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

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

**RESPONDENT'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT**


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Pursuant to 5 U.S.C. § 504, Ms. Akahoshi respectfully submits this application for an award of attorneys' fees and costs incurred in her successful defense of the charges brought against her by the Office of the Comptroller of the Currency ("OCC").[1]

## INTRODUCTION

Ms. Akahoshi is entitled to an award of fees and costs as the prevailing party against the OCC's defective and unfounded enforcement action against her. After five successive years in which OCC examinations reviewed the relevant conduct and correctly found no violations of law by Ms. Akahoshi (or any other Rabobank N.A. officer), in 2018 the OCC reversed course and charged Ms. Akahoshi with an enforcement action based on events that had occurred more than five years prior. As a result, the OCC forced her to spend the ensuing five years defending herself against its allegations in a unconstitutional tribunal in which the agency's own unlawful and inappropriate conduct eclipsed any purported misconduct by Ms. Akahoshi. The Acting Comptroller dismissed the action, ostensibly based on the passage of time and alleged errors by this Tribunal, but the OCC's ulterior motive in doing so is clear—to try to avoid subjecting the OCC's conduct to review in a federal court of appeals.

[1] We respectfully submit that this application is of permissible length. This fee application is not a motion governed by prior orders regarding page limits since Ms. Akahoshi has already prevailed, and this is an ancillary fee application covered by statute. There are no page limitations in the relevant statutes, nor are there any page limitations in the regulations, 31 C.F.R. Part 6. To the extent there is an otherwise applicable page limitation that is shorter than this application, we respectfully request that any such limitation be enlarged and that this application be accepted because the number of issues presented, combined with the extensive record and five-year duration of the action, justifies the length of this application. To truncate the application by enforcing a shorter page limitation would prejudice Ms. Akahoshi on the merits and fail to provide her an adequate opportunity to be heard.

The OCC never should have brought this enforcement action: it was a false statements case without false statements; a concealment case without concealment; and a case about failing to disclose documents that were disclosed on the exact timeframe to which the OCC agreed. Legally, the action was void from inception, since it was initiated by a non-officer wielding officer powers, it did not involve a violation of law, it was time-barred, there was no materiality, it involved no proximately caused effect on the bank, it violated due process and Ms. Akahoshi's right to a jury trial, and long before the case reached the Acting Comptroller, he prejudged the facts, as perpetuated by the dicta contained in the final decision, which despite dismissing the action, seeks to find facts and law against Ms. Akahoshi and further impugn her conduct. This enforcement action was not justified in any respect, and Ms. Akahoshi is entitled to receive the fees and expenses incurred defending against it.

## BACKGROUND

### A. Factual Background

The following factual background is not subject to reasonable dispute, as set forth in greater detail in Ms. Akahoshi's summary disposition briefing and exceptions to the Acting Comptroller.[2]

The OCC's allegations centered on a draft of a consultant's report regarding the BSA/AML program of Rabobank N.A. (the "bank" or "RNA") located in Roseville,

[2] The OCC of course may urge different conclusions from these facts, but each statement in this summary is objectively true based on documentary or testimonial evidence.

California. The consultant, Crowe Horwath LLP ("Crowe"), worked on the project for a few weeks in January and February 2013 before the bank suspended the project. Crowe's engagement in January of 2013, its brief work for the bank, and subsequent suspension from further work on the project all occurred while Ms. Akahoshi was no longer with RNA, but on an overseas assignment in the Netherlands with the bank's Dutch parent company, Rabobank. While Ms. Akahoshi previously worked as Chief Compliance Officer of RNA, she had been promoted to a compliance position at Rabobank months before the bank engaged Crowe. That is, Ms. Akahoshi had no involvement whatsoever in the Crowe engagement—she was living and working on a different continent at a different job for a different bank, thousands of miles and a nine-hour time difference away from Roseville, California.

Crowe was hired by RNA's Chief Compliance Officer, Lynn Sullivan, in order to support her view that the bank's program was deficient—a view she shared with both OCC examiners, who were onsite at the bank in November 2012 for RNA's BSA/AML examination, and Crowe—and that it needed a Sullivan-supervised and Crowe-Horwath-executed overhaul. On February 5, 2013, Crowe presented a bullet-point-format PowerPoint deck to RNA executive management and the Compliance Committee of the Board of Directors, which was based on a draft document, in narrative format, referred to as the Program Assessment and Roadmap ("PAR"). Crowe was specifically instructed that its review of RNA's BSA/AML program was not an audit or a risk assessment, but an informal review of the bank's BSA/AML

program, and Sullivan expressly directed Crowe not to "rate" the program. R-MSD-009 (Sullivan) 235 – 236.

On February 8, 2013, the OCC sent a letter to RNA stating that the examiners believed that all four pillars of the BSA/AML program were broken. Indeed, more than two months earlier (and before Crowe even began its work), the OCC's examiners had identified the same areas for improvement that Crowe later listed in its draft report (based on Sullivan's direction), but judged the program to be "generally satisfactory," found no violations, and recommended two "matters requiring attention," even taking those areas for improvement into account. *See* R-MSD-056 at 13-17, 41-43.

At the February 5 meeting—which Ms. Akahoshi did not attend—RNA's leadership concluded that Crowe's presentation had a number of problems and inaccuracies, which stemmed from a fundamental misunderstanding of the bank and its processes. As a result, Crowe did not complete its PowerPoint presentation, only presenting about one third of it. Thereafter, RNA leadership directed Crowe to conduct a formal BSA/AML risk assessment rather than continue the bespoke engagement Sullivan had requested. Thus, Crowe's January 2013 engagement was never completed by Crowe or reviewed (let alone accepted) by the bank.

By late February 2013, Sullivan had stopped processing, reviewing, and investigating Suspicious Activity Reports ("SARs"), exacerbating a SAR backlog that formed under her leadership. Meanwhile, the bank had to investigate and respond to the OCC's draft findings. Working to address those urgent matters, the bank decided

to bring Ms. Akahoshi back from the Netherlands temporarily to help investigate and respond to the OCC's draft findings. This required Ms. Akahoshi to simultaneously transition away from her Netherlands-based work and get up to speed on RNA's BSA/AML condition, while traveling back and forth between Roseville, California and Utrecht, Netherlands.

On March 21, 2013, Ms. Akahoshi was back in the Netherlands for a one-week period as part of that transition—in that week she needed to terminate her housing in the Netherlands and move her and her family (including her dogs) back to the United States. On the same day, OCC Examiner Shirley Omi sent Ms. Akahoshi an email asking for "a copy of the assessment report of the Bank's BSA program that [Crowe] was engaged to perform in January 2013." Ms. Akahoshi, from the Netherlands, emailed RNA's General Counsel, Dan Weiss, and CEO, John Ryan, with a draft response, which she thought contained "accurate" information and "the right answer" to Omi's inquiry based on Ms. Akahoshi's limited, second- or thirdhand knowledge of the January 2013 Crowe engagement. Unlike Ms. Akahoshi, Weiss and Ryan were knowledgeable about the Crowe engagement, and both had participated in various aspects of it, including the February 5 PowerPoint presentation to RNA leadership. Weiss and Ryan approved the response, which Ms. Akahoshi sent the next day, on March 22. As approved, the March 22 email stated that Crowe delivered "emerging observations and [an] action plan," but had not completed an assessment, and that "the project was suspended before any report was issued."

On March 25, Omi followed up and requested what Crowe "provided management with" or "what bank management received from Crowe, even if it was preliminary or partial." Although the email came from Omi, this request was drafted by Tom Jorn, the newly-assigned Assistant Deputy Comptroller. R-MSD-101 at 1.

On March 25, Ms. Akahoshi had returned to Roseville from the Netherlands in the early hours of the morning, following at least twelve hours of intercontinental travel, and she again consulted with RNA's CEO and General Counsel, Ryan and Weiss. She stated in an email to them that she assumed that the OCC had already obtained Crowe's "early assessment even though it was never issued and certainly never accepted by management," as her March 22 email had stated. She asked Weiss and Ryan about responding to Omi's follow-up, then wrote a draft response as a "recap of [their] discussion." Weiss and Ryan told Ms. Akahoshi that the PowerPoint deck was the operative Crowe document, because Crowe had presented it to RNA's executive leadership and the Compliance Committee of the board. Neither Weiss nor Ryan offered any indication that the draft response Ms. Akahoshi typed misrepresented the information they had discussed with her in any manner.

The response went to Omi a few hours after her follow-up email had been sent and indicated that Crowe had presented the February 5 PowerPoint deck to the highest levels of bank leadership, but that Crowe had not provided the deck to the bank. The email also detailed that the bank had been "very critical" of Crowe's draft work from the January 2013 engagement, that Crowe's work was seriously flawed and based on inaccurate information, and that Crowe had proposed a lengthy and

costly "remediation plan." All these things were true—this Tribunal identified no false statements in the email. *See* Recommended Decision ("RD") at 21.

The OCC did not respond until April 8, 2013, when Jorn called Ryan to ask for Crowe documents, regardless of whether they were officially provided to the bank and regardless of the bank's criticisms of the work, which Ryan reiterated on the call (and again on an April 10 call with Jorn). Having cleared up all misunderstanding (to the extent there was *any* misunderstanding in the first place), Ryan readily agreed to provide the draft documents to Jorn, and Jorn agreed that the bank could take until April 19 to produce the documents with a cover letter addressing the bank's concerns.

On April 18, in keeping with the OCC's timeframe, the bank sent a cover letter and certain draft Crowe documents to the OCC, including the February 5, 2013 draft PowerPoint deck—which Ryan obtained from Crowe after his calls with Jorn—and a draft version of the PAR. Ms. Akahoshi helped Weiss draft the cover letter, along with approximately six other individuals—all executive management from RNA and its Dutch parent, as well as Terry Schwakopf, an RNA board member with extensive regulatory and compliance experience. All of these people reviewed, edited, commented on, and approved the cover letter. Ryan signed the cover letter himself. The cover letter included a brief, partial, and ambiguous description of the distribution of precisely identified versions of certain Crowe documents, even though the OCC nowhere requested such a description and did nothing with it. Documentary evidence established that someone else—*not* Ms. Akahoshi—drafted that portion of the cover letter describing distribution of a couple of Crowe documents. When that

letter was delivered on time, the OCC got what it had asked for. *See* R-MSD-007 (Eagan) at 335-36.

Neither Crowe's draft, inaccurate work product from the January 2013 engagement, nor the contents of the April 18 cover letter (the relevant portion of which Ms. Akahoshi did not write) had any effect whatsoever on the OCC's ongoing BSA/AML examination of the bank. *See* RD at 64.

In sum, the OCC received exactly what it wanted on the timeframe it established, and what it received was completely inconsequential and immaterial to the OCC's BSA/AML examination.

### B. The Administrative Proceeding

#### 1. Notice of Charges

On April 16, 2018, more than five years after this alleged misconduct occurred,[3] Michael R. Brickman—who was never appointed as an officer in accordance with the Constitution and was one of approximately thirty to forty individuals at the OCC who at the time held the title of "Deputy Comptroller," although the agency's establishing statutes permit only four—issued the Notice of Charges on behalf of the OCC (it was served on April 17, 2018). The Notice sought a $50,000 civil money penalty ("CMP") and prohibition order, which would bar Ms. Akahoshi from the banking industry for life, under Title 12, United States Code, Sections 1818(e) and (i).

[3] The one exception is the April 18, 2013 cover letter, but Ms. Akahoshi did not write the relevant portion—regarding the distribution of Crowe documents—of the cover letter that the OCC identified as false.

The Notice of Charges alleged three misconduct predicates all based on the same factual allegations, recounted above: (1) a federal felony violation of 18 U.S.C. § 1001 for making false statements; (2) unsafe or unsound banking practices under Section 1818; and (3) a direct violation of 12 U.S.C. § 481 by Ms. Akahoshi. *See, e.g.*, Notice of Charges ¶¶ 40, 48(a), 50(a).

The Notice further alleged that the purported misconduct caused the following "effects": RNA suffered financial loss; Ms. Akahoshi received financial gain or other benefit; and the acts were part of a pattern of misconduct. *Id.* ¶¶ 40(b), 50(b). According to the Notice, Ms. Akahoshi acted "recklessly," with "personal dishonesty," and with "a willful or continuing disregard for the safety or soundness of the Bank." *Id.* ¶¶ 48(c), 50(a). As discussed below, throughout the litigation of this matter, the OCC continually changed its theories from those articulated in the Notice.

**2. Prejudgment Prior to the Notice of Charges**

Even before the OCC brought the Notice of Charges against Ms. Akahoshi, the agency pronounced her guilty. In February 2018, RNA negotiated a Consent Order with the OCC as part of the bank's settlement of yearslong government investigations into the bank's BSA/AML program.[4] In the Consent Order, the OCC published "Comptroller's Findings," which stated as facts, *inter alia*, that Ms. Akahoshi "concealed" and "participated in efforts to preclude the OCC from obtaining" "relevant" documents "requested by OCC officials and examiners." *See* Resp. Motion

[4] After investigating the matter, in September 2018, the Department of Justice made the considered decision *not* to bring any charges against Ms. Akahoshi, Mr. Weiss, or Mr. Ryan.

to Dismiss Due to Agency Prejudgment (2021-11-15), Ex. A. At the same time, the agency pronounced in a press release that Ms. Akahoshi had "participated in efforts to preclude the OCC from obtaining requested information and the bank concealed documents from OCC officials, in violation of 12 U.S.C. § 481." *Id.*, Ex. B.

These declarations came after five successive years of OCC examinations of RNA, all of which found no violation of law by any bank officer or employee relating to Crowe documents, and all but one of which found no violation of law by the bank relating to that topic. The sole exception was a 2015 finding by the OCC that *the bank* violated Section 481 in connection with its production of draft Crowe documents, but the OCC determined that the violation was cured by an amendment to the bank's internal policies. These considered findings by the OCC were in considerable tension with the DOJ's decision that the bank's BSA program (under Sullivan's leadership) was criminally deficient, and they contradicted the OCC's later tag-along consent order against the bank.

**3. OCC-Caused Delays**

Administrative Law Judge ("ALJ") Christopher McNeil was assigned to adjudicate the OCC's enforcement action against Ms. Akahoshi. On June 20, 2018, ALJ McNeil stayed the action on Enforcement Counsel's motion pending a Department of Justice ("DOJ") criminal investigation. In September 2018, the DOJ declined to prosecute Ms. Akahoshi. Thus, in all, the DOJ investigation accounted for only about three months of delay.

On August 17, 2018, the parties received an email from ofia@fdic.gov stating that, pursuant to the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), all prior orders issued by ALJ McNeil were void, and that the matter was stayed until the assignment of a new ALJ. On August 21, 2018, the Comptroller issued an order, without mentioning that OFIA email, purporting to unilaterally resolve *Lucia* issues and reassigning the proceeding to ALJ C. Richard Miserendino. The parties then briefed objections to the case reassignment and the Comptroller's response to *Lucia*—the briefs were fully submitted by December 4, 2018.

ALJ Miserendino retired at the end of 2018 without deciding any of the pending and fully briefed objections, leaving Ms. Akahoshi's case in a state of unassigned limbo. More than one year later, on January 6, 2020, the Acting Comptroller reassigned the proceeding to newly appointed ALJ Jennifer Whang. Thus, while the DOJ's investigation caused three months of delay, the OCC caused a year and a half of delay.

**4. The Recommended Decision**

After lengthy discovery and motion practice before ALJ Whang, the parties submitted cross-motions for summary disposition. On August 5, 2021, ALJ Whang granted summary disposition to the OCC and issued a final recommended decision on February 10, 2022, recommending a prohibition order and $30,000 CMP. Despite granting summary disposition to the OCC in other respects, the recommended decision found that the agency's allegations that Ms. Akahoshi benefitted from the alleged misconduct were "not credibly pled" and that "no reasonable inference"

supported those allegations, and made a number of other findings, described in part below, that were favorable to Ms. Akahoshi. *See, e.g.*, 2021-08-05 Summary Disposition Order at 29 n.120; 2021-03-01 Order Modifying Prior Order at 9.

**5. Exceptions to the Acting Comptroller**

On April 18, 2022, the parties submitted exceptions to the recommended decision for the Acting Comptroller's review. Ms. Akahoshi's exceptions explained in detail the numerous factual and legal defects with the proceeding against her: she was entitled to summary disposition based on undisputed facts or it was error to resolve factual issues against her without a hearing; the action was barred by the statute of limitations; the OCC violated her right to due process by claiming that her alleged conduct "caused" the bank to pay a negotiated settlement with the DOJ—the only basis offered for this claim was the contents of the bank's guilty plea; the OCC had improperly prejudged her liability and the *Lucia* issues; the appointments and removal provisions of Deputy Comptroller Brickman and ALJ Whang were constitutionally and statutorily defective; the Section 481 predicate failed as to an individual such as Ms. Akahoshi; the proceeding violated her Seventh Amendment right to a jury trial; the OCC's reliance on secret law violated statute; and the recommended decision misapplied the statutory mitigating factors when determining the CMP amount.

Enforcement Counsel filed exceptions asking for the Acting Comptroller to increase the CMP amount to $50,000. Although Ms. Akahoshi's arguments were preserved for appeal by this Tribunal's orders, Enforcement Counsel's exceptions

ignored many of those substantial legal and constitutional arguments she raised, including her Seventh Amendment jury trial argument, her argument that the OCC should not be permitted to invent its own causation standard, and that the OCC's use of the bank's guilty plea against her violated due process.

After submission of the exceptions, two federal courts of appeals issued decisions that reinforced Ms. Akahoshi's arguments in multiple respects: *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), and *Calcutt v. FDIC*, 37 F.4th 293 (6th Cir. 2022). On July 5, 2022, the Acting Comptroller requested "supplemental briefing" that provided Enforcement Counsel a new opportunity to brief the issues it had ignored —whether the administrative action against Ms. Akahoshi unconstitutionally deprived her of her right to a jury trial; the appropriate causation standard for "effects" of alleged misconduct under Section 1818; and the due process violation caused by the OCC's exclusive reliance on RNA's negotiated guilty plea to argue that Ms. Akahoshi's conduct caused loss to the bank.

### 6. Additional Prejudgment While the Parties' Exceptions Were Pending

In late July 2022, on notice of Ms. Akahoshi's prejudgment arguments briefed in her exceptions, while those very exceptions were pending before Acting Comptroller Hsu, the OCC issued a Consent Order against John Ryan containing "Comptroller's Findings" that prejudged almost every material factual allegation against Ms. Akahoshi, as well as Ms. Akahoshi's constitutional and statutory challenges to Mr. Brickman's issuance of the Notice of Charges (which render it void *ab initio*). Mr. Brickman issued the Ryan Consent Order on behalf of the OCC,

purportedly as Acting Comptroller Hsu's "duly authorized representative." *See* Consent Order, *In re Ryan*, OCC AA-ENF-2022-27 (July 27, 2022) at 7 ¶ 10.[5]

### 7. The Final Order Dismissing the Charges and Terminating the Action

On April 5, 2023, about six weeks after the regulatory deadline for issuing a final decision, *see* 12 C.F.R. § 19.40(c)(2),[6] Acting Comptroller Hsu issued a Final Decision Terminating Enforcement Action ("Final Decision"). The Final Decision need only have said, and only substantively found, two points: (1) the recommended decision had misapplied the summary disposition standards, and (2) the Acting Comptroller was dismissing the action against Ms. Akahoshi instead of remanding for a hearing. Instead, the Acting Comptroller inserted multiple pages of commentary maligning Ms. Akahoshi (and ALJ Whang) and attempting to make declarations of law (that violated the requirements of the Administrative Procedure Act for issuing regulations), such as asserting that Section 481 imposes duties on individual bankers and implying that the draft Crowe documents were material (or that materiality was not required). Indeed, the Acting Comptroller repeatedly asserted his "reluctance" to dismiss the action.

The Acting Comptroller also incorrectly asserted that the "substantial delay that ha[d] already taken place" occurred because of "the multi-year delay resulting from the DOJ investigation into the Bank," *see* Final Decision at 19, rather than

[5] Available at https://www.occ.gov/static/enforcement-actions/ea2022-025.pdf.

[6] The Acting Comptroller certified that the record of the proceeding was complete on November 21, 2022.

correctly describing the main causes of the delay: the OCC brought the Notice of Charges late, and then its tribunal defects and failures caused more than a year of delay.

The Acting Comptroller's dismissal is long overdue and does not go far enough to repair the damage that this void proceeding has inflicted on Ms. Akahoshi. But the manner in which the Acting Comptroller issued the dismissal compounded the harm to Ms. Akahoshi. The Final Decision sought to avoid Circuit Court litigation of Ms. Akahoshi's multiple meritorious exceptions to the recommended decision, some of which strike at the heart of the agency's structure and enforcement authority. *See* Final Decision at 20 (purporting to "moot" Ms. Akahoshi's contentions). And, by criticizing Ms. Akahoshi—even while insisting that he would "not reach final findings of fact"—the Acting Comptroller (likely) attempted to prejudge and prejudice this very application pursuant to the Equal Access to Justice Act. *See id.* at 19.

## ARGUMENT

### I. THE OCC'S POSITION WAS NOT SUBSTANTIALLY JUSTIFIED

The OCC's decision to pursue an enforcement action against Ms. Akahoshi presents a prime example of an ill-conceived prosecution. The agency expected Ms. Akahoshi to submit—as most respondents do—without the agency ever having to prove or defend its allegations and enforcement process. The OCC's factual and legal arguments were unreasonable from the start—that Ms. Akahoshi concealed the existence of Crowe documents, or refused to produce them, when she *acknowledged*

*their existence and produced them on the exact timeframe to which the OCC agreed*—and thrust her into litigating meritless claims in a defective forum.

The OCC, as an agency of the federal government, is a branch of the United States, the most powerful litigant in our country. Obligating the OCC to compensate Ms. Akahoshi for the fees and expenses she incurred in defending this action, which should never have been brought, comports with the twin goals of the Equal Access to Justice Act ("EAJA") to discourage the government from improperly exerting its extraordinary power, and to reward litigants who successfully defend against unjustified government action. Such compensation is appropriate here.

### A. The Legal Standards Under the EAJA

Congress elected in the EAJA to waive sovereign immunity and to *require* the award of fees and expenses to a party who prevails against an agency of the United States in an "adversary adjudication," where the agency's position was not "substantially justified," and the party meets certain financial requirements. 5 U.S.C. § 504. "The clearly stated objective of the EAJA is to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority." *Ardestani v. INS*, 502 U.S. 129, 138 (1991). The EAJA:

> rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy. An adjudication or civil action provides a concrete, adversarial test of Government regulation and thereby insures the legitimacy and fairness of the law.

*Ibrahim v. DHS*, 912 F.3d 1147, 1178 (9th Cir. 2019) (quoting *Escobar Ruiz v. INS*, 813 F.2d 283, 288 (9th Cir. 1987)).

The phrase "substantially justified" means "justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (quotations omitted). "To be 'substantially justified' means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve." *Id.* at 566. The government's position "must have a reasonable basis both in law *and* fact." *Tobeler v Colvin*, 749 F.3d 830, 832 (9th Cir. 2014) (quotations omitted) (emphasis added) (awarding EAJA fees where government position was not substantially justified because it disregarded testimony and evidence).

The OCC bears the burden, in opposing an EAJA application, to show that the agency's position was substantially justified. *Loumiet v. OCC*, 650 F.3d 796, 799 (D.C. Cir. 2011). The determination of whether the OCC has met its burden must be made on the "administrative record, as a whole." 5 U.S.C. § 504(a)(1). Moreover, "[t]he government's position must be substantially justified at *each stage* of the proceedings"—the OCC must show that its position was substantially justified when it brought the enforcement action and throughout the litigation as it progressed. *Shafer v. Astrue*, 518 F.3d 1067, 1071 (9th Cir. 2008) (quotations omitted) (emphasis added); *Meier v. Colvin*, 727 F.3d 867, 872-73 (9th Cir. 2013) (holding that

unreasonableness of government's underlying position *or* government's litigating decision "to defend the ALJ's decision in this action" sufficed to require EAJA award).

"The single finding that the Government's position lacks substantial justification, like the determination that a claimaint is a 'prevailing party,' thus operates as a one-time threshold for fee eligibility." *INS v. Jean*, 496 U.S. 154, 160 (1990). While the government may have "a legitimate basis to defend [a] litigation initially, . . . [o]nce the government discovers that its litigation position is baseless, it may not continue to defend it"—to do otherwise suggests bad faith. *Ibrahim*, 912 F.3d at 1184.

The available caselaw demonstrates that the Acting Comptroller's final order dismissing this action must result in a full award of fees and costs at market rates—indeed, a lesser award in a similar dismissal case resulted in reversal by the D.C. Circuit. *See Loumiet v. OCC*, 650 F.3d 796 (D.C. Cir. 2011). *Loumiet* appears to be the only published federal court of appeals decision considering the OCC's obligation to pay fees and costs under the EAJA after dismissing an enforcement action, and *Loumiet* compels a full award of fees and costs here. *See id.*[7] In *Loumiet*, the OCC pursued a CMP and prohibition order barring the respondent, a lawyer with Greenberg Traurig, from providing legal or consulting services to any insured depository institution. *Id.* at 798-99. The OCC alleged that Loumiet had caused harm to a bank by preparing, as the bank's outside counsel, two reports regarding the

[7] Eight years earlier, in an unpublished summary order, the D.C. Circuit affirmed an order denying a prevailing party's EAJA application. *See Washburn v. OCC*, 62 F. App'x 357 (D.C. Cir. 2003).

bank's accounting for certain transactions that reached different conclusions than the OCC's own report about the transactions, which found "wrongdoing at the Bank." *Id.* at 788. "As a result of the OCC Report, the Bank shut down," three executives entered into consent orders, and Greenberg Traurig itself, Loumiet's law firm, agreed to pay $750,000 to settle the OCC investigation. *Id.*

Loumiet alone refused to surrender, and after a hearing, the ALJ recommended dismissal of the agency's claims against him. *Id.* at 799. The Comptroller "largely rejected" the reasoning of the ALJ but agreed that dismissal was appropriate. *Id.* Loumiet filed an EAJA application, which the ALJ denied, finding that the underlying action was "substantially justified" in law and fact, and Loumiet appealed to the D.C. Circuit. *Id.*[8]

The D.C. Circuit held that the OCC had not shown that its position was substantially justified. *Id.* In particular, the D.C. Circuit noted that the harm to the bank which the agency had alleged—the continued employment of purportedly dishonest executives, and "the perpetuation of the Bank's inaccurate public financial statements"—were not the sorts of harms contemplated as "effects" under Section 1818. *Id.* at 800. The D.C. Circuit also rejected the OCC's "cornucopia of alternative arguments" that the action was substantially justified: the bank not getting "its money's worth from Greenberg's independent investigation" was not the type of "financial loss" contemplated in Section 1818; "it [was] impossible to determine" what

[8] Pursuant to 31 C.F.R. § 6.15, "[b]ecause neither party sought review by the Comptroller, the ALJ's recommendation became the final decision of the Comptroller." *Loumiet*, 650 F.3d at 799.

caused the bank to make a bad $15 million loan, which the Comptroller argued was an effect of Loumiet's conduct; and supposedly unsettled law regarding the effect-causation standard of Section 1818 did not justify the underlying action. *Id.* at 800-01. The D.C. Circuit therefore reversed and remanded for the Comptroller to consider cost-of-living and other adjustments to Loumiet's award. *Id.* at 801. Loumiet and the OCC then settled for an award of $675,000—approximately 50% of the amount in Loumiet's application (which had been calculated using market billing rates). *See* Weddle Declaration ¶ 13; *see also Loumiet v. United States*, 948 F.3d 376, 379 (D.C. Cir. 2020) (recounting history of the case, including the award of $675,000).

### B. The ALJ Is Not Bound by Prior Recommended Conclusions

This Tribunal's prior recommendation that the Acting Comptroller enter summary disposition against Ms. Akahoshi, which was based on rejecting a number of Ms. Akahoshi's arguments, is no barrier to this Tribunal granting Ms. Akahoshi's application in full for several reasons.

*First*, the Acting Comptroller did not adopt the Tribunal's recommendations on factual and legal issues. The Acting Comptroller expressly stated that the Final Decision did "not reach final findings of fact," and stated that the "remaining issues raised in the Parties' exceptions" were "moot," such that he did not need to address them. *See* Final Decision at 19-20. Indeed, the Final Decision went out of its way to malign not only Ms. Akahoshi, but also ALJ Whang, when a simple dismissal in the interest of justice would have been enough. *See, e.g.*, *id.* at 15 ("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.").

*Second*, the determination of an EAJA application requires a plenary review of the "administrative record, *as a whole*," not the repetition of prior recommendations made in response to discrete motions. *See* 5 U.S.C. § 504(a)(1) (emphasis added). That is especially so here because the Acting Comptroller made sure to state in the Final Decision that the recommended decision had misapplied the summary disposition standards.

*Third*, as explained at length in Ms. Akahoshi's exceptions and supplemental briefing before the Acting Comptroller, and again in more condensed form below, the OCC's legal and factual positions were egregiously wrong, a great distance away from "substantially justified." To the extent this Tribunal previously adopted those agency positions, now is the time to correct those findings.

In short, nothing should prevent this Tribunal from reviewing Ms. Akahoshi's EAJA application without concern for prior recommended findings, which the Acting Comptroller expressly declined to adopt and, indeed, stated were based on misapplied legal standards.

### C. No Substantial Justification Exists Here

Ms. Akahoshi incorporates in full her April 18, 2022 Exceptions to the Final Recommended Decision, her September 16, 2022 Supplemental Submission on Questions of the Acting Comptroller, and her October 17, 2022 supplemental motion regarding agency prejudgment. Those submissions detail at length the defects in this

enforcement action and show that the OCC's position was substantially *un*justified, but for the sake of brevity, and due to the sheer number of defects in the proceeding, Ms. Akahoshi only highlights and summarizes in this application some of those defects, which alone are more than enough to show that the OCC's position was not substantially justified.

### 1. The OCC's Factual Allegations Were Fundamentally Unreasonable

The OCC's factual position, as set forth in the Notice of Charges, and as demonstrated by discovery, was deeply flawed. At a minimum, the OCC cannot demonstrate that its position was substantially justified.

#### (a) Overview

The thrust of the OCC's complaint with Ms. Akahoshi's March 22 and March 25, 2013 emails to Omi is that they concealed the existence of Crowe documents from the OCC. But the emails were *all about Crowe's work*. There is a fundamental difference between, on the one hand, truthfully telling the agency that RNA believed Crowe's draft work suffered from flaws and inaccuracies and, on the other hand, denying to the OCC that Crowe's draft work existed or refusing to turn it over. Indeed, no evidence suggests that any OCC examiners *at the time* were misled into believing that Crowe documents did not exist, thought that Ms. Akahoshi had refused their authority,[9] or believed that she had otherwise committed actionable civil and criminal

[9] Had that been the case, internal OCC policy guidelines required that a number of steps be taken to avoid any misunderstanding and as a prerequisite to any enforcement action. *See* R-MSD-110 (OCC PPM 5310-10). The OCC examiners took none of these steps because the misunderstanding was promptly resolved by Tom Jorn's phone calls with Mr. Ryan on April 8 and 10, 2013.

misconduct. In addition, Jeffrey Alberts, Esq., a qualified expert, confirmed that Ms. Akahoshi's emails neither contained false statements nor concealed a material fact by trick, scheme, or device. *See* R-MSD-099 at 10, 16.[10] And for year after year, the OCC found no misconduct related to Crowe documents.

Instead, at the time, exactly what one might have expected happened. An OCC supervisor picked up the phone, called the bank, and said that the OCC wanted certain, identified draft Crowe documents (i.e., the documents whose very existence the OCC, years later, claimed Ms. Akahoshi concealed) despite the bank's concerns outlined in its two March 2013 emails. And in that simple follow-up call, the bank agreed to produce the documents, then produced the documents *on the exact timeframe to which the OCC agreed.*

As to the April 18, 2013 cover letter, the OCC belatedly took issue with some (at worst) ambiguous and immaterial statements about intra-bank distribution of particular draft Crowe documents, but a cover letter attached to the *production of documents* could not have been part of a scheme to conceal those documents or have constituted a refusal to turn over the very documents being produced. More to the point, the undisputed evidence showed that someone other than Ms. Akahoshi wrote the portion of the cover letter at issue, yet the OCC still maintained the position, even in summary disposition briefing, that the drafting of the ambiguous passage by

[10] The OCC pled a false-statements violation of 18 U.S.C. § 1001(a)(2). *See* Notice of Charges ¶ 43 ("Respondent violated 18 U.S.C. § 1001 because she knowingly and willfully made materially false statements . . ."). This Tribunal declined to find the Section 1001(a)(2) theory to be proven, but endorsed enforcement counsel's unpled alternative theory—a concealment in violation of Section 1001(a)(1). RD at 37-49.

*someone else* constituted a federal crime and misconduct by Ms. Akahoshi. There is no reasonable basis for that position.

**(b) Materiality**

The Section 1001 predicate also required that the supposedly concealed draft Crowe documents were material, but as the OCC is aware, Crowe's draft work from the January 2013 engagement objectively could not have influenced, and did not in fact influence, the OCC's BSA/AML examination of the bank. As the recommended decision put it:

> OCC examiners ultimately received the Crowe Report on the timeline established by ADC Jorn, and there has been no indication that the Crowe Report or its associated materials contained meaningful new information, not already possessed by or known to examiners, that resulted in the agency wasting resources or pursuing dead ends in the time between [March 21 and April 18, 2013].

RD at 64.[11]

In addition, the OCC's contemporaneous documentation confirmed the lack of materiality of the draft Crowe work product. When OCC examiners reentered the bank for the May 2013 target exam, they covered no new area of inquiry based on Crowe documents; and the OCC's final Report of Examination for the BSA/AML examination *only* referenced the January 2013 Crowe engagement to note that its contents "mirror[ed] some of the OCC's concerns." OCC-MSD-83; R-MSD-060 at 45;

[11] Despite this finding, this tribunal found "materiality" to be satisfied based on the "propensity" that a document requested might have been material. The "propensity" test is meant to adopt an objective rather than a subjective test for materiality; it should not be used to eliminate the materiality standard altogether by finding it to be satisfied by the potential materiality of a different, hypothetical document.

*see* RD at 64 ("[T]he examination itself was to all appearances unaffected in the end by Respondent's actions."). Indeed, an OCC examiner's BSA Compliance Conclusion Memo in December *2012*—i.e., before Crowe even began its failed assignment—had identified all of the OCC's final concerns with the bank's program.

Despite the OCC's awareness, and the recommended decision's conclusion, that the draft Crowe documents lacked materiality, the OCC maintained the position throughout this litigation that the documents were material. The OCC went so far as to label Ms. Akahoshi a *criminal*, under Section 1001, based on the agency's unreasonable materiality position. That position was not substantially justified.

**(c) Effects**

The OCC alleged three "effects" caused by the purported misconduct: (1) benefit to Ms. Akahoshi; (2) harm to the bank; and (3) a pattern of misconduct. The OCC's position as to each effect was not substantially justified, as the OCC's shifting theories in this regard confirm.

Regarding benefit to Ms. Akahoshi, the OCC put forth the untenable position that Ms. Akahoshi's alleged misconduct simultaneously benefitted her by allowing her to keep her employment, while also subsequently getting her fired. That position has no basis in logic, and, in any event, no evidence indicated that Ms. Akahoshi's continued employment at RNA or its Dutch parent company depended on her purportedly concealing documents from the OCC. The OCC appears to concede that its position regarding benefit to Ms. Akahoshi was not substantially justified, as the OCC did not present an exception to the Acting Comptroller on this point, even

though ALJ Whang dismissed allegations related to benefit on the pleadings, prior to discovery.

In addition, the OCC's position as to bank-loss-causation is not substantially justified, as discussed separately below and in Ms. Akahoshi's exceptions.

Finally, the pattern-of-misconduct effect fails because by definition it depends on whether there was misconduct in the first instance (which itself depends on questions of culpability). Thus, because the OCC's positions with respect to misconduct and culpability were not substantially justified, as described above, below, and in detail in Ms. Akahoshi's exceptions, the OCC's position as to the pattern-of-misconduct effect was similarly unjustified.

Thus, no effects position was substantially justified.

**(d) Culpability**

The culpability standards of the charged violations of law require that the alleged conduct be "knowing and willful" under Section 1001, involve "personal dishonesty" under 1818(e)(1)(C)(i), and involve "willful disregard" under 1818(e)(1)(C)(ii).

Fundamentally, the OCC's position relies on simply disregarding competent testimony that uniformly demonstrated that Ms. Akahoshi *believed* that her comments about Crowe documents, all based on second- or thirdhand information she received from others who were more senior than her, were true and accurate, not intended to conceal material information or to refuse the OCC's authority. And, the

OCC's position ignores the fact that in 2013, 2014, 2015, 2016, and 2017, the OCC found no violation of law by Ms. Akahoshi.

Even the Acting Comptroller acknowledged that the OCC's position as to *mens rea* depends on ignoring contrary evidence. The Final Decision recognized that Ms. Akahoshi has consistently maintained "that she was not trying to conceal any information from the OCC"; that she believed—based on information provided to her by Weiss and Ryan—that "the Bank viewed the Crowe Report as 'fraught with inaccuracies' and 'unsubstantiated'"; and that Ms. Akahoshi "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." Final Decision at 14.

The testimony of John Ryan and contemporaneous documentation supports the fact that Ms. Akahoshi was not culpable. Ryan testified that he, Weiss, and, by extension, Ms. Akahoshi, viewed the PowerPoint deck—which the bank did not have in March 2013 and had to obtain from Crowe to provide to the OCC—as the operative Crowe document because it was presented to executive management and the Compliance Committee of the board. For example, Ryan testified that:

> Q. Sorry, meaning Ms. Akahoshi's March 25th, 2013 e-mail to Laura Akahoshi. Did you, Mr. Weiss, and Ms. Akahoshi have a call discussing that.
>
> A. Yes, we did. And it was much more around filling in more in at the time as it relates to what was presented at the board compliance meeting, what was presented, how far we got along. In other words, *she was not at that February meeting, and we wanted to provide her with*

> *information* of what was actually presented, to the best of our knowledge or what we could recollect, *so she could appropriately respond to Shirley*.

R-MSD-004 (Ryan) 96:20-97:5 (emphasis added).

Moreover, the contemporaneous internal communications show that Ms. Akahoshi believed her March 2013 emails contained "the right answer" and "accurate" information, and that Ms. Akahoshi relayed that accurate information as a "recap" of what Weiss and Ryan told her about the January 2013 Crowe engagement and February 5 board presentation. And the contemporaneous communications also reveal that Weiss and Ryan approved as correct both of Ms. Akahoshi's emails. Doubtless, Dan Weiss would have provided the same testimony had Enforcement Counsel not abandoned its deposition subpoena to him and opposed even a three-week extension of the discovery cutoff to accommodate Mr. Weiss's health concerns. *See* 2021-04-30 Resp. Motion at 3. Thus, the OCC's culpability arguments were not substantially justified.

**2. The Enforcement Action Was Void from Inception**

The action against Ms. Akahoshi was also not substantially justified because it was void in the first issuance. The power to initiate an enforcement action on behalf of a federal agency constitutes the exercise of "significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). Anyone wielding such significant authority is in substance (regardless of name) an officer who must "be appointed in the manner prescribed by [the Appointments Clause]." *Id.*; *see* U.S. Const. art. II, § 2, cl. 2; *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 485-86 (2010) (noting parties' agreement that members of PCAOB are officers of

the United States for constitutional purposes, despite statutory provisions specifying that they are not government officials, because they can initiate "formal investigations and disciplinary proceedings"). The Supreme Court has explained that functions materially indistinguishable from the power at issue here—to seek monetary penalties and a lifetime industry bar against an individual like Ms. Akahoshi through an administrative adjudication or civil action—are "core executive powers" that can only be performed by constitutional officers. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2200-01 (2020).

Mr. Brickman, who exercised the "core executive power" to initiate the enforcement action against Ms. Akahoshi that sought a lifetime bar and imposition of a CMP, is not a constitutionally appointed officer. *See* Press Release, Michael Brickman Named Deputy Comptroller for Thrift Supervision, OCC NR 201562 (Apr. 27, 2015) (stating that Comptroller "designated" Mr. Brickman as a Deputy Comptroller).[12] Thus, the OCC permitted a non-officer who had no authority to wield core executive power to unleash the coercive power of the United States against Ms. Akahoshi. There was no substantial justification for the agency to prosecute Ms. Akahoshi for years based on a void accusatory instrument issued by a non-constitutionally-appointed officer. *See Lucia*, 138 S. Ct. at 2055 (stating that a person

[12] Nor is Mr. Brickman properly appointed according to statute. *See* 12 U.S.C. § 4. The OCC blocked any discovery on Mr. Brickman's appointment and made no affirmative disclosures to Ms. Akahoshi of these material exculpatory facts. Both of these actions lack any substantial justification, and themselves violate due process. *See, e.g.*, *Brady v. Maryland*, 373 U.S. 83 (1963); *Sperry & Hutchinson Co. v. FTC*, 256 F. Supp. 136, 142 (S.D.N.Y. 1966) (under *Brady*, due process requires agency disclosures of exculpatory evidence).

successfully challenging the improper appointment of an individual exercising officer powers is entitled to relief).

The constitutional requirements, of course, cannot be trumped by any statute. *See Marbury v. Madison*, 5 U.S. 137 (1803). Accordingly, the void Notice of Charges cannot be saved by the Comptroller's statutory power to delegate authority. *See* RD at 67-68 n.285. Indeed, if a statutory grant of delegation authority could override the constitutional requirement that officer functions be performed by constitutionally appointed officers, the Supreme Court's *Lucia* decision would have come out the other way. The Court-appointed amicus defending the SEC's view that ALJs were mere employees (a view that the Solicitor General refused to defend and conceded was incorrect) relied on the SEC's delegation authority and practice of delegating various functions to ALJs and to the Chief ALJ,[13] but the Supreme Court noted that practice and nevertheless rejected the Amicus's arguments in their entirety. *See Lucia*, 138 S. Ct. at 2049, 2054.

**3. The OCC Action Was Time-Barred**

The OCC's position was also not substantially justified because the Notice of Charges was time-barred. An agency enforcement action, such as this one, "shall not be entertained unless commenced within five years from the date when the claim *first* accrued." 28 U.S.C. § 2462 (emphasis added). Under a proper reading of the relevant statutes, the OCC's claims for a prohibition order and CMP first accrued on the date

[13] *See* Brief for Court-Appointed Amicus Curiae in Support of the Judgment Below, *Lucia v. SEC*, No. 17-130, 2018 WL 1531942, at *7-10 (Mar. 26, 2018).

of the alleged misconduct, i.e., when the OCC first could have brought the action. Thus, with the exception of the April 18, 2013 cover letter, which did not constitute misconduct and, in any event, indisputably was not *Ms. Akahoshi's* conduct in relevant part, the OCC brought the Notice of Charges more than five years after the claims first accrued.

The OCC's theory, which constructs a literal matrix of purported limitations periods and ultimately concludes that the action for a prohibition order "first accrued" at least *two* times, and the action for a CMP "first accrued" at least *four* separate times, is not substantially justified. This Tribunal disagreed with aspects of the OCC's position, at least until it was forced to reverse itself and adopt aspects of the Acting Comptroller's decision in a separate matter, *In re Ortega and Rogers*, AA-EC-2017-44, -45. *Compare* 2020-10-16 Order on Initial Dispositive Motion at 35 (stating that any claim predicated on a violation of Section 481 first accrued prior to April 17, 2013, and was therefore time-barred), *with* 2021-03-01 Order Modifying Prior Order (reversing earlier order to find that alleged Section 481 was a continuing violation and therefore timely).

The OCC's position violates every principle undergirding the statute of limitations: it creates an extra-statutory delayed-accrual rule found nowhere in the text of Sections 2462 or 1818 that depends on the OCC's discretionary pleading choice of which "effects" to allege, and impermissibly allows the OCC to engineer its own extension of the limitations period. Most strikingly, instead of providing the certainty of a knowable, fixed date on which repose attaches, it leaves banks and institution-

affiliated parties ("IAPs") guessing, in perpetuity, as to when, *if ever*, the limitations period for purported misconduct expires.

The OCC brought this action too late, and its position was not substantially justified.

#### 4. The OCC's Evidence of Bank-Loss-Causation "Effect" Violated Ms. Akahoshi's Right to Due Process and Was Unsubstantiated

The OCC argued that Ms. Akahoshi caused the "effect" of bank loss based exclusively on the result of a separate proceeding to which she was not a party, i.e., RNA's decision to plead guilty and pay a fine to end a DOJ investigation of the bank. The OCC's position, therefore, was that Ms. Akahoshi was *liable* in this action because of a different party's negotiated settlement of a different action. That is paradigmatic issue preclusion that violated Ms. Akahoshi's right to due process, and no substantial justification exists for the OCC's position.[14]

As a settled evidentiary matter, moreover, RNA's guilty plea was inadmissible against Ms. Akahoshi to prove that she caused bank loss. In any event, every other piece of evidence demonstrated conclusively that Ms. Akahoshi did *not* cause the bank loss, as the DOJ investigation and RNA settlement focused on alleged yearslong deficiencies in the bank's BSA/AML program, and the hundreds of millions of dollars that RNA paid to end the investigation related exclusively to money laundering and

[14] At the eleventh hour, the OCC argued that it used the bank's fine to prove only the fact of bank loss. *See* OCC Supplemental Submission (2022-09-16) at 39-40. That is a false assertion (and another litigating position that lacked substantial justification). Section 1818 imposes liability on an IAP *not* when a bank sustains a loss, but when the IAP *causes* the bank loss (through misconduct and with the requisite culpability). The "effect" is therefore bank-loss-causation, not bank loss. Here, accordingly, the OCC used RNA's plea (and only RNA's plea) to claim that Ms. Akahoshi *caused* the bank's negotiated settlement with the DOJ, not merely the fact that the settlement occurred.

structuring offenses. Also, the bank's settlement ended the investigation and enabled Rabobank to sell RNA to Mechanics Bank for $2.1 billion shortly after resolving the bank's exposure to government action. No reasonable basis exists for the OCC's position that the bank's alleged mishandling, years earlier and over a brief two-week period, of a draft, immaterial third-party consultant's report—which the OCC received on the exact timeframe to which it agreed, contained no new information, and had no discernible effect on any agency decision-making—caused bank loss sufficient to establish Ms. Akahoshi's legal liability.

Lastly, the OCC's position regarding the legal standard for bank-loss-causation was not substantially justified. The OCC argued that the requirements of proximate and even but-for causation, generally considered necessary limitations on legal liability, do not apply to agency enforcement actions. In *Loumiet*, the D.C. Circuit rejected the OCC's argument that its causation litigating position was substantially justified and noted that the "topic of causation can hardly be described as novel." 650 F.3d at 801 (citing *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339 (1928)). Since then, the Sixth Circuit confirmed that Section 1818 must incorporate proximate causation principles. *See Calcutt*, 37 F.4th at 329.

**5. The OCC's Prejudgment of this Proceeding Violated Due Process**

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 249 U.S. 133, 136 (1955). It is a "fundamental premise that principles of due process apply to administrative adjudications." *Antoniu v. SEC*, 877 F.2d 721, 724 (8th Cir. 1989) (citing *Amos Treat & Co. v. SEC*, 306 F.2d 260, 264 (D.C. Cir.

1962)). Administrative hearings "must be attended, not only with every element of fairness but with the *very appearance* of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process." *Amos Treat*, 306 F.2d at 267 (emphasis added). The settled test for whether an agency adjudicator impermissibly prejudged an action or issue is "whether 'a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" *Cinderella Career & Finishing Schools v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959)).

The OCC cannot substantially justify its position here because it irrefutably prejudged, or gave the appearance that it had prejudged, the action against Ms. Akahoshi both during the pendency of the action and again while Ms. Akahoshi's exceptions were pending before Acting Comptroller Hsu. *See* Resp. Exceptions Part V, pp. 100-07; Resp. Motion for Dismissal or Disclosure (2022-10-17); Resp. Prejudgment Dismissal Motion (2021-11-15). In consent orders and press releases issued against RNA, Dan Weiss, and John Ryan on behalf of the Comptroller, the OCC pronounced Ms. Akahoshi's guilt and prejudged almost every material factual issue. By putting forth Mr. Brickman as Acting Comptroller Hsu's "duly authorized representative" to issue the Ryan Consent Order, and by unilaterally purporting to resolve *Lucia* issues, the agency further prejudged the matter.

The OCC did all that gratuitously, with full knowledge that recusal is not a possibility here (the Comptroller is the unitary decision-maker in OCC

administrative enforcement actions), and even after Ms. Akahoshi alerted the agency to the due process violation caused by the agency's prejudgment. No substantial justification exists for bringing and prosecuting an action which the OCC has unconstitutionally prejudged.

### 6. The OCC's Position with Respect to the Section 481 Predicate Was Not Substantially Justified

Section 481 of Title 12 of the United States Code does not regulate the conduct of bank officers; it empowers the OCC to conduct bank examinations. *See* 12 U.S.C. § 481. Section 481 discusses the obligation of an "affiliate" of a national bank (i.e., not that of a bank officer, like Ms. Akahoshi) not to "refuse" the OCC's examination authority. *See id.*; 12 U.S.C. § 221a(b) (defining "affiliate" as "any corporation, business trust, association, or other similar organization"). The OCC cannot be substantially justified in predicating an enforcement action against an institution-affiliated party on a statute that is not violable by an institution-affiliated party, and that nowhere imposes the duties newly-announced in this enforcement action. *See* Resp. Exceptions at 112-20.

Not surprisingly, since the statute provides no support for imposing any duty on an individual banker, in the Final Decision, the Acting Comptroller could not specify even the purported elements of a Section 481 violation and openly *guessed* at what they might be. *See* Final Decision at 17 ("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 [a] minimum, however, a violation of § 481 *would likely require a showing* that an IAP . . . had a duty to furnish OCC examiners

with certain information and that the IAP subsequently breached that duty." (emphasis added)). It violates due process to bring an enforcement action based on a new agency legal or regulatory interpretation, and the violation is even more clear because this action is based on *speculation about a potential* legal interpretation. *See Trinity Broadcasting of Florida, Inc. v. F.C.C.*, 211 F.3d 618, 628 (D.C. Cir. 2000); *see also Johnson v. United States*, 576 U.S. 591, 595 (2015) (due process precludes taking away someone's liberty or property under a law so vague that it "fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement").

Moreover, the OCC alleged that Ms. Akahoshi, as an IAP, directly violated Section 481. *See, e.g.*, Notice of Charges ¶ 40. The OCC (and the recommended decision) then appeared to adopt an unpled theory that Ms. Akahoshi abetted *the bank's* violation of Section 481, even though the OCC never amended or attempted to amend the pleadings to reflect that change. *See, e.g.*, 2020-10-16 Order on Initial Dispositive Motion at 35. Acting Comptroller Hsu, for his part, then ignored the unpled abetting-theory in the Final Decision and stated that IAPs can directly violate Section 481 (even as he admitted that such a violation does not actually exist and speculated as to what it might entail if it did). *See* Final Decision at 17. No substantial justification exists for the OCC's underlying position as to Section 481 or its *post hoc* abetting-theory position.

### 7. The OCC's Action Was Not Substantially Justified Because It Denied Ms. Akahoshi Her Right to a Jury Trial

The OCC's position that this action comports with the Seventh Amendment's guarantee of the right to a jury trial is not substantially justified.

The Supreme Court has long interpreted the Seventh Amendment to require jury trials in actions brought by the federal government to collect civil money penalties because these actions are classically "suits at common law." *See Hepner v. United States*, 213 U.S. 103, 115 (1909). *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442 (1977), held that the where "Congress creates new statutory public rights, it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be preserved in suits at common law." *Id*. at 455 (internal quotations omitted).

This action bears no reasonable resemblance to the limited public-rights carveout from the jury requirement as set forth in *Atlas Roofing*. The allegations against Ms. Akahoshi do not implicate a "new type of litigation" requiring adjudication by an agency "with special competence in the relevant field." *Atlas Roofing*, 430 U.S. at 455. To the contrary, cases involving misrepresentations based on concealment and false statements were regularly brought in English courts at common law. *See, e.g.*, *Carter v. Boehm* [1766] 3 Burr 1905 (KB); *Derry v. Peek* [1889] LR 14 App Cas 337 (HL); *see also* 3 William Blackstone, Commentaries on the Laws of England *42 (explaining the jurisdiction of courts of common law over "actions on the case which allege any falsity or fraud; all of which savour of a criminal nature,

although the action is brought for a civil remedy; and make the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party"). Furthermore, the OCC has no special competence in allegations involving false statements or concealment, and the OCC's administrative forum has proved significantly more inefficient than an Article III proceeding. The OCC's position—that the agency itself could serve as judge, jury, and executioner in an action labeling Ms. Akahoshi a *criminal*—based on the inapposite, narrow public-rights doctrine was not substantially justified.

In addition, it is plain that a "public right," within the meaning of the public-rights doctrine, is not implicated whenever the federal government enforces a law. A "public right" refers to the administrative adjudication of rights that Congress has created by statute and conferred on individuals, such as Social Security benefits, immigration status, and other benefits and privileges to which people are entitled solely as a result of legislative action. The alternative eliminates all analysis—and therefore all meaning—from *Atlas Roofing*, for no inquiry is required to observe that an action has been brought by an administrative agency in order to then conclude that the action seeks to adjudicate "public rights." *See Jarkesy v. SEC*, 34 F.4th 446, 457 (5th Cir. 2022); *Axon Enter., Inc. v. FTC*, 143 S. Ct. 890, 907 (2023) (Thomas, J., concurring) ("Disposition of private rights to life, liberty, and property was understood to fall within the core of the judicial power, whereas disposition of public rights was not." (cleaned up)). The OCC cannot reasonably justify the elimination of Ms. Akahoshi's right to a jury by pursuing the deprivation of her core private rights

as "civil penalties." *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 61 (1989) ("Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.").

## II. ELIGIBILITY UNDER 5 U.S.C. § 504 AND 31 C.F.R. § 6.4[15]

### A. Net Worth

Ms. Akahoshi had a net worth of less than $2 million on April 17, 2018, when the OCC commenced this enforcement action. *See* Akahoshi Declaration (stating assets and liabilities). She is therefore eligible for an award of fees under the EAJA. 5 U.S.C. § 504(b)(1)(B); 31 C.F.R. § 6.4(b)(1).[16]

### B. Prevailing Party

Ms. Akahoshi is the "prevailing party," *see* 5 U.S.C. § 504(a)(1), as the Acting Comptroller dismissed the allegations against her in their entirety. *See Loumiet*, 650 F.3d at 799 (respondent whose charges were dismissed by Comptroller was

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[15] The regulations, by cross-referencing the original, time-limited version of the EAJA, limited the regulations' applicability to adjudicatory proceedings pending between 1981 and 1984. *See* Initial ALJ Decision, *In the Matter of Carlos Loumiet*, OCC-AA-EC-06-102 (July 20, 2010), 1 (available in Joint Deferred Appendix, *Loumiet v. OCC*, No. 10-1288 (9th Circuit), ECF No. 1296095-6 at 500) (stating that the "regulations at 31 C.F.R. Part 6, however, expired under a sunset provision in 1984"); Director's Order, *In the Matter of: Landmark Land Company, Gerald C. Burton*, 2001 WL 1755240, OTS AP 2001-2 (Nov. 30, 2001), *5 n.3 (stating that "31 CFR part 6 . . . on its face, only applies to EAJA actions pending between October 1, 1981 and 1984"). In 1985, Congress revived the then-expired EAJA, *see* PL 99-80, Aug. 5, 1985, 99 Stat. 183, but no update to the regulations referencing actions pending after 1984 has ever been made by the Treasury Department. Accordingly, it appears that the regulations do not apply to this action, and to the extent any provision of those regulations might limit a full award of fees and costs to Ms. Akahoshi (there are none, we believe), that regulation should be disregarded. In addition, any provision of the regulations that conflicts with the statute as amended should be disregarded.

[16] The regulation specifies a threshold of $1 million, rather than $2 million under the EAJA. The regulation, of course, cannot trump the clear statutory language. In any event, the difference does not matter here because Ms. Akahoshi's net worth was under $1 million on April 17, 2018. *See* Akahoshi Declaration.

"prevailing party" and entitled to EAJA award); *see also Ibrahim*, 912 F.3d at 1172-73 (reversing lower court holding that litigant was "unsuccessful" on claims which adjudicator did not reach because she prevailed on other grounds); Brief for Appellant Dale E. Washburn, *Washburn v. OCC*, No. 02-1171, 2018 WL 25585828 (D.C. Cir. Jan. 14, 2003) (describing ALJ decision on EAJA application that Washburn was the "prevailing party" where the Comptroller withdrew the Notice of Charges). In other words, the Final Decision constituted a "material alteration of the legal relationship of the parties." *Cactus Canyon Quarries v. Fed. Mine Safety and Health Rev. Comm'n*, 820 F.3d 12, 15 (D.C. Cir. 2016) (quoting *Buckhannon Board and Care Home v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 604 (2001)). Prior to the Final Decision, the OCC was pursuing a lifetime bar and a CMP against her; now "the charges against Respondent Laura Akahoshi are hereby dismissed," and the OCC may no longer pursue the charges, a prohibition order, or penalties. Final Decision at 20.

### C. Insurance

Ms. Akahoshi is eligible for an EAJA reward even though insurance advanced the costs she incurred in defending herself. *Ed A. Wilson, Inc. v. GSA*, 126 F.3d 1406 (Fed. Cir. 1997) (holding that contractor who prevailed in claim against the General Services Administration was entitled to attorneys' fees under the EAJA even though the contractor's insurer paid the costs); *see also Morrison v. Comm'r of Internal Revenue*, 565 F.3d 658, 662 n.4 (9th Cir. 2009) (adopting *Wilson*'s reasoning to hold that an employee had "incurred" attorneys' fees in defense of IRS proceeding within

the meaning of a fee-shifting statute analogous to the EAJA, even though employee's company advanced the costs of the defense). The insurance policy that covered this litigation was part of the compensation and benefits package provided to her in return for her service as an officer of the bank, and thus she effectively pre-paid for those fees and costs with the service she provided in return.

## III. OVERVIEW OF FEES AND COSTS

### A. Attorneys' Fees

Ms. Akahoshi, facing government lawyers backed by the overwhelming resources and might of the federal government, retained Justin Weddle, and his then-firm, Brown Rudnick LLP, to represent her. When Mr. Weddle left Brown Rudnick to form a boutique law firm in mid-2019, Ms. Akahoshi continued to be represented by Mr. Weddle and his new firm, Weddle Law PLLC. For the vast majority of this case, a maximum of three attorneys at Weddle Law have defended Ms. Akahoshi—a relatively miniscule level of staffing compared to typical staffing on a matter such as this at a large law firm.

By comparison, the OCC formally staffed this matter with up to five members of the agency's Enforcement Counsel, including for the intensive period in which the nine depositions in this matter were taken. In addition, Mr. Hudson Hamilton, the OCC's Counsel for the Western District Office—which covers an enormous jurisdiction, including California—actively assisted the OCC's regular enforcement counsel. Karen Boehler, the Deputy Comptroller in charge of the West and Midwest Regions of the OCC, who is listed as a "Key OCC Leader" on the Leadership page of

the OCC's website, also assisted the OCC not only as a fact witness, but as an expert. It is unknown to Ms. Akahoshi whether members of Enforcement Counsel, other OCC lawyers, or agency employees who did not enter formal notices of appearance also assisted the agency in this matter. Indeed, Ms. Akahoshi's January 26, 2021 motion to compel disclosure of exculpatory information, including the opinions of other OCC personnel who opined on whether she had violated any laws, was denied. *See* 2021-02-05 Order.

From May 2019 through the present—a period of about four years encompassing initial dispositive motions, the entire deposition and document discovery process, cross-motions for summary disposition, and the briefing of exceptions to the Acting Comptroller—all three attorneys at Weddle Law spent a combined total of about 5,030 hours on this matter. Prior to that (from April 2018 through April 2019), Brown Rudnick spent about 530 hours.[17]

By comparison, we know that Enforcement Counsel spent approximately 180-360 hours in person with a single fact witness preparing for her deposition in this matter. *See* R-MSD-008 (Omi) 12:13-13:11 (witness describing that she met with three or four members of Enforcement Counsel approximately thirty times, for two to three hours at a time, to prepare for her deposition).[18] And that does not include time

[17] These total hours relate solely to the OCC enforcement matter. Brown Rudnick's work defending Ms. Akahoshi in the context of the DOJ investigation (an investigation that resulted in the considered decision *not* to bring any charges against Ms. Akahoshi) was separately tracked under a different matter number.

[18] Enforcement Counsel frivolously blocked Ms. Akahoshi, on privilege grounds, from learning how much time other OCC witnesses, such as Deputy Comptroller Boehler, devoted to the enforcement action against Ms. Akahoshi. R-MSD-006 (Boehler) 21-23.

Enforcement Counsel may have spent preparing for that solitary deposition outside the meetings with the witness. At such rates, the OCC's lawyers surely exceeded many times over the amount of time Ms. Akahoshi's defense spent on the case.

The OCC's choice to spend months and hundreds of hours preparing one of its fact witnesses for a single deposition demonstrates that the fees and expenses Ms. Akahoshi incurred in defending this action are eminently reasonable and necessary. Of course, this application includes detailed billing entries by Ms. Akahoshi's counsel, but in light of the small number of attorneys working on her case, the length, complexity, and number of issues in her case, and the apparent efficiency of her counsel relative to the hours spent by her adversary, this tribunal "need not, and indeed should not, become [a] green-eyeshade accountant[]" reviewing each minute of voluminous billing records. *Fox v. Vice*, 563 U.S. 826, 838 (2011). "The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection." *Id*. In that way, the courts seek to avoid a request for attorneys' fees from "result[ing] in a second major litigation." *Ibrahim*, 912 F.3d at 1185 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)).

**1. Weddle Law PLLC**

Weddle Law PLLC has represented Ms. Akahoshi for the majority of this action, including in the most intensive phases: initial dispositive motions, discovery (including nine depositions and document discovery, including tens of thousands of documents produced and received), cross-summary disposition motions, and exceptions to the Comptroller. The following timekeepers billed time to this matter

in amounts and at the rates set forth in the invoices attached as Exhibit B to the Weddle Declaration. This application is also accompanied by the declarations of these timekeepers attesting to the accuracy of their time entries in the invoices. In summary:

| Timekeeper | Hours | Blended Hourly Rate | Fees |
|---|---|---|---|
| Justin S. Weddle | 1337.9 | $ 914.76 | $ 1,223,858.25 |
| Julia I. Catania | 2181 | $ 627.83 | $ 1,369,287.50 |
| Brian Witthuhn | 1514 | $ 616.55 | $ 933,462.50 |
| **Total** | 5032.9 | -- | $ 3,526,608.25 |

**2. Brown Rudnick LLP**

Ms. Akahoshi first hired Mr. Weddle to represent her at a time that he was a partner at Brown Rudnick. Brown Rudnick thus represented Ms. Akahoshi from the inception of this action in April 2018 through the transition to Weddle Law at the end of April 2019. The following timekeepers billed time to this matter in amounts and at the rates set forth in the invoices attached as Exhibit A to the Weddle Declaration. This application is also accompanied by the declarations of these timekeepers (or in the case of Mr. Vignali, Mr. Weddle's declaration) attesting to the accuracy of their time entries in the invoices. In summary:

| Timekeeper | Hours | Hourly Rate | Fees |
|---|---|---|---|
| Stephen R. Cook | 14.5 | 845 | $ 12,277.85 |
| Justin S. Weddle | 89.5 | 1130 | $ 101,101.10 |
| Daniel L. Day | 163.7 | 650 | $ 106,372.50 |
| Alex Lipman | 3.1 | 1150 | $ 3,565.00 |
| Julia I. Catania | 180.3 | 760 | $ 137,062.20 |
| Marisa I. Calleja | 20.8 | 585 | $ 12,168.00 |
| Tiffany Lietz | 53.2 | 545 | $ 28,994.00 |
| Sarah Chojecki | 2.2 | 390 | $ 858.00 |

| | | | |
|---|---|---|---|
| Erio Vignali | 7.2 | 380 | $ 2,736.00 |
| **Total** | 534.5 | -- | $ 405,134.65 |

### B. Expert Fees

The OCC designated two agency supervisors as expert witnesses: Brian Eagan, the former Examiner-in-Charge of RNA, and Karen Boehler, the Deputy Comptroller in charge of the West and Midwest Regions of the OCC. Ms. Akahoshi retained the services of only one expert witness, Jeffrey Alberts, Esq., through the law firm where he is a partner, Pryor Cashman LLP. Mr. Alberts prepared an expert report and provided expert testimony in a deposition regarding his opinions "as to the violations of law or regulation and unsafe or unsound practices alleged against Respondent in the Notice of Charges, including any requirement that national banks provide the OCC with access to bank records." Respondent's Preliminary List of Expert Witnesses (2020-12-15) at 1 (quoting Enforcement Counsel's description of proposed expert testimony of Boehler and Eagan).[19] Ms. Akahoshi is entitled to dollar-for-dollar reimbursement of these expert fees. 5 U.S.C. § 504(b)(1).[20]

[19] Ms. Akahoshi did not believe *any* expert testimony was appropriate on those topics and accordingly moved to preclude such testimony. *See* Respondent's Motion to Preclude Expert Testimony on Ultimate Issues and Matters of Law (2020-12-15). Indeed, Ms. Akahoshi would not have retained Mr. Alberts's services at all if her motion had been granted. *See* Respondent's Preliminary List of Expert Witnesses (2020-12-15) at 1 ("To the extent expert testimony proffered by Enforcement Counsel is not precluded . . . ."). Ms. Akahoshi therefore sought to avoid the time and expense of having experts opine on the topics chosen by the OCC, which were the ultimate issues in this case or matters of law, but the OCC successfully opposed that application, thereby causing the expenditure.

[20] The statute states that the award of expert fees to a prevailing party is capped at "the highest rate of compensation for expert witnesses paid by the agency involved," 5 U.S.C. § 504(b)(1)(A). This provision places no limit on the recovery of Mr. Albert's fees and costs, since Mr. Albert's rate is, if anything, low as a market rate for experts with his expertise; doubtless the OCC has paid many experts in the context of enforcement actions at rates exceeding his. In this matter in particular, the OCC used only salaried employees or an unpaid retiree as its experts (Boehler and Eagan), so there is no outside expert rate that could apply to cap Mr. Alberts's fees.

The following timekeepers at Pryor Cashman billed time to this matter in amounts and at the rates set forth in the invoices attached as Exhibit D to the Alberts and Nofziger declarations. In summary:

| Timekeeper | Hours | Hourly Rate | Fees |
|---|---|---|---|
| Jeffrey Alberts | 59.9 | $850 | $50,872.50 |
| D.N. Nofziger | 0.5 | $645 | $322.50 |
| Expenses | -- | -- | $434.36 |
| **Total** | 60.35 | -- | $51,629.36 |

**C. Costs**

In addition to the legal fees and expert fees set forth above, Ms. Akahoshi incurred substantial costs in defending this action. The costs included: substantial fees for a database vendor to host, for the years this action was pending, the many thousands of documents collected and subject to discovery in this matter; an outside vendor to perform part of the document review needed for this case;[21] deposition expenses; and travel expenses to and from Denver for Ms. Akahoshi's deposition.[22] Ms. Akahoshi is entitled to dollar-for-dollar reimbursement of these costs. 5 U.S.C. § 504(b)(1). The costs are set forth in greater detail in Exhibit C to the Weddle declaration submitted herewith, and are summarized in the table below:

| Expense | Amount |
|---|---|
| Teris – database vendor | $115,127.30 |
| Magna – deposition vendor | $22,343.18 |
| Consilio – document review vendor | $40,256.25 |

[21] Under the supervision of Weddle Law PLLC, a Consilio (an e-discovery and managed review vendor) document review team performed the initial review of a large number of documents in this matter, resulting in substantial cost savings.

[22] Only one attorney from Weddle Law travelled to Denver to prepare Ms. Akahoshi for, and to attend, her deposition in person, which substantially minimized costs.

| | |
|---|---|
| Travel and other | $21,865.88 |
| **Total** | $199,592.61 |

## IV. A COST-OF-LIVING AND SPECIAL-FACTOR ADJUSTMENT IS WARRANTED

The EAJA provides for the award of attorneys' fees Ms. Akahoshi incurred—$3,526,608.25 by Weddle Law PLLC and $405,134.65 by Brown Rudnick LLP—at "prevailing market rates for the kind and quality of the services furnished." 5 U.S.C. § 504(b)(1)(A). The statute also created a soft cap on attorneys' fees, at a rate set in 1996, of $125 per hour. *Id.* § 504(b)(1)(A)(ii). The $125 per hour cap is subject to two major exceptions, however, both of which apply here: cost-of-living adjustments and "a special factor" that "justifies a higher fee." *Id.*

### A. Routine Cost-of-Living Adjustment

The $125 per hour soft cap on attorneys' fees in the EAJA reflects the cost of living from 1996, nearly 30 years ago (prior to 1996, the soft cap had been set at $75). 5 U.S.C. § 504(b)(1)(A)(ii). Courts therefore routinely grant upward cost-of-living adjustments to EAJA awards of legal fees. Indeed, the Ninth Circuit publishes a list of the $125 per hour statutory rate adjusted for the cost of living in the past decade; the cost-of-living adjusted rate ranged from $201.60 in 2018 to $234.95 in 2019 for work performed during the years in which Ms. Akahoshi incurred attorneys' fees in defense of this action. *See* Statutory Maximum Rates Under the Equal Access to Justice Act, United States Courts for the Ninth Circuit.[23] At a minimum, therefore, when awarding attorneys' fees to Ms. Akahoshi, this Tribunal should increase the

[23] Available at https://www.ca9.uscourts.gov/attorneys/statutory-maximum-rates/ (last visited May 1, 2023).

hourly rate to adjust for the increase in the cost of living between 1996 and the years in which the work was performed. The hours, on a year-by-year basis, as reflected in the invoices submitted herewith, for Brown Rudnick and Weddle Law are:

| Year | Brown Rudnick | Weddle Law | Total Hours |
|---|---|---|---|
| 2018 | 498.2 | -- | 498.2 |
| 2019 | 36.3 | 137.5 | 173.8 |
| 2020 | -- | 1596.6 | 1596.6 |
| 2021 | -- | 2547.6 | 2547.6 |
| 2022 | -- | 606.2 | 606.2 |
| 2023 | -- | 158.6 | 158.6 |

**B. Special-Factor Adjustment**

The EAJA permits the award of attorneys' fees at a higher rate than the cost-of-living-adjusted rate where a "special factor . . . justifies a higher fee." 5 U.S.C. § 504(b)(1)(A)(ii). The statute provides one, non-exhaustive example of a "special factor": "the limited availability of qualified attorneys or agents for the proceedings involved." *Id*. The Supreme Court has declined to specify what other circumstances may qualify as "special factors" under the EAJA, but it has made clear that a special factor must not already be incorporated into the prevailing market rate. *Pierce*, 487 U.S. at 572-73. Thus, a factor such as the complexity of the case may make the number of hours spent on the matter reasonable but does not warrant an upward departure from the statutory rate. *Id*.

Here, special circumstances warrant an award of Ms. Akahoshi's full attorneys' fees, not just an award at the cost-of-living adjusted rate. First, few if any three-person teams of lawyers working at hourly rates in the $200-range would have had the experience and qualifications to successfully counter the OCC's action, or to

identify and preserve the constitutional, legal, and factual defects in this action. Second, the OCC's conduct in pursuing and litigating this proceeding has not only lacked substantial justification, but has included unlawful conduct and sharp litigation practices, that has necessitated the special skills of Ms. Akahoshi's lawyers to identify and counter those practices. Indeed, Ms. Akahoshi's lawyers' experience litigating constitutional and statutory defects of administrative proceedings has ensured that those issues were raised, briefed, and preserved for appeal efficiently. Ms. Akahoshi's lawyers have also sought to overcome the OCC's unlawful use of secrecy by coordinating with counsel for other respondents to ensure that issues are raised, briefed, and preserved for appeal efficiently. Moreover, the resources required to defend against the OCC's shifting tactics and theories seeking to salvage a case that never should have been brought (and that has now been dismissed), demonstrate that an award of the full amount of Ms. Akahoshi's attorneys' fees is necessary "to deter" the OCC from "the unreasonable exercise of government authority," as Congress intended when it enacted the EAJA. *See Ardestani*, 502 U.S. at 138.

**1. The OCC's Disregard of Laws and Rules**

To start, the OCC has disregarded limitations on its own power and organization. The OCC employs *dozens* of Deputy Comptrollers exercising officer powers, seemingly all designated by the Comptroller, whereas the agency's organizing statutes permit only four Deputy Comptrollers, to be appointed by the Secretary of the Treasury, *see* 12 U.S.C. § 4, and the Supreme Court has repeatedly made clear that individuals wielding officer powers must be constitutionally

appointed, *see, e.g.*, *Buckley*, 424 U.S. at 126. As this Tribunal has acknowledged, the OCC also maintains a system of secret law that violates statute and, when wielded against individuals like Ms. Akahoshi, impinges on due process. *See* 2021-03-21 Order on Secret Law at 2 (recognizing that the OCC does not make OFIA adjudicatory proceedings public as required by law, and that the agency's failure to do so "places respondents at a disadvantage").

Even when issuing the Final Decision, the Acting Comptroller ignored regulations stating that he had to do so within ninety days of submission of the record and instead issued the Final Decision about six weeks after that regulatory deadline. *See* 12 C.F.R. § 19.40(c)(2). The Acting Comptroller's failure to adhere to that clear deadline, in and of itself, had little effect on this proceeding, but it is emblematic of the OCC's willingness to transgress the Constitution, laws, regulations, and its own guidelines, while purporting to enforce the law against individuals like Ms. Akahoshi. The Acting Comptroller's disregard of this deadline, like Deputy Comptroller Boehler's disclosure of her hand-written notes months after a discovery deadline ordered by this Tribunal, is also ironic, given the factual complaint of this case—that Ms. Akahoshi "delayed" for approximately three weeks (from March 21, 2013 to April 18, 2023) in delivering a draft document, when she (on behalf of the bank) delivered it on time and pursuant to ADC Jorn's express agreement.

The treatment of Ms. Akahoshi also echoes a pattern by the OCC of bringing ill-conceived enforcement actions against individuals, then dropping the proceedings (after the damage has largely been inflicted on the respondent) when faced with the

need to prove or defend the agency's allegations and enforcement process in Article III courts. For example, the OCC recently did this with its actions against Richard Usher and Rohan Ramchandani—as with the action against Ms. Akahoshi, the OCC relentlessly litigated against Usher and Ramchandani for years, only to abruptly dismiss all claims against them. *See In re Ramchandani*, OCC AA-EC-2017-2; *In re Usher*, OCC AA-EC-2017-3. The OCC's action against Patrick Adams, the CEO of a Dallas bank, also reflects similar tactics as the OCC used against Ms. Akahoshi. The OCC brought the case against Adams to a hearing, after which the ALJ recommended *dismissal* of the charges. *In re Adams*, OCC AA-EC-11-50, 2014 WL 8735096, at *1 (OCC Sept. 30, 2014). The Comptroller wrote a lengthy decision stating that the ALJ was *wrong* and setting forth legal conclusions and factual findings *against* Adams, but nonetheless dismissed the action because of the "time that would be necessary to effect a remand," another example of the OCC trying to declare the law and facts in its favor while seeking to avoid judicial scrutiny. *Id.* Still earlier, the OCC brought a CMP action against an individual named Washburn, the President and Compliance Officer of a bank, charging that he "aided and abetted" the bank's violations of 12 C.F.R. § 21.21, a provision regulating BSA compliance. When Washburn filed an answer challenging the OCC's authority to bring a CMP action for alleged Section 21.21 violations, the OCC dismissed the case rather than risk a ruling on the merits (and opposed Washburn's subsequent EAJA application). *See* Brief for Appellant Dale E. Washburn, *Washburn v. OCC*, No. 02-1171, 2018 WL 25585828 (D.C. Cir. Jan. 14, 2003). Likewise, the OCC's ill-conceived action against Carlos Loumiet, a respected

lawyer, took years, a three-week hearing, and ultimately resulted in the Comptroller dismissing the action (after criticizing the ALJ's recommended decision, which had exonerated Loumiet). *See Loumiet v. OCC*, 650 F.3d 796, 798-99 (D.C. Cir. 2011) (reversing erroneously low EAJA fee award and remanding for recomputation).

As Ms. Akahoshi's case and those examples demonstrate, the OCC takes pains to avoid judicial, court-of-appeals rulings on the merits of the positions the agency takes in administrative enforcement actions. And those efforts succeed: there is a marked dearth of (published or unpublished) judicial decisions in the decades since FIRREA was passed reviewing OCC administrative enforcement proceedings, especially when compared to the FDIC, which also enforces Section 1818. This tribunal should award the full amount of attorneys' fees Ms. Akahoshi incurred to ensure that, in this instance at least, the OCC's efforts to sweep an unreasonable enforcement action under the rug will not succeed unaddressed.

**2. The OCC's Case-Specific Inappropriate Conduct**

The OCC's inappropriate litigation conduct—by government actors who have a duty to seek justice, not simply to win by fair or unfair means—constitutes a special circumstance warranting a full award of fees and costs here. *See Freeport-McMoran Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992) (government lawyers in administrative proceedings have a responsibility to seek justice, not to win); *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and

whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

Enforcement Counsel's handling of the deposition of Dan Weiss is a narrow but poignantly representative episode. When Weiss, for health reasons, could no longer sit for his deposition at the scheduled time—his "deposition could not take place [then] due to no fault of either party in this matter"—Enforcement Counsel *opposed* extending discovery deadlines by about three weeks for the parties to be able to complete his deposition. *See* Order Denying Respondent's Motion to Extend Discovery Cutoff (2021-05-18) at 2. The OCC actively opposed a brief extension that would have allowed the parties to depose the General Counsel of RNA and an *alleged co-conspirator* of Ms. Akahoshi. Thus, rather than seeking critical evidence regarding the allegations, the OCC worked to ensure that summary disposition briefing would occur without it. This example encapsulates the OCC's willingness to place winning above truth-seeking or justice in this proceeding.

The OCC and Enforcement Counsel thus far have received little critique for their conduct (although this Tribunal has correctly noted that the OCC's system of secret law is unlawful, that its "personal benefit" theory was nonsensical, that its timeliness theory was incorrect (a decision later reversed by the Acting Comptroller), and that Section 481, by its terms, does not impose duties on bankers, and that no case says otherwise), and this application may present the last opportunity this Tribunal has to reinforce that the OCC has a responsibility to seek truth and justice, rather than a favorable headline in a press release. Indeed, the D.C. Circuit has

specifically stated that an EAJA award—as opposed to, for example, a *Bivens* claim or other affirmative action against the OCC or agency personnel—provides the remedy to respondents wronged by agency conduct. *See Loumiet*, 948 F.3d at 384.

The practical effect of the OCC's action has been to publicly smear Ms. Akahoshi, ruining her reputation and career. Thus, regardless of the Acting Comptroller's dismissal, Ms. Akahoshi will never work in banking again nor reap the fruits of such a career. But even beyond this, the OCC claimed she violated a *criminal* statute—effectively branding her a felon—despite the lack of criminal law experience among the Enforcement Counsel assigned to this case and in disregard of the DOJ's investigation (which, a few months after the Notice of Charges, determined that no criminal charge (either under Section 1001 or otherwise) was warranted.

Some of Enforcement Counsel's conduct, however, is unbecoming of any attorney, let alone government attorneys purporting to enforce the law. A few noteworthy examples are listed below, and additional examples can be found in Ms. Akahoshi's October 21, November 22, and December 21, 2021 submissions regarding the amount of the civil money penalty.

- The OCC made a demonstrable misstatement in the accusatory instrument lodged against Ms. Akahoshi, the Notice of Charges, stating that she had emailed "an updated electronic copy of the Crowe Report" to Dan Weiss on February 13, 2013. *See* Notice of Charges ¶ 22.
    - Enforcement Counsel *never* corrected that statement nor even attempted, at the very least, to make this tribunal aware of it, even

though the tribunal explicitly relied on it in denying Ms. Akahoshi's initial dispositive motion, *see* Order on Initial Dispositive Motion (2020-10-16) at 10; Boehler specifically pointed out the misstatement in the Notice of Charges in her deposition, *see* R-MSD-006 (Boehler) 15:3-9; and the rules of this tribunal allow for liberal amendments of the pleadings, *see* 12 C.F.R. § 19.20.

    - That is, in a case about purportedly misleading emails—which were drafted and sent as part of routine, informal communications between the bank and the OCC, and which had to do with immaterial draft work product from a third-party consultant—the OCC let stand, in sworn, formal filings, a material misstatement on which this tribunal relied.

- Enforcement Counsel engaged in witness coaching. Eagan testified—consistent with the contemporaneous documentation, *see, e.g.*, OCC-MSD-083, and Boehler's testimony, *see* R-CMP-042 (Boehler) at 283-85—that the OCC planned to re-enter the bank for a May 2013 target examination to reconcile the differences between the OCC's preliminary findings and RNA's response thereto. After discussing the subject matter of his testimony with multiple members of Enforcement Counsel during breaks in his deposition, Eagan then *sua sponte* offered up that he had "misspoken," and that the OCC had re-entered the bank because of "the Crowe Report," despite his earlier testimony and the utter lack of contemporaneous documentation supporting that new statement. *See* R-MSD-007 (Eagan) at 222-24.

- Enforcement Counsel and their hybrid fact-expert witness, Boehler, engaged in a laundry list of bad conduct with respect to a sworn statement submitted by Boehler after her deposition, which Enforcement Counsel *twice* relied on:
    - In her deposition, contrary to the expert notice Enforcement Counsel submitted, Boehler expressly disclaimed expertise about matters of law during her deposition. *See* R-CMP-042 (Boehler) at 203-204, 192, 200-17. Enforcement Counsel objected at least *nine times* to questions, as "beyond the scope," designed to elicit Boehler's legal training and her knowledge, and opinions on, the violations of law alleged against Ms. Akahoshi. *Id.*
    - In her deposition, Boehler also disclaimed knowledge of the scoping of the May 2013 target exam, and Enforcement Counsel objected at least *seven times* to related questions, stating that Boehler had "no foundation" to answer questions about the scoping, that the questions called for her to "speculate," or both.
    - Despite that testimony and Enforcement Counsel's objections, Boehler then opined in her declaration on the very matters of which she had disclaimed knowledge, and on matters for which she had no factual or expert competence, including:
        - The purported violation of Section 481;

- The purported causal relationship between Ms. Akahoshi's alleged conduct and losses suffered by RNA as part of its guilty plea;
- The materiality of Crowe documents;
- Legal conclusions about Ms. Akahoshi's *mens rea*;
- The scoping of the May 2013 target exam;
- The amount of the CMP;
- False statements about the purported effect of "the Crowe Report" on RNA's already-withdrawn application to merge with Rabobank AgriFinance;
- And more.

*See* 2021-11-12 Resp. Response to OCC CMP Amount Submission at 21-34.

This conduct alone—soliciting, submitting, relying on, and refusing to correct false or inaccurate statements in formal legal, public filings—far outstrips any alleged impropriety by Ms. Akahoshi. And those practices represent only *some* of the bad conduct by the OCC in the course of this matter, which also included, for example, a document dump, the late production of Boehler's handwritten notes, the misleading production and submission of documents without maintaining family relationships in contravention of the Tribunal's orders governing discovery, and more. *See* Respondent's Submission on CMP Amount (2022-10-22) at 23-34.

The OCC's conduct in this proceeding constitutes a "special factor" under the EAJA that warrants awarding the full amount of legal fees Ms. Akahoshi incurred. Such litigation conduct—especially by government actors—should not be permitted to pass by without consequence.

## CONCLUSION

For the reasons stated herein and in all prior proceedings in this matter, this Tribunal should grant Ms. Akahoshi's fee application in full pursuant to the Equal Access to Justice Act.

Dated: New York, New York
May 5, 2023

Respectfully submitted,

BY: 

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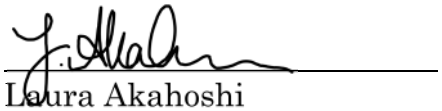
Verification:

Pursuant to 28 U.S.C. § 1746, I, Laura Akahoshi, hereby declare under penalty of perjury that the information provided in this application is true and correct.



Laura Akahoshi
Dated: May 5, 2023