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

In the Matter of **LAURA AKAHOSHI,** Equal Access to Justice Applicant	)))))))	OCC AA-EC-2018-20

FINAL DECISION ON RESPONDENT'S APPLICATION FOR AN AWARD OF ATTORNEY'S FEES AND COSTS PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT

This matter is before the Comptroller of the Currency ("Comptroller") on the initial order of the Administrative Law Judge ("ALJ") denying an application for a monetary award pursuant to the Equal Access to Justice Act ("EAJA") filed by Laura Akahoshi ("Respondent"), former Chief Compliance Officer of Rabobank, N.A. ("Bank"). In 2018 the Office of the Comptroller of the Currency ("OCC") brought an administrative enforcement action against Respondent charging her with violations of 12 U.S.C. § 481 and 18 U.S.C. § 1001 and/or unsafe or unsound practices in managing the affairs of the Bank. On April 5, 2023 the Comptroller[1] dismissed the action ("Termination Order"), explaining

> [G]iven the substantial delays that have taken place that were beyond the control of this tribunal …, the Comptroller concludes that the more appropriate course of action is to terminate the proceeding. …

Termination Order, at 3.

Respondent bases her EAJA claim on that dismissal, asserting primarily that the OCC was not substantially justified in bringing the administrative enforcement action. The

[1] This Decision refers to current and former Comptrollers and Acting Comptrollers as "Comptroller."

Comptroller rejects this assertion. For the reasons stated below and upon review of Respondent's May 5, 2023 EAJA Application ("EAJA Application"), Respondent's May 1, 2025 Supplemental EAJA Application, Enforcement Counsel's June 5, 2023 Answer in Opposition to Respondent's May 5, 2023 Application ("ENF EAJA Response") and Enforcement Counsel's May 15, 2025 Opposition to Respondent's Supplemental Application, and the administrative record as a whole, the Comptroller affirms, to the extent consistent with this Decision, the ALJ's June 14, 2023 Order Denying Respondent's Application for an Award of Attorney's Fees and Costs Pursuant to EAJA ("ALJ EAJA Order") and denies the EAJA Application.

I. OCC ADMINISTRATIVE ENFORCEMENT ACTIONS

In furtherance of the OCC's mission, Congress has granted the OCC authority to undertake a variety of administrative enforcement actions against bank institution-affiliated parties ("IAPs"). *See, e.g.,* 12 U.S.C. § 1818(e) (proceedings to suspend or remove IAPs from participation in the banking industry), (i) (proceedings to assess civil money penalties). Pursuant to this enforcement authority, OCC Enforcement Counsel may initiate an action by issuing a notice of charges detailing alleged violations. Unless the charges are uncontested, a hearing and related proceedings are conducted by an ALJ pursuant to the Administrative Procedure Act and the OCC's rules of practice and procedure. 12 U.S.C. § 1818(e), (h)-(i); *id.* § 1818 note; 12 C.F.R. Part 19. Motions may be filed with the ALJ, and document discovery and depositions are permitted, subject to certain limitations. *See* 12 C.F.R. §§ 19.23-19.29.

The ALJ "will recommend that the Comptroller issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition

show" that "[t]here is no genuine issue as to any material fact" and "[t]he moving party is entitled to a decision in its favor as a matter of law." 12 C.F.R. § 19.29. If a case is not decided on summary disposition nor terminated by consent of the parties, the case shall proceed to an evidentiary hearing. *See id.* §§ 19.29-19.30. Within 30 days after service of a recommended decision, the parties may file with the Comptroller exceptions to the recommended decision. 12 C.F.R. § 19.39(a). Thereafter, the Comptroller issues a final decision or order. 12 U.S.C. § 1818(h); 12 C.F.R. § 19.40.

A. Section 1818(e) Prohibitions

There are three separate elements to support a charge of prohibition against an IAP: *misconduct*, *effect*, and *culpability*. *See* 12 U.S.C. § 1818(e)(1)(A), (B), & (C); *Kim v. OTS*, 40 F.3d 1050, 1054 (9th Cir. 1994). The misconduct element may be satisfied, among other ways, by showing one or both of two underlying predicates: that an IAP has "directly or indirectly" . . . "engaged or participated in any unsafe or unsound practice in connection with any insured depository institution. . ." or that an IAP has "violated . . . any law or regulation." 12 U.S.C. § 1818(e)(1)(A). The effect element may be satisfied by showing that "by reason of" the misconduct one or more of three underlying predicates has occurred: that an institution at issue "has suffered or will probably suffer financial loss or other damage," that an institution's "depositors have been or could be prejudiced," or that the IAP has "received financial gain or other benefit by reason of such violation[ ] [or practice]." *Id*. § 1818(e)(1)(B). Last, the culpability element may be satisfied when the alleged misconduct meets one or both of two underlying predicates: that it "involves personal dishonesty" or that it "demonstrates willful or

continuing disregard . . . for the safety or soundness of such insured depository institution. . .." *Id*. § 1818(e)(1)(C).

B. Section 1818(i) Civil Money Penalties

The Comptroller may also assess civil money penalties. To support an assessment of a second-tier civil money penalty, Enforcement Counsel must establish two elements: *misconduct* and *effect*. Misconduct can take the form of a violation of law or a recklessly unsafe or unsound practice. 12 U.S.C. § 1818(i)(2)(B)(i). The effect element may be satisfied by establishing one or more of three underlying predicates: that the misconduct "is part of a pattern of misconduct," "results in pecuniary or other benefit" to the IAP, or "causes or is likely to cause more than a minimal loss to [a] depository institution." *Id.* § 1818(i)(2)(B)(ii).

II. PROCEDURAL HISTORY

The OCC commenced administrative enforcement proceedings against Respondent by initiating a Notice of Charges ("Notice") that was signed on April 16, 2018 and served the following day. The Notice sought an order of prohibition and imposition of a $50,000 civil money penalty under 12 U.S.C. § 1818 for violations of 12 U.S.C. § 481 and 18 U.S.C. § 1001 and/or unsafe or unsound practices in managing the affairs of the Bank. In relevant part, the Notice alleged that Respondent, in her capacity as the Bank's Chief Compliance Officer, had concealed from OCC examiners a third-party auditor's draft report ("the Crowe Report") identifying deficiencies in the Bank's Bank Secrecy Act and Anti-Money Laundering ("BSA/AML") compliance program, despite the OCC's repeated requests for the document. Notice, at 4-11. The Notice also alleged that Respondent demonstrated an actionably culpable state of mind and that her misconduct ultimately resulted in the Bank suffering financial loss and

reputational harm as the result of, among other events, its February 2018 entry of a guilty plea to conspiracy to obstruct an OCC examination. *Id*.

The administrative enforcement proceedings spanned multiple years, during which the case was stayed in connection with an intervening criminal investigation by the U.S. Department of Justice and was then reassigned twice: first, following issuance of *Lucia v. Securities and Exchange Commission*, 585 U.S. 237 (2018), and, second, following retirement of the newly assigned ALJ and the subsequent appointment of his replacement. *See* Termination Order, at 9-10. The parties filed cross-motions for summary disposition, each arguing that no material facts were in dispute and that each was entitled to judgment in their favor as a matter of law. In August 2021 the ALJ issued an Order Regarding the Parties' Cross Motions for Summary Disposition, in which she concluded that at least one of the alternative predicates required to satisfy each of the statutory elements for a prohibition order and first- and second-tier civil money penalties had been met. Accordingly, the ALJ recommended that Enforcement Counsel's motion for summary disposition be granted on such bases. Thereafter the parties submitted a Joint Status Report agreeing that the only remaining issue that required resolution was determination of an appropriate civil money penalty. On February 10, 2022 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 against her a second-tier civil money penalty for $30,000. Thereafter the parties filed with the Comptroller their respective exceptions to the RD.

On April 5, 2023 the Comptroller issued the Termination Order that ended the proceedings. The Termination Order declined to adopt the RD, finding that the ALJ had misapplied the summary disposition standard. The Comptroller recognized "that there are

genuine factual disputes about what Respondent knew and whether, as a result, she acted in good faith based on her understanding at the time." Termination Order, at 16-17. The Termination Order found it "appropriate to dismiss th[e] case in the interest of adjudicatory efficiency and economy given the substantial delay" related, largely, to the intervening criminal investigation and case reassignments following *Lucia*, and where "the factual disputes that would need to be resolved at a hearing predominantly relate[d] to Respondent's state of mind." *Id.* at 19-20. The Comptroller did not issue findings or conclusions regarding the merits of the claims.

On May 5, 2023 shortly after issuance of the Termination Order, Respondent undertook two courses of actions. First, she filed her administrative EAJA Application pursuant to 5 U.S.C. § 504 seeking over $4 million in fees and other expenses related to the OCC's administrative enforcement proceeding. Second, she filed a petition in the U.S. Court of Appeals for the Ninth Circuit for review of the Termination Order that ended the enforcement proceeding. *Akahoshi v. OCC*, No. 23-938 (9th Cir. May 5, 2023), ECF No. 1. On June 14, 2023 the ALJ who issued the RD issued the ALJ EAJA Order denying Respondent's EAJA Application on the basis that Enforcement Counsel's position was "substantially justified." In July 2023 the Comptroller issued an order staying Respondent's EAJA case until the conclusion of the Ninth Circuit appeal.

On October 21, 2024 the Ninth Circuit dismissed Respondent's appeal for lack of Article III standing. *See Akahoshi v. OCC*, No. 23-938, 2024 WL 4532895 (Oct. 21, 2024). On January 21, 2025 Respondent filed a petition for *certiorari* to the U.S. Supreme Court for review of the Ninth Circuit's dismissal order, which was denied on March 24, 2025. *See Akahoshi v. OCC*, 145 S. Ct. 1431, 2024 WL 2532895 (2025). On March 26, 2025 the Comptroller issued an order stating that the administrative stay he previously had imposed on the EAJA Application proceeding would be lifted on April 23, 2025 given the Supreme Court's denial of Respondent's

certiorari petition and the resulting finality of the Ninth Circuit dismissal. On April 2 and April 18, 2025 Respondent sought to supplement her EAJA Application with fees incurred litigating these appeals.

On April 22, 2025 the Comptroller issued an order granting Respondent's request to review the ALJ EAJA Order and allowing her to supplement her application. On that same day, however, and despite the Ninth Circuit dismissal, Respondent filed a separate EAJA application with the Ninth Circuit pursuant to 28 U.S.C. § 2412. *See* Motion for Attorneys Fees, *Akahoshi*, No. 23-938 (9th Cir. April 22, 2025), ECF No. 63. On May 1, 2025 Respondent filed with the Comptroller a supplement to her EAJA Application for fees for litigating her Ninth Circuit and Supreme Court appeals and the EAJA Application. On May 15, 2025 Enforcement Counsel filed an opposition to the supplement. On May 22, 2025 the Ninth Circuit dismissed Respondent's EAJA application pursuant to 28 U.S.C. § 2412 finding that it lacked jurisdiction to award fees under EAJA. *See* Order, *Akahoshi*, No. 23-938 (9th Cir. May 22, 2025), ECF No. 70.

Respondent's administrative EAJA Application pursuant to 5 U.S.C. § 504 is now ripe for Comptroller review.

III. STANDARD OF REVIEW

In adversary adjudications brought by an agency, EAJA requires an adjudicator to award fees and expenses to a prevailing party other than the United States, subject to certain limitations, unless the adjudicator finds that "the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504. While EAJA's purpose is "to diminish the deterrent effect of seeking review of, or defending against governmental action," *Sullivan v. Hudson*, 490 U.S. 877, 890 (1989) (citation omitted), the Act's

substantial-justification standard prevents "chill[ing] the government's right to litigate." *See Roanoke River Basin Ass'n v. Hudson*, 991 F.2d 132, 139 (4th Cir. 1993)).

Under the standard "a position is substantially justified if 'a reasonable person could think it correct."' *Griffith v. Comm'r of Social Security*, 987 F.3d 556, 563 (6th Cir. 2021) (quoting *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988)). Even if the Government loses a case, there is no "presumption that the Government position was not substantially justified." *Scarborough v. Principi*, 541 U.S. 401, 415 (2004). Instead, to be "substantially justified," a position need only be "'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Griffith*, 987 F.3d at 563 (quoting *Pierce*, 487 U.S. at 565). The substantial-justification standard is met if there is a "genuine dispute" or "if reasonable people could differ as to [the appropriateness of the contested action]." *See Pierce*, 487 U.S. at 565 (quoting *Reygo Pacific Corp. v. Johnston Pump Co.*, 680 F.2d 647, 649 (9th Cir. 1982), *overruled on other grounds as recognized in Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007)). Finally, the government's position is substantially justified when "not contrary to controlling law." *Meza-Vazquez v. Garland*, 993 F.3d 726, 729 (9th Cir. 2021).

The standard is also holistic in application. "The test is an inclusive one; we consider whether the government's position 'as a whole' has 'a reasonable basis in both law and fact.'" *Ibrahim v. U.S. Dep't of Homeland Sec.*, 912 F.3d 1147, 1168 (9th Cir. 2019) (quoting *Gutierrez v. Barnhart*, 274 F.3d 1255, 1259 (9th Cir. 2001)). In other words, an adjudicator must make a "global assessment" of the case, rather than focusing on "atomized line items." *See, e.g.*, *Crosby v. Halter*, 152 F. Supp. 2d 955, 959 (N.D. Ill. 2001) (quoting *Comm'r, INS v. Jean*, 496 U.S. 154, 161-162 (1990)). Although this standard requires "that the government's position must be 'more than merely undeserving of sanctions for frivolousness,"' a position can readily be

"justified even though it [was] not correct." *Griffith*, 987 F.3d at 563 (quoting *Pierce*, 487 U.S. at 566 & n.2).

IV. FINDINGS

In her Application Respondent first argues that the OCC's position was not substantially justified because the factual claims against her did not indicate *misconduct*, *culpability*, or *effect* under 12 U.S.C. § 1818(e) or (i), as applicable, or *culpability* separately under 18 U.S.C. § 1001. Respondent further argues that the OCC's position was not substantially justified for various other purported reasons, including that (1) the Notice was filed after the statute of limitations had expired; (2) the Notice was not signed by a duly appointed officer of the United States; (3) an IAP cannot violate 12 U.S.C. § 481; (4) Respondent did not receive a jury trial; and (5) the OCC violated her due process rights. As discussed more fully below and based upon a review of the administrative record as a whole, the Comptroller finds that the OCC was substantially justified in bringing the administrative enforcement action and denies Respondent's EAJA Application.

A. Facts Underlying Notice of Charges

As an initial matter, Respondent contends that the factual allegations against her are "unreasonable." EAJA Application, at 22-24. But the facts underlying the Notice primarily rest upon Respondent's own correspondence and related actions.

In November 2012 the OCC commenced an on-site examination of the Bank's BSA/AML compliance program. Termination Order, at 4. After the examination had begun, the Bank contracted with audit firm Crowe Horwath LLP to provide an assessment of the Bank's BSA/AML compliance program – the Crowe Report – an initial draft of which was submitted to the Bank in January 2013. Notice, at ¶¶ 15-16; Enforcement Counsel's Statement of Undisputed Material Facts, and supporting exhibits ("ENF SOF"), at ¶¶ 21-22, 24. The Crowe Report

identified deficiencies in the Bank's BSA/AML program. ENF SOF, at ¶ 24; Respondent's Statement of Undisputed Material Facts, and supporting exhibits ("Resp. SOF"), at ¶ 60. On February 8, 2013 the OCC issued a letter to the Bank, which provided preliminary conclusions regarding deficiencies in the Bank's BSA/AML compliance program. ENF SOF, at ¶ 30; Resp. SOF, at ¶ 39. The Bank responded to the letter on March 15, 2013 largely disagreeing with the OCC's preliminary findings. ENF SOF, at ¶ 45; Notice, at ¶ 27; *see* Respondent's Answer to Notice ("Resp. Answer"), at ¶ 27.

On March 21, 2013 an OCC examiner emailed Respondent,[2] requesting "a copy of the assessment report of the Bank's BSA program that Crowe Horowath [sic] LLC was engaged to perform in January 2013." Notice, at ¶ 29; ENF SOF, at ¶ 49; Resp. Answer, at ¶ 29. Respondent forwarded the email to the Bank's General Counsel Dan Weiss ("GC Weiss"), stating that she "think[s] the right answer is that Crowe did not perform an assessment" and that "the project was shelved before any report could be issued." Notice, at ¶ 30; Resp. Answer, at ¶ 30. GC Weiss responded as follows:

> 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? 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.

Notice, at ¶ 31; Resp. Answer, at ¶ 31. On March 22, 2013 Respondent sent the following reply

[2] Respondent joined the Bank as its Chief Compliance Officer in 2008. Part of her responsibilities was overseeing the Bank's BSA/AML program. In July 2012 Respondent was promoted to a Global Compliance Manager role with the Bank's parent company and moved to the Netherlands. On February 28, 2013 Respondent was called back to the Bank to support its response to the OCC examination. Before joining the Bank in 2008, Respondent served as an OCC examiner for nearly ten years. *See* Termination Order, at 4-5.

by email to the OCC examiner:

> 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.

Notice, at ¶¶ 32-33; Resp. Answer, at ¶¶ 32-33. Respondent then forwarded that email to Bank CEO John Ryan ("CEO Ryan") and GC Weiss. Brief in Support of Enforcement Counsel's Motion for Summary Disposition, and supporting exhibits ("ENF MSJ"), at 7. In an email response, CEO Ryan wondered, "Where [the OCC examiner] heard Crowe did a program assessment." *Id.* Respondent replied,

> Lynn [Sullivan] 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 the [OCC examiner] 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 wrote back, "Ok let's hope she did not provide a draft report. If she did your approach with [the OCC examiner] is a good one." OCC-MSD-52.[3]

[3] OCC-MSD refers to the designation for exhibits supporting Enforcement Counsel's Motion for Summary Disposition.

On March 25, 2013 the OCC examiner sent another request to Respondent, asking for "a copy of what bank management received from Crowe, even if it was only preliminary or partial." Notice, at ¶ 34; Resp. Answer, at ¶ 34. 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. ENF MSJ, at 8; OCC-MSD-55. GC Weiss replied that he "never kept an electronic copy" but that "Sharon [Edgar] may have found a copy in Lynn [Sullivan's] papers." OCC-MSD-55. Respondent replied, "All the better if you don't have it as we can then tell [the OCC examiner], truthfully, that only Lynn was in receipt of the letter and we are unable to locate a copy." *Id.* Shortly thereafter, Respondent received the draft Crowe report from GC Weiss and another Bank employee. OCC-MSD-56; OCC-MSD-58. After circulating a proposed response to CEO Ryan and GC Weiss, for which GC Weiss offered suggested edits, Respondent then replied by email to the OCC examiner 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. …
>
> 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-63; OCC-MSD-64.

While Respondent attached a copy of the referenced proposal to the email to the OCC, she did not attach the Crowe Report or any other related materials. *See* OCC-MSD-64; OCC-MSD-65. After the OCC's unsuccessful requests to obtain the Crowe documents, OCC Assistant Deputy Comptroller ("ADC") Thomas Jorn called CEO Ryan on April 8, 2013 and verbally requested the documents directly from him. *See* RD, at 21-22 (citing relevant documents). On April 18, 2013 Respondent emailed ADC Jorn, attaching, among other materials, a draft of the Crowe Report and the Bank's cover letter explaining why management rejected Crowe's conclusions. OCC-MSD-78-81.

The preceding record—which is largely rooted in Respondent's own correspondence—speaks for itself. An OCC examiner made repeated requests for Crowe's assessment report, including "preliminary or partial" findings. Respondent had documented knowledge of the Crowe Report. Instead of furnishing the Crowe Report, Respondent crafted evasive responses, including what could be reasonably construed as a denial of the Crowe Report's existence, and did not provide the report until a month after the first request. As discussed below, a reasonable person could interpret this conduct and Respondent's emails as supporting a charge of prohibition and a civil money penalty assessment.

B. The Legal Bases for Bringing the Claims Were Substantially Justified

The Notice sought an order of prohibition and assessment of a civil money penalty against Respondent under 12 U.S.C. § 1818(e)(1) and (i)(2). As discussed above, there are three elements to support a charge of prohibition against an IAP – *misconduct*, *effect*, and *culpability* – and two elements to support assessment of a civil money penalty – *misconduct* and *effect*. Respondent argues that Enforcement Counsel's positions regarding many of the elements required to support an order of prohibition or civil money penalty lacked substantial justification. Upon review of the record as a whole and as discussed below, the Comptroller finds that there is substantial justification for each charge.

1. Misconduct

There is a reasonable basis in law and fact to support the allegations of misconduct in the Notice.

a. Violation of 12 U.S.C. § 481

Respondent argues that Enforcement Counsel was not substantially justified in bringing an enforcement action against an IAP premised on a violation of 12 U.S.C. § 481. EAJA Application, at 35-36. However, Enforcement Counsel had a reasonable legal basis to conclude that the OCC's enforcement authority under 12 U.S.C. § 1818 extends to Respondent's conduct. Specifically, § 1818(e) authorizes the OCC to seek a prohibition order against an IAP who has "directly or indirectly violated any law or regulation," and § 1818(i) states that the violation of "any law or regulation" is grounds for the assessment of a civil money penalty, assuming the other statutory elements of the actions are met. Furthermore, 12 U.S.C. § 1813(v) provides that a violation may "include[] any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding and abetting a violation." In addition, § 481 provides that, among other authority, an examiner has the "power to make a thorough

examination of all affairs of the bank," which includes prompt and complete access to a bank's officers, directors, and employees as well as to a bank's books, records, and documents. *See Consumer Union of United States, Inc. v. Heimann*, 589 F.2d 531, 541 (D.C. Cir. 1978) (Skelly Wright, J., concurring) (finding that "the Comptroller ha[s] a considerable arsenal of weapons at his disposal to compel disclosure" and interpreting 12 U.S.C. § 481 as "giving examiners power to examine all documents and to compel testimony"). Moreover, this interpretation of § 481 is not new. At least one court has previously interpreted § 481 to require bank personnel to cooperate in the bank examination process. *See Seafirst Corp. v. Jenkins*, No. C83-771R, 1986 WL 564, at *5 (W.D. Wash. June 19, 1986) (interpreting 12 U.S.C. § 481 to require cooperation of bank personnel in the bank examination process).

The plain language of § 1818 identifies as misconduct the violation of any law, including § 481. Enforcement Counsel was substantially justified in relying on that language to bring a claim premised on a violation of § 481. *See also* RD, at 31-37. Further, the Comptroller finds that there is a reasonable basis in law and fact to conclude that Respondent caused a violation under § 481 when she failed to promptly furnish the Crowe Report or provide prompt and accurate information about the existence of the Crowe Report after requests from the OCC.

b. Violation of 18 U.S.C. § 1001

Respondent also argues that Enforcement Counsel's position regarding Respondent's alleged violation of § 1001 was not substantially justified. Specifically, Respondent argues that Enforcement Counsel's position failed to meet the statutory provision's materiality requirement. EAJA Application, at 24-25. Eighteen U.S.C. § 1001 prohibits, in any matter within the jurisdiction of the federal government, a person from knowingly and willfully (1) falsifying, concealing, or covering up by trick, scheme, or device a material fact; or (2) making any materially false, fictitious, or fraudulent statement or representation. Under 18

U.S.C. § 1001 a fact or representation is material if it has a "tendency to influence" an agency decision or function. *See United States v. Moore*, 612 F.3d 698, 701 (D.C. Cir. 2010). A representation is not, however, required to influence the federal government, *see United States v. Herring*, 916 F.2d 1543, 1547 (11th Cir. 1990); *U.S. v. Service Deli Inc,*, 151 F.3d 938, 941 (9th Cir. 1998), and a "false statement can be material even if the decision maker actually knew or should have known that the statement was false." *United States v. Henderson*, 893 F.3d 1338, 1351 (11th Cir. 2018); *United States v. King*, 735 F.3d 1098, 1108 (9th Cir. 2013) ("propensity to influence is enough" to satisfy materiality element under § 1001).

Based on controlling law in place at the time of relevant events and the underlying proceeding, there was a reasonable basis in law and fact to conclude that the conduct of and correspondence among Respondent and other Bank officials evidenced a plan to conceal or withhold the Crowe Report from the OCC. *See also United States v. Bowser*, 964 F.3d 26, 33 (D.C. Cir. 2020) (Government can establish concealment under § 1001 if there was duty to disclose material facts); *United States v. Dorey*, 711 F.2d 125, 128 (9th Cir. 1983) (same).[4] Furthermore, the record shows that "[t]he OCC received information that a BSA/AML assessment report drafted by Crowe existed, determined that obtaining that document would be useful to [its] examination process," and requested a copy of Crowe's assessment report from Respondent multiple times. RD at 49, n.212 (citing a March 2013 email informing the OCC of the report). Accordingly, the Comptroller finds that there was a reasonable basis to conclude that

[4] *See supra* pp. 14-15 (discussing 12 U.S.C. § 481 and obligation to provide prompt and complete access to information sought by OCC examiners); *see also* RD, at 38 n.165 (citing Respondent's testimony acknowledging responsibility, to the best of one's ability, to "provide complete, accurate, and timely information to the OCC" and during the examination process); OCC-MSD-108, at 47:16-23.

the Crowe Report, which described deficiencies in the Bank's BSA/AML program, was "material" for purposes of § 1001 because it would have had the tendency or propensity to influence the OCC's actions and decision-making with respect to examination and supervisory functions.

c. Unsafe or Unsound Practices

Respondent's EAJA Application does not argue that Enforcement Counsel's position on the unsafe or unsound practices misconduct predicate was not substantially justified. Accordingly, this Decision need not address it. *Ezell on Behalf of Nominal Defendant Cabot Oil & Gas Corp. v. Dinges*, 137 F.4th 291, 308 (5th Cir. 2025) ("A party waives an argument by inadequately briefing it."); *United States v. Ramirez*, 448 F. App'x 727, 729 (9th Cir. 2011) (undeveloped argument is waived). Even if Respondent made colorable arguments regarding the reasonableness of the unsafe or unsound misconduct predicate, this single issue would not negate substantial justification where, as here, the Comptroller finds that there is a reasonable basis to conclude that Enforcement Counsel's positions on the violations of law, the alternative misconduct predicates, were substantially justified. *See Crosby*, 152 F. Supp. 2d at 959. Moreover, although there may have been genuine factual disputes at the summary judgment stage regarding whether Respondent engaged in unsafe or unsound practices, *see* Termination Order, the ALJ's review in the RD of Enforcement Counsel's position on unsafe or unsound practices suggests that the position would have been reasonable based on controlling law. *See Pierce*, 487 U.S. at 565 (substantial justification exists if "reasonable people could differ as to the appropriateness of the contested action.")

2. Culpability

There is a reasonable basis in law and fact to support the allegations of culpability in the Notice.

a. Knowing and Willful Conduct

Respondent argues that there was no substantial justification for Enforcement Counsel's position that she engaged in any prohibited conduct under 18 U.S.C. § 1001 "knowingly and willfully." EAJA Application, at 26-28. Specifically, Respondent points to evidence supporting her defense, the ALJ's finding that there was no genuine factual dispute that Respondent knowingly and willfully concealed a material fact under § 1001(a)(1), and the contemporaneous ALJ finding that there was a genuine factual dispute of whether Respondent knowingly and willfully made a materially false statement or representation under 1001(a)(2). *See* EAJA Application, at 23 n.10, 27-28; *see* ALJ Order Regarding the Parties' Cross Motions for Summary Disposition, at 45. However, whether there was a genuine factual dispute regarding Respondent's state of mind is of little consequence here because the substantial-justification standard is met even when there is a genuine dispute regarding the underlying conduct. *See Pierce*, 487 U.S. at 565. Moreover, section 1001 requires a violation to be "knowing[] and willful[]," rather than inadvertent or mistaken. *See* RD, at 44-45. A reasonable person could conclude that Respondent knowingly and willfully concealed the Crowe Report and its assessment of the Bank's BSA/AML program deficiencies from the OCC. Accordingly, the Comptroller finds that there was a reasonable basis to conclude that Respondent's conduct was knowing and willful.

b. Personal Dishonesty and Willful Disregard

Respondent argues that Enforcement Counsel's positions on two culpability predicates for a prohibition under 12 U.S.C. § 1818(e) – personal dishonesty and willful disregard for the

safety and soundness of the Bank – were not substantially justified because she believed her comments to the OCC regarding the Crowe Report were accurate. EAJA Application, at 26-28.

There is a reasonable basis to conclude that Respondent's actions satisfied the culpability element for a prohibition as conduct demonstrating personal dishonesty or a willful or continuing disregard for the Bank's safety and soundness. While Respondent disputes that she had the requisite state of mind to meet either culpability predicate, a review of the record reasonably supports a conclusion that Respondent and others engaged in an evasive and deliberate course of conduct designed to impede an OCC examiner's requests for the Crowe Report. Courts have found personal dishonesty where an individual has misled or withheld information from a bank's directors or regulators, *see Dodge v. Comptroller of Currency*, 744 F.3d 148, 160 (D.C. Cir. 2014); *Landry v. FDIC*, 204 F.3d 1125, 1139-40 (D.C. Cir. 2000); *Greenberg v. Bd. of Governors of Fed. Rsrv. Sys.*, 968 F.2d 164, 171 (2d Cir. 1992),[5] or where an individual has failed to disclose information, *see De la Fuente v. FDIC*, 332 F.3d 1208, 1222 (9th Cir. 2003); *Hutensky v. FDIC*, 82 F.3d 1234, 1241 (2d Cir. 1996). Furthermore, a reasonable person could also conclude based on controlling law that Respondent acted with willful disregard[6] for the Bank's safety and soundness by continuing to withhold an assessment of the Bank's BSA program from regulators. *Cf. De la Fuente*, 332 F.3d at 1223-24.

Even if the record presented a genuine factual dispute regarding either culpability predicate, that would not negate a finding of substantial justification. *See Pierce*, 487 U.S. at

[5] *See also Michael v. FDIC,* 687 F.3d 337, 351 (7th Cir. 2012) (personal dishonesty under Section 1818(e) includes "deliberate deception by pretense and stealth," and "want of fairness and straightforwardness") (internal quotation marks and citations omitted).

[6] Willful disregard includes deliberate conduct that "evidences utter lack of attention to an institution's safety and soundness" and "a willingness to turn a blind eye to [a bank's] interests in the face of known risk." *Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995).

565. Accordingly, the Comptroller finds that there was a reasonable basis to conclude that Respondent engaged in personal dishonesty and demonstrated a willful disregard for the safety and soundness of the Bank.

3. Effect

The effect element of a prohibition order is satisfied by showing that "by reason of" the misconduct the financial institution "has suffered or will probably suffer financial loss." 12 U.S.C. § 1818(e)(l)(B)(i). The effect element of a second-tier CMP is satisfied by showing that the misconduct "causes or is likely to cause more than a minimal loss to such depository institution." 12 U.S.C. § 1818(i)(2)(B)(ii)(II). Respondent argues that Enforcement Counsel was not substantially justified in positing either of these effect predicates under § 1818(e) and (i) because the loss identified in the Notice was based on the Bank's agreement to pay a fine and forfeiture to the Department of Justice. EAJA Application, at 26, 32-33.

There is a reasonable basis in law and fact to conclude that Respondent's misconduct resulted in financial loss and caused more than minimal loss to the Bank, satisfying the effect elements of both a prohibition and a civil money penalty charge. On February 7, 2018 the Bank pled guilty to conspiring with Respondent and others to obstruct an OCC investigation and agreed to pay a forfeiture of $368,701,259 and a fine of $500,000. OCC-MSD-88. Courts have held that a bank's fines or forfeitures that result from an IAP's misconduct constitutes loss under 12 U.S.C. § 1818. *See, e.g.*, *Hendrickson v. FDIC*, 113 F.3d 98, 103 (7th Cir. 1997); *see also In the Matter of Christopher Ashton,* No. 16-015-E-I, 2017 WL 2334473, at *5 (May 17, 2017) (FRB final decision) (on default, effect element satisfied when bank paid "$2.4 billion in criminal and civil fines in connection with the [alleged] conduct"); *infra* 28-29 (showing that non-party plea agreements are admissible in civil

action). While Respondent argues that there is no reasonable basis to conclude that Respondent's actions resulted in or caused the loss, Respondent's and other Bank officials' actions are specified in the Bank's guilty plea as obstructing an OCC examination. *See* ENF's EAJA Response, at 19; OCC-MSD-88, at 2-3. A reasonable person could therefore conclude that Respondent's and others' actions resulted in financial loss and caused more than a minimum loss to the Bank.

While Respondent also takes issue with Enforcement Counsel's alternative bases for asserting effect in the Notice – that is any benefit to Respondent or that any misconduct of Respondent is part of a pattern of misconduct – this Decision need not analyze those positions in detail.[7] EAJA Application, at 25-26. Even if Respondent could successfully argue that Enforcement Counsel's positions on these alternative effect predicates were incorrect, the substantial justification analysis rests on a "global assessment" of the case rather than "atomized line items" and the adjudicator is to "examin[e] the record as a whole and mak[e] a single finding" about the government's position. *See Crosby*, 152 F. Supp. 2d at 959; *Brown v. Kijakazi*, No. 22-35243, 2023 WL 2239028, at *2 (9th Cir. Feb. 27, 2023)

[7] Respondent argues that there was no substantial justification for Enforcement Counsel's position that the effect element could be supported by a pattern of misconduct. More specifically, Respondent argues that there is no reasonable basis to conclude that she engaged in culpable misconduct. Because this Decision finds that Enforcement Counsel's positions on misconduct and culpability were substantially justified, the Comptroller finds Respondent's argument unavailing. Regarding the effect element premised on alleged misconduct resulting in a benefit to Respondent, the Comptroller notes that the ALJ revisited and revised her view on the viability of this effect predicate. *See* March 1, 2021 ALJ Order Modifying Sections A2, B2, and B3 of This Tribunal's October 16, 2020 Order. While this alternative predicate was ultimately dismissed after being revisited, that dismissal does not mean that Enforcement Counsel's position on effects as a whole failed to meet the substantial-justification standard. *See Ibrahim*, 912 F.3d at 1169 n.16 (when considering the government's litigation positions, EAJA contemplates "substantial" rather than "total" or "complete" justification).

(quoting *Ibrahim*, 912 F.3d at 1153). As discussed above, there exists a reasonable basis in law and fact to conclude that Enforcement Counsel's position on there having been financial loss and more than a minimal loss to the Bank to support both a prohibition and a civil money penalty was substantially justified. Accordingly, based on a "global assessment" of the case and record, the Comptroller finds that Enforcement Counsel's position on the effect elements was substantially justified.

C. There Is a Reasonable Basis in Law and Fact to Conclude that the Notice Was Timely Filed

Respondent argues that the action was not substantially justified because the Notice was filed out of time. EAJA Application, at 30-32. It is well settled that "a claim accrues 'when [there exists] a complete and present cause of action'" – that is, when all the elements of an actionable claim have been met and can be pled. *Gabelli v. SEC*, 568 U.S. 442, 448 (2013) (quoting *Wallace v. Kato,* 549 U.S. 384, 388 (2007)); *see also Ortega v. OCC*, -- F.4th --, 2025 WL 2588495, at *12 (5th Cir. Sept. 8, 2025), *petition for reh'g en banc filed*, *Ortega v. OCC*, 23-60617 (5th Cir. Oct. 21, 2025), ECF No. 140; *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys*., 603 U.S. 799, 809 (2024). Respondent argues that the claims at issue first accrued when the misconduct—rather than the effect stemming from that misconduct—occurred. EAJA Application, at 30-32, 32 n.14. This is not so.

When assessing a claim, accrual is "evaluated and applied in the context of the statutory scheme at issue." *See Fed. Energy Regul. Comm'n v. Powhatan Energy Fund*, LLC, 949 F.3d 891, 899 (4th Cir. 2020). The occurrence of an alleged effect is a necessary condition to initiate an action pursuant to § 1818(e) or (i)(2)(B). An effect might not occur—rendering the cause of action not complete and present—until sometime after the alleged misconduct. *Proffitt v. Fed. Deposit Ins. Corp.*, 200 F.3d 855, 863 (D.C. Cir. 2000) ("Because misconduct and effect are

separate prongs, the underlying conduct may not always immediately effect a [§ 1818(e)] violation and thus the accrual of the claim."). Under Respondent's interpretation that the occurrence of misconduct alone triggers claim accrual, the statute of limitations would have begun to run *before* Enforcement Counsel could even initiate an action pursuant to § 1818(e) or (i)(2)(B). The interpretation that is consistent with well-settled precedent is that the statute of limitations does not begin to run until *all* factual and legal prerequisites for filing a notice of charges are in place. *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) ("Unless Congress has told us otherwise in the legislation at issue, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief."). Under this precedent, there is a reasonable basis in law and fact to conclude that the statute of limitations began to run, for example, when the Bank sustained loss and paid a fine and forfeiture in February 2018.

Respondent also criticizes that the charges in the Notice were premised on occurrences of alternative statutory effects each triggering accrual of a separate § 1818(e) or (i)(2)(B) claim. EAJA Application, at 31-32. The alternative-effects theory was reasonable because it was consistent with the language of § 1818(e) and (i)(2)(B), with Congressional intent, and with the D.C. Circuit's decision in *Proffitt*. *See* 200 F.3d at 863 ("The same misconduct can produce different effects at different times, resulting in separate [§ 1818] claims and separate accruals."); *id.* at 864 ("Separate accrual for each alternative effect gives meaning to all of the statutory language."); *id.* (examining relevant legislative history); *Meza-Vazquez*, 993 F.3d at 729 (government's position substantially justified when "not contrary to controlling law at the time they were made"). Because the Notice alleged multiple effects occurring within the five-year limitations period, *see* 28 U.S.C. § 2462, which, if established, would have been sufficient to

satisfy this element of § 1818(e) and (i)(2)(B), there is a reasonable basis in law and in fact that the Notice was timely as pled. Accordingly, the Comptroller finds that Enforcement Counsel was substantially justified in filing the Notice in April 2018. *Cf. Hill v. Gould*, 555 F.3d 1003, 1008 (D.C. Cir. 2009) (denying an EAJA application where the agency "took a reasonable [legal] approach.").

D. The OCC Was Substantially Justified in Defending the Issuance of the Notice of Charges

Respondent contends that the enforcement action was not substantially justified and was void from inception because the individual who signed the Notice of Charges on behalf of the OCC, Deputy Comptroller for Special Supervision Michael Brickman ("Brickman"), was not appointed in conformity either with the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, or with 12 U.S.C. § 4. EAJA Application, at 28-30. Throughout the underlying proceeding, the OCC's position was that Brickman did not hold a position subject to the requirements of the Appointments Clause or one established by § 4.[8] Specifically, the OCC has argued that the authority under which Brickman signed the Notice was neither "significant" nor "continuing"—both indispensable requirements for an office to be subject to the Appointments Clause. *Lucia*, 585 U.S. at 245. The OCC also has argued that Brickman's authority to issue notices of charges was limited by numerous conditions, was exercised occasionally, and was subject to the direction and control of the Comptroller. The OCC also argued that the Comptroller was expressly authorized to "delegate to *any duly authorized employee*, representative, or agent *any power* vested in the office by law." 12 U.S.C. § 4a (emphasis added). While Respondent has argued that

[8] For an overview of the OCC's position on this issue, see Enforcement Counsel's Response to Respondent's Objection in Accordance with Notice of Case Reassignment and Prior Orders, at 16-17 (Mar. 19, 2020) and OCC Answering Brief, *Akahoshi*, No. 23-938, at 30-36 (9th Cir. May 16, 2024), ECF No. 42. *See also* RD, at 67-68.

there are dozens of OCC employees holding some variation of the title "Deputy Comptroller" and that they are therefore "Deputy Comptrollers of the Currency" within the meaning of § 4 and must be appointed by the Secretary of the Treasury, the OCC has argued that Respondent has offered no legal justification that bridges the gap between observing that dozens of OCC employees hold titles containing some variation of the term "Deputy Comptroller" and declaring that the actions of those employees should be invalidated. In sum, the OCC's position has been that Brickman was a "mere employee" who was not subject to the Appointments Clause and who was not a "Deputy Comptroller of the Currency" within the meaning of 12 U.S.C. § 4. *See Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976).

The OCC is substantially justified in defending the constitutionality of the issuance of the Notice. Courts have held that the "Government is entitled—if not obligated—to put forth a good faith effort to defend the constitutionality of federal laws, especially those that have never been found unconstitutional." *Vacchio v. Ashcroft*, 404 F.3d 663, 675 (2d Cir. 2005); *see Kiareldeen v. Ashcroft*, 273 F.3d 542, 549-51 (3d Cir. 2001) (government is "duty-bound" to defend its congressionally granted authority and is substantially justified in doing so); *Gonzales v. Free Speech Coal.*, 408 F.3d 613, 618 (9th Cir. 2005) ("[T]he defense of a congressional statute from constitutional challenge will usually be substantially justified.") (quoting *League of Women Voters of California v. F.C.C.*, 798 F.2d 1255, 1259 (9th Cir. 1986)). Respondent has argued that the holding in *Lucia – i.e.*, that the SEC's ALJ's were "Officers of the United States" and therefore subject to the Appointments Clause – should have been extended to this proceeding when considering the constitutionality of issuing the Notice. But the OCC was entitled, if not duty-bound, to defend the Comptroller's delegation of authority to Brickman to issue the Notice, particularly in light of good faith arguments that the delegation was proper where Brickman was

a "mere employee" under *Buckley* and *Lucia*.[9] Accordingly, the Comptroller finds that Respondent's argument fails, and the OCC's defense of issuing the Notice was substantially justified.

E. The OCC Was Substantially Justified in Defending Its Enforcement Proceedings under § 1818

Respondent argues that the administrative enforcement action against her was void from inception and not substantially justified because she was denied her Seventh Amendment right to a jury trial. Twelve U.S.C. § 1818 authorizes the OCC's enforcement proceedings and provides the exclusive mechanism for enforcement actions via administrative proceedings. In acting pursuant to its express statutory authority and defending the proceeding's constitutionality in good faith, the OCC's position was substantially justified. *Cf. Meza-Vazquez*, 993 F.3d at 729 (government's position substantially justified when consistent with controlling law); *Vacchio*, 404 F.3d at 675 (government entitled if not obligated to put forth good faith arguments defending the constitutionality of federal laws).

While Respondent cites to decisions analyzing the right to jury trial in her EAJA Application, at 37-39, none of the cases she cites held that enforcement proceedings under § 1818 were void. Indeed, a September 2025 decision from the U.S. Court of Appeals for the

[9] In addition to her Appointments Clause argument, Respondent dedicates one sentence in the Background section of her EAJA Application, at 12, to her assertion that the "removal provisions" of the ALJ presiding over the enforcement proceeding and related to Brickman were "unconstitutionally and statutorily defective." It is highly doubtful that this Decision needs to address this passing assertion. *Dinges*, 137 F.4th at 308 (argument waived when inadequately briefed); *Ramirez*, 448 F. App'x at 729 (same). Even if the argument were not waived, the OCC's position in the underlying proceeding has been that Respondent's argument failed because she has not demonstrated "compensable harm" *See Collins v. Yellen*, 594 U.S. 220, 259 (2021) (identifying inquiry as whether "an unconstitutional provision . . . inflict[ed] compensable harm"); *see also Kaufmann v. Kijakazi*, 32 F.4th 843, 849 (9th Cir. 2022) ("A party challenging an agency's past actions must . . . show how the unconstitutional removal provision *actually harmed* the party . . . ."); OCC Answering Brief, *Akahoshi*, No. 23-938, at 36-38.

Fifth Circuit holds that the that "the public-rights exception [to the Seventh Amendment] applies to federal banking enforcement actions." *Ortega*, -- F.4th --, 2025 WL 2588495, at *11, *petition for reh'g en banc filed*, *Ortega v. OCC*, 23-60617 (5th Cir. Oct. 21, 2025), ECF No. 140. Accordingly, the Comptroller finds that Respondent's argument fails, and the OCC's defense of its enforcement proceedings was substantially justified.[10]

F. Respondent's Due Process Arguments Are Without Merit and Do Not Compel a Finding of Unreasonableness

Respondent raises three due process claims: that exculpatory material was wrongly withheld from her under *Brady v. Maryland*, 373 U.S. 83 (1963), that the OCC impermissibly prejudged the proceedings, and that Enforcement Counsel improperly relied on a separate Department of Justice plea agreement with the Bank to support its position that Respondent's misconduct caused or resulted in loss to the Bank. Respondent's arguments lack merit or, at the very least, do not compel a finding that the underlying enforcement action was unreasonable.

1. Brady v. Maryland Is Inapplicable to Civil Administrative Proceedings

Respondent dedicates one sentence in her EAJA Application, at 29 n.12, to contending that her due process rights were violated in a discovery dispute when the production of certain allegedly exculpatory evidence to which she was allegedly entitled under *Brady* was denied.[11]

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[10] Respondent also asserts that the underlying enforcement action "label[ed her] a criminal" and, as a such, the enforcement action should have proceeded in an Article III court. EAJA Application, at 38. Even if one were to disregard an affirmed position that the public-rights exception applies to federal banking enforcement actions, Respondent's argument ignores several relevant aspects of this case. First, Enforcement Counsel did not – and cannot – bring criminal penalties against Respondent. Second, a violation of law under 18 U.S.C. § 1001 was just one of three alternative misconduct predicates for the underlying enforcement action. Moreover, for reasons already stated, it was reasonable for the OCC to defend the constitutionality of its enforcement proceedings.

[11] The *Brady* doctrine holds that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

Respondent's argument fails, however, because *Brady* applies in criminal proceedings; it is inapplicable in civil administrative actions. *See, e.g.*, *Brodie v. Dep't of Health & Hum. Servs*., 951 F. Supp. 2d 108, 119 (D.D.C. 2013) ("*Brady* does not apply 'in the context of administrative hearings'"); *U.S. v. Project on Gov't Oversight*, 839 F. Supp. 2d 330, 342-43 (D.D.C. 2012) (accord) (collecting cases).

While Respondent cites a case that states that due process "presumably" requires certain evidentiary disclosures in civil proceedings, EAJA Application, at 29 n.12 (citing *Sperry & Hutchinson Co. v. FTC*, 256 F. Supp. 136, 142 (S.D.N.Y. 1966)), Respondent does not attempt to argue how any evidentiary ruling in the discovery dispute was incorrect or how her due process rights were violated because of any such evidentiary ruling. *Cf. Sperry*, 256 F. Supp. at 143 (plaintiff's failure to furnish basis for evaluating discovery-based due process claim precluded meaningful consideration). Indeed, the court in the very case that Respondent cites found that denial of the plaintiff's "very broad" discovery demands was not arbitrary or capricious. *Id.* at 142-43. Accordingly, Respondent does not sufficiently articulate why resolution of the discovery dispute was so unreasonable as to elevate its resolution to the "level of a deprivation of a constitutional right." *Id.* at 143. Accordingly, the Comptroller finds that Respondent's argument lacks merit. *See also Ramirez*, 448 F. App'x at 729 (undeveloped argument waived).

2. The Use of the Bank's Settlement Agreement Did Not Violate Due Process

Respondent also contends that her due process rights were violated when Enforcement Counsel offered—and the ALJ admitted into evidence—a settlement agreement between the Department of Justice and the Bank to satisfy the effect elements of the prohibition order and second-tier civil money penalty. EAJA Application, at 32-33; *see* 12 U.S.C. § 1818(e)(l)(B)(i) (showing that "by reason of" the misconduct the financial institution "has suffered or will probably suffer financial loss" sufficient to satisfy the effect element); *id.* § 1818(i)(2)(B)(ii)(II)

(showing that the misconduct "causes or is likely to cause more than a minimal loss to such depository institution" sufficient to satisfy the effect element). Respondent asserts that the settlement agreement was inadmissible as a "settled evidentiary matter." EAJA Application, at 32. However, in civil actions, guilty pleas of non-parties are admissible against civil defendants. *See, e.g.*, *RSBI Aerospace, Inc. v. Affiliated FM Ins. Co.*, 49 F.3d 399, 401, 403 (8th Cir. 1995) (finding that non-party employee's guilty plea and accompanying sworn statement were admissible against defendant employer in subsequent civil case); *Newby v. Enron Corp*., 491 F. Supp. 2d 690, 703 (S.D. Tex. 2007) (finding that non-party's guilty plea was admissible against defendants in subsequent civil case); *see also* 12 C.F.R. § 19.36 ("relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law"). Accordingly, Respondent's argument that use of the settlement agreement to satisfy the effect elements violated her due process rights lacks merit. At the very least, there was a reasonable basis in law and fact to do so, *see supra* 20-22, and, therefore, the Comptroller finds that the proffer and use of the settlement agreement was substantially justified.

3. OCC Did Not Prejudge the Proceeding

Respondent asserts that the enforcement action was not substantially justified because the OCC prejudged the proceeding (1) in consent orders and press releases, (2) by delegating authority to sign a Consent Order related to another Bank employee, and (3) by resolving *Lucia*-related issues on its own. EAJA Application, at 33-35. "[T]o make out a claim of unconstitutional bias, a plaintiff must 'overcome a presumption of honesty and integrity' on the part of decision-makers." *Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Respondent must show that the OCC "has prejudged, or

reasonably appears to have prejudged, an issue." *Id.* (quoting *Kenneally v. Lungren*, 967 F.2d 329, 333 (9th Cir. 1992)). This can be established in two ways: (1) where "the proceedings and surrounding circumstances may demonstrate *actual bias* on the part of the adjudicator" or (2) where "the adjudicator's pecuniary or personal interest in the outcome of the proceedings may create an *appearance of partiality* that violates due process, even without any showing of actual bias." *Id.* (emphasis in original). Respondent does not contend any pecuniary or personal interest in the outcome of the enforcement action. Therefore, to overcome the presumption of honesty, Respondent must demonstrate actual bias. She has made no such showing.

Respondent does not explain how her second and third arguments relate to prejudgment or actual bias or how they would undermine the OCC's reasonable basis in law and fact to bring the underlying action.[12] Regarding the first argument, Respondent's sole ground for her prejudgment argument is language in Consent Orders and public statements in press releases related to the Bank or Bank employees other than her. EAJA Application, at 34. This argument fails because an action is never prejudged simply because an order affecting one person or institution discusses common issues in a related individual's case, *cf. FTC v. Cement Institute*, 333 U.S. 683, 703 (1948) (noting in a case alleging agency prejudgment where the FTC refused to disqualify itself that "judges frequently try the same case more than once and decide identical issues each time"), or because of negative publicity related to the proceeding, *see United States v. Silver*, 103 F. Supp. 3d 370, 379-80 (S.D.N.Y. 2015) (even in the context of a criminal indictment before a grand jury, "the existence of negative pretrial publicity is generally not

[12] Moreover, the Fifth Circuit recently concluded that the process of appointing and reassigning ALJs in light of *Lucia's* holding properly resolved the very ALJ Appointment's Clause issue that Respondent finds fault in. *Ortega*, -- F.4th --, 2025 WL 2588495, at *12. Further, this Decision concludes that the OCC was substantially justified in defending its delegation to Brickman the task of issuing a notice of charges. *See supra* 24-26.

sufficient to show substantial influence or actual prejudice"); *accord Randolph v. People of the State of Cal.*, 380 F.3d 1133, 1142-43 (9th Cir. 2004); *U.S. v. Baras*, No. CR 11-00523, 2013 WL 6502846, at *13 (N.D. Cal. Dec. 11, 2013). A claim of actual bias is also unavailing because the enforcement action against Respondent was dismissed by the Comptroller in its entirety. Moreover, as discussed above, there are extensive grounds to support a finding that the OCC had "reasonable basis in law and fact" to bring the administrative enforcement action against Respondent. Accordingly, the Comptroller finds that Respondent's prejudgment arguments are without merit.

V. CONCLUSION

Upon consideration of the administrative record as a whole and for the reasons stated above, the Comptroller finds that the OCC was substantially justified in bringing the underlying administrative enforcement action, finds that Respondent's due process arguments are without merit or otherwise do not change the finding of substantial justification, and denies Respondent's EAJA Application. The ALJ's order denying Respondent's application for a monetary award pursuant to the Equal Access to Justice Act is affirmed to the extent consistent with this Decision. Because the Comptroller affirms the ALJ's order denying the EAJA Application and concludes that the OCC's position was substantially justified, it is unnecessary to address other arguments for denying the EAJA Application or to analyze the reasonableness of the fees in the Application.[13]

IT IS SO ORDERED.

Jonathan V. Gould

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Date: 2025.11.10 14:48:06 -05'00'

JONATHAN V. GOULD
COMPTROLLER OF THE CURRENCY

[13] Respondent's May 1, 2025 Supplemental Application and Enforcement Counsel's May 15 opposition address whether Respondent can obtain fees relating to her appeals to the Ninth Circuit and the Supreme Court following the Comptroller's Termination Order and fees for litigating her EAJA Application. Whether Respondent is entitled to these fees is an inquiry of whether the fees are reasonable. *Atkins v. Apfel*, 154 F.3d 986 (9th Cir. 1998) (whether EAJA applicant is entitled to fees related to different stages of litigation is a reasonableness determination). Engaging in this reasonableness analysis is unnecessary where the EAJA application is denied. *See Comm'r, I.N.S. v. Jean*, 496 U.S. 154, 160-61 (1990) (finding district court was tasked with determining the reasonableness of fees only after it determined that an applicant is eligible under EAJA).