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

IN THE MATTER OF	)	
	)	OCC-AA-EC-06-102
Carlos Loumiet, Esq.	)	
Equal Access to Justice Applicant	)	

INITIAL DECISION

STATEMENT OF THE CASE

C. Richard Miserendino, Administrative Law Judge. On August 26, 2009, counsel for Carlos Loumiet filed an application for attorneys fees and expenses pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, as amended. The Application, which counsel supplemented on December 8, 2009, seeks recovery of fees and expenses incurred in defense of a Notice of Charges brought against Loumiet which the Comptroller of the Currency dismissed by Order dated July 27, 2009.

On January 7, 2010, Enforcement Counsel filed its Answer to Respondent's Application.[1] The Answer asserts that the position of the government was substantially justified, and argues that the Comptroller's Final Decision ("OCC Final Decision"), though ultimately ruling against the Enforcement Counsel, confirmed that certain elements of the controlling statute were satisfied by the evidence of record. As to those elements which the Comptroller ultimately found unproven, Enforcement Counsel insists that its position was substantially justified as the elements were supported by a permissible view of the law and evidence, and also supported by the opinions of the government's several expert witnesses. While the position asserted by Enforcement Counsel did not prevail in the end, they argue nonetheless that substantial justification existed for bringing and litigating the allegations.

The OCC Rules of Practice and Procedure provide at 12 C.F.R. § 19.210 that the Department of Treasury Regulations at 31 C.F.R. Part 6 govern the conduct of OCC EAJA proceedings. The regulations at 31 C.F.R. Part 6, however, expired under a sunset provision in 1984 and have never been reinstated. As with the several other EAJA cases that have arisen before the OCC in the past, the parties here stipulated that notwithstanding their expiration, the regulations at 31 C.F.R. Part 6 shall apply and govern here.[2]

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1 The parties jointly stipulated to a procedural schedule which provided for the filing of additional declarations and documents by Loumiet, followed by a delayed filing of the Answer by Enforcement Counsel.

2 Given the recurrent problem presented by the expired regulations, and given that the EAJA requires that "each agency shall by rule establish uniform procedures for the submission and consideration of applications," the OCC is urged to take action to rectify this omission in the future. *See* 5 U.S.C. § 504(c)(1). The other federal banking agencies -- with the exception of the Office of Thrift Supervision which similarly has not updated its

The EAJA provides that the question of substantial justification "shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought." 5 U.S.C. § 504(a)(1). However, 31 C.F.R. § 6.14 permits additional "proceedings on the application." After consulting the parties, and with their concurrence, I find that no further proceedings are necessary in order to make a determination in this case.

Findings of Fact

I. The Underlying Case

The Notice of Charges in the underlying proceeding sought a cease-and-desist order and civil money penalty of $250,000 against Loumiet as a result of legal services he rendered to the audit committee of Hamilton Bank, N.A., Miami, Florida ("Hamilton Bank" or "the Bank"). When retained by the Bank, Louimet was a partner at the law firm of Greenberg & Traurig, LLP ("Greenberg firm"). He also chaired the firm's banking and international law departments. Loumiet and his firm had been retained by the Hamilton Bank audit committee to internally investigate and determine whether certain Hamilton senior bank officers engaged in (and concealed) unlawful transactions characterized as "adjusted price trades." (OCC Final Decision at 5).

The engagement resulted in two written reports principally authored by Loumiet which concluded that insufficient evidence existed to find that the Bank's management had engaged in the unlawful transactions. (Jt. Exhs. 2 and 3). The first report, dated November 15, 2000, found no "agreement" in a "legal sense" supporting an impermissible swap or exchange. (Jt. Exh. 3 at 18). The report also found "no convincing evidence" to establish that Hamilton Bank officers intentionally misled the Bank's auditors, Deloitte & Touche ("Deloitte") or the Hamilton Bank Audit Committee on the specific nature of the transactions. (Jt. Exh. 3 at 23).

The first report carefully analyzed numerous bank documents, including some "troubling" documents acquired from the counterparties to the transactions. (Jt. Exh. 3 at 19). These documents implied that that the Bank's senior officers were involved in impermissible trades, which senior officers denied during the Greenberg firm investigation. The first report concluded that nothing unlawful was discovered with respect to the transactions under inquiry. (Jt. Exh. 3 at 23).

On November 28, 2000, Deloitte representatives met with Loumiet to discuss a number of concerns with the report's findings. Specifically, Deloitte assembled a lengthy list of written questions about the report, many of which dealt with specific details of the transactions, and the report's conclusions on management misrepresentations. Jt. Exh. 5. The Hamilton Bank Audit Committee, with the concurrence of Deloitte, ultimately decided to treat the transactions for

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regulations – have current EAJA regulations promulgated as part of their Local Rules of Practice and Procedure, 12 C.F.R. § 263.100 *et. seq.* (Federal Reserve Board), 12 C.F.R. § 308.169 *et. seq*. (Federal Deposit Insurance Corporation), and 12 C.F.R. § 747.601 *et. seq*. (National Credit Union Administration).

accounting purposes as adjusted price trades, notwithstanding the conclusions reached in the Loumiet report. (Jt. Exh. 6 at 6).

An OCC enforcement subpoena secured sworn testimony from an officer of West Merchant Bank, one of the counterparties. The testimony directly implicated Bank management and demonstrated their active involvement in the contemporaneous purchase and sale of replacement debt. OCC officials grew concerned about the conclusions contained in the first Greenberg firm report and wrote Loumiet on January 17, 2001, conveying some of the preliminary findings of the enforcement investigation.

On February 8, 2001, Loumiet and the representatives of Deloitte met with OCC officials. During the meeting, the OCC officials read aloud portions of the deposition testimony and provided six "red flags" which the OCC believed showed that Hamilton Bank management knowingly engaged in the unlawful trades. The inconsistent findings and additional evidence discovered by OCC led Loumiet to reopen the Greenberg firm investigation. (Jt. Exh, 2).

During the course of the reopened investigation, the Greenberg firm was retained by the Bank's holding company to represent the Bank's senior officers in a class action lawsuit brought as a result of the transactions that Loumiet was investigating. (OCC Final Decision at 8). While Loumiet was not personally involved in the class action engagement, other partners of his law firm were involved and there arose – at least potentially – a conflict between the two engagements. The Greenberg firm conducted a standard conflict of interest check. The record reflects that while no written waiver was executed with respect to the potential conflict, the Bank's general counsel, the board of directors, and the chairman of the Bank's audit committee were all aware of the dual engagement and impliedly consented to the potential conflict. (Judge Cook's Recommended Findings of Fact at 106-111).

As part of the reopened investigation, Loumiet attempted, unsuccessfully, to secure from the OCC a copy of the investigatory deposition which purportedly revealed management's unlawful involvement. He also made repeated attempts to interview the individual deponent of West Merchant Bank, who refused. Left with the six "red flags" supplied by the OCC, and the verbal representations of the testimony secured in the preliminary investigation, Loumiet and his team thoroughly questioned the senior Bank officers once again, each of whom steadfastly denied the conflicting assertions discovered by OCC. (Jt. Exh. 2 at 3).

On March 14, 2001, Loumiet produced his second report. This supplemental report thoroughly analyzed the six "red flags" raised by the OCC, as well as the asserted testimony secured in the OCC investigation. While sharply critical of the manner in which Bank management handled the transactions, the supplemental report nonetheless repeated the initial conclusion that insufficient evidence established the intentional involvement in, or concealment of, the unlawful price trades. (Jt. Exh. 2 at 14). Loumiet's findings in his second report were issued while other Greenberg lawyers prepared to defend the senior bank officers in the class action lawsuit – which defense would naturally require that bank management deny involvement in the adjusted price trades.

The OCC investigation continued. On January 11, 2002, the OCC closed Hamilton Bank and appointed the FDIC as receiver. Contrary to the conclusions reached in the two Greenberg firm reports, Hamilton's senior officers were indicted in June 2004 on bank and securities fraud as a result of their participation in the adjusted price trades. (OCC Final Decision at 9, fn 5). Two of the bank officers pled guilty to lesser charges, and a third was convicted of sixteen counts related to the adjusted price trades and the concealments. All three defendants were sentenced to substantial prison terms, and ordered to pay criminal restitution as a result of the Bank's significant losses which were concealed. The contested conviction of the Bank's chairman and CEO was later affirmed by the United States Court of Appeals of the Eleventh Circuit. *United States v. Masferrer*, 514 F.3d 1158 (11th Cir. 2008).

On November 6, 2006, the OCC issued the Notice of Charges against Louimet. The Notice asserted that Loumiet, as an independent contractor of Hamilton Bank, met the elements necessary to establish status as an institution affiliated party ("IAP"). The Notice alleged, among other things, that Loumiet breached his fiduciary duty to the bank's audit committee through his conduct of the internal investigation ("the misconduct element"); that the breach was undertaken knowingly or recklessly ("the culpability element"); and that the breach resulted in financial loss and other harm to the Bank ("the effect element"). Based on these assertions, the Notice sought a cease and desist order and civil money penalty against Loumiet.

A hearing was held by U.S. Administrative Law Judge Ann Z. Cook in October 2007. On June 17, 2008, Judge Cook issued a recommended decision dismissing all of the charges on the grounds that none of the three elements required to establish IAP status were proven. Judge Cook also found the intervening decision in *Grant Thornton LLP v. OCC*, 514 F.3d 1328 (D.C. Cir. 2008) foreclosed Enforcement Counsel's ability to claim that Loumiet participated or engaged in an "unsafe or unsound practice" in "conducting the business" or "the affairs" of the Bank within the meaning of 12 U.S.C. §§ 1813(u)(4)(C), 1818(b)(1), and 1818(i)(2)(B)(i)(II) – thus altering and limiting the bases under which the OCC could pursue charges against Loumiet. (Judge Cook's Recommended Decision at 19-20).

On July 27, 2009, the Comptroller issued a Final Decision dismissing the case against Loumiet. The Comptroller reversed the ALJ's finding with respect to the misconduct element, concluding the evidence did in fact establish a breach of Respondent's fiduciary duty to Hamilton Bank. The Comptroller further concluded that the evidence "could have" met the culpability requirement of IAP status, had the ALJ permitted additional expert evidence on the subject of whether the breach of duty was reckless. Even had the culpability element been satisfied, however, the Comptroller concluded the third and final element – a requisite harm or effect – was not established, and the Comptroller accordingly dismissed all charges against Loumiet. (OCC Final Decision at 2). The instant application for recovery of attorney fees and expenses under the EAJA was subsequently filed.

II. The Applicable Legal Standard

The Comptroller's final decision dismissed the proceeding for lack of jurisdiction over Loumiet. (OCC Final Decision at 17). Having prevailed in the underlying case, Loumiet may be entitled to an award of fees and expenses incurred in connection with the adversary adjudication if the Enforcement Counsel cannot show that its position was substantially justified; if it cannot show that its position in the proceeding was reasonable in law and fact; or if special circumstances make the award sought unjust. *Pierce v. Underwood*, 487 U.S. 552 (1988); *Tyler Business Systems v. NLRB*, 695 F.2d 73 (4th Cir. 1982). The fact that Enforcement Counsel did not prevail in the proceedings below does not raise a presumption that its position was not substantially justified. 31 C.F.R. § 6.5(a). Nor must Enforcement Counsel establish that its decision to litigate was based upon a substantial probability of prevailing. *Westerman, Inc.,* 266 NLRB 799 (1983). Likewise, the fact that Enforcement Counsel failed to establish a prima facie case is not determinative for purposes of an EAJA award. *United States v. Paisley*, 957 F.2d 1161 (4th Cir. 1992).

III. Analysis and Findings

In his application, the Respondent argues that Enforcement Counsel's position was not substantially justified as the ALJ "completely exonerated Respondent of any wrongdoing," and she concluded that "none of the OCC's arguments were supported by the evidence." (Application at 6: *citing* Judge Cook's Recommended Decision at 56). Respondent further argues that the ALJ found that none of the elements of the three-part test used to determine jurisdiction under 12 U.S.C. § 1813(u)(4) were established; that the theory of Enforcement Counsel shifted "at the eleventh hour" by the intervening standard announced in *Grant Thornton LLP v. OCC*, 514 F.3d 1328 (D.C. Cir. 2008); and that the Comptroller's OCC Final Decision conceded that insufficient evidence existed to establish the requisite harm by Loumiet in satisfaction of the effect element. (Application at 6, 15, and 16).

Enforcement Counsel accurately points out that Judge Cook's Recommended Decision was not the final decision of the agency, and that the Comptroller decided the matter on decidedly more narrow grounds. Because the ALJ concluded facts or circumstances which were not adopted (and in some cases were rejected) by the Comptroller does not establish that the agency was unjustified in bringing the underlying case.

Regarding the three elements required to establish jurisdiction under Section 1813(u), both parties presented substantial expert testimony of varying opinions – often at opposite conclusions. With respect to the misconduct element and allegation of breach of fiduciary duty, Enforcement Counsel solicited the expert opinion of Professor Nancy Moore of Boston University School of Law. (OCC Exh. 168: Expert Report of Nancy Moore). Professor Moore's opinion was clear and unwavering – Loumiet operated with an obvious conflict of interest which breached his fiduciary duty of loyalty to Hamilton Bank, without adequate consent or waiver. (Tr. 1708-1714).

In contrast, the Respondent solicited the expert opinion of Professor Alfred Alfieri, University of Miami School of Law. (R. Exh. 732: Expert Report of Alfred Alfieri). Professor Alfieri's opinion was equally clear and convincing – while a potential conflict existed with the two Greenberg firm engagements, they were "generally aligned" with one another, did not conflict or impair either representation, and did not result in a conflict of interest or breach of Respondent's fiduciary duty. (Tr. 2908 – 2928).

The differing expert opinions on this issue resulted in different conclusions by the ALJ and Comptroller. The ALJ concluded that no breach of fiduciary duty was established on the record, essentially adopting, in part, the opinion offered by Professor Alfieri. The Comptroller, on the other hand, rejected the ALJ's conclusion on this issue, finding instead a breach of Respondent's fiduciary duty. (OCC Final Decision at 15). The different conclusions reached on these competing opinions demonstrate the closeness with which the issues were ultimately decided – establishing a reasonable degree of justification in asserting the claim.

As to the issue of culpability, and whether the Respondent's conduct met the "reckless" standard of Section 1813(u)(4), Enforcement Counsel relied on the expert opinion of Professor James Fleissner of Mercer University School of Law, whose proffered testimony, though not admitted by the ALJ on other grounds, would have suggested that the Loumiet violated the "standards of care" required of the Greenberg firm's investigation under the circumstances. Professor Fleissner, if permitted to testify, would have opined that Respondent Loumiet was reckless in the conduct of the investigation and preparation of the subsequent two reports. (*See* Prehearing Order Granting Motion in Limine, dated September 20, 2007). Thus, the allegation that Loumiet acted recklessly was not without some basis in law and fact, as supported by the opinion of this expert witness.

Enforcement Counsel likewise relied on the expert testimony of National Bank Examiner C. Michael Rardin, who articulated the general standards of care required in the business of banking, though perhaps not in the specific legal context at issue here. *See* Judge Cook's Recommended Decision at 10. Examiner Rardin was permitted to offer his expert opinion on each of the elements of misconduct, culpability, and effect, and testified at length on the harm and financial loss suffered by Hamilton Bank as a result of the deficient investigation. (Tr. 192-279; OCC Exh. 169).

Both the ALJ and the Comptroller, however, expressly rejected Rardin's conclusions on the element of "effect," finding that "the record lacks sufficient evidence that the two reports prepared by Mr. Loumiet caused, or were likely to cause, harm to the bank satisfying the "effect" requirement" of the IAP statute. (OCC Final Decision at 17).

Despite the Comptroller's findings that insufficient evidence had been adduced to meet the effect requirement, it was not without some reasonable and permissible evidence. Instead, there was a clearly held opinion by a National Bank Examiner – an expert of presumed expertise – that harm to Hamilton Bank occurred within the "more than minimal financial loss"

requirement of the effect element.

The decision in *Grant Thornton* was issued after the hearing in the underlying case had been completed, but before the ALJ issued her Cook Recommended Decision. It clarified the standard previously applied to independent contractors, insofar as they are judged to have engaged in "unsafe or unsound practices" in the business or affairs of banking within the meaning of Section 1818(b). The decision in *Grant Thornton* caused the ALJ to request supplemental briefing on the effects that decision would have on the ultimate outcome of the underlying proceeding, and during this supplemental briefing Enforcement Counsel was forced to somewhat change the theory of its jurisdictional claim. (*See* OCC Post-Hearing Supplemental Brief at 6). The standard announced by the court foreclosed in part Enforcement Counsel's original claim that Loumiet participated in the "business or affairs" of the Bank. (*See* Judge Cook's Recommended Decision at 20; OCC Final Decision at 11, fn. 6).

The intervening decision in *Grant Thornton*, and the ultimate effect that decision might have had on the claims previously brought by Enforcement Counsel, could neither be foreseen nor anticipated. The Respondent's claim of an "eleventh hour" change does not necessarily equate to an unjustified assertion, if there remained a reasonable basis in law and fact for making the initial allegation.

Based on the record viewed as a whole, I find that the position initially advanced, and ultimately pursued by Enforcement Counsel in the underlying litigation, was substantially justified, had a reasonable basis in both law and fact, and raised issues about which reasonable persons could differ as to the appropriateness of the contested action, all within the meaning of the Equal Access to Justice Act as interpreted by *Pierce v. Underwood*, 487 U.S. 552 (1988). The positions asserted by the government were supported by a variety of highly-qualified expert witnesses from both within and outside the OCC; stood a reasonable chance of succeeding on the merits; and represented a good-faith and credible interpretation of law that, in the end, was not unjustified.

Based on the above finding that Enforcement Counsel was substantially justified in filing the Notice of Charges, the remaining issues need not be addressed, to wit: whether a monetary recovery should be limited by the applicable fee cap contained in the EAJA; whether the Respondent "incurred" fees within the meaning of the EAJA as a result of payments made by his current and former law firms; or whether eligibility for a monetary recovery is otherwise affected by the agreements of these law firms to reimburse. Because the OCC was substantially justified in bringing the action, I recommend that the request for fees and expenses be denied.

Conclusion

Under all of these circumstances, I find that the position taken by Enforcement Counsel with respect to alleging jurisdiction over Loumiet as an IAP under 12 U.S.C. § 1813(u)(4)(B), and with respect to the alleged violation of 12 U.S.C. §§ 1818(b) and (i), were substantially

justified and I recommend that Respondent's application pursuant to EAJA be denied.[3]

Order

The Respondent's application for an award of attorney's fees and expenses is denied.

SO ORDERED.

Dated: July 20, 2010.

C. Richard Miserendino
Administrative Law Judge

3 If neither the Applicant nor Enforcement Counsel seek review of the initial decision on the fee application, and the agency does not take review on its own initiative, the initial decision on the application shall become a Final OCC Decision 30 days after it is issued. 31 C.F.R. § 6.15.