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

In the Matter of:	)	
	)	
James E. Plack, individually,	)	AA-EC-2014-90
and as a former institution-affiliated party of	)	
	)	
American Bank	)	
Rockville, Maryland	)	
(Inactive Federal Savings Association)	)	

ORDER DENYING RESPONDENT'S MOTION TO REOPEN PROCEEDING

Before the Comptroller of the Currency ("Comptroller") is a "*Motion to Reopen Proceeding*" ("*Motion to Reopen*") submitted by former Respondent James E. Plack ("Respondent"). Respondent requests that the Comptroller reopen the above-captioned enforcement action so that Respondent may move to vacate and set aside all rulings against him, including a 2015 *Consent Order*, on the ground that the Office of Financial Institution Adjudication ("OFIA") administrative law judges ("ALJs") who presided over the enforcement action were unconstitutionally appointed. Office of the Comptroller of the Currency ("OCC") Enforcement Counsel opposes Respondent's request. For the reasons discussed below, the *Motion to Reopen* is hereby denied.

I. BACKGROUND

The instant motion presents an attempt by Respondent to revive a long-resolved challenge to an OCC enforcement action that was concluded when Respondent agreed to the entry of a Consent Order over five years ago, in 2015. OCC Enforcement Counsel commenced the action against Respondent on October 29, 2014, when they filed the *Notice of Charges for Removal and Prohibition and Notice of Assessment of Civil Money Penalty* ("*Notice of Charges*"). *See Motion to Reopen* at 2; *Enforcement Counsel's*

Opposition to Motion to Reopen Proceeding ("*Opposition*") at 2; *Opposition*, Ex. 1. Pursuant to 12 U.S.C. § 1818(e) and (i), the *Notice of Charges* sought an order of removal and prohibition and a civil money penalty against Respondent. *See Motion to Reopen* at 2; *Enforcement Counsel's Opposition to Motion to Reopen Proceeding* ("*Opposition*") at 2; *Opposition*, Ex. 1.

After the OCC initiated the enforcement action against him, Respondent waged a multi-prong litigation campaign to halt the proceeding. This included a judicial challenge to the constitutionality of the appointment of the ALJ assigned to the case. In November 2015 Respondent filed in the United States District Court for the Southern District of New York a complaint for injunctive relief and a motion for preliminary injunction ("*November 2015 Complaint*") against the OCC asserting that the appointment of OFIA ALJs violated the Appointments Clause of the Constitution ("Appointments Clause Claim"), *see* U.S. CONST. art. II, § 2, cl. 2. *See Motion to Reopen* at 2; *Opposition* at 2. The district court denied the request of the *November 2015 Complaint* and dismissed the action for lack of subject matter jurisdiction and venue. *See Plack v. OCC*, No. 1:15-cv-08783, ECF No. 24, *Order Den. Prelim. Inj. Dismissing for Lack of Subject Matter Jurisdiction and Venue* (S.D.N.Y. Dec. 11, 2015). As relevant, the court found that Section 1818(h)-(i) "limit[ed] review to the Courts of Appeals, after the completion of the action," and that the statutory framework would "not foreclose meaningful judicial review of the Plaintiff's important structural constitutional claims." *Id.* at 1-2. Respondent appealed the order of dismissal to the Second Circuit, but voluntarily dismissed this appeal in late December 2015. *See Plack v. OCC*, No. 15-4006, ECF No. 19, *Order* (2d Cir. Dec. 30, 2015).

In parallel with the legal challenge that was filed in New York, the financial institution associated with Respondent, American Bank Holdings and American Bank, FSB, filed an action with the United States Court of Appeals for the District of Columbia Circuit that also sought to halt the enforcement proceedings. *American Bank Holdings, Inc. et al. v. OCC*, No. 15-1446 (D.C. Cir.). Filed on December 14, 2015, American Bank petitioned the Court to stay the enforcement action in order to allow the bank, a non-party to the enforcement action, to legally challenge a ruling by the ALJ regarding an assertion of privilege concerning proposed testimony in connection with the hearing, which was scheduled to begin shortly. *See Petition for Review*, *American Bank Holdings, Inc. et al. v. OCC*, No. 15-1446 (D.C. Cir., Dec. 14, 2015). The Court denied the bank's emergency motion for a stay of the enforcement proceedings against Respondent on December 15, 2015. The appeal was voluntarily dismissed in March of 2016.

Meanwhile, on December 13, 2015, Respondent filed in the enforcement action a *Motion to Dismiss*, reiterating—this time in the administrative forum—his Appointments Clause Claim. *Motion to Reopen* at 2; *Opposition* at 2-3. The *Motion to Dismiss* was denied and the administrative hearing commenced on December 15. *Motion to Reopen* at 2; *Opposition* at 3. On December 17, after two days of hearing, the OCC and Respondent executed a *Consent Order* in which Respondent, as relevant, agreed to a permanent prohibition from the banking industry and a $100,000 civil money penalty, and voluntarily waived: "(a) all rights to a hearing and a final agency decision pursuant to 12 U.S.C. §§ 1818(e) and (i) and 12 C.F.R. Part 109; (b) all rights to seek judicial review of this Order; [and] (c) all rights in any way to contest the validity of this Order." *See Opposition*, Ex. 1, *Consent Order*, arts. 2 § 1-2; 3 § 1; 5 § 1(a)-(c).

Nearly five years later, on November 3, 2020, Respondent submitted his *Motion to Reopen.* In the *Motion to Reopen*, Respondent asserts that under the Supreme Court's 2018 decision in *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018), the proceedings against him were commenced in violation of the Appointments Clause and the 2015 *Consent Order* is thus "null and void." *Motion to Reopen* at 3. The Comptroller directed Enforcement Counsel to respond to the *Motion to Reopen* by December 11. *See Order*, dated November 12, 2020. Enforcement Counsel timely opposed the *Motion to Reopen*, arguing that there is no basis to reopen an enforcement proceeding after a final consent order has been issued; that Respondent waived any right to challenge the *Consent Order*; and that instead of moving to reopen the proceedings, Respondent should avail himself of existing channels to request modification or termination of the terms of the *Consent Order*. *See Opposition* at 4-9.

II. DISCUSSION

Having carefully considered the parties' arguments, the Comptroller concludes that there is no basis for authorizing the extraordinary remedy of reopening the long-terminated proceedings against Respondent, particularly when Respondent did not exhaust his administrative remedies and knowingly waived any right to challenge the *Consent Order* or reopen the enforcement action.

A. Respondent failed to exhaust his administrative remedies

A party against whom the OCC assesses a penalty or proposes a cease-and-desist order or a prohibition from the banking industry may contest such action through an administrative hearing. *See* 12 U.S.C. § 1818(b)(1), (e)(4), (i)(2)(H). Section 1818(h)(1) provides that "[a]fter such hearing, and within ninety days after the [OCC] has notified

the parties that the case has been submitted to it for final decision, it shall render its decision . . . and shall issue and serve upon each party to the proceeding an order or orders consistent with the provisions of this section." *See id.* § 1818(h)(1). Section 1818(h) further provides that "[j]udicial review of any such order shall be *exclusively* as provided in this subsection (h)" and authorizes judicial review in the appropriate United States Court of Appeals of "any order served pursuant to paragraph (1) of this subsection (*other than an order issued with the consent of the . . . institution-affiliated party . . .*)." *See id.* § 1818(h)(1)-(2) (emphasis added).

Respondent asserts that "[a]fter exhausting all of his remedies for challenging the unconstitutional appointment of the OFIA ALJs, [he] entered into a Consent Order with the OCC." *Motion to Reopen* at 2-3. This assertion demonstrates a misapprehension of the requirements of exhaustion. Respondent cannot have exhausted his administrative remedies *precisely because* he entered the *Consent Order*. Respondent cites no authority to support his view that raising his Appointments Clause Claim either in the *Motion to Dismiss* or *November 2015 Complaint* but ultimately failing to pursue that claim through the exclusive channels authorized in Section 1818(h)-(i) is sufficient to establish administrative exhaustion. *Cf. Lucia.*, 138 S.Ct. at 2055 (finding that "Lucia made . . . a timely challenge [to constitutionality of appointment of ALJ]: He contested the validity of [ALJ's] appointment before the Commission, and continued pressing that claim in the Court of Appeals and this Court.). The statutory enforcement framework exclusively provides for the following chronology of review: an administrative hearing, final decision by the Comptroller, and judicial review in a circuit court of appeals. *See* 12 U.S.C. § 1818(h)-(i). Respondent did not raise his challenge to the Comptroller or in

circuit court. Indeed, as discussed *infra*, review at these stages was expressly foreclosed by the terms of the *Consent Order* into which he entered. Because Respondent voluntarily chose to settle the enforcement action against him prior to a full administrative hearing, he cannot claim to have exhausted his administrative remedies. *See also Greenberg v. Comptroller of the Currency*, 938 F.2d 8, 12 (2d Cir. 1991) ("The exhaustion doctrine counsels us to allow the OCC to make the necessary factual record and to correct its own errors before we pass on the merits of appellants' claims."); *Dembski v. Sec. and Exch. Comm'n.*, 437 F.Supp. 3d 286, 295 (W.D.N.Y. 2020) ("the *Lucia* court indicated that a timely challenge should be made *both* in the SEC proceeding *and* during the judicial appeal." (emphasis in original)).

B. Respondent waived any right to challenge the Consent Order or reopen the proceedings

An Appointments Clause challenge is a nonjurisdictional, structural claim that is subject to waiver or forfeiture. *See Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 893-94 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("Appointments Clause claims, and other structural constitutional claims, have no special entitlement to review. A party forfeits the right to advance on appeal a nonjurisdictional claim, structural or otherwise, that he fails to raise at trial."); *id.* at 878-79 (characterizing Appointments Clause challenges as "nonjurisdictional structural constitutional objections"). Here, when Respondent signed the *Consent Order* on December 17, 2015—after having raised the Appointments Clause Claim in both the enforcement and district court actions—he acknowledged that he had "read and unders[tood]" the promises and obligations of the order, which included the waiver provisions set out in

Article V. *Consent Order*, art. 5, § 3.[1] Consistent with this expression of understanding, on December 29, Respondent voluntarily withdrew his Second Circuit appeal of the order dismissing his *November 2015 Complaint*. *See Plack*, No. 15-4006, ECF No. 19; Fed. R. App. Proc. 42; Second Circuit Local Rule 42.1. This sequence of events thus demonstrates that by entering the *Consent Order*, Respondent knowingly waived his right to pursue his Appointments Clause Claim. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (explaining that waiver is "an intentional relinquishment or abandonment of a known right or privilege").

Finally, it is worth noting that the Supreme Court's *Lucia* decision was not a necessary predicate for Respondent to meaningfully press his Appointments Clause Claim through the channels provided for in Section 1818(h)-(i); indeed, the Supreme Court explained that existing case law contained "everything necessary to decide" *Lucia*. *Lucia*, 138 S. Ct. at 2053. The untimeliness of the instant motion—submitted nearly five years after the execution of the *Consent Order* and over two years after *Lucia* was decided—further establishes that this matter is not among "those rare cases" in which an exercise of discretion to hear an unexhausted or waived claim would be appropriate. *Cf. Freytag*, 501 U.S. at 879. When there exist procedures to request modification or termination of the terms of a consent order, *see* 12 U.S.C. § 1818(e)(4), and in the absence of established precedent or any compelling justification to do so, the Comptroller will not disturb the finality of the underlying proceedings, particularly when those

[1] Respondent was represented by counsel throughout the underlying administrative enforcement proceedings, the related district court proceedings, and at the time of execution of the *Consent Order*. *See Opposition* at 6.

proceedings were concluded because of a bargained-for agreement that included waiver of challenges such as the one raised in the instant *Motion to Reopen*.

III. CONCLUSION

For the reasons stated, the Comptroller hereby denies Respondent's *Motion to Reopen*.

It is so ordered.

Date: February 1[redacted] 2021

/s/ Blake J. Paulson

ACTING COMPTROLLER OF THE CURRENCY