

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

In the Matter of:)	
)	
Saul Ortega)	AA-EC-2017-44
Former Chief Financial Officer, Director,)	
President, Chief Executive Officer, and)	
Chairman of the Board)	
)	
David Rogers, Jr.)	AA-EC-2017-45
Former Chairman of the Board)	
)	
First National Bank)	
Edinburg, Texas)	

**ORDER DENYING RESPONDENTS' EMERGENCY MOTION TO CERTIFY
ISSUE FOR APPEAL AND STAY PROCEEDINGS BELOW**

Before the Comptroller of the Currency (“Comptroller”) is Respondents’ Emergency Motion to Certify Issue for Appeal and to Stay Proceedings Below (“*Motion to Certify and Stay*”). Respondents request that the Comptroller certify his December 18, 2020 Order Granting Cross Motions for Interlocutory Review and Vacating and Reversing in Part April 9 Order (“*December 18 Order*”) so that they may pursue an immediate petition for review to the United States Court of Appeals for the Fifth Circuit. Respondents further request that the Comptroller stay the proceedings below pending such a petition for review. Office of the Comptroller of the Currency (“OCC”) Enforcement Counsel has filed an Opposition to Respondents’ *Motion to Certify and Stay* (“*Opposition*”). For the reasons discussed below, the Comptroller hereby denies Respondents’ *Motion to Certify and Stay*.

I. BACKGROUND

This matter has twice come before the Comptroller for interlocutory review. *See December 18 Order* at 1-2, n. 3. Respondents first requested that the Comptroller grant interlocutory review of two orders issued by Administrative Law Judge (“ALJ”) Jennifer Whang. These orders concluded that the rulings issued by the previously-assigned ALJs were correctly decided and that any potential Appointments Clause issue with respect to ALJ Whang’s appointment did not warrant further delay of the proceedings. The Comptroller denied Respondents’ request for interlocutory review of these orders (“*Order Denying Interlocutory Review*”). *See id.* n.3. Respondents thereafter petitioned the Fifth Circuit for review of the *Order Denying Interlocutory Review*, and the Fifth Circuit summarily granted the OCC’s motion to dismiss Respondents’ petition for review for lack of jurisdiction. *See Ortega v. OCC* (5th Cir. Sept. 3, 2020) (No. 20-60590) (*per curiam*) (granting OCC’s motion to dismiss).

When this matter came before the Comptroller for interlocutory review for the second time, the Comptroller issued the *December 18 Order*, which granted the parties’ cross-requests for interlocutory review; vacated and reversed in part ALJ Whang’s rulings on statute-of-limitations issues; lifted a stay of the proceedings below; and remanded the matter to ALJ Whang for continued proceedings consistent with the *December 18 Order*. *See generally, December 18 Order.*

On December 21, 2020, Respondents submitted to the Comptroller—purportedly “pursuant to 12 C.F.R. [Part] 19 and the [*December 18 Order*]”—the instant *Motion to Certify and Stay*, which relies on 28 U.S.C. § 1292(b) (setting forth procedure for United States district court to certify issue for appeal to circuit court of appeals) and argues that

because the criteria supporting interlocutory review to the Comptroller under the applicable procedural rules were deemed satisfied, certification for immediate judicial review is warranted. *See Motion to Certify and Stay* at 1, 8-9. Enforcement Counsel thereafter filed an *Opposition*, arguing that the *Motion to Certify and Stay* should be denied because its submission was unauthorized, and the *December 18 Order* is not a final agency action subject to judicial review. *Opposition* at 2-4.

II. DISCUSSION

As an initial matter, the present motion is not provided for by either the applicable rules of procedure found in the OCC's regulations or in the *December 18 Order* issued by the Comptroller. Respondents confoundingly identify the *December 18 Order* as one of the bases pursuant to which they submitted the instant motion. The *December 18 Order* did not solicit additional briefing and instead "remand[ed] this matter so that the proceedings below may be resumed in a manner consistent with [the order]." *See December 18 Order* at 3, 19. Equally puzzlingly, Respondents cite 12 C.F.R. Part 19 as another basis on which they submit the instant *Motion to Certify and Stay*, yet there is nothing in Part 19 that lends substantive or procedural support to their motion. Not only is the *Motion to Certify and Stay* inconsistent with the express terms of the Comptroller's *December 18 Order* and plainly outside the course of regular proceedings, as is discussed below, the relief Respondents request is not cognizable under the relevant statutory framework regarding judicial review of OCC administrative proceedings.¹ Nevertheless,

¹ With regard to this latter point, Respondents should be well aware that the scope of judicial review permitted under 12 U.S.C. § 1818(h)(1) is limited to *final* orders by the Comptroller, especially after having previously litigated this issue before the Fifth Circuit in connection with this case. The Comptroller cautions Respondents of their duty and obligation to avoid engaging in obstructive or dilatory tactics in these proceedings. *See* 12 C.F.R. §§ 19.6(b), 19.7.

pursuant to 12 C.F.R. § 19.4, the Comptroller exercises his discretion to issue this order denying the *Motion to Certify and Stay* for the reasons below.

A. Section 1292(b) Does Not Provide for Interlocutory Review of Administrative Proceedings.

As an initial matter, section 1292(b) of Title 28 of the United States Code has absolutely no applicability here and does not confer upon the Comptroller the ability to “certify” an interlocutory issue in an administrative matter for review by a Court of Appeals. On its face, Section 1292(b) only applies to the certification of interlocutory orders issued by United States district courts and makes no mention of granting similar authority to administrative tribunals in the Executive Branch. Respondents argue (without citing to any authority) that “this tribunal may also certify the statute of limitations of [sic] issue to the Fifth Circuit Court of Appeals under 28 U.S.C. 1292(b) as applied through 12 U.S.C. § 1818(h) and 5 U.S.C. § 704.” *Motion to Certify and Stay* at 8. The Comptroller declines to give these statutes the reading suggested by Respondents and views this argument as pressing the bounds of either being warranted under existing law or representing a good faith argument for the extension, modification, or reversal of existing law, *see* 12 C.F.R. § 19.7(b)-(c).

B. Judicial Review Of Interlocutory Orders Is Precluded By Statute.

The Comptroller also concludes that the Respondents’ petition for an order to either certify or otherwise authorize an interlocutory appeal of the *December 18 Order* to the relevant Court of Appeals is directly contrary to the statutory provisions that govern the current administrative proceeding and judicial review thereof. As Respondents are aware, having just litigated (and lost) this issue before the United States Court of Appeals for the Fifth Circuit, the statutory scheme expressly limits the scope of reviewable orders

to agency orders that present a *final* decision or disposition of a case. Thus, even if the Comptroller were disposed to authorize an interlocutory review of an order other than a final decision, the appellate court would lack the jurisdiction to hear the appeal.

This conclusion is evident from the statutory language and the relevant case law. First, section 1818(h)(1) provides that “[a]fter [an administrative] 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 12 U.S.C. § 1818(h)(1) (emphasis added). As is acknowledged by Respondents, the *December 18 Order* is not the “final say in the enforcement proceeding,” and the Comptroller concludes that it is logical to construe section 1818(h)(1) as limiting judicial review to final orders given that it “is evident because the administrative hearing on the Notice of Charges . . . has not even occurred yet.” See *Henderson v. Office of Thrift Supervision*, 135 F.3d 356, 360 (5th Cir. 1998). The Fifth Circuit (or any court for that matter) would lack a jurisdictional basis to review the *December 18 Order* even if the Comptroller were to acquiesce and grant Respondent’s motion. See *id.* at 359 (“Section 1818(h) . . . does not provide this Court with jurisdiction to hear this case because no final agency order with respect to the Notice of Charges is at issue.”); see also *La. Real Estate Appraisers Bd. v. Fed. Trade Comm’n*, 917 F.3d 389, 394 (5th Cir. 2019) (explaining that federal courts “cannot act without authority from Congress or the Constitution”).

This conclusion is buttressed by other provisions of section 1818. For example, section 1818(i) expressly states that “except as otherwise provided . . . no court shall have

jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order.” See 12 U.S.C. § 1818(i)(1). This statutory framework plainly reflects Congress’s intent to deny judicial review of ongoing administrative proceedings. See *Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 44 (1991) (finding that Section 1818(i)(1) “provides us with clear and convincing evidence that Congress intended to deny . . . jurisdiction to review . . . ongoing administrative proceedings”); *Ridder v. Office of Thrift Supervision*, 146 F.3d 1035, 1039 (D.C. Cir. 1998) (“[t]o prevent regulated parties from interfering with the comprehensive powers of the federal banking regulatory agencies, Congress severely limited the jurisdiction of courts to review ongoing administrative proceedings brought by banking agencies”) (quoting *CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 741 (D.C. Cir. 1995)); *Eastern Nat’l Bank v. Conover*, 786 F.2d 192, 193 (3d Cir. 1986) (“under the plain terms of § 1818(h) and (i), we lack jurisdiction to review the ALJ’s prehearing ruling denying the Bank’s motion to compel disclosure of proposed sanctions”). In *Bank of Louisiana v. Fed. Deposit Ins. Corp.*, 919 F.3d 916, 920 (5th Cir. 2019), a case involving the same statutory scheme at issue here, the Fifth Circuit explained that that enforcement proceedings such as those underlying the instant Petition are “not to be disturbed by untimely judicial intervention.” 919 F.3d at 920; see also *Bd. of Governors of Fed. Reserve Sys. v. DLG Fin. Corp.*, 29 F.3d 993, 999 (5th Cir. 1994); *Groos Nat. Bank v. Comptroller of Currency*, 573 F.2d 889, 895 (5th Cir. 1978).

The *December 18 Order*—which, like the *Order Denying Interlocutory Review*, remanded this matter to ALJ Whang for further proceedings—was not issued in

connection with any final disposition of the underlying enforcement action. Thus, the relevant procedural aspects of this matter remain unchanged since the Fifth Circuit summarily granted the OCC's motion to dismiss Respondents' petition for review for lack of jurisdiction. Under the plain language of Section 1818(h)-(i), the Comptroller has no authority to confer on the Fifth Circuit jurisdiction to review an order that has not been issued in connection with a final decision following an administrative hearing. The *Motion to Certify and Stay* is therefore denied.

III. CONCLUSION

For the reasons stated, the Comptroller hereby denies the *Motion to Certify and Stay*.

It is so ordered.

Date: January 5, 2021

/s/ Brian Brooks, Acting Comptroller of the Currency of the United States

