12 U.S.C. § 1818, namely, that *IAPs* can violate banking laws—or contribute to their violation—even though many banking statutes are phrased in terms of a *bank's* obligations. Even so, because the Recommended Decision misapplied the summary disposition standard, it is unnecessary—and the Comptroller declines—to define § 481's elements with more precision here.

In addition to the disputed issues concerning Respondent's state of mind discussed *supra*, the ALJ misapplied the summary disposition standard when drawing conclusions about Respondent's communications with the OCC. Take, for instance, the Recommended Decision's discussion of the Bank's April 18 email that transmitted the Crowe Report to the OCC. As noted previously, whether the Respondent reasonably interpreted the OCC's request as being limited to the PAR PowerPoint was a disputed issue. The Recommended Decision reflected that:

> The undersigned observes *sua sponte* that this email inaccurately characterizes the OCC's March 25, 2013 request to the extent that it suggests that the OCC at that time had requested only the PAR PowerPoint, or even principally the PAR PowerPoint, rather than the draft Crowe Report itself.

RD at 23. Rather than evaluate the evidence "in the light most favorable to the non-moving party" or draw "all justifiable inferences" in favor of the Respondent, the ALJ offered a "*sua sponte*" observation that clearly drew a factual inference *against* the non-moving party on a key issue.[5] *See Blanton*, 2017 WL 4510840, at *6. If Respondent reasonably believed that the PowerPoint was the sole operative document, it might not be misleading or inaccurate to characterize the OCC's request in this manner. While the Comptroller reaches no conclusion about which view is correct, he notes that Enforcement Counsel's own expert witness confirmed that there was "nothing false or misleading about the [April 18] cover e-mail." OCC-MSD-112.

One final example suffices: the Recommended Decision stated that Respondent's March 25 email "conveyed the clear impression, again, that there were no other documents responsive to the examiner's request and that a 'draft report' separate from the February 5 presentation

[5] The Recommended Decision went on to discuss a passage in the April 18 cover letter attaching the Crowe Report. But its analysis reads more as a *de novo* review of the record evidence than as a review of that evidence in a light most favorable to the non-moving party. The ALJ acknowledged that the Parties disagreed over whether Respondent authored the passage in question but still held that the passage was "factually inaccurate and [] in any event misleading." RD at 24. The ALJ also described her interpretation of the passage as it is "most reasonably read," in clear violation of the summary disposition standard. *Id.*

simply did not exist." Regardless of whether the email in question conveyed a "clear impression," that is not the applicable standard. The tribunal is required to determine whether, viewing the evidence in the light most favorable to Respondent and drawing all inferences in her favor, a dispute with respect to a material fact still exists. When viewed in this way, existence of a material factual dispute was plain to see. The Recommended Decision erred in determining that the undisputed facts proved that Respondent met the "misconduct" prong of § 1818(i).

It is worth emphasizing again that the Comptroller's holding in this case is a narrow one: the Recommended Decision misapplied the summary disposition standard required by 12 C.F.R. § 19.29(a), and therefore entry of summary disposition against Respondent is inappropriate.

c. Dismissal Is an Appropriate Remedy

In nearly all cases involving misapplications of the summary disposition standard, the normal remedy is for the Comptroller to remand the matter for a hearing on the disputed factual questions. 12 C.F.R. § 19.40(c)(2). But for the following reasons, the Comptroller concludes that a departure from this general rule is appropriate. While the allegations in this matter are troubling and allude to conduct that does not comport with the OCC's expectations of a banking professional, the Comptroller, reluctantly, will not remand this matter and will not reach final findings of fact, given the unique circumstances underlying this case and the further lapse of time necessary to effect such a remand. Instead, the Comptroller finds it appropriate to dismiss this case in the interest of adjudicatory efficiency and economy given the substantial delay that has already taken place, in large part owing to the multi-year delay resulting from the DOJ investigation into the Bank as well as the ALJ transfer caused by the Supreme Court's decision in *Lucia* (discussed *supra* at 10). The Comptroller also finds that dismissal is appropriate here since the factual disputes that would need to be resolved at a hearing predominantly relate to

Respondent's state of mind. While the Comptroller does not condone Respondent's alleged actions—and reminds institutions and IAPs, in the strongest possible terms, that institutions subject to the OCC's supervisory authority must promptly produce their books, records, or documents to OCC examiners on request—the delay in this action would likely make it difficult for witnesses to accurately recall the events in question and their attendant states of mind. More than ten years have passed since the events that gave rise to this matter. Accordingly, in an exercise of his plenary discretion over remedies, the Comptroller hereby orders that the action be terminated and the outstanding Notice of Charges and Assessment be dismissed. Because this action is now dismissed, the remaining issues raised in the Parties' exceptions and any pending motions are moot.

CONCLUSION

For the foregoing reasons, the Comptroller declines to adopt the ALJ's Recommended Findings of Fact and Recommended Conclusions of Law because the ALJ erred in her application of the summary disposition standard. The Comptroller also declines to remand the case to the ALJ for new findings of fact and conclusions for the reasons stated above. Accordingly, the charges against Respondent Laura Akahoshi are hereby dismissed.

IT IS SO ORDERED.

Date: _____, 2023

Michael J. Hsu

Digitally signed by Michael J. Hsu
Date: 2023.04.05 11:23:21 -04'00'

MICHAEL J. HSU
ACTING COMPTROLLER OF THE CURRENCY