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

In the Matter of: RICHARD USHER Former Head of EMEA FX Spot Trading JP Morgan Chase Bank, N.A. Columbus Ohio	)))))))))	AA-EC-2017-3

ORDER DENYING ENFORCEMENT COUNSELS' MOTION FOR INTERLOCUTORY REVIEW

Before the Comptroller of the Currency ("Comptroller") is *OCC's Motion for Interlocutory Review* filed by Enforcement Counsel ("EC"), requesting that the Comptroller review the *Order Regarding Enforcement Counsel's Claim of Privilege* issued by Administrative Judge Jennifer Whang on December 7, 2020 and the subsequent *Order Denying Motion for Reconsideration* issued by ALJ Whang on January 15, 2021. For the reasons discussed below, the Comptroller hereby denies *OCC's Motion for Interlocutory Review*. Although the motion is denied, the Comptroller does note the highly sensitive nature of the Document and orders that it and any discussion of its contents remain under seal throughout all proceedings in this matter.

I. BACKGROUND

This dispute arises out of the disclosure of a document ("Document") by EC to Respondent during the normal course of discovery in the captioned matter. EC claims that the disclosure was inadvertent, and that the Document contains information protected by the attorney-client privilege. Respondent advised EC of his intention to attach the

Document to the parties' joint October 19, 2020 filing regarding scheduling. EC then asserted attorney-client privilege over the content of the Document and attempted to claw back[1] the Document and substitute a redacted version. Ultimately the parties could not agree regarding the disposition of the Document, which resulted in proceedings before the ALJ.

A. Respondent's Sealed Submission Regarding Enforcement Counsel's Claim of Privilege.

Respondent filed *Respondent Richard Usher's Sealed Submission Regarding Enforcement Counsel's Claim of Privilege* on November 6, 2020. Respondent argued that the statements at issue within the document were not, on their face, subject to attorney-client privilege as they were neither to nor from an attorney. Respondent further argued that the statements at issue fell into two categories; (1) the author's discussion of his expectations based on his conversation with unnamed individuals not identified as attorneys; and (2) a discussion between two OCC bank examiners in which each expressed their opinion without reference to or participation by an attorney. The Respondent noted that the information from the unknown individual in the first category was so intertwined with statements of the author's opinion as to be indistinguishable as separate statements. Finally, Respondent argued that the documents supported a key element of his defense.

[1] The Comptroller notes that discovery in this case is governed by a Protective Order agreed to by the parties and entered by the ALJ on May 20, 2020. The Protective Order states in relevant part that:

> The production of any document in this proceeding shall not, for the purpose of this or any other proceeding, constitute a waiver of any legal privilege, right, or protection from disclosure applicable to the document produced or any other documents, and the parties do not have to meet the requirements similar to or specified in Federal Rule of Evidence 502(b)(1)-(3), or any other standard, to prevent the waiver of any privilege, right, or protection from disclosure.

The Protective Order also provides for a "claw back" procedure to protect documents that are produced pursuant to the order that are subject to claims of privilege. Questions regarding privilege are to be submitted to the ALJ for resolution.

B. OCC's Response to Respondent's Sealed Submission

EC filed the *OCC's Response to Respondent's Sealed Submission* on November 20, 2020. EC argued that the statements in the Document were, on their face, attorney-client communications because the author referenced "enforcement" which, EC argued, referred to the Enforcement Group within the OCC's Chief Counsel's Office. EC further argued that the communications within the Document were made for the purpose of obtaining legal advice and were privileged, and that the inclusion of 13 non-attorney participants in the email chain is explained by the fact that these participants were OCC examiners with a need to know the information at issue. EC also disputed the argument that Respondent's claimed need for the Documents in support of his defense overrode the attorney-client privilege, challenging the underlying assumption that the Documents support the defense itself.

C. Respondent's Reply Brief

On November 25, 2020, Respondent filed *Respondent Richard Usher's [Proposed] Reply Brief in Support of His Sealed Submission Regarding Enforcement Counsel's Claim of Privilege*. Respondent argued that the source of the information at issue is not self-apparent on the face of the Document and, more significantly, the EC had not proffered any evidence in its pleading as to that source. Respondent argued that the claim of privilege should not be upheld because the source remained ambiguous and EC, as the party asserting the privilege, had failed to meet its burden to show that the communication was protected. Respondent further argued that the statements reflecting OCC examiner's own thoughts and opinions regarding OCC policies (to the extent that they were not part of seeking or receiving legal advice) did not fall within the attorney-client privilege. Finally, Respondent

argued that the Documents contain no indicia that there was any expectation of privacy, noting, *inter alia,* that one recipient forwarded the communication to others without first seeking permission to do so.

D. Order Regarding Enforcement Counsel's Claim of Privilege

On December 7, 2020 ALJ Whang issued her *Order Regarding Enforcement Counsel's Claim of Privilege*, rejecting EC's arguments. ALJ Whang held that EC had failed to meet its burden of proof as to either category of statements within the Documents. ALJ Whang specifically held that EC had failed to demonstrate that the statements in the first category were "accurately reflective of communications that[the author] or someone else had had with an E&C attorney, rather than the impressions of some non-attorney managerial, administrative, or support personnel within E&C...." *Order Regarding Enforcement Counsel's Claim of Privilege*, at 6. ALJ Whang likewise held that there was no evidence that the examiner opinions in the second category were made to or received from an attorney[2] nor was there evidence of an intent to confer with an attorney. *Id* at 8.

E. OCC's Motion for Reconsideration.

On December 21, 2020, EC filed a motion seeing reconsideration of the December 7, 2020 Order. EC provided an affidavit from Thomas McQuade, the author of the original statements in the Document, attesting to the fact that he was relaying communications from an attorney in Enforcement and that all recipients of the emails within the Document had a need to know the information conveyed.

F. Respondent's Opposition to Enforcement Counsel's Motion for Reconsideration

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[2] ALJ Whang found that EC conceded that the statements were neither made to nor received from an attorney. *Order Regarding Enforcement Counsel's Claim of Privilege*, at 8.

On January 7, 2021, Respondent filed an opposition to EC's motion for reconsideration. Respondent argued that EC was attempting to relitigate the initial filing by supplementing prior arguments with information that had been available to EC at the time of the original filing.

G. Order Denying Motion for Reconsideration

On January 15, 2021 ALJ Whang denied EC's Motion for Reconsideration finding that EC's proffered testimony of Mr. McQuade was not new evidence, EC had not established that the testimony was newly discovered and not available at the time the *OCC's Response to Respondent's Sealed Submission* was filed. ALJ Whang took particular note that appropriate time for filing such an affidavit was in support of the original response, particularly because the attorney named by Mr. McQuade as the source of the information was one of the attorneys of record for the OCC at the time of the filing and he could have supplied[3] the necessary affidavit. *Order Denying Motion for Reconsideration* at 3.

ALJ Whang also explained that her order did not represent a categorical determination that EC attorneys are never protected by the attorney client privilege when they provide advice regarding policy or strategy:

> In the Order, the undersigned did note that she was "not sufficiently persuaded," based on Enforcement Counsel's arguments, "that the work done by E&C attorneys in reviewing draft supervisory letters and providing comments and edits to [the Large Bank Supervision division] resembles that of private lawyers seeking to protect the interests of their clients, which may confer the protection of attorney-client privilege, rather than agency lawyers performing regulatory or policy functions, which may not." Id. at 6-7. In so concluding, however, the undersigned made no determination of whether

[3] The Comptroller notes that it appears in the record that Mr. McQuade had retired from the OCC several years previously, presenting the possibility that his late-appearing affidavit was due to the fact that he was not as readily available to provide an affidavit as a current employee. The Comptroller also recognizes that counsel who is appearing on behalf of a client in litigation is placed in a very difficult position when they are also called upon to provide factual testimony in the matter as well. *See generally, ABA Model Rules of Professional Conduct*, Rule 3.7 (Lawyer as Witness).

> the information relayed in the email exchange indeed constituted legal advice, given Enforcement Counsel's lack of sufficient showing that the Document reflected attorney-client communication in the first instance, and she does not do so now. See id. at 7 (stating that "[t]he undersigned does not hold that such activity on the part of agency attorneys reviewing draft supervisory letters is definitively not protected by attorney-client privilege, only that Enforcement Counsel has not made a persuasive case as to why it should be in this instance").

Id. at 2, fn 2. ALJ Whang further emphasized this point:

> In particular, the undersigned disagrees that there is any reason the Order should have a "significant chilling effect on the OCC and the other federal banking agencies" (Motion for Reconsideration at 14), as Enforcement Counsel fears, given that the Order does not reach the issue of when and whether the work done by agency attorneys in reviewing and commenting on draft supervisory letters constitutes privileged legal advice.

Id. at 4, fn 6.

H. Motion for Interlocutory Appeal

On January 29, 2021 EC filed a *Motion for Interlocutory Appeal* arguing that subsequent modification of the ruling at the conclusion of the proceedings in this matter would be an inadequate remedy to protect the alleged attorney-client privileged information from public disclosure. EC also argued that permitting Respondent to continue to use the information would result in "manifest injustice" and that immediate review was warranted in light of clear errors of law and fact.

I. Opposition to Enforcement Counsels Motion for Interlocutory Review

On February 12, 2021, Respondent filed his opposition to the motion for interlocutory review, arguing that EC had failed to meet the standard for interlocutory review.

J. Order Referring Enforcement Counsel's Motion for Interlocutory Review

On February 16, 2021 ALJ Whang referred the Motion for Interlocutory Review and Opposition to the Comptroller of the Currency pursuant to Rule 28 of the Office of the Comptroller of the Currency's Uniform Rules of Practice and Procedure, 12 C.F.R. § 19.28.

II. DISCUSSION

The Comptroller may, at his discretion, exercise interlocutory review of an ALJ's ruling if the Comptroller finds that:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;
(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;
(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or
(4) Subsequent modification of the ruling would cause unusual delay or expense.

12 C.F.R. § 19.28(b). EC invokes the third criteria as grounds for interlocutory review of the *Order Regarding Enforcement Counsel's Claim of Privilege* and *Order Denying Motion for Reconsideration*. EC also argues that manifest injustice will result from a failure to intercede in the dispute on an interlocutory basis, and that the interlocutory review is not only warranted but also required to correct clear errors of law and fact.

As a general matter, an interlocutory appeal of a presiding officer's ruling on a case-management issue will not be granted unless the circumstances justifying the appeal are extraordinary or involve issues that are fundamental to the presentation of the case or affect substantial rights of the parties. *IN THE MATTER OF * * * NATIONAL BANK * * *, * * **, 1985 WL 203012, at *1 (Citing *Beatrice Foods Co.*, 18 Ad. L.2d 305 (FTC 1965); *Montgomery Ward Co. Inc.*, 16 Ad. L.2d 458 (FTC 1964); *James S. Rivers, Inc.*, 14 Ad. L.2d 447 (FCC Rev. Bd. 1963); *School Services Inc.*, 22 Ad. L.2d 323 (FTC 1967).. Discovery issues are rarely the proper subject for interlocutory review. *Id.* In that context,

"an agency will not normally accept interlocutory review on matters committed to the ALJ's discretion, such as the admissibility of evidence." *IN THE MATTER OF * * *, FORMER PRESIDENT AND DIRECTOR, * * * NATIONAL BANK, * * *, * * **, 1987 WL 288108, at *1 (citing *Toledo-Edison Co.*, 38 Ad. L.2d 763 (NRC 1976); *Mellon National Corp.*, 38 Ad. L.2d 50 (FRB 1975);2 Fed. Proc. 136 § 2:167 (1981)). Again, "interlocutory review is proper where the underlying issue is significant, and the interests of the parties are sufficiently great." *Id.* (citing *Kansas Gas and Electric Co.*, 39 Ad. L.2d 11 (NRC 1976).

Questions of privilege may merit consideration on an interlocutory basis, and the Comptroller has granted such review in the past. However, in the one past instance where interlocutory appeal was granted that the Comptroller is aware of, review was granted to delineate a larger, more fundamental issue, such as how to apply a qualified governmental privilege to proceedings before the Comptroller. *See, IN THE MATTER OF * * *, FORMER PRESIDENT AND DIRECTOR, * * * NATIONAL BANK, * * *, * * **, 1987 WL 288108, at *1. (In this instance, while this motion for interlocutory review arises in a procedural context, the underlying issue involves a substantive rule of law which requires the application of the deliberative process privilege. At issue are the interests of the Respondent in accurate judicial fact finding and of EC in maintaining the integrity of the bank examination process.). That situation is not presented here. In this case there is no dispute that the attorney-client privilege presents an absolute privilege that, if applicable, would bar the disclosure of at least a portion of the document in question in this setting. There is also no fundamental uncertainty regarding the appropriate burden of proof– a preponderance of the evidence – necessary to successfully defend the assertion of the

privilege. There is likewise no question that the burden of proving that the attorney-client privilege is applicable rests with EC. *See, e.g. .Judicial Watch, Inc. v. U.S. Dep't of Homeland Security*, 841 F. Supp. 2d 142, 153 (D.D.C. 2012)(" the proponent bears the burden of demonstrating the applicability of any asserted privilege...[t]o do so, the proponent must adduce competent evidence in support of 'each of the essential elements necessary to support a claim of privilege.'" (citations omitted). Likewise, any ambiguity in that presentation of proof is construed against EC. *Scholtisek v. Edlre Corp*, 441 F. Supp. 2d 459, 462 (W.D.N.Y 2006). Moreover, as ALJ Whang's order makes clear, her ruling does not represent a categorical determination that communications by EC attorneys are not covered by the attorney client privilege when they provide policy advice to their clients. ALJ Whang's order found that EC counsel had failed to provide timely evidence to meet its burden that the communication was privileged, not that the communication was unlikely to be privileged.

For the reasons stated below, the Comptroller disagrees with EC that the criteria supporting interlocutory review – specifically that subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy – has been met. The Comptroller therefore denies EC's *Motion for Interlocutory Review* as to both the *Order Regarding Enforcement Counsel's Claim of Privilege* and *Order Denying Motion for Reconsideration.* In denying this motion the Comptroller expressly takes no view regarding the merits of the underlying privilege dispute.

A. Post-Hearing Review Would Be an Adequate Remedy

With respect to the first criterion raised in support of their motion, EC argues that the "sacred" nature of attorney-client privilege and likelihood of public disclosure of the

information if this matter proceeds further require immediate review. Specifically, EC argues that:

> [u]nder the Tribunal's ruling, Respondent will be free to use a highly sensitive, confidential, and plainly privileged Document. In addition, once unsealed, any member of the public could likely obtain the Document under the Freedom of Information Act. Respondent will also likely introduce the Document into the record at hearing, meaning that the privileged information in the Document would likely become known to the public, including any members of the public or press that attend the hearing.

Motion for Interlocutory Appeal at 4. EC further cites as support for its position the provisions of the Uniform Rules of Practice and Procedure, 12 C.F.R. Part 19, subpart A ("Uniform Rules"), specifically 12 C.F.R. §19.25(g) governing the ruling on motions related to discovery disputes, which provides:

> …the administrative law judge may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the administrative law judge its intention to file a timely motion for interlocutory review….

12 C.F.R. §19.25(g). EC's argues that this provision acknowledges the importance of any discovery ruling involving privileged material, and, more significantly, mandates the acceptance of an interlocutory appeal in any matter in which a dispute involves a claim of privilege.

The Comptroller recognizes that maintaining and preserving applicable privileges is important to the maintaining the integrity of the OCC's supervisory functions. However, EC's argument ignores the other protections against unwarranted public disclosure of sensitive information during the course of proceedings as well as the opportunity for post-proceeding review during the course of a review of recommended decision by the Comptroller that are inherent in the Uniform Rules. Specifically, the Document has been

filed under seal, and can remain under seal throughout the proceedings, including being shielded from public disclosure by closing to the public portions of any hearing that involve evidentiary discussion, testimony and argument regarding the Document.

EC is correct that proceedings before an ALJ are generally public in nature. *See* 12 C.F.R. §19.33(a). However, EC is incorrect that participation in a public hearing will immediately expose the Documents to public scrutiny. The Uniform Rules provide that parties may file sensitive material under seal, a procedure well known to EC as all pleadings in the instant dispute have been filed under seal. Once filed under seal, the ALJ is required to "take all appropriate steps to preserve the confidentiality of [documents as to which a dispute regarding, *inter* alia, privilege exists] or parts thereof, **including closing portions of the hearing to the public.**" 12 C.F.R. §19.33(b) (emphasis added).

The Uniform Rules likewise provide a mechanism for post-hearing review of the disputed materials and related rulings while the information is still protected from public disclosure. Specifically, the Uniform Rules provide that after a hearing an administrative judge prepares and files with the Comptroller findings of fact, conclusions of law, a proposed decision and order along with the record in every case. 12 C.F.R. §19.38. The Parties may then file exceptions to "the recommended decision, findings, conclusions or proposed order, **to the admission or exclusion of evidence**, or to **the failure of the administrative judge to make a ruling proposed by a party**." 12 C.F.R. §19.39(a) (emphasis added). Only after review and decision on the exceptions would the Documents become public, and then only if EC were not successful in persuasively arguing in favor of the privilege. Therefore, contrary to its assertions, EC is not without the ability to protect the Documents from public disclosure nor without an adequate remedy even if

interlocutory review is denied. Although the Comptroller is denying the Motion for Interlocutory Appeal, the Comptroller does note the highly sensitive nature of the Document. Because of this, the Comptroller will order that the Document and any discussion of its contents remain under seal throughout all proceedings in this matter.

Furthermore, the Comptroller agrees with Respondent that the Supreme Court's decision in *Mohawk Industries Inc. v. Carpenter*, 558 U.S. 100 (2009) supports the finding that interlocutory appeal is not required. In *Mohawk Industries* the petitioner asserted a claim of attorney-client privilege regarding a meeting with counsel. Petitioner argued that "disclosure orders adverse to the attorney-client privilege qualify for immediate appeal," reasoning that such orders render confidentiality "irreparably destroyed." 558 U.S. at 103, 108. The Court disagreed, stating "post judgement appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege." 558 U.S. at 109. The Court further noted "[a]ppellate courts can remedy the improper disclosure of privileged material . . . by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence." *Id.* This is exactly the scenario envisioned by the post-hearing exceptions provisions of the uniform rules. The Document can remain under seal, the hearing can be closed to the public during discussion of the document, EC can brief its objections as part of the exceptions process and, if EC is correct, the Comptroller "can remedy the improper disclosure of privileged material . . . by vacating [the] adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence."

B. Manifest Injustice

The Comptroller is similarly unpersuaded by EC's argument that manifest injustice will result if Judge Whang's rulings stand. EC argues that "[m]anifest injustice would result from allowing Respondent to obtain and use privileged information in an OCC administrative proceeding, particularly when EC has demonstrated that the Document itself, on its face, evidences that it contains attorney-client privileged information." *OCC's Motion for Interlocutory Review* at 6. Every contested ruling in every adverse proceeding necessarily results in one party "winning" and one party "losing." As detailed above, the Uniform Rules contemplate that a party may disagree with one or more rulings of an administrative judge and provide a mechanism for obtaining review prior to issuance of a final decision. See 12 C.F. R. §19.39(a). EC's argument is essentially that the manifest injustice that will result is that it will have to wait to obtain that review, as any party would, until the conclusion of proceedings. The Comptroller is unpersuaded that subjecting EC to application of the Uniform Rules constitutes manifest injustice.

C. Clear Error of Law and Fact

The Comptroller is not persuaded by EC's third and final argument that interlocutory intervention is required because ALJ Whang's decisions evidence clear errors of fact and law. Inherent in any appeal is an argument that there has been an erroneous ruling of fact, law or both. EC has failed to demonstrate that the error alleged here merits interlocutory review under the provisions of 12 C.F.R. §19.28(b). To the contrary, as detailed above, EC proffered a single reason, inadequacy of a post-hearing remedy, which has been found unpersuasive. The Comptroller is also unpersuaded that by itself EC's assertion of clear error of law and fact somehow renders post-hearing review pursuant to section 19.39(a) to be an inadequate remedy.

III. CONCLUSION

The Comptroller notes that in declining to grant interlocutory appeal, the parties and the public should not construe this ruling as a broad statement of policy regarding the availability of interlocutory appeal, generally. Further, this order should not be construed as establishing precedent regarding a particular set of facts that are necessary to establish (or overcome) an assertion of the attorney-client privilege. Each case presents a unique circumstance and turns on its own set of facts. Finally, this order should not be construed as a ruling on the correctness of the ALJ's ruling on the underlying issue, whether the Document is properly subject to an assertion of attorney-client privilege. This order finds that EC's claim of privilege did not succeed in this instance because of a perceived weakness in the factual record developed in this case; if the Document is subjected to a future demand for production the agency may seek to supplement the record to bolster its claim.

For the reasons stated above, the Comptroller hereby denies *OCC's Motion for Interlocutory Review*. The Comptroller further orders that the Document and all discussion of its contents remain under seal throughout all proceedings in this matter.

It is so ordered.

Date: April 22, 2021