No. _____

IN THE

Supreme Court of the United States

CARLOS LOUMIET, ESQUIRE,
Petitioner,

v.

UNITED STATES OF AMERICA, MICHAEL RARDIN, LEE STRAUS, GERARD SEXTON, AND RONALD SCHNECK,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For District of Columbia

APPENDIX

Andres Rivero
Counsel of Record
Charles E. Whorton
Jorge A. Mestre
RIVERO MESTRE LLP
2525 Ponce de Leon Blvd.
Suite 1000
Miami, Florida 33134
(305) 445-2500
arivero@riveromestre.com

Counsel for Petitioner

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 13, 2018 Decided January 28, 2020

No. 18-5020

CARLOS LOUMIET, ESQUIRE, APPELLEE

v.

UNITED STATES OF AMERICA, APPELLEE
MICHAEL RARDIN, ET AL., APPELLANTS

Appeal from the United States District Court for the District of Columbia
(No. 1:12-cv-01130)

Tyce R. Walters, Attorney, U.S. Department of Justice, argued the cause for appellants. With him on the briefs were *Jessie K. Liu*, U.S. Attorney, and *Mark B. Stern*, Attorney.

Carlos Loumiet, pro se, argued the cause for appellee. On the brief was *Andrés Rivero*.

Before: GARLAND, *Chief Judge*, KATSAS, *Circuit Judge*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* KATSAS.

KATSAS, *Circuit Judge*: In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court held that the Fourth Amendment creates an implied damages action for unconstitutional searches against line officers enforcing federal drug laws. In this case, we consider whether the First Amendment creates an implied damages action against officials in the Office of the Comptroller of the Currency (OCC) for retaliatory administrative enforcement actions under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). Consistent with the Supreme Court's marked reluctance to extend *Bivens* to new contexts, we hold that the First Amendment does not create such an implied damages action.

I

In 1999, the OCC began an investigation of Hamilton Bank and three of its executives for the allegedly fraudulent concealment of some $22 million in loan losses. The bank retained an outside law firm to investigate the charges. Carlos Loumiet, then a partner at the law firm, prepared two reports. The first one, made for the bank's auditing committee and shared with the OCC, was issued in November 2000. It found no convincing evidence that the executives had fraudulently concealed the losses. The OCC was skeptical and provided Loumiet with additional evidence. In response, Loumiet prepared a second report, issued in March 2001. It concluded that the disputed transactions were poorly handled but still found insufficient evidence to conclude that the executives had fraudulently concealed the losses. The OCC disagreed and placed the bank into a receivership. Later, the executives were indicted. Two of them pleaded guilty; the third, Hamilton's former chairman and chief executive officer, was convicted and sentenced to thirty years of imprisonment. *United States v. Masferrer*, 514 F.3d 1158 (11th Cir. 2008).

According to Loumiet, OCC officials engaged in various forms of misconduct during the investigation. The alleged misconduct included lying to Hamilton officers, threatening to retaliate against its lawyers, and making racist statements. In March and April 2001, Loumiet raised these allegations with the Secretary of the Treasury, the Inspector General of the Treasury Department, and the Comptroller. In June 2001, Loumiet met with an attorney in the Inspector General's Office to discuss his allegations. In July 2001, the Inspector General concluded that there was no basis to investigate them any further. Nonetheless, Loumiet represented the bank in suing the OCC for alleged civil-rights violations. The bank voluntarily dismissed its suit in 2002. Order of Dismissal, *Hamilton Bank, N.A. v. Comptroller*, No. 01-4994 (S.D. Fla. Oct. 16, 2002), ECF Doc. 64.

In 2006, after the Hamilton executives were convicted, the OCC brought an administrative enforcement action against Loumiet, one of his partners, and his law firm. The OCC proceeded under FIRREA, which allows it to seek civil penalties from "any institution-affiliated party" who breaches a fiduciary duty to a federally-insured bank and thereby "causes or is likely to cause more than a minimal loss" to the bank. 12 U.S.C. § 1818(i)(2)(B). In turn, FIRREA defines an "institution-affiliated party" to include "any attorney" who "knowingly or recklessly participates in" a breach of fiduciary duty that "caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on" the bank. *Id.* § 1813(u)(4). The law firm and Loumiet's partner settled with the OCC and agreed to pay $750,000 in fines. Loumiet contested the charges against him. An Administrative Law Judge recommended their dismissal on the ground that Loumiet had not breached any fiduciary duty. Recommended Decision, *In re Loumiet*, OCC-AA-EC-06-102 (June 18, 2008). The Comptroller disagreed, but nonetheless dismissed on the alternative ground that

Loumiet had not caused the bank any harm. Final Decision & Order, *In re Loumiet*, OCC-AA-EC- 06-102 (July 27, 2009).

Loumiet sought fees under the Equal Access to Justice Act (EAJA). In pertinent part, EAJA allows a prevailing private party in an administrative adjudication to recover "fees and other expenses" unless the adjudicator "finds that the position of the agency was substantially justified." 5 U.S.C. § 504(a)(1). The OCC denied fees, but we reversed on the ground that there was no substantial justification for the OCC's position that Loumiet could have significantly harmed the bank. *Loumiet v. OCC*, 650 F.3d 796 (D.C. Cir. 2011). We reasoned that even if Loumiet's false exoneration of the executives caused the bank to "retain the dishonest officers," there was no evidence that this harmed the bank. *Id.* at 800. On remand, Loumiet was awarded $675,000.

Loumiet then filed this lawsuit against the United States and four OCC officials. He asserted *Bivens* claims against the officials as well as various tort claims. The *Bivens* claims rest on the theory that the officials caused the OCC enforcement action in retaliation for Loumiet's protected speech criticizing the OCC investigation, in violation of the First and Fifth Amendments of the Constitution. The district court held that the *Bivens* claims were untimely, and it dismissed the tort claims on other grounds. *Loumiet v. United States*, 65 F. Supp. 3d 19 (D.D.C. 2014). We reversed both rulings. *Loumiet v. United States*, 828 F.3d 935 (D.C. Cir. 2016).

On remand, the district court declined to dismiss the First Amendment *Bivens* claims. *Loumiet v. United States*, 255 F. Supp. 3d 75, 83–96 (D.D.C. 2017). The court reasoned that prior decisions had already "recognized the existence of a *Bivens* implied cause-of-action for retaliatory prosecution in violation of the First Amendment." *Id.* at 84. Likewise, the court concluded that the procedural and remedial protections provided under FIRREA do not counsel against

recognizing an implied damages action. *See id.* at 85–90. The court further held that the complaint plausibly stated First Amendment claims against the OCC officials who allegedly "induce[d] an enforcement action against Plaintiff in reprisal for critical statements that he made against them and the OCC more generally." *Id.* at 95. And it denied those officials qualified immunity on the ground that the "First Amendment right to be free from retaliatory prosecution" was clearly established long before 2006. *Id.* at 93 (quotation marks omitted). Finally, the court held that the Fifth Amendment count did not state a claim, converted the tort claims against the individual defendants into claims against the United States, and dismissed some but not all of the tort claims. *Id.* at 97–100.

After the Supreme Court decided *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), the officials moved for reconsideration. The district court denied the motion. *Loumiet v. United States*, 292 F. Supp. 3d 222 (D.D.C. 2017). In light of *Abbasi*, the court assumed that Loumiet was seeking to extend *Bivens* into a "new context." *Id.* at 229. But the court concluded that the "special factors counselling hesitation" in *Abbasi*, which involved programmatic actions undertaken by high-ranking officials in response to terrorist attacks, were not present in this case. *Id.* at 227 (quotation marks omitted); *see id.* at 229–31. Finally, the court discounted the significance of EAJA in its special-factors analysis because that statute was not enacted as part of FIRREA. *Id.* at 232–38.

The OCC officials now seek review of the district court's refusal to dismiss the First Amendment claims against them.

II

We begin, as we must, with our jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). We have jurisdiction to review "final decisions" of the district court. 28 U.S.C. § 1291. Under the collateral-order doctrine, the "denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision'" within the meaning of section 1291. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). We thus have jurisdiction to decide whether the OCC officials are entitled to qualified immunity on the First Amendment claims.

We also have jurisdiction to decide whether the First Amendment confers upon Loumiet an implied cause of action for damages. Because "the recognition of the entire cause of action" is "directly implicated by the defense of qualified immunity," both questions are "properly before us on interlocutory appeal." *Wilkie v. Robbins*, 551 U.S. 537, 549 n.4 (2007) (quotation marks omitted); *see Liff v. Office of Inspector Gen. for U.S. Dep't of Labor*, 881 F.3d 912, 917–18 (D.C. Cir. 2018).

III

In this court, the OCC officials contend that the First Amendment creates no implied cause of action for damages and that, in any event, they are entitled to qualified immunity on the facts alleged by Loumiet. We begin with the cause-of- action question, which is antecedent to the question of qualified immunity. *See Liff*, 881 F.3d at 918 ("it is appropriate to determine the availability of a *Bivens* remedy at the earliest practicable phase of litigation").

A

The Free Speech Clause of the First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." Neither the First Amendment, nor any other provision of the Constitution, provides an express

cause of action for its own violation. Congress has provided a statutory cause of action against state officials for violations of the federal Constitution, 42 U.S.C. § 1983, but it has provided no such cause of action against federal officials. Nonetheless, Loumiet asks us to hold that the First Amendment, by its own force, creates an implied cause of action for damages against OCC and other federal officials for retaliatory enforcement activities.

The Supreme Court first recognized an implied damages action under the Constitution in *Bivens*. There, the Court held that the Fourth Amendment creates an implied damages action against federal narcotics officers for unconstitutional searches and seizures. 403 U.S. at 389. Over the next decade, the Supreme Court recognized two more implied damages actions under the Constitution—one under the Fifth Amendment against members of Congress for employment discrimination on the basis of sex, *Davis v. Passman*, 442 U.S. 228, 248–49 (1979), and one under the Eighth Amendment against federal prison officials for failure to provide adequate medical care, *Carlson v. Green*, 446 U.S. 14, 19 (1980).

Since *Carlson*, however, the Supreme Court has carefully circumscribed *Bivens* and "consistently refused to extend *Bivens* to any new context or new category of defendants." *Abbasi*, 137 S.Ct. at 1857 (quotation marks omitted). Recognizing an implied damages action "is a significant step under separation-of-powers principles." *Id.* at 1856. Imposing personal liability on federal officers may promote important interests in deterring constitutional violations and redressing injuries, but it also "create[s] substantial costs" for the officers, the government, and citizens who depend on the vigorous enforcement of federal law. *Id.* The Constitution itself is silent on how to balance these competing considerations in various contexts, and judges are not well-suited to do so. Rather, "[i]n most instances ... the Legislature is in the better position to consider if the public

interest would be served by imposing a new substantive legal liability." *Id.* at 1857 (quotation marks omitted). Moreover, in the decades since *Bivens* was decided, the Court has grown wary of creating implied damages actions in other contexts. *See id.* at 1855–56. For these reasons, "expanding the *Bivens* remedy is now a disfavored judicial activity," so the Supreme Court demands "caution before extending *Bivens* remedies into any new context." *Id.* at 1857 (quotation marks omitted).

Exercising this caution, the Supreme Court has not recognized a new *Bivens* action in the four decades since *Carlson* was decided. At the same time, the Court has declined to extend *Bivens* on ten separate occasions. Once, it declined to create a *Bivens* cause of action because Congress had made another remedy expressly exclusive. *Hui v. Castaneda*, 559 U.S. 799, 805–07 (2010). Twice, it declined to extend *Bivens* to areas where Congress had provided an alternative scheme of protections and remedies. *Schweiker v. Chilicky*, 487 U.S. 412, 424–29 (1988) (Social Security disability benefits); *Bush v. Lucas*, 462 U.S. 367, 380–90 (1983) (federal employment). Three times, it declined to extend *Bivens* to sensitive areas. *Abbasi*, 137 S. Ct. at 1860–63 (national security); *United States v. Stanley*, 483 U.S. 669, 678–86 (1987) (military); *Chappell v. Wallace*, 462 U.S. 296, 298–305 (1983) (military). Three times, it declined to extend *Bivens* to new categories of defendants. *Minneci v. Pollard*, 565 U.S. 118, 126–31 (2012) (private individuals); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70–74 (2001) (private corporations); *FDIC v. Meyer*, 510 U.S. 471, 484–86 (1994) (federal agencies). Once, it declined to extend *Bivens* simply because Congress is better positioned to evaluate when agency officials "push too hard for the Government's benefit," and what consequences should follow if they do so. *Robbins*, 551 U.S. at 562.

After reviewing these precedents, *Abbasi* set out a two-part test to decide when to recognize implied damages

actions under *Bivens*. First, we must consider whether the plaintiff seeks to extend *Bivens* into a "new context." If so, we then must consider whether there are any "special factors counselling hesitation." *See* 137 S. Ct. at 1857–60.

B

The new-context inquiry in this case is straightforward. According to the Supreme Court, "[t]he proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new." *Abbasi*, 137 S. Ct. at 1859. The Court has provided a non-exhaustive "list of differences that are meaningful enough to make a given context a new one":

> the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

Id. at 1859–60. In addition, a "new context" is present whenever the plaintiff seeks damages from a "new category of defendants." *See id.* at 1857 (quotation marks omitted); *Meshal v. Higgenbotham*, 804 F.3d 417, 424 (D.C. Cir. 2015). Under these criteria, "even a modest extension is still an extension," and so "the new-context inquiry is easily satisfied." *Abbasi*, 137 S. Ct. at 1864–65.

This case clearly presents a new *Bivens* context. First, the constitutional right at issue differs from the ones at issue in *Bivens*, *Davis*, and *Carlson*. Loumiet alleges a violation of the Free Speech Clause of the First Amendment, but *Bivens* was a Fourth Amendment search-and-seizure case, 403 U.S.

at 389; *Davis* was a Fifth Amendment sex-discrimination case, 442 U.S. at 231; and *Carlson* was an Eighth Amendment medical- care case, 446 U.S. at 16 & n.1. Although the Supreme Court twice has assumed that the First Amendment creates an implied cause of action for damages, *see Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (Free Exercise Clause); *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (Free Speech Clause), it has "never held that *Bivens* extends to First Amendment claims," *Reichle v. Howards*, 566 U.S. 658, 663–64 n.4 (2012). *Abbasi* removed any possible doubt on this point. There, the Supreme Court stressed that "three cases—*Bivens*, *Davis*, and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself." 137 S. Ct. at 1855. To the extent we suggested otherwise in *Munsell v. Department of Agriculture*, 509 F.3d 572, 587–88 (D.C. Cir. 2007)—a case rejecting *Bivens* claims for failure to exhaust, *see id.* at 591—*Reichle* and *Abbasi* have displaced that dicta. And though we previously recognized First Amendment *Bivens* claims in *Haynesworth v. Miller*, 820 F.2d 1245, 1255 (D.C. Cir. 1987), and *Moore v. Valder*, 65 F.3d 189, 196 n.12 (D.C. Cir. 1995), those cases have been overtaken by *Abbasi*'s holding that the new-context analysis may consider only Supreme Court decisions approving *Bivens* actions. *See* 137 S. Ct. at 1859.

Second, the legal mandate under which the OCC officials were operating is different from the ones in *Bivens*, *Davis*, and *Carlson*. The dispute here arose from the enforcement of federal banking laws under FIRREA, whereas *Bivens* involved the enforcement of federal drug laws, 403 U.S. at 389; *Davis* involved employment decisions by members of Congress, 442 U.S. at 230; and *Carlson* involved the provision of medical care to federal prisoners, 446 U.S. at 16.

Third, Loumiet seeks damages from a new category of defendants. The defendants here are OCC officials, whereas the defendants in *Bivens* were federal narcotics agents, 403

U.S. at 389; the defendant in *Davis* was a former member of Congress, 442 U.S. at 230; and the defendants in *Carlson* were federal prison officials, 446 U.S. at 16. For each of these reasons, this case presents a new context.

C

We next consider whether special factors counsel hesitation. One factor stands out here: "if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Abbasi*, 137 S.Ct. at 1858. Likewise, "when alternative methods of relief are available, a *Bivens* remedy usually is not." *Id.* at 1863. Two Supreme Court cases—*Bush* and *Chilicky*—illustrate these special factors.

In *Bush*, the Court refused to extend *Bivens* to a federal employee allegedly demoted in retaliation for protected speech criticizing his employer. 462 U.S. at 368–69. As the Court explained, federal workers are "protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed." *Id.* at 385; *see also id.* at 368 (observing that the scheme affords "meaningful remedies against the United States"). The Court held that such an "elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations," should not be "augmented by the creation of a new judicial remedy" for the claimed First Amendment violation. *Id.* at 388.

In *Chilicky*, the Court refused to extend *Bivens* to individuals denied Social Security disability benefits, allegedly in violation of the Fifth Amendment Due Process Clause. 487 U.S. at 414. Applying *Bush*, the Court concluded that the "administrative structure and procedures of the Social Security system" was a special factor counselling hesitation. *Id.* at 424. That system established "federal

standards and criteria" for the provision of benefits, created "elaborate administrative remedies" for claimants denied benefits, and provided for "judicial review, including review of constitutional claims." *Id.* But it made "no provision for remedies in money damages against officials responsible for unconstitutional conduct that leads to the wrongful denial of benefits," and the Court declined to recalibrate the scheme to add that remedy. *Id.* at 424–25.

On three occasions, we have applied *Bush* and *Chilicky* to reject *Bivens* claims. In *Spagnola v. Mathis*, 859 F.2d 223 (D.C. Cir. 1988) (en banc), we confirmed that the Civil Service Reform Act bars First Amendment *Bivens* claims by individuals allegedly denied federal employment or promotion in retaliation for protected speech. *See id.* at 224–25, 229. We stressed that, under *Bush* and *Chilicky*, "it is the comprehensiveness of the statutory scheme involved, not the 'adequacy' of specific remedies extended thereunder, that counsels judicial abstention." *Id.* at 227. In *Wilson v. Libby*, 535 F.3d 697 (D.C. Cir. 2008), we held that the Privacy Act barred First and Fifth Amendment *Bivens* claims brought by a plaintiff alleging that her status as a covert agent had been unconstitutionally disclosed. *See id.* at 702–04. And we did so even though the Privacy Act, which authorizes private damages actions for willful violations, exempts the Offices of the President and the Vice President from coverage—and thus afforded no remedy against the defendants in the case. *See id.* at 706–08. In *Liff*, we held that the "myriad statutes and regulations that provide remedies for contracting-related disputes," which collectively afford a "spectrum of remedies," bar the imposition of *Bivens* liability for claims arising out of federal government contracts. *See* 881 F.3d at 920–21. In each of these cases, we declined to question whether the remedial scheme at issue was the "best response" in the specific context at issue, "for Congress is the body charged with making the inevitable compromises required." *Spagnola*, 859 F.2d at 228 (cleaned up).

Here, FIRREA's administrative enforcement scheme is likewise a special factor counselling hesitation. This scheme permits the imposition of civil penalties only for defined offenses such as knowingly breaching a fiduciary duty or recklessly engaging in an unsound banking practice. 12 U.S.C. § 1818(i)(2)(A)–(C). Any party subject to a penalty is entitled to advance notice and a hearing, *id.* § 1818(i)(2)(H), which must be conducted in accordance with the Administrative Procedure Act, *id.* § 1818(h)(1). Thus, the party is entitled to make arguments, cross-examine witnesses, and submit oral, documentary, and rebuttal evidence. 5 U.S.C. § 554(c)(1); *id.* § 556(d). Enforcement officials within the OCC bear the burden of proof and cannot participate or advise in the decision. *Id.* § 556(b) & (d). And the presiding official, if not the OCC itself, must be a duly appointed ALJ, *id.* § 556(b), who must render a recommended decision on a closed record with a statement of reasons, *id.* § 557(c), and without any *ex parte* contacts relevant to the proceeding, *id.* § 557(d). FIRREA also requires the OCC to augment these procedures with implementing regulations, 12 U.S.C. § 1818(i)(2)(K), under which administrative respondents are entitled to be represented by counsel, 12 C.F.R. § 19.35; seek summary disposition, *id.* § 19.29; apply for document subpoenas, *id.* § 19.26; object to evidence, *id.* § 19.36(d); depose unavailable witnesses, *id.* § 19.36(f); and more. The ALJ's recommended decision is then subject to further review by the Comptroller himself, 5 U.S.C. § 557(b), and his decision in turn is subject to judicial review in a court of appeals, 12 U.S.C. § 1818(h)(2). Similar rules, protections, and review attend other exercises of OCC administrative enforcement, including the adjudication of cease-and-desist orders, *id.* § 1818(b), and the removal of affiliated individuals from participating in a bank's affairs, *id.* § 1818(e). Together, these provisions afford regulated parties an "alternative, existing process for protecting [their] interest." *Abbasi*, 137 S. Ct. at 1858 (quotation marks omitted).

Moreover, the FIRREA enforcement scheme gives regulated parties a sword as well as a shield. Under EAJA, any party prevailing in a contested agency adjudication is entitled to "fees and other expenses incurred by that party in connection with that proceeding," unless the ALJ "finds that the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a)(1). This stands in marked contrast to the American Rule, under which "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Fee awards under EAJA can be substantial, as evidenced by Loumiet's own award of $675,000. The FIRREA scheme thus affords "meaningful remedies against the United States," *Bush*, 462 U.S. at 368, as a general matter and in this case.

One more aspect of the scheme is important—judicial review, although available, is carefully circumscribed. Specifically, FIRREA provides that "[j]udicial review" of any OCC administrative adjudication "shall be exclusively as provided" in FIRREA itself, which channels such review to the courts of appeals. 12 U.S.C. § 1818(h)(1) & (2). Likewise, FIRREA provides that, in any district-court action to enforce a civil penalty, "the validity and appropriateness of the penalty shall not be subject to review." *Id.* § 1818(i)(2)(I)(ii). These provisions come close to foreclosing a *Bivens* action expressly, just as the exclusive-review provision at issue in *Castaneda* expressly foreclosed *Bivens* actions against officers of the Public Health Service. *See* 559 U.S. at 805–06. At a minimum, the precise nature of the available judicial review makes clear that Congress did not "inadvertently" omit a damages remedy from FIRREA, *see Liff*, 881 F.3d at 921; *Wilson*, 535 F.3d at 708; *Spagnola*, 859 F.2d at 228, underscoring that the courts should not augment the scheme to supply one. *See Abbasi*, 137 S. Ct. at 1865 ("legislative

action suggesting that Congress does not want a damages remedy is itself a factor counseling hesitation").

Loumiet's contrary arguments are all without merit. First, he contends that the procedural protections afforded in the FIRREA administrative process are not remedies at all. True enough, but they do help constrain the unconstitutional exercise of government power—unlike the largely or wholly unregulated search in *Bivens*, hiring decision in *Davis*, and care provision in *Carlson*. Moreover, as explained above, we rely not only on procedural protections, but also on the affirmative EAJA remedy and the channeled nature of the judicial review provided. Second, Loumiet contends that EAJA cannot be considered because it is a separate statute from FIRREA. But in *Liff*, we assessed special factors by considering the full "constellation of statutes and regulations governing federal contracts, as well as the Privacy Act." 881 F.3d at 920. There is no reason to disregard any of the statutes establishing the governing scheme. Third, Loumiet contends that he is not subject to the FIRREA scheme at all, because the Comptroller concluded that he is not an institution-affiliated party. But Loumiet—as an attorney for a federally-insured bank—was not wholly outside the regulatory scheme. To the contrary, the Comptroller concluded that Loumiet was not an institution- affiliated party only because his conduct did not harm the bank. If it had, he might have been subject to a penalty. *Compare* 12U.S.C. §1813(u)(4) (definition of "institution-affiliated party"), *with id.* § 1818(i)(2)(A)–(C) (penalties for institution- affiliated parties). Loumiet does not fall outside the FIRREA scheme simply because he won his individual case. Finally, Loumiet argues that the remedy afforded to him was insufficient. But *Bush* and *Chilicky* were decided on the premise that the available remedy in each of those cases— setting aside an adverse personnel decision or denial of benefits—was less effective than would be an award of full damages for all consequential harms. *See*

Chilicky, 487 U.S. at 425. Moreover, we later held that, so long as the administrative scheme is comprehensive, a *Bivens* remedy is unavailable even if the plaintiff before the court is afforded no remedy at all. *See Wilson*, 535 F.3d at 709.

We recognize that retaliatory enforcement actions can be hard to ferret out in administrative processes and can impose harms well beyond those remediable through EAJA. On the other hand, charges of a retaliatory motive are easy to make, hard to disprove, potentially crippling to regulators, and perhaps not unlikely in the context of hotly contested adversarial proceedings. As in *Abbasi*, there is a hard "balance to be struck" in considering whether to create a damages remedy for the kind of claim that Loumiet seeks to press here. 137 S. Ct. at 1863. That decision is best left to Congress.

IV

The First Amendment creates no implied damages action against OCC officials for inducing an allegedly retaliatory administrative enforcement proceeding. We therefore reverse the district court's judgment and remand the case with instructions to dismiss Loumiet's First Amendment claims.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CARLOS LOUMIET, *Plaintiff*, v. UNITED STATES OF AMERICA, *et al.*, *Defendants.*	Civil Action No. 12-1130 (CKK)

MEMORANDUM OPINION
(June 13, 2017)

Plaintiff Carlos Loumiet filed suit against the United States Government for the actions of its agency, the Office of the Comptroller of the Currency ("OCC"), under the Federal Tort Claims Act ("FTCA"), and against Defendants Michael Rardin, Lee Straus, Gerard Sexton, and Ronald Schneck (collectively, the "Individual Defendants"), alleging claims under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), as well as various state-law tort claims. In a series of rulings, the Court previously dismissed all of Plaintiff's claims at the motion to dismiss stage. Plaintiff appealed to the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), which remanded for this Court to consider two issues: *first*, as to Plaintiff's FTCA claims, "whether [Plaintiff's] complaint plausibly alleges that the OCC's conduct exceeded the scope of its constitutional authority so as to vitiate discretionary-function immunity;" and *second*, as to Plaintiff's *Bivens* claims, "the remaining defenses raised but not yet decided in the district court." *Loumiet v. United*

States, 828 F.3d 935, 946, 949 (D.C. Cir. 2016) ("*Loumiet IV*"). Following remand, the Court ordered the parties to brief these and any other pertinent legal issues. Sept. 29, 2016 Order, ECF No. 61.

Pending before the Court are the Individual Defendants' [62] Motion to Dismiss and the United States' [63] Motion to Dismiss. Upon consideration of the pleadings,[1] relevant legal authorities, and the record as a whole, the Court **GRANTS IN PART AND DENIES IN PART** the Individual Defendants' [62] Motion to Dismiss, and **GRANTS IN PART AND DENIES IN PART** the United States' [63] Motion to Dismiss. Plaintiff's First Amendment *Bivens* claim for retaliatory prosecution shall proceed against Defendants Rardin, Schneck, and Sexton. Plaintiff's Fifth Amendment *Bivens* claim, and all claims against Defendant Straus are **DISMISSED WITHOUT PREJUDICE**. Pursuant to the Westfall Act, the state-law tort claims against the Individual Defendants are **CONVERTED** to FTCA claims against the United States. Plaintiff's FTCA claims against the United States may proceed, except that the abuse of process (Count III) and malicious prosecution (Count IV) claims are **DISMISSED WITHOUT PREJUDICE**, leaving only the claims for intentional infliction of emotional distress (Count I),

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[1] The Court's consideration has focused on the following documents:

- Individual Defs.' Mot. to Dismiss and Statement of P&A in Supp., ECF No. 62 ("Ind. Defs.' Mem.");
- United States' Mot. to Dismiss and Statement of P&A in Supp., ECF No. 63 ("U.S. Mem.");
- Carlos Loumiet's Opp'n to the Individual Defs.' Mot. to Dismiss under Fed. R. Civ. P. 12(b)(6) and the United States' Mot. to Dismiss under Fed. R. Civ. P. 12(b)(6) and 12(b)(1), ECF No. 64 ("Opp'n Mem.");
- Reply Mem. of P&A in Supp. of the Defs.' Mot. to Dismiss, ECF No. 66 ("Reply Mem.").

invasion of privacy (Count II), negligent supervision (Count V), and civil conspiracy (Count VIII).

I. BACKGROUND

The Court previously detailed the factual background of this matter in its prior rulings, familiarity with which is assumed.[2] *See Loumiet v. United States*, 968 F. Supp. 2d 142, 145 (D.D.C. 2013) (*Loumiet I*). To the extent particular factual allegations are relevant to the Court's analysis of the pending motions, they are detailed below.

II. LEGAL STANDARD

A. Motion to Dismiss for Lack of Subject-Matter Jurisdiction

To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), Plaintiff bears the burden of establishing that the Court has subject-matter jurisdiction over its claims. *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007); *Ctr. for Arms Control & Non-Proliferation v. Redd*, No. CIV.A. 05-682 (RMC), 2005 WL 3447891, at *3 (D.D.C. Dec. 15, 2005). In determining whether there is jurisdiction, the Court may "consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed

[2] The full sequence of decisions is as follows: *Loumiet v. United States*, 968 F. Supp. 2d 142 (D.D.C. 2013) (*Loumiet I*); *Loumiet v. United States*, 65 F. Supp. 3d 19 (D.D.C. 2014) (*Loumiet II*); *Loumiet v. United States*, 106 F. Supp. 3d 219 (D.D.C. 2015) (*Loumiet III*); *Loumiet v. United States*, 828 F.3d 935 (D.C. Cir. 2016) ("*Loumiet IV*"). In addition, the D.C. Circuit previously ruled on Plaintiff's application for attorney fees under the Equal Access to Justice Act ("EAJA") in connection with his defense before the OCC, *Loumiet v. Office of Comptroller of Currency*, 650 F.3d 796, 798 (D.C. Cir. 2011) ("*Loumiet EAJA*").

facts plus the court's resolution of disputed facts." *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003) (internal quotation marks omitted); *see also* 5B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1350 (3d ed. 2017) (noting the "wide array of cases from the four corners of the federal judicial system involving the district court's broad discretion to consider relevant and competent evidence on a motion to dismiss for lack of subject matter jurisdiction to resolve factual issues"). "Although a court must accept as true all factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1)," the factual allegations in the complaint "will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Wright v. Foreign Serv. Grievance Bd.*, 503 F. Supp. 2d 163, 170 (D.D.C. 2007) (internal quotation marks omitted).

B. Motion to Dismiss for Failure to State a Claim

Defendants also move to dismiss the Complaint for "failure to state a claim upon which relief can be granted" pursuant to Federal Rule of Civil Procedure 12(b)(6). "[A] complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). Rather, a complaint must contain sufficient factual allegations that, if accepted as true, "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. In deciding a Rule 12(b)(6) motion, a court may consider "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint," or "documents upon which the plaintiff's complaint necessarily relies even

if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss." *Ward v. District of Columbia Dep't of Youth Rehab. Servs.*, 768 F. Supp. 2d 117, 119 (D.D.C. 2011) (internal quotation marks omitted). The court may also consider documents in the public record of which the court may take judicial notice. *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007).

III. DISCUSSION

The Court's analysis below proceeds as follows. *First*, the Court finds it appropriate to recognize a First Amendment *Bivens* claim for retaliatory prosecution under the particular factual circumstances of this case. *Second*, the Court finds that Plaintiff has plausibly alleged such a First Amendment *Bivens* claim against Defendants Rardin, Schneck, and Sexton, and that they are not entitled to absolute prosecutorial or qualified immunity at this procedural juncture. Nonetheless, the Court finds that Defendant Straus is entitled to absolute prosecutorial immunity, and that any non-immunized conduct fails to state a First Amendment retaliatory prosecution *Bivens* claim against him. *Third*, the Court concludes that Plaintiff's Fifth Amendment *Bivens* claim must be dismissed for failure to state a claim. *Fourth*, the Court converts the state-law tort claims against the Individual Defendants to FTCA claims against the United Stated. In sum, this means that the only claims surviving with respect to the Individual Defendants are Plaintiff's First Amendment *Bivens* claims against Defendants Rardin, Schneck, and Sexton.

Turning to the FTCA claims against the United States, the Court finds *first*, that discretionary-function immunity is vitiated under the circumstances of this case because Plaintiff has plausibly alleged that the tortious conduct at issue violated a clearly established First Amendment right

against retaliatory prosecution; *second*, that Plaintiff's malicious prosecution and abuse of process claims must be dismissed because the OCC employees at issue in this case are not "investigative or law enforcement officers" as defined by the FTCA; and *third*, that Plaintiff's invasion of privacy claim may proceed. Accordingly, Plaintiff's surviving FTCA claims are for intentional infliction of emotional distress (Count I), invasion of privacy (Count II), negligent supervision (Count V), and civil conspiracy (Count VIII).

A. The Court Recognizes a First Amendment *Bivens* Claim in this Action

In *Bivens*, the Supreme Court of the United States created an implied cause of action for money damages stemming from an alleged Fourth Amendment violation at the hands of federal officials. 403 U.S. at 397. "Since *Bivens*, the Supreme Court has proceeded cautiously in implying additional federal causes of action for money damages." *Meshal v. Higgenbotham*, 804 F.3d 417, 421 (D.C. Cir. 2015). The *Bivens* issues in this case must be assessed in two stages, and because the Fifth Amendment claim shall be dismissed for failure to state a claim, this analysis is limited to Plaintiff's claim of retaliatory prosecution in violation of his First Amendment right to free speech.

As an initial matter, the parties disagree on whether by permitting Plaintiff's *Bivens* claim to proceed, the Court would in effect recognize a cause of action unprecedented in *Bivens* case law. In other words, whether this case presents a "new context." If so, the Court would be required to ask and answer two follow-up questions. First, whether "Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson v. Green*, 446 U.S. 14, 18–19 (1980); *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) ("In the first place, there

is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages."). Put differently, a *Bivens* remedy will generally not be available if a comprehensive statutory scheme already exists for a plaintiff to seek redress of the alleged constitutional violation. Defendants concede that no such scheme exists here. *See* Reply Mem. at 6.

As a result, the Court must turn to assess whether there are "any special factors counselling hesitation before authorizing a new kind of federal litigation." *Wilkie*, 551 U.S. at 550 (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)). One such special factor "that precludes creation of a *Bivens* remedy is the existence of a comprehensive remedial scheme." *Wilson v. Libby*, 535 F.3d 697, 705 (D.C. Cir. 2008). Unlike the first question— which asks whether there is a specific, equally effective alternative remedy to the implied cause-of-action—this "special factor" analysis is intended to isolate situations in which "the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration . . . ." *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). As a result, the "comprehensive remedial scheme" need not provide "complete relief" for the specific violation at issue; rather, "the doctrine relates to the question of who should decide whether such a remedy should be provided." *Wilson*, 535 F.3d at 705 (internal quotation marks omitted). Consequently, it is "the comprehensiveness of the statutory scheme involved, not the 'adequacy' of specific remedies extended thereunder, that counsels judicial abstention." *Spagnola v. Mathis*, 859 F.2d 223, 227 (D.C. Cir. 1988). In sum, the doctrine reflects "an appropriate judicial deference to indications that congressional inaction has not been inadvertent." *Chilicky*, 487 U.S. at 423.

Both the D.C. Circuit and Supreme Court, at least impliedly, have recognized the existence of a *Bivens* implied cause-of-action for retaliatory prosecution in violation of the First Amendment guarantee of freedom of speech. *Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out"); *Moore v. Valder*, 65 F.3d 189, 196 (D.C. Cir. 1995) ("Moore's retaliatory prosecution claim, however, does allege the violation of clearly established law."); *Haynesworth v. Miller*, 820 F.2d 1245, 1255 (D.C. Cir. 1987) ("[w]e agree that the retaliatory prosecution constitutes an actionable First Amendment wrong"). Defendants, however, assert that this case presents a "new context" because "[n]o court has ever extended *Bivens* to the conduct of government officials engaged in oversight of the safety and soundness of the national banking system." Ind. Defs.' Mem at 7. The D.C. Circuit in *Meshal* noted the difficulty in distinguishing various *Bivens* actions on the basis of context: "viewed at a sufficiently high level of generality, any claim can be analogized to some other claim for which a *Bivens* action is afforded, just as at a sufficiently high level of particularity, every case has points of distinction." 804 F.3d at 424 (internal quotation marks omitted). Ultimately, *Meshal* defined "context" by reference to its common usage in law: the word "reflects[s] a potentially recurring scenario that has *similar* legal and factual components." *Id*. (emphasis added) (internal quotation marks omitted).

Although Defendants seek to distinguish the prosecutorial action in this case on the basis that it was directed by a Federal agency overseeing the banking industry, they have failed to explain *why* that distinction is at all relevant to the case law recognizing claims against Federal agents for retaliatory prosecution. For instance, there is no indication in the record that Plaintiff's

prosecution was motivated out of a particular concern for the safety of the banking system. In fact, the allegations of the Complaint portray a prosecution that was levied against an individual with relatively little involvement in the perpetuation or concealment of the illicit activity subject to the OCC's regulatory action, and was instead, according to the allegations, primarily motivated by Plaintiff's complaints regarding certain alleged racial comments made by OCC staff, and the aggressive nature of the OCC's investigation into Hamilton Bank. *See infra* at 26–27. Moreover, upon administrative review, the D.C. Circuit found that the record did not support a finding that Plaintiff's prosecution was justified. *See Loumiet EAJA*, 650 F.3d at 800. Accordingly, while the fact that the retaliatory prosecution was brought by a banking regulator is a point of distinction, the salient legal and factual matters are similar to those at issue in the controlling Supreme Court and D.C. Circuit cases regarding retaliatory prosecution. As in *Hartman* and *Moore*, the allegations here suggest that employees of a Federal entity (there, the United States Postal Service), in reprisal for speech critical of the Federal entity, directed a meritless investigation and prosecution (there, the trial court determined that there was a "complete lack of direct evidence" for the alleged crime, while here, the presiding Administrative Law Judge ("ALJ"), the Comptroller, and the D.C. Circuit found that the enforcement action was unwarranted, *see Loumiet EAJA*, 650 F.3d at 799–800).

In sum, the conduct at issue, although allegedly perpetuated by banking regulators, plainly fits the mold of the controlling authorities wherein a *Bivens* cause of action has been recognized for retaliatory prosecution at the behest of Federal officials. No doubt, the banking regulatory arena is complex and of immense importance to the American economy, but it can hardly be said that any Federal agency does not administer an important facet of the American

economy or society. And while the D.C. Circuit has on several occasions refused to afford a *Bivens* remedy in certain sensitive policy areas, the decisions pressed by Defendants are limited to the national security and intelligence context. *See* Reply Mem. at 3*; see, e.g.*, *Klay v. Panetta*, 758 F.3d 369 (D.C. Cir. 2014). Certainly, it is conceivable that a factual context related to the banking industry could present circumstances that distinguish it from other cases in which a Bivens remedy for retaliatory prosecution has been recognized. The essential point here, however, is that Defendants have not shown how their status as banking regulators is relevant to the question of whether a Bivens remedy should be recognized under the particular factual circumstances of this case, wherein any banking law or regulatory issues seem, accepting the allegations as true, completely peripheral to the challenged conduct (i.e., the bringing of the enforcement action).

Even assuming that this case presents a "new context," however, the special factor analysis does not preclude a Bivens remedy for Plaintiff's retaliatory prosecution claim. Defendants contend that the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), pursuant to which the OCC took enforcement action against Plaintiff, is a "comprehensive remedial scheme" that counsels against finding an implied cause-of-action under the factual circumstances of this case. As an initial matter, however, there is no clear indication that Plaintiff was properly the subject of a FIRREA enforcement action. As relevant here, that statutory scheme applies to an "institution-affiliated party" ("IAP"), which is defined to include: "[A]ny independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in . . . any unsafe or unsound practice, which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution." 12 U.S.C. § 1813(u)(4). The D.C. Circuit, in

reviewing the denial of Plaintiff's request for attorney fees in connection with the enforcement action, concluded that the administrative record was devoid of evidence linking Plaintiff's allegedly illicit actions (drafting two investigative reports) with a "significant adverse effect on the Bank." *Loumiet EAJA*, 650 F.3d at 799. This accorded with the decision of the Comptroller dismissing the action against Plaintiff, which found that the "administrative record lacked sufficient evidence that the two reports prepared by [Plaintiff] caused, or were likely to cause, harm to the Bank that satisfies the 'effect' requirement." *Id*. at 800. As such, the D.C. Circuit concluded that the record did not demonstrate that the OCC's "litigating position was justified, let alone 'substantially' so." *Id*. Consequently, this case is brought in a posture wherein both the D.C. Circuit and the Comptroller determined that Plaintiff did not qualify under the statutory test that determines whether a party like Plaintiff is subject to FIRREA.

Beyond this, the case at bar is readily distinguishable from the controlling authorities that have declined to establish a *Bivens* remedy due to the existence of a comprehensive remedial scheme. In each such case, there was a statutory scheme that provided relief for similarly-situated plaintiffs, but happened not to provide relief for the litigant, either due to the particular factual circumstances, or the nature of the relief sought. Given the existence of the complex ameliorative scheme, however, the reasonable inference to draw in these cases was that Congress weighed competing policy goals and fashioned a system of remedies that reflected its policy-based determinations. Consequently, while the remedial scheme may have not afforded complete relief to the particular plaintiff at bar, judicial deference to Congressional law-making called for hesitation before creating a remedy through judicial fiat under circumstances where the evidence showed that Congress had intentionally declined to do so.

In *Bush v. Lucas*, the Supreme Court addressed a putative First Amendment claim by a Federal employee who had allegedly been terminated for making critical public remarks regarding his agency. 462 U.S. at 369. Following a review of the pertinent regulatory landscape, the Court determined that "Federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed." *Id.* at 385. Although recognizing that the current system would not provide "complete relief" to the petitioner, the Court declined to recognize a *Bivens* remedy under the circumstances given the existence of an "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations . . . ." *Id.* at 388. This system and other factors, in the Court's view, evidenced that "Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service." *Id.* at 389. Similarly, in *Chilicky*, petitioners sought money damages under *Bivens* stemming from the denial of their Social Security benefits. 487 U.S. at 419. The Supreme Court declined to recognize a *Bivens* remedy under the circumstances, holding that "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." *Id.* at 423. In the Court's view, the Social Security system evidenced such a design, and "while respondents ha[d] not been given a remedy in damages for emotional distress or for other hardships suffered because of delays in their receipt of Social Security benefits[,] . . . Congress . . . ha[d] not failed to provide meaningful safeguards or remedies for the rights of persons situated as respondents

were." *Id*. at 425. Based on these precedents, the D.C. Circuit in *Wilson* declined to recognize a *Bivens* remedy against the Vice President and others for injuries allegedly suffered by the revelation of plaintiff's employment with the Central Intelligence Agency. 535 F.3d at 702. The D.C. Circuit determined that the disclosure of personal information by Federal officials, the crux of the complaint, was governed by the Privacy Act, and the Act was a "comprehensive scheme" that precluded a *Bivens* remedy. Although the Act did not provide a cause of action against the three defendants, because it excluded the Offices of the President and Vice President, that exclusion was not inadvertent and thus did not weigh in favor of granting *Bivens* relief; rather, the legislative history of the Act showed that the exclusion was intentional. *Id*. at 708. *See also Davis v. Billington*, 681 F.3d 377, 383 (D.C. Cir. 2012) (defining "comprehensive remedial scheme" as "when Congress has put in place a comprehensive system to administer public rights, has not inadvertently omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve *Bivens* remedies" (quoting *Spagnola*, 859 F.2d at 228) (internal quotation marks omitted)).

FIRREA was enacted in response to the savings-and-loan crisis of the 1980s to "enhance the regulatory enforcement powers of the depository institution regulatory agencies to protect against fraud, waste, and insider abuse." *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 741 (D.C. Cir. 1995). FIRREA applies both to banks and, as relevant here, institution-affiliated parties. If the OCC determines that an IAP has engaged in actionable misconduct, it may institute a "cease-and-desist" proceeding, and if it does so, must provide the IAP with a notice of charges and an administrative hearing. 12 U.S.C. § 1818(b). The OCC may also seek civil monetary penalties, which are likewise subject to an administrative hearing. 12 U.S.C. § 1818(i)(2)(H). The hearing must be conducted before an ALJ

in accordance with the Administrative Procedure Act ("APA"), and the IAP may choose to be represented by counsel, and may present evidence and cross- examine witnesses. 12 U.S.C. § 1818(h)(1); 12 C.F.R. §§ 19.35, 19.36. In short, the hearing is "a full adversarial proceeding." Ind. Defs.' Mem. at 9. Following the hearing, the ALJ issues a written recommendation for the Comptroller, who reviews the decision, the administrative record, and any objections by the IAP, and issues a final written decision. 12 U.S.C. § 1818(h)(1); 12 C.F.R. §§ 19.38–19.40. The IAP may then seek review of the final decision before a United States Court of Appeals. 12 U.S.C. § 1818(h)(2).

Succinctly stated, Defendants' position is that "the comprehensive remedial scheme of the FIRREA, coupled with judicial review under the APA, is a special factor that counsels hesitation against authorizing a *Bivens* remedy in this case." Reply Mem. at 6. In support, Defendants press *Sinclair*, a decision by the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit"), as dispositive of FIRREA's status as a "comprehensive remedial scheme" that precludes the recognition of a *Bivens* claim under the particular factual circumstances of this case. In *Sinclair*, the proprietor of Sinclair National Bank ("SNB") brought a putative *Bivens* claim against OCC employees for a series of adverse regulatory actions, which plaintiff claimed were retaliatory and motivated by racial animus. These culminated in the OCC declaring the bank insolvent and appointing the Federal Deposit Insurance Corporation ("FDIC") as a receiver, which promptly sold the assets of SNB to another bank. *Sinclair v. Hawke*, 314 F.3d 934, 938 (8th Cir. 2003). The Eight Circuit declined to recognize a *Bivens* remedy for this allegedly retaliatory regulatory action against SNB, finding that Congress had "been establishing and extensively regulating national banks for over two hundred years." *Id.* at 940. In their view, FIRREA was simply a further expansion of the already immense

regulatory powers afforded to Federal bank regulators such as the OCC and FDIC, and all of the "adverse regulatory actions at issue fell within the OCC's express statutory powers to regulate national banks . . . ." *Id.* at 942. Importantly, regulatory action was subject to judicial review via the APA, and to the "extent these APA remedies are limited, the long history of congressional regulation of national banks confirms that the limitations are not inadvertent. Rather, Congress has repeatedly adjusted, and at times overhauled, these statutory remedies in a continuing effort to resolve . . . a difficult and delicate problem of reconciling conflicting interests . . . ." *Id.* As such, the Eighth Circuit concluded that it was "for Congress to decide whether the public interest in a sound national banking system would be furthered by a cause of action requiring bank regulators to pay damages personally unless they can convince a jury that their conduct in aggressively regulating a national bank was not the product of an unconstitutional motive." *Id.*

The analogy between this case and *Sinclair*, while appealing, is ultimately specious. As an initial matter, the D.C. Circuit in *Munsell* expressed skepticism with precisely the sort of analysis pressed by *Sinclair*; namely, that APA review precludes a *Bivens* remedy. In that case, the D.C. Circuit assessed a claim that Federal Food Safety and Inspection Service "officials used USDA enforcement powers to retaliate against [plaintiff] for statements he made concerning USDA's handling of an *E. coli* outbreak in 2002." *Munsell v. Dep't of Agric.*, 509 F.3d 572, 589 (D.C. Cir. 2007). In so doing, the court reviewed another decision by the Eight Circuit, *Nebraska Beef*, which, in reliance on the holding in *Sinclair*, concluded that when "Congress has created a comprehensive regulatory regime, the existence of a right to judicial review under the APA is sufficient to preclude a *Bivens* action." *Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005) (citing *Sinclair*, 314 F.3d at 940).

The D.C. Circuit noted that the decision in "*Nebraska Beef* leaves some weighty issues unanswered[,]" and that it was "unaware of any Supreme Court decision holding that APA review *alone* is sufficient to eliminate the need for a *Bivens* remedy." *Munsell*, 509 F.3d at 590. Moreover, the D.C. Circuit opined that even "assuming, *arguendo*, that the existence of APA review might factor into a determination as to whether a *Bivens* remedy is available, its relevance would be minimal in a case involving claimants who are ineligible for relief under the APA." *Id.*

Whatever the significance of APA review may have been in *Sinclair*, it does little here to obviate the need for a *Bivens* remedy. In *Sinclair*, the OCC successfully engaged in regulatory action that could have been challenged in court pursuant to the APA. Here, the presiding ALJ and the Comptroller ultimately declined to take any enforcement action against Plaintiff. As a result, there was no final decision to review, and Defendants have not proffered any explanation of how Plaintiff, under the particular factual circumstances of this case, could have sought relief through the amalgam of FIRREA and the APA. However, while this distinction is important, it does not end the inquiry. As recounted above, the failure of a putative "comprehensive remedial scheme" to afford "complete relief" is not dispositive if the absence of such relief is the product of intentional Congressional policy making. In this vein, the *Sinclair* court determined that regulatory action pursuant to FIRREA was limited to APA review as a result of Congressional balancing of competing policy interests: those of banks, who would benefit from additional review, against those of depositors, who would benefit from the ability of banking regulators to take prompt ameliorative action. As such, the absence of a remedy equivalent to what would be available under *Bivens* was not accidental, but a product of that intentional balancing of competing interests. This reasoning is consistent with that of the Supreme Court and

D.C. Circuit authorities discussed earlier, each of which concluded that although the pertinent remedial scheme was limited as applied to the plaintiff at bar, that limitation was the product of Congressional choice in an area subject to Congressional law- making, and consequently counseled against the recognition of a judicially created remedy.

In order to press a similar argument in this case, Defendants would need to show that the absence of a remedy for Plaintiff under the circumstances of this case was the intentional product of how Congress constructed the administrative review procedures under FIRREA. But Defendants have completely failed to furnish any legislative or other evidence that Congress intentionally excluded claims similar to Plaintiff's from FIRREA. Nor does the statute itself indicate an intent to exclude such claims. While it may be sensible for review of regulatory action to be limited to what is available under the APA, that conclusion does not flow so readily for prosecutorial action that is alleged to have been wholly *ultra vires*. In fact, Defendants have pointed to no mechanism under FIRREA for review of prosecutorial abuse, other than the APA review that generally applies to a final decision of the Comptroller. Consequently, the question at hand ultimately reduces to whether the absence of APA review for Plaintiff's claim is the product of intentional Congressional policymaking in constructing FIRREA.

On this point, however, no evidence has been proffered, nor does such intent seem likely. The absence of APA review in this case stems from the fact that the presiding ALJ and the Comptroller ultimately determined that the enforcement action against Plaintiff had to be dismissed. As a result, to agree with Defendants, the Court would need to conclude that Congress intended to limit review of retaliatory prosecution claims within the confines of FIRREA to only those cases where the OCC rendered a final decision (i.e.,

where the allegedly improper prosecution is successful), regardless of the length of the prosecution and its toll on plaintiff, and the practical reality that the most meritless prosecutions are the ones that are most likely to prove unsuccessful when subject to the review of a neutral arbiter. Absent some affirmative evidence, the Court declines to conclude that Congress intended this odd result. *See Munsell*, 509 F.3d at 591 ("Thus, in a case of this sort, were the possibility of APA review deemed sufficient to foreclose a *Bivens* remedy, the very success of the unconstitutional conduct in removing [Plaintiff] from the regulated arena would make APA review unavailable and insulate the conduct entirely from judicial review. That would make little sense."). Moreover, this determination comports with the recognition of a *Bivens* claim for retaliatory prosecution in the criminal context, given that in those cases further review was plainly available via the appeals process (although, like here, only for retaliatory prosecutions that proved successful); and this determination also comports with other district court decisions that have allowed *Bivens* claims to proceed under similar circumstances. *See Navab-Safavi v. Broad. Bd. of Governors*, 650 F. Supp. 2d 40, 69 (D.D.C. 2009) (recognizing *Bivens* remedy despite the availability of APA review), *aff'd sub nom. Navab-Safavi v. Glassman*, 637 F.3d 311 (D.C. Cir. 2011); *Zherka v. Ryan*, 52 F. Supp. 3d 571, 580 (S.D.N.Y. 2014) (recognizing *Bivens* claim for retaliation by employees of the Internal Revenue Service, despite the availability of administrative review as provided by the Internal Revenue Code, and also noting that "[l]eaving plaintiff to pursue administrative remedies through the very agency he asserts has targeted him for retaliatory investigation would be, in essence, no remedy at all"). Accordingly, for all of the foregoing reasons, the Court concludes that FIRREA is not a "comprehensive remedial scheme" that counsels against the recognition of a *Bivens* remedy under the particular factual circumstances of this case.

Defendants' remaining "special factor" argument is that recognizing a *Bivens* claim here would have a "chilling effect" on the willingness of banking regulators like the OCC employees at issue "to aggressively attack unsafe banking practices." Ind. Defs.' Mem. at 11 (citing *Sinclair*, 314 F.3d at 939). As such, Defendants contend that "there is more than a reasonable fear that a general *Bivens* cure would be worse than the disease." *Id.* (citing *Wilkie*, 551 U.S. at 561). The Court disagrees. First, this case treads on familiar ground, as its salient facts are not substantially dissimilar from the controlling authorities that have recognized the existence of a *Bivens* claim for retaliatory prosecution. Second, the factual circumstances of this case are unique in the context of regulatory enforcement actions undertaken by banking regulators like the OCC. Plaintiff alleges that he was prosecuted without cause, in connection with a matter in which he had little substantive involvement, solely for statements he made against the prosecuting agency. *See infra* at 26–27. Although these allegations may, on their own, seem self-serving, the Court is also guided by the practical reality that the presiding ALJ and the Comptroller determined that the prosecution should be dismissed, and that the D.C. Circuit later concluded that the prosecution was not "justified" by the administrative record. *Loumiet EAJA*, 650 F.3d at 800. Based on these allegations, which must be taken as true for purposes of the pending motions, the case at bar is plainly not a run-of-the-mill lawsuit in which the subject of adverse regulatory action, unhappy with the result, sues the responsible government officials. Rather, this case presents a unique constellation of factual allegations—most importantly that neutral authorities have expressed skepticism at the propriety of the challenged prosecution—that are unlikely to be present in other cases. Consequently, given the uniqueness of the allegations in this case, in this Court's view, allowing Plaintiff to proceed with his First Amendment *Bivens* claim is unlikely to have a

chilling effect on the proper regulatory activities of banking regulators like the Individual Defendants. Accordingly, no special factor pressed by Defendants counsels against the recognition of a *Bivens* remedy in this case for Plaintiff's claim of retaliatory prosecution by the Individual Defendants in violation of his First Amendment right to freedom of speech. As such, Plaintiff's First Amendment claim is cognizable under *Bivens*, and the Court proceeds to assess whether Plaintiff has stated viable claims against each of the Individual Defendants to whom such a claim could attach.

B. Plaintiff Has Stated a Plausible First Amendment *Bivens* Claim Against Defendants Rardin, Schneck, and Sexton, But Not Straus

Before assessing whether the allegations of the Complaint state a plausible First Amendment claim against each of the Individual Defendants, the Court surveys the legal framework of two doctrines that could potentially preclude such a claim: absolute prosecutorial immunity, and qualified immunity.

1. Absolute Immunity

Federal prosecutors enjoy absolute immunity for "initiating a prosecution and in presenting the State's case . . . ." *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976). This principle has been extended by the Supreme Court to agency officials who perform tasks under administrative auspices that are equivalent to that of a prosecutor in a court of law. *Butz v. Economou*, 438 U.S. 478, 515 (1978) ("agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts"). Consequently, "those officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to

absolute immunity from damages liability for their parts in that decision." *Id*. at 516; *see also Gray v. Poole*, 243 F.3d 572, 577 (D.C. Cir. 2001) (extending absolute immunity to a government attorney for initiating a civil child neglect action). Nonetheless, an act is not immune merely because it is performed by a prosecutor; for instance, absolute prosecutorial immunity does not extend to "investigative functions normally performed by a detective or police officer[,]" which are generally only afforded qualified immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

In *Hartman*, the Supreme Court explained the effect of absolute immunity in the context of a First Amendment *Bivens* claim for retaliatory prosecution. There, the Court instructed that a *Bivens*

> action for retaliatory prosecution will not be brought against the prosecutor, who is absolutely immune from liability for the decision to prosecute . . . . Instead, the defendant will be a nonprosecutor, an official, like an inspector here, who may have influenced the prosecutorial decision but did not himself make it, and the cause of action will not be strictly for retaliatory prosecution, but for successful retaliatory inducement to prosecute.

Hartman, 547 U.S. at 261–62. Thus, in light of absolute prosecutorial immunity, the focus of a retaliatory prosecution claim is primarily on the non-prosecuting officials who induced the allegedly improper prosecution, and not the prosecutors themselves, unless they perform non-immunized tasks that likewise engender the improper prosecution. *Id*. at 262 n.8 (noting that "[a]n action could still be brought against a prosecutor for conduct taken in an investigatory capacity," and noting that plaintiff's complaint "charged the prosecutor with acting in an investigative as well as in a prosecutorial capacity, . . . but dismissal of the

complaint as against the prosecutor was affirmed . . . , and no claim against him is before us now"). The Court addresses whether any of the Individual Defendants are entitled to dismissal on the basis of absolute prosecutorial immunity below, in connection with its assessment of whether Plaintiff has stated a plausible claim for retaliatory prosecution.

2. Qualified Immunity

The Individual Defendants also contend that they are shielded from litigation by the doctrine of qualified immunity, which "protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation marks omitted). In order for a complaint to counter an assertion of qualified immunity, a plaintiff must plead "facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Ashcroft v. al–Kidd*, 563 U.S. 731, 735 (2011) (internal quotation marks omitted). With respect to the second element, "though in the light of pre-existing law the unlawfulness of the officer's conduct must be apparent, there is no need that the very action in question have previously been held unlawful." *Navab-Safavi*, 637 F.3d at 317 (internal quotation marks and alterations omitted) (declining to remand on the basis of qualified immunity because it "cannot be gainsaid that a person expressing her viewpoint is exercising an established constitutional right"); *Ashcroft*, 563 U.S. at 735 ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."). Put differently, qualified immunity does not attach simply because the factual circumstances of the present case are in some sense unique. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("officials can still be on notice that their

conduct violates established law even in novel factual circumstances"). Rather, the "relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 201–02 (2001).

Defendants contend that they did not violate a "clearly established" right because when the OCC initiated its enforcement action against Plaintiff in November 2006, there "was no law establishing that the initiation of a civil administrative proceeding—as opposed to a criminal prosecution—can support a retaliatory prosecution claim." Ind. Defs.' Mem. at 18. The Court notes that this is the only instance in their briefing on the pending motions where Defendants seek to distinguish the OCC's enforcement action from other retaliatory prosecution cases on the basis that the prosecution here proceeded under administrative auspices (for example, they do not argue that this case presents a new *Bivens* context on that basis). This position is also somewhat at odds with Defendants' claim of absolute prosecutorial immunity. In any event, the argument is of no avail.

The D.C. Circuit has stated unequivocally that it "clearly established in 1988 . . . the contours of the First Amendment right to be free from retaliatory prosecution." *Moore v. Hartman*, 704 F.3d 1003, 1004 (D.C. Cir. 2013). More generally, in *Hartman*, the Supreme Court stated that "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out . . . ." 547 U.S. at 256. As support for that general proposition, the Supreme Court relied upon two earlier decisions, *Crawford*, issued in 1998, and *Perry*, issued in 1972. *Id.*; *Crawford–El v. Britton*, 523 U.S. 574, 588, 592 (1998) ("the general rule has long been clearly

established [that] the First Amendment bars retaliation for protected speech"); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (noting that the government may not punish a person or deprive him of a benefit on the basis of his "constitutionally protected speech"). Based on these precedents, it has been clearly established, long before the OCC instituted the enforcement action against Plaintiff, that retaliatory action by Federal officials against protected speech is unconstitutional. And this general principle was further crystalized by authorities which held that retaliatory prosecutions were a particular example of this sort of unconstitutional behavior. That these cases did not involve an administrative proceeding is ultimately a distinction without a difference. The pertinent question is whether the general constitutional principle was sufficiently established that it should have been clear to the Individual Defendants that their conduct, if the allegations prove true, was unlawful. Here, the case law had clearly established the unlawfulness of retaliatory conduct generally, and retaliatory prosecutions more specifically. The OCC's enforcement powers, by Defendants' own admission, are immense and may be exercised in an administrative hearing with all the hallmarks of full court proceeding. *See supra* at 14. Moreover, the possible sanctions, albeit not criminal, are no less severe than what could face a criminal defendant. Plaintiff, in particular, faced a $250,000 fine and exclusion from the banking industry, and by extension, his chosen legal practice.[3] Compl. ¶ 80.

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[3] These factual circumstances distinguish this case from the non-controlling authority pressed by Defendants: *Bank of Jackson County v. Cherry*, 980 F.2d 1362 (11th Cir. 1993). *See* Ind. Defs.' Mem. at 18–19. There, the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") affirmed a grant of summary judgment on the basis of qualified immunity for a *Bivens* suit in which plaintiff, a small bank, alleged that it was "debarred" from working with the Farmers Home Administration, a federal agency that guaranteed the bank's

Given the gravity of the enforcement action, and the established case law just recounted, if the allegations are substantiated, it should have been clear to the Individual Defendants that using their immense enforcement powers as a means to retaliate against Plaintiff for his protected speech was unconstitutional. Accordingly, the Court concludes that the right against retaliatory prosecution was clearly established at the time the Individual Defendants initiated the enforcement action. As a result, the Individual Defendants are not entitled to dismissal on the basis of qualified immunity so long as Plaintiff has stated a plausible claim that they violated this right, an issue addressed in the following section.

3. Plaintiff Has Stated a Plausible Claim Against Defendants Rardin, Schneck, and Sexton, But Not Straus

The "essential elements" of a retaliatory prosecution claim are

> [F]irst, that the conduct allegedly retaliated against or sought to be deterred was constitutionally protected, and, second, that the State's bringing of the criminal prosecution was motivated at least in part by a purpose to retaliate for or to deter that conduct. If

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loans to farmers, in retaliation for a legal dispute with the agency. *Id.* at 1364–65. In relevant part, the Eleventh Circuit held that "[a]ny legal similarity between [the] debarment, on the one hand, and criminal prosecution, on the other, would not have been readily apparent to government officials attempting to do their jobs on a day-to-day basis." *Id.* at 1370. Here, for the reasons stated, the allegations suggest that the similarity was far more apparent.

> the Court concludes that the plaintiffs have successfully discharged their burden of proof on both of these issues, it should then consider a third: whether the State has shown by a preponderance of the evidence that it would have reached the same decision as to whether to prosecute even had the impermissible purpose not been considered.

Haynesworth, 820 F.2d at 1257 n.93.[4]

Plaintiff alleges that Defendant Rardin was the examiner-in-chief ("EIC") in charge of Hamilton Bank from 2000 to 2001, and that he was "actively involved" in the OCC enforcement action against Plaintiff, Compl. ¶ 3; that Lee Straus "is an enforcement attorney at the OCC who was the lead counsel" in the enforcement action, *id.* ¶ 4; that Defendant Schneck "is Director of the Special Supervision and Fraud Division at the OCC [and] was actively involved in the OCC's various dealings with Hamilton from 2000 to 2001," as well as with the enforcement action, *id.* ¶ 5; and finally, that Defendant Sexton is "Assistant Director of the Enforcement and Compliance Division of the OCC," and was similarly "actively involved in the OCC's various dealings with Hamilton from 2000 to 2001," and the enforcement action, *id.* ¶ 6. Defendant Sexton, like Defendant Straus, is an "experienced Government enforcement lawyer." *Id.* Plaintiff alleges that the Individual Defendants were all

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[4] In *Hartman*, the Supreme Court added the additional requirement that plaintiffs bringing a retaliatory prosecution suit must plead and prove the absence of probable cause. 547 U.S. at 265. Defendants do not challenge the Complaint on the basis that it has failed to adequately plead the absence of probable cause (or its equivalent), an unsurprising result given the D.C. Circuit's determination that the enforcement action was not justified. In any event, the Court finds that Plaintiff has adequately pled the absence of probable cause, or its equivalent in the administrative setting in which the enforcement action was brought.

"senior, influential employees of the OCC, with particularly strong say and influence on enforcement matters." *Id.* ¶ 7.

According to the Complaint, Plaintiff's critical statements toward the OCC caused severe embarrassment to OCC "officials who had been involved in the OCC behavior relating to Hamilton that those letters criticized, including prominently, and in senior roles, defendants Rardin, Schneck, and Sexton." *Id.* ¶ 52. According to Plaintiff, these same officials, "all embarrassed and angered by [Plaintiff's] whistle-blowing, began discussing how to retaliate against him for his temerity, [and] all three of these defendants were actively involved in the case brought by the OCC." *Id.* ¶ 61. Defendant Sexton, in particular, is alleged to have said, in reference to the investigative reports prepared by Plaintiff, that Plaintiff had "gone too far," and that he and others "had to pay." *Id.* ¶ 64. Consequently, Plaintiff alleges that the decision to bring an enforcement action against him was "unduly influenced by defendants Rardin, Sexton and Schneck . . . ." *Id.* ¶ 72.

Taking the foregoing allegations as true and drawing all reasonable inferences in Plaintiff's favor, as the Court must at this procedural juncture, Plaintiff's allegations, taken as a whole, plausibly suggest that Defendants Rardin, Schneck, and Sexton used the fruits of their investigation into Hamilton Bank (i.e., their scrutiny of the investigative reports drafted by Plaintiff) to improperly induce an enforcement action against Plaintiff in reprisal for critical statements that he made against them and the OCC more generally. This view of the Complaint is corroborated by the fact that the ALJ, the Comptroller, and the D.C. Circuit ultimately concluded that the enforcement action was not meritorious. *Loumiet EAJA*, 650 F.3d at 800; *see also Hartman*, 547 U.S. at 261 ("[d]emonstrating that there was no probable cause for the underlying criminal charge will tend to reinforce the retaliation evidence and show that

retaliation was the but-for basis for instigating the prosecution"). Moreover, Plaintiff has alleged that an action was brought against him—and not other advisors involved with the Hamilton Bank investigation—despite him having relatively less involvement with that investigation, *id.* ¶¶ 28, 84, and that the OCC ultimately concluded that Plaintiff's work product, which was the purported basis of the enforcement action, did not "cause[] more than a minimal financial loss to, or a significant adverse effect on [Hamilton Bank,]" *Loumiet EAJA*, 650 F.3d at 800. Taken as a whole, the foregoing suffices to state a claim of retaliatory prosecution against Defendants Rardin, Schneck, and Sexton.

Because the allegations against these three Defendants plausibly state that they induced the enforcement action against Plaintiff through their investigative conduct, and did not merely act as prosecutors who made the ultimate decision to prosecute, they are not entitled to absolute prosecutorial immunity at this procedural juncture. *See supra* at 19–20. Furthermore, because the Complaint plausibly alleges that they violated a right that the Court has concluded was clearly established at the time of the alleged violation, these three Defendants are also not entitled to qualified immunity at this procedural juncture. Nonetheless, further factual development may show that these Defendants are entitled to one or both of these immunities. The only allegations in the Complaint with respect to Defendant Straus, however, are that he was lead counsel of the enforcement action, and that he made certain comments to the press in the course of the prosecution that were critical of Plaintiff. Compl. ¶¶ 4, 78, 85. Of these two, the only actionable conduct is Defendant Straus' press

commentary,[5] his prosecutorial conduct being entitled to absolute immunity, *see supra* 19–20. But the gravamen of a retaliatory prosecution claim is the decision to, or inducement of, prosecution, and consequently the statements that Defendant Straus allegedly made to the press *in the course of the prosecution* do not make out a claim of retaliatory prosecution. Accordingly, Plaintiff's First Amendment *Bivens* claim shall proceed against Defendants Rardin, Schneck, and Sexton, but shall be dismissed, without prejudice, against Defendant Straus on the basis of absolute immunity and for failure to state a claim.

C. Plaintiff Has Not Stated a Viable Fifth Amendment *Bivens* Claim

Plaintiff also alleges a Fifth Amendment due process claim against the Individual Defendants. The count in the Complaint alleging this claim merely mirrors the First Amendment count. *Compare* Compl. ¶¶ 140–142, *with id.* ¶¶ 137–139. Moreover, Plaintiff has not briefed whether a Fifth Amendment claim for retaliatory prosecution is cognizable under *Bivens*, or whether such a Fifth Amendment claim was sufficiently established to avoid dismissal on the basis of qualified immunity. To the extent Plaintiff's Fifth Amendment claim is intended to bring a substantive due process claim for the First Amendment violation already discussed at length, that is foreclosed by Supreme Court precedent. *Albright v. Oliver*, 510 U.S. 266, 273 (1994) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." (internal

[5] Defendants acknowledge that the press commentary alleged in the Complaint is not entitled to absolute prosecutorial immunity. Reply Mem. at 8 (citing *Buckley*, 509 U.S. at 278).

quotation marks omitted)). However, in his opposition to the pending motions, Plaintiff seeks to restyle his Fifth Amendment claim as a "stigma plus" or "reputation plus" due process claim. Opp'n Mem. at 32. To bring such a claim in the D.C. Circuit, Plaintiff must plausibly allege that the Individual Defendants engaged in conduct that not only harmed Plaintiff's reputation, but that also either formally excluded Plaintiff from a chosen trade or profession, or caused "harms approaching, in terms of practical effect, formal exclusion from a chosen trade or profession . . . ." *Trifax Corp. v. District of Columbia*, 314 F.3d 641, 644 (D.C. Cir. 2003). "The key inquiry then is this: Has the government, by attacking personal or corporate reputation, achieved in substance an alteration of status that, if accomplished through formal means, would constitute a deprivation of liberty?" *Id*. Absent such "broad preclusion" from a chosen trade or profession, a Fifth Amendment claim will not lie even if the government conduct would "impair [plaintiff's] future employment prospects . . . so long as such damage flows from injury caused by the defendant to a plaintiff's reputation." *Siegert v. Gilley*, 500 U.S. 226, 234 (1991). For example, in *Kartseva*, the D.C. Circuit remanded for the district court to determine whether the government conduct in that case had effectively precluded plaintiff "from pursuing her profession as a Russian language translator," or whether plaintiff had "merely lost one position in her profession but is not foreclosed from reentering the field," in which case her Fifth Amendment claim would not be viable. *Kartseva v. Dep't of State*, 37 F.3d 1524, 1529 (D.C. Cir. 1994).

Here, Plaintiff has not alleged that the conduct of the Individual Defendants has precluded him from engaging in his chosen career as a banking law practitioner. Rather, the Complaint alleges that Plaintiff's "practice—particularly in the banking field—largely evaporated," and that his "income dropped significantly," and that he "fell six partnership

levels . . . ." Compl. ¶ 106. Although these allegations plausibly state that Plaintiff's employment prospects were impaired, that is not equivalent to him being precluded from practicing law as a banking attorney. Indeed, by the plain terms of the Complaint, he remained a partner at a law firm, and his practice only "largely" evaporated; it did not cease to exist. Accordingly, the Complaint does not state a plausible "reputation-plus" or "stigma-plus" Fifth Amendment *Bivens* claim, and Plaintiff has not presented any other theory of how his Fifth Amendment claim could proceed. As a result, the Fifth Amendment claim shall be dismissed.

D. The State-Law Tort Claims Against the Individual Defendants are Converted to FTCA Claims Against the United States

Defendants contend that the state-law tort claims against the Individual Defendants for intentional infliction of emotional distress (Count I), invasion of privacy (Count II), abuse of process (Count III), malicious prosecution (Count IV), and conspiracy (Count VIII), are automatically converted to FTCA claims against the United States pursuant to the Westfall Act, 28 U.S.C. § 2679(d), which "accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." *Osborn v. Haley*, 549 U.S. 225, 229 (2007). Pursuant to the Westfall Act, all that is required for conversion of the state-law claims against the Individual Defendants is a certification of a designee of the Attorney General that the Individual Defendants were "acting within the scope of [their] office or employment at the time of the incident out of which the claim[s] arose . . . ." 28 U.S.C. § 2679(d)(1). Here, such a certification has been provided by the Director of the Torts Branch of the Department of Justice's Civil Division, a designee of the Attorney General, and Plaintiff does not oppose the conversion in his opposition to the pending motions. Ind.

Defs. Mem at 21, Ex. 1; *see FDIC v. Bender*, 127 F.3d 58, 67–68 (D.C. Cir. 1997) ("It is well understood in this Circuit that when a plaintiff files an opposition to a motion to dismiss addressing only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded."). Accordingly, the state-law tort claims against the Individual Defendants are converted to FTCA claims against the United States.

E. Plaintiff's FTCA Claim

1. Discretionary-Function Exception

The D.C. Circuit has instructed that "the discretionary-function exception does not categorically bar FTCA tort claims where the challenged exercise of discretion allegedly exceeded the government's constitutional authority to act." *Loumiet IV*, 828 F.3d at 939. The task for this Court on remand was to determine whether Plaintiff's "complaint plausibly alleges that the OCC's conduct exceeded the scope of its constitutional authority so as to vitiate discretionary-function immunity." *Id*. at 946. For the reasons discussed above, the Court has concluded that Plaintiff has plausibly alleged that Defendants engaged in conduct that violated a clearly established First Amendment right against retaliatory prosecution. *See supra* at 28. As Defendants make no other challenges on this point, the Court concludes that the United States may not make use of the discretionary-function exception of the FTCA under the circumstances of this case to shield itself from Plaintiff's state-law tort claims predicated on the OCC's allegedly retaliatory enforcement action.

2. Plaintiff's Malicious Prosecution and Abuse of Process Claims Must be Dismissed

The waiver of sovereign immunity afforded by the FTCA generally does not apply to claims of malicious prosecution or abuse of process, among a number of other intentional torts. 28 U.S.C. § 2680(h). Nonetheless, the Act contains an exception to this general rule, known as the Law Enforcement Proviso, which states that "with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the [FTCA] shall apply to any claim arising . . . out of . . . abuse of process, or malicious prosecution." *Id*. Accordingly, in order for Plaintiff to pursue these two claims, as he seeks to do in the Complaint, he must establish that the OCC employees who engaged in the allegedly tortious activity were "investigative or law enforcement officers of the United States."

The FTCA defines "investigative or law enforcement officer" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id*. According to Plaintiff, OCC officials are vested with

> so-called "visitorial powers," which allows federal agents to (i) examine a bank; (ii) inspect a bank's books and records; (iii) regulate and supervise the bank; and (iv) enforce compliance with any applicable federal or state laws concerning those activities. The agents also are empowered to engage in comprehensive investigations, where they can command attendance at depositions, administer oaths, and depose officers, directors, employees, or agents of the bank under oath.

Opp'n Mem. at 35 (citing 12 U.S.C. §§ 481, 484, 1820). The officials are also empowered to "issue, revoke, quash, or modify subpoenas." *Id*. (citing 12 U.S.C. § 1818(n)). In the Court's view, however, these powers do not suffice to render OCC officials "investigative or law enforcement officers," as

none of these rights amount to a power to execute searches, to seize evidence, or to make arrests. In a closely analogous case, another district court held that officials of the Office of Thrift Supervision ("OTS"), a bank regulator, were not investigative or law enforcement officers, as there was no "legal authority vested in the OTS to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Biase v. Kaplan*, 852 F. Supp. 268, 281 (D.N.J. 1994); *see also Saratoga Sav. & Loan Ass'n v. Fed. Home Loan Bank of San Francisco*, 724 F. Supp. 683, 689 (N.D. Cal. 1989) (finding that Federal bank examiners with the Federal Home Loan Bank were not "investigative or law enforcement officers"). In particular, the *Biase* court noted that while "OTS is empowered to examine bank documents and issue subpoenas therefor, . . . OTS must make application to a district court to compel access to documents," which does not suffice to render such bank examiners law enforcement officers. 852 F. Supp. at 281 n.9 (collecting cases).

The same is true here. Of the various powers described above, the only one that potentially suffices to render the OCC officials subject to the Law Enforcement Proviso is the ability to subpoena evidence. Nonetheless, much like the OTS officials in *Biase*, the OCC officials in this case can only enforce witness and document subpoenas by application to a United States District Court. 12 U.S.C. § 1818(n) ("such agency . . . may apply to the United States District Court . . . for enforcement of any subpena or subpena duces tecum issued pursuant to this subsection"). Accordingly, OCC officials are not subject to the Law Enforcement Proviso merely by virtue of their subpoena powers. *See Art Metal-U.S.A., Inc. v. United States*, 577 F. Supp. 182, 185 (D.D.C. 1983) ("[o]btaining evidence by subpoena is the antithesis of obtaining it through search and seizure"), *aff'd*, 753 F.2d 1151 (D.C. Cir. 1985).

The other powers afforded to OCC officials—to review bank records and engage in regulatory activities—likewise do not constitute the types of powers to execute searches, seize evidence, or make arrests that were envisioned by the Law Enforcement Proviso. The Proviso was enacted by Congress "as a counterpart to the *Bivens* case and its progeny, in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages under state law for the same type of conduct that is alleged to have occurred in *Bivens*[,]" which involved federal narcotics agents searching a residence and making arrests. *Denson v. United States*, 574 F.3d 1318, 1336 (11th Cir. 2009) (citing S. Rep. No. 93–588 (1974)) (alterations in original omitted). Consequently, the bank examination functions of the OCC described above are plainly not equivalent to the type of law enforcement searches and seizures that Congress intended to waive immunity for with the passage of the Law Enforcement Proviso.

Finally, although Plaintiff requests that the Court permit discovery on this issue, which would be tantamount to jurisdictional discovery given that sovereign immunity implicates this Court's subject matter jurisdiction,[6] he does not explain how that discovery would be helpful to the resolution of this issue. The FTCA makes clear that whether

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[6] *See FC Inv. Grp. LC v. IFX Markets, Ltd.*, 529 F.3d 1087, 1094 (D.C. Cir. 2008) ("a request for jurisdictional discovery cannot be based on mere conjecture or speculation"); *Atlantigas Corp. v. Nisource, Inc.*, 290 F. Supp. 2d 34, 53 (D.D.C. 2003) ("Where there is no showing of how jurisdictional discovery would help plaintiff discover anything new, it is inappropriate to subject defendants to the burden and expense of discovery." (internal quotation marks and alterations omitted)); *Williams v. ROMARM*, 187 F. Supp. 3d 63, 72 (D.D.C. 2013), *aff'd sub nom. Williams v. Romarm, SA*, 756 F.3d 777 (D.C. Cir. 2014) ("[W]hen requesting jurisdictional discovery, a plaintiff must make a detailed showing of what discovery it wishes to conduct or what results it thinks such discovery would produce." (internal quotation marks and alterations omitted)).

an official is an "investigative or law enforcement officer" depends on whether they are "empowered by law" to execute the functions enumerated in the statute. Here, the Court has reviewed the relevant law and found that the OCC officials are not so empowered. Furthermore, the two out-of-Circuit authorities relied upon by Plaintiff to seek discovery are not persuasive. First, in *Sutton*, the Fifth Circuit did not require the district court on remand to permit discovery, as Plaintiff contends, but rather required the court to make a determination as to whether the official at issue fit the Proviso. *Sutton v. United States*, 819 F.2d 1289, 1294 n.8 (5th Cir. 1987). And while Plaintiff seeks to equate the powers of the OCC officials here with those of the Postal Inspectors in *Sutton*, the Fifth Circuit expressly noted that the latter are empowered to "[m]ake arrests without warrant . . . ." *Id.* The other authority relied upon by Plaintiff, *Pellegrino*, faced the question of whether "airport security screenings" by Transportation Security Agents constituted "searches" for purposes of the Law Enforcement Proviso. The *Pellegrino* court expressly noted the similarity between these "screenings" and the type of unlawful, warrantless searches that were the subject of *Bivens* and the Law Enforcement Proviso, and consequently permitted discovery to determine whether this conduct in fact amounted to a type of warrantless search subject to the Proviso. *Pellegrino v. U.S. Transp. Sec. Admin.*, 855 F. Supp. 2d 343, 356 (E.D. Pa. 2012). As already stated here, there is no indication in the applicable law, or any allegation in the Complaint, that OCC officials are empowered to engage in conduct that approximates the activities envisaged by the Law Enforcement Proviso. Accordingly, the Court finds that the OCC officials at issue were not "investigative or law enforcement officers," and that, as a result, Plaintiff's malicious prosecution and abuse of process claims shall be dismissed without prejudice.

3. Based on the Court's Prior Ruling, The Invasion of Privacy Claim Can Proceed

"Invasion of privacy is not one tort, but a complex of four, each with distinct elements and each describing a separate interest capable of being invaded." *Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1061 (D.C. 2014) (internal quotation marks omitted). Of the four, the one relevant here is "public disclosure of private facts." *Id.* The elements of this claim are "(1) publicity, (2) absent any waiver or privilege, (3) given to private facts (4) in which the public has no legitimate concern (5) and which would be highly offensive to a reasonable person of ordinary sensibilities." *Wolf v. Regardie*, 553 A.2d 1213, 1220 (D.C. 1989). Plaintiff alleges that private facts were tortiously disclosed in two instances: the November 6, 2006 Notice of Charges, and an October 3, 2006 press release issued by the OCC with respect to the enforcement action. Opp'n Mem. at 39–40. Both of these documents are subject to the Court's review as they are "public records and government documents available from reliable sources." *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 67 (D.D.C. 2014).

Although the Court agrees with Defendants that some of the statements in these documents do not appear to concern private facts and/or are matters of public concern (e.g., the results of the Hamilton Bank investigation), the amount of fees charged by Plaintiff and his firm, relayed by both documents, is a seemingly private fact, the public importance of which is not apparent, and the disclosure of which may be highly offensive to a reasonable person (much like one may be offended by the disclosure of his or her salary). As such, Plaintiff has stated a plausible claim for invasion of privacy, in particular, the public disclosure of private facts.

The remaining question is whether this claim is timely. On this, the Court previously ruled that the continuing tort doctrine tolled the statute of limitations with respect to Plaintiff's FTCA claims, all of which arose out of the allegedly retaliatory prosecution, until the "final disposition of the case." *Loumiet I*, 968 F. Supp. 2d at 154 (citing *Whelan v. Abell*, 953 F.2d 663, 674 (D.C. Cir. 1992)). Because Plaintiff brought an administrative action within two years of the cessation of the prosecution, the Court concluded that "Plaintiff's FTCA claims need not be dismissed on statute of limitations grounds." *Id.* at 155. Defendants point the Court's towards its later decision, which held that the statements underling the invasion of privacy claim did not warrant application of the continuing tort doctrine. *Loumiet III*, 106 F. Supp. 3d at 225–26. Importantly, this decision was rendered after the Court had determined that Defendants' decision to

prosecute was not actionable under the discretionary-function exception. *Id.* at 222. That decision has now been reversed, and accordingly, the Court's analysis reverts to its prior conclusion that the pendency of the prosecution constituted a continuing tort that tolled the statute of limitations for Plaintiff's FTCA claims. Accordingly, Plaintiff's invasion of privacy claim may proceed.

IV. CONCLUSION

For all of the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN PART** the Individual Defendants' [62] Motion to Dismiss, and **GRANTS IN PART AND DENIES IN PART** the United States' [63] Motion to Dismiss. Plaintiff's First Amendment *Bivens* claim for retaliatory prosecution shall proceed against Defendants Rardin, Schneck, and Sexton. Plaintiff's Fifth Amendment *Bivens* claim, and all claims against Defendant Straus are **DISMISSED WITHOUT PREJUDICE**. Pursuant to the

Westfall Act, the state-law tort claims against the Individual Defendants are **CONVERTED** to FTCA claims against the United States. Plaintiff's FTCA claims against the United States may proceed, except that the abuse of process (Count III) and malicious prosecution (Count IV) claims are **DISMISSED WITHOUT PREJUDICE**, leaving only the claims for intentional infliction of emotional distress (Count I), invasion of privacy (Count II), negligent supervision (Count V), and civil conspiracy (Count VIII).

An appropriate Order accompanies this Memorandum Opinion.

Dated: June 13, 2017

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CARLOS LOUMIET, *Plaintiff*, v. UNITED STATES OF AMERICA, *et al.*, *Defendants.*	Civil Action No. 12-1130 (CKK)

MEMORANDUM OPINION

(November 28, 2017)

Plaintiff Carlos Loumiet brought this suit against the United States Government for certain actions of its agency, the Office of the Comptroller of the Currency ("OCC"), and against Defendants Michael Rardin, Lee Straus, Gerard Sexton, and Ronald Schneck (together, the "Individual Defendants"), alleging a variety of torts under federal and state law. After a series of rulings by this Court and the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), on remand this Court granted-in-part and denied-in-part the United States' and Individual Defendants' latest motions to dismiss. *Loumiet v. United States*, 255 F. Supp. 3d 75 (D.D.C. 2017) ("*Loumiet V*"). The Court allowed the following claims to proceed: a First Amendment claim for retaliatory prosecution under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), against Defendants Rardin, Schneck, and Sexton, and claims under the Federal Tort Claims Act ("FTCA") for intentional infliction of emotional distress (Count I), invasion of privacy (Count II), negligent supervision (Count

V), and civil conspiracy (Count VIII), against the United States. *Loumiet V*, 255 F. Supp. 3d at 81.

In light of the Supreme Court's recent decision in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), Individual Defendants now urge this Court to revisit its decision on their [62] motion to dismiss.[1] *See* Individual Defs.' Rule 54(b) Mot. to Reconsider in Light of *Ziglar v. Abbasi* and Supporting Mem. of P&A, ECF No. 74, at 1-2 ("Ind. Defs.' Mem."). While their specific request is somewhat ambiguous, Individua l Defendants essentially ask the Court not to recognize subject-matter jurisdiction over Plaintiff's First Amendment *Bivens* claim, and in turn to reverse its decision to deny their motion with respect to Defendants Rardin, Schneck, and Sexton. *See Loumiet V*, 255 F. Supp. 3d at 82-83 (discussing standard for surviving Rule 12(b)(1) motion and recognizing First Amendment *Bivens* claim); Ind. Defs.' Mem. at 1-2 ("[T]his Court should . . . decline to recognize a *Bivens* remedy in this case.").

Upon consideration of the briefing and notices of supplemental authority,[2] the relevant legal authorities, and

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[1] The United States has not filed a motion to reconsider the Court's decision on the United States' [63] Motion to Dismiss. Therefore, only the First Amendment claim for retaliatory prosecution under *Bivens* against Individual Defendants is considered here.

[2] The Court's consideration has focused on the following documents:

- Individual Defs.' Rule 54(b) Mot. to Reconsider in Light of *Ziglar v. Abbasi* and Supporting Mem. of P&A, ECF No. 74 ("Ind. Defs.' Mem.");
- Carlos Loumiet's Opp'n to Individual Defs.' Rule 54(b) Mot. to Reconsider in Light of *Ziglar v. Abbasi*, ECF No. 75 ("Opp'n Mem.");
- Reply Mem. in Supp. of Individua l Defs.' Rule 54(b) Mot. to Reconsider in Light of *Ziglar v. Abbasi*, ECF No. 76 ("Reply Mem.");

the record as a whole, the Court **DENIES** the Individual Defendants' [74] Rule 54(b) Motion to Reconsider in Light of *Ziglar v. Abbasi* and Supporting Memorandum of Points and Authorities ("Motion to Reconsider"). Plaintiff's First Amendment *Bivens* claim for retaliatory prosecution shall proceed against Defendants Rardin, Schneck, and Sexton. Plaintiff's FTCA claims for intentional infliction of emotional distress (Count I), invasion of privacy (Count II), negligent supervision (Count V), and civil conspiracy (Count VIII) shall proceed against the United States.

I. BACKGROUND

In prior proceedings, the Court has extensively discussed the factual background, *e.g.*, *Loumiet v. United States*, 968 F. Supp. 2d 142, 145-47 (D.D.C. 2013) ("*Loumiet I*"),[3] and

- Carlos Loumiet's Mot. for Leave to File Sur-Reply, ECF No. 78 ("Sur-Reply Mot.);
- Carlos Loumiet's Sur-Reply in Opp'n to Individual Defs.' Mot. for Recons., ECF No. 78-1 ("Sur-Reply Mem.");
- Individual Defs.' Notice of Suppl. Auth., ECF No. 77 ("Notice Suppl. Auth.");
- Carlos Loumiet's Resp. to Individual Defs.' Notice of Suppl. Auth., ECF No. 79 ("Resp. to Notice Suppl. Auth.");
- Individual Defs.' Second Notice of Suppl. Auth., ECF No. 80 ("Second Notice Suppl. Auth.").

[3] The list of past rulings consists of *Loumiet v. United States*, 968 F. Supp. 2d 142 (D.D.C. 2013) ("*Loumiet I*"); *Loumiet v. United States*,65 F. Supp. 3d 19 (D.D.C.2014) ("*Loumiet II*"); *Loumiet v. United States*, 106 F. Supp. 3d 219 (D.D.C. 2015) ("*Loumiet III*"); *Loumiet v. United States*, 828 F.3d 935 (D.C. Cir. 2016) ("*Loumiet IV*"); and *Loumiet v. United States*, 255 F. Supp. 3d 75 (D.D.C. 2017) ("*Loumiet V*"). In addition, the D.C. Circuit previously ruled on Plaintiff's application for attorney fees under the Equal Access to Justice Act ("EAJA") in connection with his defense before the OCC. *Loumiet v. Office of*

shall deal here only with those details necessary to evaluate Individual Defendants' [74] Motion to Reconsider.

II. LEGAL STANDARD

A. Motion to Dismiss for Lack of Subject-Matter Jurisdiction

In order to hear Plaintiff's *Bivens* claim, the Court must be satisfied that it has subject- matter jurisdiction. At the motion to dismiss stage, Plaintiff bore the burden of establishing that the Court has subject-matter jurisdiction over its claims. *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007); *Ctr. for Arms Control & Non-Proliferation v. Redd*, No. CIV.A. 05- 682 (RMC), 2005 WL 3447891, at *3 (D.D.C. Dec. 15, 2005). In determining whether there is jurisdiction, the Court may "consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003) (internal quotation marks omitted). "Although a court must accept as true all factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1)," the factual allegations in the complaint "will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Wright v. Foreign Serv. Grievance Bd.*, 503 F. Supp. 2d 163, 170 (D.D.C. 2007) (internal quotation marks omitted).

Comptroller of Currency, 650 F.3d 796, 798 (D.C. Cir. 2011) ("*Loumiet EAJA*").

B. Motion to Reconsider

Now on a motion for reconsideration, the burden shifts. Under Federal Rule of Civil Procedure Rule 54(b), "any order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). As it has before, the Court again shares the view in this district that a Rule 54(b) motion may be granted "as justice requires." *E.g.*, *Loumiet II*, 65 F. Supp. 3d at 24; *Coulibaly v. Tillerson*, Civil Action No. 14-189, 2017 WL 4466580, at *5 (D.D.C. Oct. 5, 2017) (Contreras, J.); *United States v. Dynamic Visions, Inc.*, Civil Action No. 11-695 (CKK), 2017 WL 1476102, at *2 (D.D.C. Apr. 24, 2017) (Kollar-Kotelly, J.); *Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005) (Lamberth, J.) (quoting *Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004) (Lamberth, J.)). While this is a broad standard, Individual Defendants carry the burden of proving "that some harm, legal or at least tangible, would flow from a denial of reconsideration," and accordingly persuading the Court that in order to vindicate justice it must reconsider its decision. *Dynamic Visions, Inc.*, Civil Action No. 11-695 (CKK), 2017 WL 1476102, at *2 (quoting *Cobell*, 355 F. Supp. 2d at 540) (internal quotation marks omitted). Among the ways that a movant may attempt to do so is by proposing that "a controlling or significant change in the law or facts has occurred since the submission of the issue to the Court," *id.* (citing *Singh*, 383 F. Supp. 2d at 101), as Individual Defendants have done here. Ind. Defs.' Mem. at 1-2, 6-7. But "motions for reconsideration . . . cannot be used as an opportunity to reargue facts and theories upon which a court has already ruled, nor as a vehicle for presenting theories or arguments that could have been advanced earlier." *Loumiet II*, 65 F. Supp. 3d at 24 (quoting *Estate of Gaither ex rel.*

Gaither v. District of Columbia, 771 F. Supp. 2d 5, 10 & n.4 (D.D.C. 2011)) (internal quotation marks omitted).

III. DISCUSSION

Only if *Abbasi* made a "controlling or significant change" to an aspect of the *Bivens* inquiry shall the Court need to reevaluate its decision to deny in pertinent part Individua l Defendants' [62] motion to dismiss.[4] The Court shall first address Individual Defendants' arguments that *Abbasi* renders this a "new context" for a *Bivens* claim and that *Abbasi* further discourages courts from finding a new context. *See* Ind. Defs.' Mem. at 1-2. Next the Court shall evaluate whether *Abbasi* adjusted the two *Wilkie v. Robbins* inquiries into "any special factors counselling hesitation," and—although Individual Defendants do not discuss it quite this way—any "alternative, existing process" that should displace *Bivens*. *See Wilkie v. Robbins*, 551 U.S 537, 550 (2007); Ind. Defs.' Mem. at 2 (arguing that "*Abbasi* demonstrates that special factors preclude recognition of a *Bivens* remedy in this case," and naming among such alleged factors, "Loumiet's access to alternative statutory and judicial remedies").[5]

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[4] The Court has no reason to doubt that a four-justice majority opinion issued when the Supreme Court had satisfied the six-justice quorum represents controlling precedent. *See* Reply Mem. at 1 n.1 (citing 28 U.S.C. § 1 (2015)); *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 461 n.1 (2013) (applying 28 U.S.C. § 1 to four-justice portion of opinion in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), which also met quorum of six justices).

[5] Individual Defendants make no argument that *Abbasi* should affect this Court's prior determination regarding absolute prosecutorial immunity and qualified immunity. *See, e.g.*, *Loumiet V*, 255 F. Supp. 3d at 95-96.

Consistent with the approach in *Wilkie*, the Court shall evaluate any alternative, existing process separately from the special factors analysis; the Court finds that *Abbasi*'s slightly different structure of discussing any alternative, existing process in the course of the special factors analysis makes no practical difference in this case. *See Wilkie*, 551 U.S. at 550-61 ("assessing the significance of any alternative remedies at step one" before proceeding to "*Bivens* step two [involving] weighing reasons for and against the creation of a new cause of action"); *Abbasi*, 137 S. Ct. at 1857-58, 1860-63 (discussing the "special factors" consideration before examining, "[i]n a related way," whether "there is an alternative remedial structure" (citing *Wilkie*, 551 U.S. at 550)).

While the Court endeavors to give complete consideration to the Individual Defendants' motion, and the parties' extensive briefing and supplemental notices, the Court addresses here only those aspects to which justice requires attention in the wake of *Abbasi*.[6]

A. *Abbasi* Does Not Affect This Court's "New Context" Assumption

Individual Defendants make much of *Abbasi*'s articulation of what may be a new standard for finding a "new context" for a *Bivens* claim. Furthermore, they emphasize that *Abbasi* renders *this* case a new context. For example,

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[6] Individual Defendants point to various post-*Abbasi* cases in courts outside this circuit that allegedly "have already begun to decline invitations to expand the *Bivens* remedy to new contexts." Reply Mem. at 2; *see also* Notice Suppl. Auth.; Second Notice Suppl. Auth. The Court finds that these cases do not add meaningfully to the analysis in the parties' briefs or the Court's own analysis in this opinion.

> After *Abbasi*, it is crystal clear that permitting a constitutional tort action in this case extends the *Bivens* remedy into a new context. *Abbasi* establishes that the familiar context of *Bivens* is now limited to the three cases—*Bivens*, *Davis*, and *Carlson*—in which the Supreme Court itself (not the Courts of Appeals) has approved of an implied damages remedy under the Constitution. *Abbasi*, 2017 WL 2621317, at *9 ("These three cases—*Bivens*, *Davis*, and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself."); *Id.* [sic] at *15 ("The proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new.") (emphasis added). Thus, after *Abbasi*, it is no longer appropriate to look to circuit precedent in determining whether a case presents a familiar or new *Bivens* context. *Id.*

Ind. Defs.' Mem. at 8. Even if the Supreme Court's language does establish a new standard for identifying a new *Bivens* context—a point that the D.C. Circuit has not yet addressed and which this Court need not decide—that point would not compel this Court to reevaluate its decision to recognize this *Bivens* claim. Because the Court decided the new context inquiry in the alternative, any adjustment that *Abbasi* may have made to the relevant standard is inapposite. *See Loumiet V*, 255 F. Supp. 3d at 85 ("Even assuming that this case presents a 'new context,' however, the special factor analysis does not preclude a *Bivens* remedy for Plaintiff's retaliatory prosecution claim."); Opp'n Mem. at 3 (citing *id.*).

Individual Defendants also insist that *Abbasi* raises the bar for finding that a *Bivens* remedy may be extended to a particular new context. Notably,

> *Abbasi* emphasizes that expanding the *Bivens* remedy is "now a disfavored judicial activity," given Congress's primary role in deciding whether establishing a private right of action is the best means to enforce a constitutional guarantee. As a result, the determination that a plaintiff seeks to extend the *Bivens* remedy to a new context weighs heavily against permitting the claim to proceed, given the strong policy against expanding *Bivens* to any new context.

Ind. Defs.' Mem. at 2. Individual Defendants appear to make some kind of argument that *Abbasi* adds a further presumption against finding a *Bivens* remedy, a presumption that is suggested to exceed the Supreme Court's already clear trend against such findings, and that is somehow independent of the "special factors" and "alternative, existing process" inquiries that the Supreme Court distilled in *Wilkie*. The Court is not persuaded that *Abbasi* should be read this way. As if in agreement, later in their brief Individual Defendants seem to back away from this argument because they never explain what this Court is supposed to do with such an added presumption aside from doing what it already did: assume *arguendo* a new context, and give serious attention to any special factors and any alternative, existing processes (or *vice versa*, in the *Wilkie* articulation) that should prevent extension of *Bivens* here.

Moreover, the Court finds unpersuasive Individual Defendants' argument to the effect that, after *Abbasi*, a district court may no longer rely on circuit court precedent recognizing a *Bivens* cause of action in a context that has not expressly been recognized (or expressly rejected) by the Supreme Court. *See* Ind. Defs.' Mem. at 10 ("*Abbasi* unequivocally declares that whether a case presents a new *Bivens* context is determined *only* by reference to the three decisions in which the Supreme Court has approved the

remedy."). Rather, the Supreme Court observes simply that the "three cases—*Bivens*, *Davis*, and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself." *Abbasi*,137 S. Ct. at 1855. While this Court is of the view that *Abbasi* should not require relitigating the "new context" question for every *Bivens* action recognized by circuits but not (yet) by the Supreme Court, that issue need not be decided here due to the Court's assumption that this is, in fact, a new context.

Consequently, the Court shall proceed to consider whether any adjustments that *Abbasi* may have made to the subsequent two *Bivens*/*Wilkie* steps dictate a change in the Court's ruling on Individual Defendants' motion to dismiss.

B. *Abbasi* Does Not Change the Outcome of This Court's "Special Factors" Inquiry

Individual Defendants repeat arguments about special factors that they concede the Court already has considered.

> Three of the special factors that barred the plaintiffs' *Bivens* claims in *Abbasi* are the same special factors that the Individual Defendants argued in their motion to dismiss—specifically, (1) Loumiet's access to alternative statutory and judicial remedies; (2) the harmful effect introduction of a *Bivens* remedy will have on the performance of official duties; and (3) Congress has been establishing and extensively regulating national banks for two hundred years, but has never seen fit to establish a *Bivens* cause of action against federal bank regulators.

Ind. Defs.' Mem. at 2. As adverted above in the introduction to this Part III, the Court shall defer until the following subpart Individual Defendants' first argument, about alternative remedies— *Wilkie* clearly states that this

deserves separate consideration, and *Abbasi* does not expressly state otherwise.

Turning to Individual Defendants' second argument, the Court is not convinced that *Abbasi* requires a change in the Court's analysis of any potential chilling effect in lawful enforcement activity. Unlike the facts in *Abbasi*, this is not a case in which "high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis." *Abbasi*, 137 S. Ct. at 1863. Rather, Plaintiff's prosecution was separate from, and subsequent to, the OCC's enforcement action against his bank client; the prosecution against Plaintiff does not seem to have been "urgent," driven by "crisis," or, for that matter, necessary to the underlying enforcement action against Plaintiff's client. *See, e.g.*, *Loumiet I*, 968 F. Supp. 2d at 145-47; Opp'n Mem. at 22 ("The Individual Defendants brought their retaliatory prosecution more than *four-and- a-half-years* after [Plaintiff's client] Hamilton Bank failed."). Indeed, the Court already made a fact-specific determination that a *Bivens* claim will not deter lawful enforcement activity. *See Loumiet V*, 255 F. Supp. 3d at 91 (considering the facts and finding that, "given the uniqueness of the allegations in this case, in this Court's view, allowing Plaintiff to proceed with his First Amendment *Bivens* claim is unlikely to have a chilling effect on the proper regulatory activities of banking regulators like the Individual Defendants"). No further consideration of an alleged chilling effect is necessary.

As for their third argument, Individual Defendants resurrect assertions about Congress's extensive regulation of the banking system, but, despite copious citations to *Abbasi*, fail to identify why *Abbasi* dictates a different outcome. *See* Ind. Defs.' Mem. at 2, 13-14, 19. This Court already thoroughly considered whether a *Bivens* remedy should be implied in light of the statutory scheme established by the Financial Institutions Reform, Recovery,

and Enforcement Act ("FIRREA") and backstopped by review under the Administrative Procedure Act ("APA"). *See Loumiet V*,255 F. Supp. 3d at 83-90. Individual Defendants contend that this Court "required [them] to affirmatively prove that Congress expressly considered and rejected a damages remedy against federal banking regulators." Ind. Defs.' Mem. at 2, 13. That is a distortion of the Court's rationale for concluding that the FIRREA and APA do not supplant a *Bivens* remedy here. Rather, Individual Defendants could not show "how Plaintiff, under the particular factual circumstances of this case, could have sought relief through the amalgam of FIRREA and the APA," *or in the alternative*, that "the absence of a remedy for Plaintiff under the circumstances of this case was the intentional product of how Congress constructed the administrative review procedures under FIRREA." *Loumiet V*, 255 F. Supp. 3d at 89. At least one of these indicators is necessary for the Court logically to conclude that Congress intended to forego an implied damages remedy.

In *Abbasi*, the Supreme Court noted that "the silence of Congress is relevant; and here that silence is telling," because none of the extensive congressional involvement in countering terrorism since September 11—including in addressing confinement conditions—had resulted in a damages remedy. *Abbasi*,137 S. Ct. at 1862-63. There is no parallel silence here, for the remedy at issue concerns a subject—retaliatory prosecution—which Individual Defendants have not shown that Congress even contemplated, much less expressly rejected, from the relevant statutory scheme. "[Individual] Defendants have completely failed to furnish any legislative or other evidence that Congress intentionally excluded claims similar to Plaintiff's from FIRREA. Nor does the statute itself indicate an intent to exclude such claims." *Loumiet V*, 255 F. Supp. 3d at 89. And as for "whether the absence of APA review for Plaintiff's claim is the product of intentional Congressional

policymaking in constructing FIRREA," "no evidence has been proffered, nor does such intent seem likely." *Id.*

At the end of their opening brief, Individual Defendants also make the argument that "the existence of procedural safeguards against the retaliatory initiation of an OCC enforcement action is a special factor that weighs against implying a *Bivens* remedy in this case." Ind. Defs.' Mem. at 21-22. However, they do not explain why *Abbasi* dictates that the Court consider this argument, aside from observing that "*Abbasi* reaffirms that the purpose of *Bivens* is to deter misconduct by individual officers, not to challenge agency action or policy." *Id.* at 21 (citation omitted). The Court is aware of this purpose of a *Bivens* action and dealt with it before when addressing the chilling effect argument. Even if it were proper to raise this special factor now, the Court does not find Individual Defendants' treatment persuasive.

Elsewhere in *Abbasi*, the Supreme Court elaborates on the scope of "special factors," a point which Individual Defendants cite only summarily in their rush to urge deference to Congress. *See* Ind. Defs.' Mem. at 19. "[T]he decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide," which "include[s] the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies." *Abbasi*, 137 S. Ct. at 1858. Such an "assessment" could potentially sweep quite broadly. But Individual Defendants have not raised any specific "burdens" or "costs and consequences" that the Court is not satisfied are otherwise addressed by the Court's dispatch of the "chilling effect" argument on the basis of the unique facts at issue. *See Loumiet V*, 255 F. Supp. 3d at 90-91. Moreover, on these facts, the Court is satisfied that this

is not a case targeting public policy change—as *Abbasi* echoes precedent in prohibiting—but rather is properly focused on specific activities of individual officers. *See Abbasi*, 137 S. Ct. at 1860 (citing *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 (2001); *FDIC v. Meyer*, 510 U.S. 471, 485 (1994)).

In summary, Individual Defendants do not make any arguments about *Abbasi* that cause this Court to reevaluate its conclusion that the special factors inquiry does not preclude a *Bivens* remedy.

C. Individual Defendants Have Not Proven That the Equal Access to Justice Act Is an "Alternative Remedial Structure" Sufficient to Preclude a *Bivens* Claim

Next, the Court turns to the Individual Defendants' argument about "[a]lternative avenues for protecting the interest at stake," insofar as they assert that "[t]he statutory and judicial remedies available to Loumiet under the FIRREA, [Equal Access to Justice Act ("EAJA")], and APA provided ample opportunity for him to protect his interests and thus render a *Bivens* action unnecessary." Ind. Defs.' Mem. at 18-19. At the outset, the Court observes a technical reason that this argument is flawed, as Plaintiff notes. Opp'n Mem. at 8-9.

Individual Defendants arguably forewent their opportunity to pursue this argument in their prior Motion to Dismiss. *See* Opp'n Mem. at 8; Individual Defs.' Mot. to Dismiss and Statement of P&A in Supp., ECF No. 62, at 12 ("[T]he defendants do not contend that the FIRREA afforded Loumiet an 'alternative, existing process' to pursue his constitutional claims. In other words, the defendants are not invoking the first step of the *Wilkie* analysis." (citing *Wilkie*, 551 U.S. at 550)). And this Court already dealt with the

issue. *Loumiet V*, 255 F. Supp. 3d at 84 ("[A] *Bivens* remedy will generally not be available if a comprehensive statutory scheme already exists for a plaintiff to seek redress of the alleged constitutional violation. Defendants concede that no such scheme exists here." (citing Reply Mem. of P&A in Supp. of the Defs.' Mots. to Dismiss, ECF No. 66, at 6)). The Court could have elaborated its citation of support:

> Individual Defendants do not contend that judicial review of agency action under the APA, standing alone, precludes a *Bivens* remedy. Rather, the defendants' position is that the comprehensive remedial scheme of the FIRREA, coupled with judicial review under the APA, is a special factor that counsels hesitation against authorizing a *Bivens* remedy in this case.

Reply Mem. of P&A in Support of the Defs.' Mots. to Dismiss, ECF No. 66, at 6. Together with Individual Defendants' aforementioned concession that FIRREA alone is not an "alternative, existing process," the concession here that APA is not either seals the deal. Defendants' last-gasp attempt to package FIRREA and APA together as a special factor does not suffice; the Court addresses above why the combination of these two statutory schemes is not a special factor causing the Court to hesitate from recognizing a *Bivens* remedy. *See supra* Part III.B. As such, the Court is not persuaded by Individua l Defendants' argument that they did not waive this argument because *Abbasi* allegedly "characterized access to alternative forms of relief as a 'special factor.'" Reply Mem. at 6.

Having come this far, it may not do justice to decide a motion to reconsider based only on the argument (or lack thereof) in Individual Defendants' prior briefing. From a more substantive perspective, the Court observes one potential "alternative, existing process" that warrants

further consideration, namely Plaintiff's recovery of attorney's fees under the EAJA. The parties only skirted this argument when they briefed Individual Defendants' [62] Motion to Dismiss. At the time, they appeared to focus instead on Individual Defendants' argument that FIRREA and the APA qualified as alternatives. *See, e.g.*, Individual Defs.' Mot. to Dismiss and Statement of P&A in Supp., ECF No. 62, at 11 ("Not only did Loumiet have access to these remedies [i.e., through the FIRREA and the AP A], but he successfully invoked them *and* recovered a substantial amount of attorney's fees as the prevailing party."); Carlos Loumiet's Opp'n to Individual Defs.' Mot. to Dismiss under Fed. R. Civ. P. 12(b)(6) and United States' Mot. to Dismiss under Fed. R. Civ. P. 12(b)(6) & (b)(1), ECF No. 64, at 18 ("[I]t's simply absurd to suggest that [future lawyers] will view FIRREA's procedures, its reference to the ADA [sic], or even the possibility of recovering attorneys' fees, as adequately protecting them, their careers, and their futures from the type of mercenary retaliatory conduct undertaken by the Individua l Defendants in this case."). Accordingly, recovery under the EAJA was not a focus of this Court's decision in *Loumiet V* when it found no alternative remedies.

Fueled by *Abbasi*, the parties now devote significant portions of their briefing, especially in the reply and sur-reply, to the issue of whether attorney's fees under the EAJA amount to an alternative remedy sufficient to preclude a *Bivens* remedy. *See* Reply Mem. at 6-11 ("Having prevailed in the enforcement proceeding and pocketed $675,000 in fees and defense costs, how does Loumiet reasonably claim that 'it is damages or nothing' for him in this case?" (citing Opp'n Mem. at 20)); Sur-Reply Mem. at 4-5 (deeming Individual Defendants' EAJA argument a "red herring that hopes to distract the Court from the truly dispositive fact that there is a complete absence of congressional intent in any statutory scheme to which the Individual Defendants have pointed" and furthermore arguing "Loumiet did not 'pocket'

anything"); *see also* Ind. Defs.' Mem. at 17 (noting in the course of their "new context" argument that "the recovery of attorney's fees under EAJA is a remedy that Congress has expressly provided for a civil enforcement proceeding that was brought without substantial justification" (citing 5 U.S.C. § 504(a)(1) (2016)).

Even so, the Court would not feel compelled to overlook this omission and reconsider its decision, absent a plausible argument for some movement in the controlling case law. But *Abbasi* could be interpreted as lowering the threshold for finding an alternative remedy sufficient to preclude a *Bivens* claim. *See, e.g.*, *Abbasi*, 137 S. Ct. at 1858 ("[I]f there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action."). Individual Defendants parrot this line from *Abbasi*—italicizing "*alone*" without noting that the emphasis is their own, Ind. Defs.' Mem. at 18—but fail to provide any corresponding explanation of the practical difference that this purported standard makes, if any, in the pre-*Abbasi* approach to alternative processes for relief. On such a minimal showing, the Court does not feel obligated to trace the Individual Defendants' steps for them, but in the interest of a complete analysis, the Court shall consider whether *Abbasi* in fact adjusted the threshold for recognizing an alternative remedy, and even if not, whether this Court should consider the EAJA to be an alternative in the first instance.

As the Supreme Court has limited the availability of *Bivens* remedies in recent decades, the standard for recognizing an alternative to a *Bivens* claim has arguably evolved as well. Early Supreme Court cases set a high bar for a showing of congressional intent that an alternative would preclude *Bivens*. In *Bivens* itself, the Supreme Court rejected defendants' argument that it should defer to seemingly inadequate state tort law remedies and found "no

explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." *Bivens*, 403 U.S. at 394-97. The *Bivens* Court thereby demonstrated a concern with both the adequacy of a purported alternative, and any clear indication that Congress intended it, or any other remedy, to supplant damages against individual officers, finding neither to be so in that case. *See also Davis v. Passman*,442 U.S. 228, 248 (1979) ("[W]ere Congress to create equally effective alternative remedies, the need for damages relief might be obviated." (citing *Bivens*, 403 U.S. at 397)).

Shortly thereafter in *Carlson v. Green*, the Supreme Court again decided that a candidate alternative was not sufficient to preclude a *Bivens* remedy. There, a deceased prisoner's estate sought to recover against individual prison officials for alleged violation of his Eighth Amendment and other constitutional rights. 446 U.S. 14, 16 (1980). The Court reasoned that a *Bivens* claim could only be defeated by a purported alternative "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Id.* at 18-19 (citing *Bivens*, 403 U.S. at 397; *Davis v. Passman*, 442 U.S. at 245-47). The Court rejected the argument that the FTCA should count as such an alternative, because no evidence could be mustered "to show that Congress meant to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations"; on the contrary, legislative history to a pertinent FTCA amendment demonstrated beyond doubt that Congress intended the two causes of action to coexist. *Id.* at 19-20. Here again, the Supreme Court rejected a purported alternative for lack of congressional intent, this time without assessing whether that alternative would otherwise have been adequate to remedy the harm.

Subsequent cases confirmed that the (in)adequacy of a purported alternative is not dispositive. *See Malesko*, 534 U.S. at 68-69 (discussing, *e.g.*, *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *Bush v. Lucas*, 462 U.S. 367 (1983)).

More recently, consistent with the general curbing of the *Bivens* remedy, the Supreme Court has at least once declined to infer a *Bivens* remedy apparently without relying on either the adequacy of any alternatives *or* Congress's intent with respect to those alternatives. In *Correctional Services Corp. v. Malesko*, a former federal inmate sought to recover damages for injuries suffered while he was confined to a privately owned halfway house. 534 U.S. at 63-64. The Court refused to recognize a *Bivens* remedy because a suit against the operator of the halfway house fell outside the objective of the *Bivens* remedy, namely to deter constitutional torts by individual officers, not their employers, federal or otherwise. *Id.* at 70-71. This grounds was sufficient to preclude *Bivens*, *see id.* at 71 ("There is no reason for us to consider extending *Bivens* beyond this core premise here."), but the Court also observed the availability of alternative remedies. "It was conceded at oral argument that alternative remedies are at least as great, and in many respects greater, than anything that could be had under *Bivens*." *Id.* at 72. Those remedies included tort law, administrative processes, or a federal suit for injunction against future such harms. *Id.* at 72-74. While *Malesko* did not rest on the available alternatives, the Court still found it worthwhile to mention that there were some.

In *Wilkie*, however, we see that *Malesko* did not necessarily dispose of previous *Bivens* considerations. *Wilkie* demonstrated that Congressional intent behind a given alternative was again a focal point. The Supreme Court articulated perhaps its most definitive standard yet governing the availability of an alternative remedy. A court must ask "whether any alternative, existing process for

protecting the [constitutionally recognized] interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550 (citing *Bush*, 462 U.S. at 378); *see also Minneci v. Pollard*, 565 U.S. 118, 122-23 (2012) (describing two-step inquiry from *Wilk* as "standards [that] seek to reflect and to reconcile the Court's reasoning set forth in earlier cases"). The *Wilkie* Court discussed a number of alternative methods of addressing plaintiff-respondent's problems, some of which he did not exhaust—*e.g.*, tort law remedies for damages from trespass, administrative remedies for challenging administrative claims, and most analogously to the EAJA in this case, timely appeal of the district court's denial of attorney's fees sought under the Hyde Amendment in a criminal case—without finding that any of these disqualified his efforts to obtain a *Bivens* remedy. *Wilkie*, 551 U.S. at 553-54. Rather, considering the "patchwork" of remedies, "an assemblage of state and federal, administrative and judicial benches applying regulations, statutes, and common law rules," the Supreme Court declined to infer that Congress meant to preclude a *Bivens* remedy. *Id.* at 554 (finding it necessary to proceed to special factors inquiry). Accordingly, *Wilkie* demonstrates that as of at least 2007 it remained important in the Supreme Court's *Bivens* jurisprudence to consider congressional intent with respect to purported alternatives. For this reason, even a plethora of alternatives might not be sufficient to preclude a *Bivens* claim.

One might argue that the Supreme Court took a step in the restrictive direction, with respect to alternative remedies, in *Minneci*, but that argument would be flawed too. There the Court observed that a federal prisoner could pursue state law tort remedies against private employees operating the prison, and accordingly, no *Bivens* action for an alleged Eighth Amendment violation should be permitted. 565 U.S. at 120, 127. In dictum the Court

appeared to recognize a low bar for a finding of an alternative remedy sufficient to preclude *Bivens*. *See id.* at 127 (referring to *Malesko* as "noting that the Court has implied *Bivens* action only where any alternative remedy against individual officers was 'nonexistent' or where plaintiff 'lacked *any alternative remedy*' at all" (quoting *Malesk o*, 534 U.S. at 70)). Like *Malesk o*, however, *Minneci* contained an alternative that did not test this bottom limit, for the Court "believe[d] that in the circumstances present here state tort law authorizes adequate alternative damages actions—actions that provide both significant deterrence and compensation." *Id.* at 120 (citing *Wilkie*, 551 U.S. at 550).

As noted above in this subpart, certain language in *Abbasi* could be read to slightly lower the threshold for a finding of an alternative remedy sufficient to preclude a *Bivens* claim. *See supra* (discussing whether "an alternative remedial structure" "alone" suffices). But the facts of *Abbasi* did not test the lower limit. *Abbasi* observed that a habeas petition, an injunction, "or some other form of equitable relief" may have been available to plaintiff-respondents and concluded that "when alternative methods of relief are available, a *Bivens* remedy *usually* is not." *Abbasi*, 137 S. Ct. at 1863, 1865 (emphasis added). *Abbasi* carefully avoided a pronouncement that alternative remedies *always* will suffice; it also did not say—because that case was not before it—that a *single* candidate alternative about which there is some debate over the sufficiency (as the Court shall address below) will be enough to keep a court from inferring a *Bivens* remedy. In short, *Abbasi* does not conclusively address the only question remaining: whether the single candidate alternative remaining in this case, the EAJA, qualifies as an alternative remedy sufficient to keep the Court from inferring a *Bivens* remedy.

The D.C. Circuit has yet to interpret *Abbasi*, and D.C. Circuit cases since *Wilkie* have not had the opportunity to clarify that case's standard for the minimum alternative remedy sufficient to preclude *Bivens*. *See, e.g.*, *Meshal v. Higgenbotham*, 804 F.3d 417, 425 (D.C. Cir. 2015) (applying *Wilkie* steps and finding parties in agreement that plaintiff-appellant had no other remedies, before moving on to special factors inquiry). Perhaps the closest the D.C. Circuit came to directly addressing this issue was in *Wilson v. Libby*, which denied a *Bivens* claim after recognizing that plaintiff-appellants allegedly harmed by the disclosure of covert employment with the Central Intelligence Agency could seek *some*, albeit incomplete, relief under the Privacy Act. 535 F.3d 697, 709 (D.C. Cir. 2008). But it is not clear that this would have been enough for the court to preclude *Bivens* if not for the consideration of a congressional omission as a special factor. The D.C. Circuit found that the Privacy Act is a comprehensive remedial scheme from which Congress had "intentionally" excluded claims against certain of the Executive Branch officials being sued in that case, and that accordingly the court would "not supplement the scheme with *Bivens* remedies." *Id.* at 706-10; *see also Davis v. Billington*, 681 F.3d 377, 383-84 (D.C. Cir. 2012) (finding a "comprehensive remedial scheme" in which "Congress's choice to omit damages remedies for claimants in [plaintiff-appellee's] posture was a deliberate one").

In this case, by contrast, Individual Defendants have not demonstrated that the EAJA— alone or in combination with the FIRREA and APA—is such a "comprehensive remedial scheme" by which Congress intends to supplant a damages remedy against the OCC officials. *See Loumiet V*, 255 F. Supp. 3d at 89-90 (rejecting this argument with respect to the FIRREA and APA). Rather, the most they offer is a thin comparison to a statutory scheme that is not at issue in this case. *See* Reply Mem. at 11 ("The same congressional judgment [behind foregoing a *Bivens* remedy for improper

criminal prosecutions in favor of the Hyde Amendment] is reflected in the EAJA, which operates similarly in the civil context to deter 'substantially unjustified' administrative enforcement actions.").

As the foregoing discussion illustrates, the parties have not identified, nor has this Court found, controlling case law that provides a clear, consistent standard for evaluating whether Plaintiff's recovery under the EAJA should preclude a *Bivens* remedy. *See, e.g.*, *Minneci*, 565 U.S. at 125 (noting that "the Court, in reaching its [*Bivens*] decisions, has not always similarly emphasized the same aspects of the cases," and proceeding with the *Wilkie* analysis). However, the case law does illustrate that at least three considerations have been significant to the disposition of controlling *Bivens* cases: congressional intent (*see, e.g.*, Supreme Court decisions in *Bivens*, *Carlson*, and *Wilkie*, and D.C. Circuit decisions in *Wilson* and *Davis v. Billington*); deterrent effect (*see Malesko* and *Minneci*); and adequacy of the remedy (*see Bivens* and *Minneci*). And these considerations remain relevant in recent cases. *See, e.g.*, *Wilkie*, 551 U.S. at 554 (illustrating the continuing relevance of assessing whether "Congress expected the Judiciary to stay its *Bivens* hand"); *Minneci*, 565 U.S. at 120-21 (citing both "significant deterrence and compensation" from alternative remedies as reason for denying *Bivens* claim). Yet, none of these considerations suggests that the Court should decline a *Bivens* remedy here.

First, the Court is not persuaded by Individual Defendants' meager efforts to prove, by analogy alone, that Congress intended the EAJA to preclude a *Bivens* remedy. Individual Defendants point to congressional intent underlying the Hyde Amendment in 1997, which created a means by which prevailing criminal defendants could recover attorney's fees and other litigation costs under certain circumstances when "the position of the United

States was vexatious, frivolous, or in bad faith." Reply Mem. at 10-11 (quoting Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (codified at 18 U.S.C. § 3006A note (2016) (Award of Attorney's Fees and Litigation Expenses to Defense))) (internal quotation marks omitted); *see also id.* (citing Statement of Honorable Henry J. Hyde Before the House Rules Committee on an Amendment to H.R. 2267 to Allow for the Recovery of Attorneys Fees and Litigation Costs in a Criminal Prosecution, 1997 WL 545756 (Sept. 5, 1997) (showing amendment sponsor's satisfaction that this mechanism would "deter unjustifiable governmental conduct" even without "impos[ing] personal liability on prosecutors for negligence" or subjecting them to "the tort of malicious prosecution")). Even if Congressman Hyde's intentions were properly said to reflect those of the whole Congress, a point which Individual Defendants seem to assume without support, *see* Reply Mem. at 11, it is by no means certain that Congress had the same intent in fashioning the EAJA in 1980. Moreover, the opportunity for the *Wilkie* plaintiff to pursue fees and costs under the Hyde Amendment following his acquittal in a prior criminal case was among the alternatives that collectively were found *not* to be sufficient to preclude *Bivens*. *Wilkie*, 551 U.S. at 545-46, 552-54. The facts of *Wilkie* are particularly salient because the prior criminal case concerned the *Wilkie* plaintiff's resistance to certain activity of an agency official against whom he later sought the *Bivens* remedy in his civil case. *See id.* at 545-46 (discussing charges of "knowingly and forcibly impeding and interfering with a federal employee"). Yet, Individual Defendants say nothing about why recovery under the EAJA alone—setting aside their FIRREA and APA arguments, which, as discussed above, the Court dispatched in its prior ruling, *see Loumiet V*, 255 F. Supp. 3d at 89-90—should be sufficient to preclude *Bivens* while the availability of the Hyde Amendment was not sufficient to do so in *Wilkie*. *See supra* Part III.B (discussing FIRREA and APA).

Second, the EAJA arguably lacks the deterrent effect on individual officers that a *Bivens* remedy would have. Recovery under the EAJA is awarded out of the pockets of the government, *not* the individual officers. 5 U.S.C. § 504(d) (2016) ("Fees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.").[7] Moreover, *Abbasi* reinforces that deterrence is at the core of *Bivens*: "The purpose of *Bivens* is to deter the *officer*." *Abbasi*, 137 S. Ct. at 1860 (quoting *Meyer*,510 U.S. at 485) (internal quotation marks omitted). Without damages recovery against the OCC officers themselves, provided that Plaintiff can prove his claims, it is not clear that officers similarly positioned in the future would find the personal risks of pursuing a retaliatory prosecution to caution adequately against it.

Lastly, Individual Defendants make much of the quantity of Plaintiff's recovery under the EAJA, effectively arguing that it adequately compensates his loss. *E.g.*, Reply Mem. at 10. While the Supreme Court has sometimes considered the adequacy of a given remedy, such as in *Bivens* and *Minneci*, Individual Defendants have not pointed to, nor is the Court aware of, any case considering whether attorney's fees under the EAJA are adequate. The closest case is *Wilkie*, where the availability of attorney's fees in the parallel criminal context was found to be part of an *inadequate* "patchwork" of remedies. *Wilkie*, 551 U.S. at 554. In evaluating a motion to dismiss, and without the benefit of discovery, the Court is not in a position to assess whether

[7] Conceivably, the provision for payment through funds from appropriation "or otherwise" could include indemnification by the individual officers held responsible, but Individual Defendants do not pursue that argument.

the award of $675,000 in attorney's fees under the EAJA adequately compensates Plaintiff's damages, alleged to be $4 million.[8] *See* Compl. ¶ 148; *Coal. for Underground Expansion*, 333 F.3d at 198 (noting that only "the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts" may be considered on motion to dismiss for lack of subject-matter jurisdiction); *cf. Koubriti v. Convertino*, No. 07-13678, 2008 WL 5111862, at *7 (E.D. Mich. Dec. 3, 2008), *aff'd in part, rev'd in part on other grounds*, 593 F.3d 459 (6th Cir. 2010) (finding in criminal case that opportunity to recover attorney's fees under Hyde Amendment is not "alternative process mandating restraint" from recognizing a *Bivens* remedy "[b]ecause recovery of attorney fees is such a minimal part of the damages resulting from the criminal prosecution that occurred here"). It is also true that the Supreme Court has on occasion found that the *inadequacy* of a given alternative to address fully a plaintiff's injury is not, of itself, a reason to permit a *Bivens* remedy. *See Malesko*, 534 U.S. at 68- 69 (discussing, *e.g.*, *Schweiker*, 487 U.S. 412; *Bush*, 462 U.S. 367). But the Supreme Court has not gone so far as to say that an allegedly *inadequate* alternative that Congress does *not* clearly intend to supplant a *Bivens* remedy and that does *not* act as an adequate deterrent to the activity of individual officers is nevertheless a remedy sufficient to preclude *Bivens*.

***

Individual Defendants have failed to persuade the Court that *Abbasi* dictates reevaluating this Court's subject-

[8] In their briefing, Individual Defendants often cite the $675,000 award; at one point Plaintiff quotes Individua l Defendants' use of this figure without objecting to it. *See, e.g.*, Sur-Reply Mem. at 4 (quoting Reply Mem. at 8).

matter jurisdiction over Plaintiff's *Bivens* claim against Individua l Defendants. Discovery will make clear whether Plaintiff can support this claim. Until then, that claim must be allowed to go forward.

IV. CONCLUSION

For all of the foregoing reasons, the Court **DENIES** the Individual Defendants' [74] Motion to Reconsider. Plaintiff's First Amendment *Bivens* claim for retaliatory prosecution shall proceed against Defendants Rardin, Schneck, and Sexton. Plaintiff's FTCA claims for intentional infliction of emotional distress (Count I), invasion of privacy (Count II), negligent supervision (Count V), and civil conspiracy (Count VIII) shall proceed against the United States.

An appropriate Order accompanies this Memorandum Opinion.

Dated: November 28, 2017

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:12-cv-01130-CKK

CARLOS LOUMIET

v.

THE UNITED STATES OF AMERICA, MICHAEL RARDIN, LEE STRAUS, GERARD SEXTON, and RONALD SCHNECK, each in their individual capacities

defendants.

_____/

COMPLAINT FOR DAMAGES

Carlos Loumiet sues defendant, the United States Government, for actions of its agency, the Office of the Comptroller of the Currency ("OCC"), and also sues Michael Rardin, Lee Straus, Gerard Sexton and Ronald Schneck (together the "Individual Defendants").

GENERAL ALLEGATIONS

1. Mr. Loumiet is an individual who is a member of the Bars of the States of New York and Florida and has been a citizen of the United States since approximately 1972. Since 1980, Mr. Loumiet has been a resident of South Florida.

2. Defendant Government is the federal government of the United States of America, being sued because of the actions of its agency, the OCC.

3. Defendant Michael Rardin is an examiner at the OCC who was the examiner-in-chief ("EIC") in charge of Hamilton Bank, N.A., in Miami, Florida ("Hamilton") during 2000 to 2001, and who was also actively involved in the OCC's action against Mr. Loumiet discussed in this complaint (the "OCC Action").

4. Defendant Lee Straus is an enforcement attorney at the OCC who was the lead counsel in the OCC Action.

5. Defendant Ronald Schneck is Director of the Special Supervision and Fraud Division at the OCC and an investigative officer as that term is used in 28 U.S.C. 2680(h) because, at all relevant times, he had the authority to execute searches and to seize evidence. Defendant Schneck was actively involved in the OCC's various dealings with Hamilton from 2000 to 2001, as well as in the OCC Action.

6. Defendant Gerard Sexton is Assistant Director of the Enforcement and Compliance Division of the OCC and an investigative officer as that term is used in 28 U.S.C. 2680(h) because, at all relevant times, he had the authority to execute searches and to seize evidence. Defendant Sexton was actively involved in the OCC's various dealings with Hamilton from 2000 to 2001, as well as in the OCC Action. Like defendant Straus, defendant Sexton is a veteran, experienced Government enforcement lawyer.

7. The defendants identified in paragraphs 3 through 6 are at times collectively referred to as the "Individual Defendants." At all times relevant to this complaint, the Individual Defendants were senior, influential employees of the OCC, with particularly strong

say and influence on enforcement matters. Additional individual defendants may be added to this complaint as discovery develops.

8. Mr. Loumiet sues the Government under the Federal Tort Claims Act (the "FTCA"), and the Individual Defendants under the First Amendment and Fifth Amendment (Due Process Clause) of our Constitution, the decision of the U.S. Supreme Court in Bivens v. Six Unknown Agents, 403 U.S. 388 (1971), and various other relevant cases, including Hartman v. Moore, 126 S. Ct. 1695 (2006). In Bivens, the Supreme Court ruled that individuals working for agencies of the federal government could be held liable for their violations of a citizen's rights under our federal Constitution. In Hartman, the Supreme Court ruled that a prosecution brought by federal agents in retaliation for a citizen's criticism of those agents violates the citizen's right to free speech under the First Amendment of our Constitution. The Supreme Court further stated that when nonretaliatory grounds are insufficient to explain a prosecution, then "retaliation is subject to recovery as the but-for cause of official action offending the Constitution." Further, the Court held that, "When the vengeful officer is federal, he is subject to an action for damages on the authority of Bivens." As will be seen below, the OCC's prosecution of Mr. Loumiet—both in its initial charging decision and in the manner the OCC conducted the litigation—was trumped-up and is inexplicable other than as retaliation against Mr. Loumiet for his earlier strong criticism of certain improper behavior of OCC staff, including some of the Individual Defendants who themselves were later actively involved in the OCC Action.

JURISDICTION AND VENUE

9. This is an action for damages in excess of US $ 75,000, exclusive of interest and costs.

10. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 as this is an action brought against the United States under the Federal Torts Claims Act (28 U.S.C. § 2671, et seq. and 28 U.S.C. § 1346(b)) for money damages as compensation for injuries that were caused by the wrongful acts of employees of the United States Government while acting within the scope of their offices and employment, and under circumstances where the United States, if a private person, would be liable to Mr. Loumiet. The United States has waived immunity from these claims under 28 U.S.C. § 1346.

11. This Court also has subject matter jurisdiction as this is a private right under *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), and various other cases, including the decision of the U.S. Supreme Court in *Hartman v. Moore*, 126 S. Ct. 1695 (2006), to redress violations of the First Amendment and Fifth Amendment (Due Process Clause) of our Constitution.

12. This Court has venue under 28 U.S.C. § 1391 in that the defendant resides in this district, and under 28 U.S.C. § 1402 because all, or a substantial part of the acts and omissions forming the basis of these claims occurred in the District of Columbia.

13. Mr. Loumiet has fully complied with the provisions of 28 U.S.C. § 2675 of the Federal Torts Claims Act.

14. Mr. Loumiet timely files this suit, in that he first presented his claims to the OCC on July 20, 2011, and the OCC denied them in writing by mail on January 9, 2012.

THE OCC ACTION

15. Franz Kafka and Lewis Carroll would have found rich literary fodder in the OCC Action. As described

fully below, the OCC Action was directed by a group of Government officials who—in pursuing their own retaliatory agenda against Mr. Loumiet because he had earlier exercised his Constitutional right to complain about their behavior to the Treasury Office of Inspector General ("OIG")—brought a sham action based on patently ridiculous claims; ignored indisputable facts adverse to their position, or "played ostrich" so as to not face them; intentionally misled the press; threatened punishment that was completely disproportionate to the supposed wrongdoing; knowingly ignored all of the overwhelming factual and legal arguments against their position, including the OCC's own rules and guidelines; made up the law and standards as they went along; disregarded through the end the absolute lack of evidence in support of their position; intentionally took positions contrary to sworn testimony of witnesses put forward by that same Government; deliberately exaggerated claims against Mr. Loumiet and repeatedly publicly defamed him to the press; knowingly presented false testimony in a judicial proceeding; made a complete mockery of "expert" evidence; violated a series of Bar ethical rules applicable to the conduct of litigation by legal counsel; and vindictively and obstinately continued to pursue a case to its inevitable losing conclusion so as to inflict maximum injury on Mr. Loumiet long after it was clear that the action could not prosper. In short, this was the truly ugly and abusive side of Government regulatory enforcement power. However, Mr. Loumiet does not mean to implicate or disparage the many thousands of fine current and former public servants at the OCC who were not involved in the action described here, or to suggest that all OCC enforcement actions are conducted in this same ghastly manner.

16. This action arises from an administrative proceeding brought by the OCC against Mr. Loumiet on November 6, 2006. After an approximately three-week trial held in October 2007, the administrative law judge ("ALJ")

presiding over the case issued a 56-page Recommended Decision on June 18, 2008 that exonerated Mr. Loumiet on all charges. Thirteen months later, on July 27, 2009, the Comptroller of the Currency issued his Final Decision dismissing all charges against Mr. Loumiet.

17. On August 26, 2009, Mr. Loumiet sued the OCC under the federal Equal Access to Justice Act (the "EAJA"), to recover legal fees and expenses he had incurred in defending the OCC Action. The ALJ in the OCC Action initially rejected Mr. Loumiet's EAJA claim. Mr. Loumiet appealed that decision to the D.C. Circuit Court of Appeals. On July 12, 2011, the D.C. Circuit unanimously reversed the ALJ's denial of the EAJA claim and awarded Mr. Loumiet's legal fees and expenses, finding that the OCC Action lacked "substantial justification"—a finding that has been held by the courts to be synonymous with "lacking a reasonable basis in law and fact." Evidencing the same institutional arrogance and lack of respect for the rule of law demonstrated throughout this Complaint, almost one year later the OCC has not paid a cent of the awarded amount.

18. Under *Hartman v. Moore*, unless "probable cause" for the Government's criminal prosecution can be shown to have existed, retaliation becomes the "but-for" cause behind the Government's behavior. "Probable cause" is widely understood to mean "a reasonable ground to suspect." *See, e.g.*, *Black's Law Dictionary* 1219 (7th ed. 2007). Translating the criminal law concept of "probable cause" to an administrative prosecution such as the OCC Action, the D.C. Circuit already held, as noted above, that after considering all of the OCC's attempted justifications, the OCC Action lacked any reasonable basis in law and fact—i.e., was without "substantial justification."

19. After the D.C. Circuit's decision, the OCC opposed Mr. Loumiet's request to that same Court for legal

fees and expenses he had spent in pursuing his successful EAJA action, including his successful appeal. On January 24, 2012, the D.C. Circuit, per curiam, again ruled for Mr. Loumiet and ordered the OCC to pay him the full amount of fees and costs he was claiming.

20. Mr. Loumiet now brings this action under the FTCA and the First and Fifth Amendments to our U.S. Constitution for damages defendants have caused him by their tortious and unconstitutional behavior. The OCC's own embarrassing and otherwise-inexplicable behavior and positions in the OCC Action are the best evidence of defendants' improper motives in persecuting Mr. Loumiet.

THE HAMILTON BANK SAGA

21. In 2000, Mr. Loumiet was a Principal Shareholder at the law firm Greenberg Traurig ("Greenberg"), heading both its International and Banking Practices. Mr. Loumiet had then been practicing successfully as a banking lawyer for about 22 years, and had also taught banking law-related courses at the law schools at the University of Miami and Yale University for several years each.

22. Among Greenberg's clients was a Hispanic-controlled bank based in Miami named Hamilton Bank, N.A. ("Hamilton"). At the time, on information and belief, Hamilton was the second largest Hispanic-controlled bank in the continental United States. The bank was 100% owned by a holding company named Hamilton Bancorp ("Bancorp"). Of Hamilton's 270 or so staff, on information and belief roughly 250 were Hispanic (mostly of Cuban origin) or black. Bancorp's and Hamilton's Boards of Directors and its management were largely the same, primarily consisting of Hispanic individuals. Most of Hamilton's clients were from Latin America and the Caribbean. Hamilton specialized in

short-term trade financing, which historically has been a very safe form of lending.

23. Mr. Loumiet over the years had not personally done much work for Hamilton, though under Greenberg's client origination system he was listed as one of six or seven originating attorneys given credit for work coming from Hamilton. (At the time, Greenberg did not have a formula that directly linked work origination to shareholder compensation, so it was not uncommon for multiple shareholders to claim some credit for a client.) Hamilton had never been a large client for Greenberg—the fees Hamilton paid annually represented less than 1% of Greenberg's revenues, and before 1997, much, much less. In 1997, Greenberg had handled an initial public offering of stock for Hamilton, and, thereafter, securities law attorneys at Greenberg had also handled a trust preferred offering, and also continued advising Hamilton on its periodic securities filings.

24. As a national bank, Hamilton was regulated by the OCC. Because state banking regulators do not regulate nationally-chartered banks, alone among federal and state bank regulators the OCC is able to act on enforcement matters with respect to the banks it regulates—and the people they employ or with whom they contract—without having to consult another regulator and take into account its views. Until 1998, the OCC gave Hamilton very good examination ratings. In 1998, the EIC for Hamilton was transferred to the OCC's headquarters in Washington, D.C., and replaced with a new EIC, who, among other things, later made the anti-Cuban statements described below. Not long after, the relationship between Hamilton and the OCC began seriously deteriorating.

25. As reported in the press, in the Fall of 1998, the OCC held a meeting in Miami with the various small

national banks headquartered in that city and advised them that they had to decrease their international lending because it was not safe for smaller banks to engage in that business. On information and belief, only Hamilton among the Miami-headquartered national banks resisted this instruction. Again on information and belief, this defiance created additional friction between Hamilton and the OCC.

26. In the early Summer of 2000, Mr. Loumiet was approached by the then-General Counsel of Hamilton and Bancorp. He wanted Mr. Loumiet to advise the Board of Directors of Hamilton on the possible consequences to them of a Consent Agreement to be entered into between the OCC and Hamilton, which Mr. Loumiet was not previously aware of. Hamilton had negotiated the agreement with the assistance of one of the preeminent bank regulatory law firms in the United States, Arnold & Porter, its lead outside regulatory counsel. Nevertheless, the Hamilton General Counsel wanted Mr. Loumiet to briefly review the proposed agreement and explain to the Board the potential personal liability of members of the Board should this agreement not be performed, all while not spending much time (or Hamilton money) on it. Limiting his role further, the Hamilton Bank General Counsel also instructed Mr. Loumiet not to become involved in the specific provisions of the agreement, which had already been negotiated at length with the assistance of Arnold & Porter and were essentially agreed to. Over the course of the two following months or so, Mr. Loumiet, without assistance from anyone else at Greenberg, spent a total of 8 to 9 hours on this task, meeting with the entire Board once, speaking with them by conference phone a second time, reviewing two drafts of the agreement, and ultimately writing a brief comment letter with some general observations to the General Counsel. (Unbeknownst to Mr. Loumiet, he actually sent his letter after Hamilton had already signed the agreement with the OCC.) Mr. Loumiet never communicated or consulted with

any member of the Board individually, and Greenberg sent the modest bill for Mr. Loumiet's work to Hamilton's General Counsel, and Hamilton paid the bill. In one provision out of many in the draft agreement, Hamilton agreed in the future not to engage in "adjusted price trades." Mr. Loumiet was not given any background for the inclusion of this language and, consistent with his very limited engagement, Mr. Loumiet did not enter into detail.

27. In August of 2000, the Board of Hamilton and Bancorp, without Mr. Loumiet's involvement, began speaking to another shareholder at Greenberg about the possibility of Greenberg advising the Audit Committee of Hamilton on an investigation of certain transactions Hamilton had engaged in October 2008 (the "Transactions"), involving the sale of certain loans and the simultaneous purchase of other loans. (Greenberg had not participated in the Transactions as they were made.) The Greenberg shareholder involved had led the securities offerings Greenberg had handled for Bancorp and provided securities law advice for some time to Bancorp as called on from time to time. The investigation primarily concerned whether those purchases and sales were sufficiently closely-linked that they should be treated as an "adjusted price trade" under generally accepted accounting principles (GAAP). Unfortunately, this determination does not involve a "bright line" test, but depends on all of the facts and circumstances involved. As a result, reasonable men and women may differ on the conclusion to be drawn as regards any particular set of transactions, depending on its facts. The investigation was being conducted at the request of Deloitte & Touche, Hamilton's and Bancorp's auditors. The Greenberg securities shareholder informed Mr. Loumiet of the possible engagement. Mr. Loumiet offered to assist as needed on the banking and banking-law aspects of the matter but also made note that it was important to consider the work done by Mr. Loumiet for the Board that same Summer to make

sure there was no conflict. Deloitte also asked that the Board consider Greenberg's independence in handling this matter, which the Board did. Ultimately, a big factor in Greenberg's engagement appears to have been that the investigation had to be done and the report completed by early November, and Greenberg's existing familiarity with Hamilton and Bancorp by virtue of the securities legal work it handled for Bancorp made this more feasible than would have been true for an entirely new law firm. In any event, if an "adjusted price trade" were found, many SEC filings done by Bancorp in the previous 18 months or so would have to be refiled, presumably with Greenberg's assistance. Greenberg was engaged in mid-September. Mr. Loumiet had no involvement in this decision to engage Greenberg.

28. The investigation that followed over the next six weeks or so was primarily handled by the securities shareholder at Greenberg, with the help of two associates. Greenberg attorneys sought to interview every individual who appeared likely to have pertinent information, but as is often the case in private-sector investigations where there is no way of forcing people to speak, some individuals approached by the Greenberg lawyers refused to talk. While it was contemplated that Mr. Loumiet would help with any banking law concepts and documents that surfaced, there was relatively little of that work involved. Thus, over a six-week investigatory period, Mr. Loumiet spent a total of about 10 hours, or roughly 1.6 hours a week, on the matter, mostly serving as a resource and occasional sounding board on banking-related issues for those doing the investigating. In fact, the Transactions had already been thoroughly investigated for about 18 months by the OCC, using far greater resources than a law firm like Greenberg could possibly bring to bear, including subpoena powers, the possibility or threat of involving sister law enforcement government agencies, and the international reach of the U.S. Government. Some 15 to 20 OCC examiners, investigators,

lawyers and consultants had already investigated the matter before Greenberg. In addition, both Deloitte and Arnold & Porter, as auditors and regulatory counsel for Hamilton, respectively, had also investigated the matter thoroughly before Greenberg. Consequently, by the time Greenberg became involved, the investigative path had already been well-trod.

29. Originally, the initial drafting of the necessary report was entrusted to a mid-level associate involved in the investigation. By late October, as the deadline for the report loomed, it became apparent the associate was in over his head, so Mr. Loumiet took over the drafting of that report based on information provided to him by the lawyers doing the investigation. The report was completed and sent out on November 15, 2000.

30. One of the tasks of the report was to try to determine whether three members of Hamilton's senior management, including its Chair and CEO, had lied to Hamilton's Board, Deloitte, Arnold & Porter and the OCC about the Transactions. The OCC, after its investigation, had provided to Deloitte a series of documents that it had culled from Hamilton's files and from the files of other banks involved in the Transactions that the OCC felt were particularly significant. The Greenberg report expressly discussed each of those documents and attached them all as exhibits, exactly as received. Ultimately, because of inconclusive facts, the report was unable to reach a conclusion whether or not the members of Hamilton's senior management had lied about the Transactions. In fact, that was the same non-conclusion that Deloitte, Arnold & Porter and the OCC itself (as discussed below) had reached at that point in time, presumably for the same reasons. However, on review of the report, the OCC did concede that the report was well-organized and thorough.

31. One document attached to the report was a fax that had been sent to both the bank through which the loan sales had been done, and another bank through which loans had apparently been purchased. As discussed below, the cover sheet to this fax was to become a focal point of the OCC's harsh public accusations against Mr. Loumiet, designated by the OCC itself as the "smoking gun" in its case.

32. Two weeks after the Greenberg report was sent out, there was a lengthy pre-scheduled meeting at OCC headquarters in Washington, D.C. to discuss the situation. In attendance were numerous representatives of the OCC, members of Hamilton's Board, two attorneys from Arnold & Porter, representatives of Deloitte, and the securities shareholder and Mr. Loumiet from Greenberg. By then the Hamilton Board, based on the Greenberg report, had concluded that the purchases and sales had been sufficiently linked that they should have been considered part of a single "adjusted price trade," and that the bank therefore had to report a loss on its books. The exact amount of that loss was a big topic of discussion at the Washington meeting, with the discussion ranging from US$ 4 million (advocated by some of the Hamilton Directors) to US$ 24 million (the amount advocated by the OCC).

33. At that meeting, the OCC also stated that, of all of the national banks that it regulated, Hamilton had become its biggest headache. In addition, the topic of Hamilton's access to a Congressionally-mandated OCC ombudsman was discussed. Hamilton had sought access to that ombudsman because it disagreed with instructions from its OCC examiners on the write-down of certain of its loans. At the meeting the senior OCC official present openly stated that Hamilton should stop seeking access to the ombudsman, because that ombudsman would only do what the OCC told him to do anyway. In fact, it is Mr. Loumiet's

understanding that the ombudsman was never helpful to Hamilton Bank. At least part of this may have been attributable to the fact that under OCC rules in effect at that time, loans that were the subject of investigation by the OCC could not be considered by the ombudsman. Thus, the OCC could insulate its decision on any given loan from review by the Congressionally-mandated ombudsman by the tactic of simply designating the loan as subject to investigation even after the ombudsman had already been approached on the particular loan.

34. Also noteworthy is that, at the Washington meeting, both Mr. Loumiet and his fellow Greenberg shareholder expressly asked if the OCC had any additional information on the issues Greenberg had investigated and addressed in its report, to which the OCC's very clear response was, "no." A couple of weeks later Deloitte asked the OCC the same question, and was also told, "no." In fact, during the OCC's action against Mr. Loumiet years later, it became apparent that the OCC did have significant additional information that it simply did not share with Greenberg, while misleading Greenberg (and Deloitte) that the information did not exist. At the Washington meeting, when asked directly about Hamilton management, all the OCC stated was that it could not "strongly endorse" that management.

35. As already suggested, a couple of weeks after the D.C. meeting, Hamilton's Board agreed to write down its books by US$ 22 million, an amount very near to the US$ 24 million the OCC had advocated, to reflect the "adjusted price trades." This required Bancorp's securities filings from late 2008 and on to be revised and resubmitted. After the write-down was completed, Hamilton remained a "well-capitalized" bank under OCC standards at the beginning of 2001.

36. Since he had heard nothing more from the OCC after the meeting in D.C. at the end of November, by mid-January Mr. Loumiet assumed that this matter had been concluded. Then, unexpectedly, a letter arrived from the OCC describing a deposition it had taken of an official at a counterparty-bank involved in the Transactions that directly contradicted what Greenberg had been told by the least senior of the three Hamilton officers whom the OCC suspected of wrongdoing. To make matters even more confusing, the deposition statements of the counterparty-bank official also directly contradicted what that person's own lawyer, a partner at a major Wall Street law firm, had told the Greenberg investigators the previous Fall, statements that had actually been included in the Greenberg report. Mr. Loumiet promptly reached out to the Hamilton officer whose truthfulness was being challenged to see if he would change his story in light of this contradictory deposition. The officer did not and, eventually, at Mr. Loumiet's insistence, that Hamilton officer signed a sworn Affidavit prepared by Mr. Loumiet confirming what that Hamilton officer had told Greenberg investigators the previous Fall, which directly conflicted with the deposition testimony the OCC had described to Mr. Loumiet. (Mr. Loumiet prepared the sworn Affidavit to make sure there was no wiggle room: if the Hamilton officer signed it, either he or the counterparty-bank official had to be wrong on at least some facts.) At the same time, Mr. Loumiet tried to get the lawyer of the counterparty-bank official to explain the contradiction between his own statements included in the Greenberg report, and his client's sworn deposition to the OCC. The lawyer never gave an explanation; to this day, the contradiction between client and counsel remains unexplained. Following Bar ethical rules, Mr. Loumiet also asked that counsel for access to his counterparty-bank client, but that access was denied. Mr. Loumiet, of course, had no way of compelling the counterparty-bank official or the lawyer to speak to Greenberg.

37. Mr. Loumiet, the Greenberg securities shareholder, and two Deloitte partners visited OCC headquarters in Washington, D.C. a second time in early February 2001. This time, Mr. Loumiet and the other three were ushered into a meeting in the smaller conference room with several OCC officials, one of whom read them excerpts from the counterparty-bank official's deposition to the OCC. Since they were concerned that excerpted, redacted language taken out of context can sometimes be misleading, both Mr. Loumiet and the other Greenberg shareholder asked if, within the confines of that same room, they could just look at—not even take with them—the deposition from which the extracts were derived. The OCC officials refused; the visitors were not allowed to even touch the folder that contained the deposition. Later, at the same meeting, the OCC also advised the Greenberg shareholders of six "red flags" that the OCC wanted Greenberg to use to reconsider its earlier conclusions.

38. On returning to Miami, the securities shareholder spoke to the Hamilton Board and then informed Mr. Loumiet that a new report had to be written taking into account the sworn statement by the counterparty-bank official as well as the OCC's "red flags." Moreover, since the securities shareholder was very busy redoing past Bancorp securities filings and putting together the annual report for that company, Mr. Loumiet would have to lead this effort. Mr. Loumiet suggested having other Greenberg shareholders handle the matter instead, but it was pointed out to him that the only two shareholders who knew the case were Mr. Loumiet and the unavailable securities shareholder, and that it would be costly and unfair to the client to now bring in additional senior attorneys with no background in the matter.

39. Further complicating matters was that a securities class action had been filed in January against

Bancorp, Hamilton, the Boards of both, as well as the three Hamilton officers who had principally been involved in the transactions Greenberg had investigated in the Fall. Without Mr. Loumiet's involvement in any manner, Hamilton had approached a litigation shareholder at Greenberg to represent all of the defendants. When he subsequently found out about this, Mr. Loumiet discussed with that shareholder making sure, before undertaking the matter, that all legal conflicts arising from Greenberg's work for the Audit Committee were resolved in the course of opening the file. Greenberg, like all major law firms, had established internal conflicts clearance procedures when new matters were undertaken, and it was traditionally up to the senior attorney opening a matter to make sure conflicts were resolved. (The undisputed first-hand testimony at Mr. Loumiet's trial was that any conflict was in fact waived, and the ALJ so found in her Recommended Decision.) Further, Mr. Loumiet understood that Greenberg at that point simply planned to handle on behalf of all of the defendants the early procedural stages in any class action—for example, challenging class certification—which could be done collaboratively on behalf of all the defendants and did not require a determination of any particular defendant's behavior, or conflicts among them on substantive issues that would have to be addressed before a responsive pleading relating to the merits would have to be filed months later. This would leave to a later date a decision as to whether separate counsel was appropriate for the different defendants, once the early procedural stages passed and before the merits of the action were reached. Nevertheless, thereafter Mr. Loumiet kept away from that litigation matter, except for a couple of occasions when the litigation shareholder, on his own initiative and as an intended courtesy to Mr. Loumiet, informed him at what early procedural stages the litigation was (e.g., we've asked for an extension of time and are filing a motion challenging the

class). By mutual agreement, there was no discussion of the substance of the matter between the two shareholders.

40. By this time, Mr. Loumiet knew that he would be leaving Greenberg for another law firm not long after that same Spring, together with a group of younger shareholders who worked with Mr. Loumiet. He also knew that the OCC matter would remain at Greenberg after he left, because it was primarily a securities law (disclosure) matter that had come in through the securities shareholder, who would continue to handle it, with Arnold & Porter acting as bank regulatory counsel. Similarly, the class action (with which Mr. Loumiet, as noted, had no involvement) would remain at Greenberg in the hands of the litigation shareholder. In addition, as already noted, Hamilton had never been a significant personal client of Mr. Loumiet. Altogether, Mr. Loumiet had little reason or desire to continue his involvement in the OCC matter. However, after giving the matter some thought, Mr. Loumiet reluctantly concluded that he could not just walk away and leave the client hanging.

41. Unlike an auditor's investigations and reports, there is no published guidance for lawyers on how to conduct an Audit Committee investigation, or how to write the ensuing report. There are neither "generally accepted accounting principles" nor published standards by a governing body of the legal profession on how a lawyer should proceed in these situations. The matter is therefore largely left to the judgment of the attorney involved. Since the OCC had not suggested that Greenberg had missed any information in its investigation other than the statement from the counterparty-bank official who would not speak to Greenberg, Mr. Loumiet believed the crux lay in resolving the factual dispute between the most junior of the three Hamilton officers, who occupied a mid-level position at the bank, and the counterparty-bank official. However, since

that official and his lawyer declined to speak to Greenberg, and the OCC, despite requests from Mr. Loumiet and the securities shareholder, appeared to be doing nothing to persuade them to do otherwise, Mr. Loumiet felt his best choice was to focus on the Hamilton officer and try to break him down. As noted, Mr. Loumiet himself had earlier been unable to do so, so he believed it was time to bring in bigger guns. Mr. Loumiet did not believe that the Hamilton bank officer was a particularly strong person and it did not make sense to him that, if that officer was lying, he would continue to do so under a tough grilling, given his relatively modest salaried position at the bank. So, Mr. Loumiet arranged an interview at Hamilton's offices where the Hamilton bank officer, voluntarily unaccompanied by counsel, underwent a lengthy barrage of questions from the head Arnold & Porter partner involved, the Greenberg securities shareholder, and another Greenberg litigation shareholder who was a former senior federal prosecutor, the latter with express instructions from Mr. Loumiet to break the Hamilton bank officer down. Together, these three attorneys had then been practicing for about 70 years. Mr. Loumiet deliberately was not present to allow the three other lawyers to do their best without any influence from Mr. Loumiet. After several hours, the three attorneys emerged and informed Mr. Loumiet that they had been unable to even dent the Hamilton officer's story.

42. Some time after that session, Mr. Loumiet began assembling a second report, which was sent out on March 14, 2001. Again, there was no blueprint for the task. The first part of the report compared at length the statements from the counterparty-bank official with those of the Hamilton bank officer, tried to reconcile them, and ultimately concluded a few were irreconcilable. The second part took each of the OCC's six "red flags" and listed all of the known facts supporting or challenging them. Ultimately, the report concluded that while the Transactions had been

very poorly handled by Hamilton officers, there was not enough evidence to conclude that the three had intentionally lied. However, like the predecessor report, this report also did not conclude that they had told the truth. Before being sent out in final form, the report was reviewed by Arnold & Porter (who suggested changes softening the language of the report in places, many of which Mr. Loumiet rejected), Deloitte and the Greenberg securities shareholder. The report went out in the names of both Mr. Loumiet and that shareholder.

43. As was the case with the prior Greenberg report, the report was delivered to the Hamilton Audit Committee and Board of Directors, and Mr. Loumiet heard no dissatisfaction from either. In each case, Greenberg billed for its work (which totaled US$ 210,000 for the 20 weeks or so of work on both reports) in due course and the bill was paid without comment by Hamilton.

44. By this time, Mr. Loumiet was committed to leaving both Greenberg and this matter behind in a few short weeks. In the additional weeks after the letter was received from the OCC in mid-January describing the counterparty-bank official's surprising deposition to the OCC, Mr. Loumiet's continued involvement with Hamilton had exposed Mr. Loumiet to a series of incidents that showed OCC staff behaving in a very disturbing manner. Before becoming involved in the Hamilton OCC matter, Mr. Loumiet had generally had good experiences working with the OCC in matters relating to national banks. In fact, Mr. Loumiet had worked well with the OCC on a variety of matters, including the extension of the Deposit Guaranty statewide branching precedent to Florida in the late 1980s, and Mr. Loumiet considered the OCC to be enlightened in terms of certain of its policies—for example, on nationwide banking and new powers (insurance and others) for national banks. However, Mr. Loumiet cannot remember having ever

before dealt with the Special Supervision and Fraud Division of the OCC, which by early 2000 had taken over responsibility for Hamilton, with defendant Rardin serving as Hamilton EIC, or ever having been involved in a contested enforcement action brought by the OCC's Enforcement and Compliance Division.

45. Mr. Loumiet had already been dismayed by the OCC's admission at the meeting in late November at OCC headquarters that the OCC ombudsman was an agency rubber stamp. In the period from mid-January to mid-March 2001, when the second Greenberg report was issued, Mr. Loumiet learned of additional very disturbing OCC behavior at Hamilton. For example, Mr. Loumiet learned that OCC representatives had repeatedly told seemingly pointless lies to Hamilton officers and others. In addition, OCC staff on various occasions had either ignored the law or, disregarding their own prior precedents, reinterpreted it in a manner that then suited their immediate objectives. Mr. Loumiet also learned that the principal Arnold & Porter partner in charge of Hamilton had been threatened that, if he did too good a job representing Hamilton in its various disputes with the OCC, he had better "watch his back" every time he walked into OCC headquarters in Washington, D.C. (This threat was confirmed by that attorney in a sworn deposition given in the action later brought by the OCC against Mr. Loumiet.) Since this partner's practice was a D.C.-based bank regulatory practice revolving in large part around national banks, and since he was himself a former OCC official, Mr. Loumiet did not take this threat lightly. The OCC had also sought to pressure the Deloitte officials in Miami working on the Hamilton matter by contacting Deloitte representatives responsible for that firm's national banking practice, which was very significant. When combined with the OCC's repeated disregard for precedent and its corresponding proclivity to make rules up as suited it along the way, Mr. Loumiet saw these ham-handed actions as a troubling

disregard for the rule of law by the OCC representatives involved.

46. The OCC's behavior was troubling enough. However, that behavior was compounded by overtly anti-Hispanic behavior and language by OCC officials at Hamilton, whose staff, as noted, was probably 90% or so minority. The then-OCC EIC at Hamilton in 1999 (the predecessor to defendant Rardin) told Hamilton employees that he had been forced to leave his native Miami-Dade County because of the arrival of the Cubans. (Many, if not most, of Hamilton employees were Cuban.) Unfortunately, the OCC has had a troubled relationship with the Hispanic community in our country for many years. On information and belief, there are some 5 national banks in the U.S. in total currently owned or controlled by Hispanics, out of a total of approximately 1,800 national banks altogether—or about 4/10ths of 1%—even though Latinos now represent more than 1/6th—or almost 17%—of our nation's population. Mr. Loumiet did not believe that this percentage disparity is attributable to Hispanics somehow being culturally less suited for the banking industry, or less interested in it, than non-Hispanics. Mr. Loumiet does not know of any senior Hispanic official at the OCC, in its almost 150-year history. The history of American banking is littered with the carcasses of Latino-owned or controlled national banks closed by the OCC—many in South Florida—in numbers way disproportionate to the total number of such banks that have existed, when compared to the corresponding numbers for national banks generally. Moreover, Mr. Loumiet was told at the time that the OCC had a history of internal racial issues, having been the subject of a Consent Decree with the Justice Department in the 1970s and 1980s over this precise issue. Until Hamilton, while Mr. Loumiet had heard second-hand of OCC difficulties with the Latino community, he had never had to face the situation directly, so he had simply ignored the situation. Now it was in Mr. Loumiet's face.

47. 47. As a result, Mr. Loumiet was faced with a quandary: whether and how to blow the whistle on the behavior of OCC representatives. There were many good reasons for Mr. Loumiet to simply turn his head and pretend he did not see. Mr. Loumiet was a prominent and established banking attorney with a significant practice, to whom the OCC itself, at the trial that would follow some five years later, would ironically refer on the trial record as "pre-eminent," "leading," "distinguished" and "learned". (This all while publicly accusing Mr. Loumiet of "concealing crimes," "suppressing material evidence," "purposely" covering up the Hamilton officers' misconduct, and the like; Mr. Loumiet could only wonder at trial what superlatives the OCC could possibly have used to describe Mr. Loumiet had it not been prosecuting him and attempting to ban him for life from representing any FDIC-insured institution.) At the time, Mr. Loumiet generally prided himself on his good relationship with U.S. bank regulators generally. Moreover, as already noted, Hamilton had never been an important client of Mr. Loumiet's, and he knew he would be leaving his current law firm in a manner of weeks and that Hamilton was unlikely to be a significant client of his at his new firm. As a veteran regulatory lawyer, Mr. Loumiet also knew that reporting a regulator's misbehavior was likely to only hurt hid relationship with the agency involved on a going-forward basis. In addition, Mr. Loumiet was warned by another regulatory lawyer who had much greater experience than he in dealing with the OCC Divisions involved that these were "mean, nasty, vindictive" people, who would do whatever they could in the future to get back at him. The then-existing threats against the Arnold & Porter partner simply reinforced this point. Mr. Loumiet thought long and hard about just shutting up and going along.

48. Given the eventual personal consequences of his actions, as described below, which he candidly did not anticipate when he acted, Mr. Loumiet has many times since

second-guessed himself for not doing just that. Perhaps Mr. Loumiet was ultimately compelled to blow the whistle by his deep-rooted belief, based on his own life experience as a young immigrant from a homeland where the rule of law at one point devolved to whatever the uniformed man with the gun standing in front of you said, that there is no rule of law unless the Government itself is the first to respect it. Perhaps it was that Mr. Loumiet also believes that if the Bar does not stand up when necessary and call the Government to task for ignoring the rule of law, who in our society will do so? Certainly, an important factor was that Mr. Loumiet had already discerned a worrisome, increasing anti-Hispanic sentiment and backlash as the U.S. Latino population grew dramatically in the 1980s and 1990s, and Mr. Loumiet simply was not willing to put up with overt anti-Hispanic behavior from the Government as well while remaining silent. Some combination of these factors ultimately persuaded Mr. Loumiet that he should blow the whistle on the OCC behavior involved.

49. The next concern was, to whom and how to blow the whistle? Mr. Loumiet simply wanted someone in a position of authority to look into the situation and take appropriate steps, without necessarily generating any publicity. The obvious person was the Comptroller himself, since the behavior at issue had been that of his staff. However, that did not seem right, since by law the same Comptroller would be the final decision-maker in the various pending Hamilton administrative actions, and Mr. Loumiet did not want to affect (or appear to be trying to affect) the outcome of those actions. (To Mr. Loumiet, the OCC's behavior at Hamilton was not legally, morally or logically linked to the merits of any administrative action involving that bank, any more than police brutality is justified by the merits of any arrest the police officer may be making.) So instead, Mr. Loumiet wrote to the Office of Inspector General ("OIG") at the Treasury Department, whose

statutory functions include assuring that all of the agencies and bureaus within that Cabinet department, including the OCC, and their employees, comply with the law. On March 26, 2001, Mr. Loumiet wrote to the Treasury Inspector General, avoiding any mention of Hamilton, but complaining about OCC staff behavior at an unnamed national bank in some detail. Because the letter was a public document, Mr. Loumiet did not reveal in the letter all of the troublesome OCC behavior (such as the threats against Hamilton's lead regulatory lawyer). To make sure that the OCC did not think that Mr. Loumiet was acting surreptitiously, he copied the General Counsel of the OCC on the letter.

50. On an afternoon in late April 2001, there was a third meeting at OCC headquarters in Washington, D.C. relating to Hamilton's ongoing problems with the OCC. At that meeting, the Board of Hamilton and Bancorp was given approximately 20 minutes, while required to remain in a OCC conference room, to "voluntarily" agree to comply with a series of onerous OCC requirements which were sprung on them for the first time at that meeting, without even a prior hint. No discussion or even minimal change to the requirements was allowed—it was take it or leave it, "as is." Moreover, the alternative to its agreement, the Board was told, was that those same requirements would be imposed unilaterally by the OCC by Cease and Desist Order that same afternoon, while the Board was flying home. Particularly since Bancorp was a publicly-traded entity, it was impossible for the Board to deliberate and act in 20 minutes on the complicated issues presented, without any background or consultation with third parties or advisors (other than the few present) and without leaving OCC headquarters, and still meet its fiduciary duties to its shareholders. As a result, the Board declined to act, and the OCC imposed the requirements that same afternoon by unilateral Order. The OCC imposed the requirements without providing any explanation for them to the Board,

and without explaining the urgency for their implementation in this rushed manner. In addition, the OCC prohibited Hamilton from discussing even with its own affected clients what had happened. Among the various requirements the OCC imposed on Hamilton was that it immediately, overnight, and without delay, sever and discontinue doing all business with a long list of customers, including the Panamanian Consulates in the U.S., some of which had been its customers or more than 10 years, without explanation for why it was yanking their banking relationship literally overnight and with no time allowed for them to migrate that relationship elsewhere—this, regardless of any consequences from that sudden, drop-dead rupture either to Hamilton or to those clients or their business, and without any allegation that those selected clients were themselves engaged in any wrongdoing. The single visible common denominator for all of these clients was that they were Spanish-speaking. Mr. Loumiet found this additional OCC behavior—which again did not seem to him to comport with due process, and again smacked of bias against the Hispanic community—profoundly troubling, so, after returning to Miami, Mr. Loumiet sent the Treasury Inspector General a follow-up letter denouncing aspects of that third meeting.

51. On May 1, 2001, Mr. Loumiet changed law firms, moving from Greenberg to Hunton & Williams LLP. Unexpectedly and ironically, one of the very first congratulatory messages he received was an e-mail from the former OCC EIC at Hamilton who had been "kicked upstairs" to Washington, D.C. in 2008, before Hamilton's serious conflicts with the OCC began. Mr. Loumiet had met this OCC official and even once, years before, had lunch with him, but Mr. Loumiet was frankly surprised at the warmth of the e-mail.

52. In late Spring 2001, the senior OCC official who had stated at the late November 2000 meeting that the OCC ombudsman was but a rubber stamp, ceased to occupy her post. Her statement had been singled out and recounted in Mr. Loumiet's March 26, 2001, letter to the Treasury OIG. On information and belief, Mr. Loumiet's two letters to the Treasury OIG caused severe embarrassment to various OCC Special Supervision and Fraud, and Enforcement and Compliance, officials who had been involved in the OCC behavior relating to Hamilton that those letters criticized, including prominently, and in senior roles, defendants Rardin, Schneck and Sexton. Further, Mr. Loumiet's communications stood out because they were highly unusual since, as already suggested, given the vast power that OCC officials wield over anyone in any way involved with a national bank, as explained below, it is extremely rare for anyone to challenge those officials' behavior. Even though the OCC has several thousand employees to draw on, several of those same officials—e.g., defendants Rardin, Sexton and Schneck—would be directly and actively involved in the decision to sue Mr. Loumiet five years later, as well as in the actual conduct of that litigation. This lack of concern for their own personal conflict in bringing and pursuing that action would render the OCC's conflicts charges against Mr. Loumiet in that action, as discussed below, ironic.

53. In late June of 2001, three months after Greenberg's second and last report, the OCC issued an examination report for Hamilton. Normally, those reports are privileged and confidential. However, in this case the OCC later, on its own, chose to use that examination report in its trial of Mr. Loumiet, thereby waiving any examination privilege relating to Hamilton. Nowhere in that lengthy examination report is there any suggestion that the three senior Hamilton officials had lied to or misled the OCC or anyone else in connection with the transactions investigated by Greenberg. While the report, not surprisingly, was

generally highly critical of Hamilton management, it praised the leadership and inspirational value of the Chair and CEO of Hamilton, suggesting that he resign as CEO but remain as Board Chair. It seems inconceivable to Mr. Loumiet that if in June 2001, after some two years of investigating the subject transactions, and with the benefit not only of the Greenberg reports, but also the additional information the OCC had gathered, the OCC itself had concluded that the three Hamilton officers involved had repeatedly lied, including under oath, the OCC under any circumstances would have recommended that the most senior of those officers remain as Chair of Hamilton's Board. This means that like Greenberg, Deloitte and Arnold & Porter, as of June 2001, the OCC had not been able to conclude that those three individuals had acted in an intentionally wrongful manner. In an amazing example of "do as I say, not as I do," this fact would not prevent the OCC from prosecuting Mr. Loumiet years later for having failed to reach the "right" conclusion on this issue in the Greenberg reports.

54. In the Summer of 2001, Mr. Loumiet was approached by a former Big 4 accountant in Miami who had become CEO of a small national bank in Arkansas by the name of Sinclair National Bank, many of whose customers were less-affluent African-Americans and Hispanics. Sinclair was in the midst of its own battles with the OCC, which, according to sworn Affidavits from Sinclair representatives, included some troublesome racial behavior by OCC staff. Sinclair already had other Washington counsel, and had already sued the OCC through that counsel. Nevertheless, Sinclair's CEO and its Board Chair wanted Mr. Loumiet to also represent the bank in this matter before the OCC. After giving the matter some thought, Mr. Loumiet declined the representation, since he did not want to risk any possibility of the two instances of alleged racism—Hamilton and Sinclair—being treated as one. Sinclair was closed by the OCC in September 2001.

55. Also in the Summer of 2001, Mr. Loumiet was invited to Washington to meet with an attorney of the Treasury OIG to discuss the two letters he had written to that office. Mr. Loumiet thought that meeting went very well, and that there was genuine concern at the Treasury OIG about the OCC's troubling behavior. Moreover, some time after returning to Miami, Mr. Loumiet received a letter from the Office of Legal Counsel at the OCC, whom he had copied on the original letters, stating that the proper authority to look into the incidents described in those letters was, in fact, the Treasury OIG. Nevertheless, not long after Mr. Loumiet received another letter from the Treasury OIG stating, without explanation, that it would not be looking into those matters. It was only years later, in the course of discovery for his trial, that Mr. Loumiet would learn that a meeting to discuss those letters had taken place between representatives of the OCC and the Treasury OIG. At that meeting, the OCC officials persuaded their counterparts from the OIG that it was not necessary for them to look into the matters, since the OCC itself would do so. Of course, OCC never did and the matter was swept under the proverbial rug.

56. Also in the Summer of 2001, Hamilton engaged CIBC, an investment bank, to seek a possible sale of Hamilton. However, through the Summer and Fall of 2001 the situation at Hamilton continued to deteriorate as the OCC progressively required the bank to write down its assets to the point where, under the federal Prompt Corrective Action statute, its capital had been sufficiently reduced so that it could be seized. Since the OCC ombudsman was not available for challenge of any write-downs, Hamilton was largely at the mercy of its OCC examiners. Some of the write-downs occurred under unusual circumstances. For example, after closing the OCC's examination of the bank for the quarter ended June 30, 2001, defendant Rardin on his own some time later

overnight retroactively wrote down the bank's books effective June 30 by an additional US$ 12 million because the bank unexpectedly recovered in early July that exact same amount on loans that had been previously written off. Because of this and other behavior reflecting the extraordinary hostility that had by then developed between Hamilton and the OCC, Deloitte resigned as auditor for Hamilton in October 2000, citing the inability to perform its job under those circumstances. Not long before its closing, Hamilton filed in federal court a lengthy verified civil rights complaint against the OCC which Mr. Loumiet co-signed along with two well-known litigation partners at the firm where he then practiced. That complaint summarized much of the OCC's inappropriate behavior at Hamilton. Before it ever responded to the complaint, the OCC closed Hamilton in early 2002 and appointed the FDIC as receiver for the bank. On information and belief, that complaint, and Mr. Loumiet's involvement in it, further angered defendants Rardin, Schneck and Sexton, who had been senior OCC officials actively involved in, and responsible for much of, the behavior it described.

57. Hamilton was seized on January 11, 2002, slightly more than a year after the Audit Committee and Board agreed to write down the bank's books by US$ 22 million because of the "adjusted price trades." Hamilton was one of only 11 FDIC-insured banks closed nationwide in all of 2002. On the day before Hamilton was seized, Mr. Loumiet was involved in negotiations to sell Hamilton's assets and liabilities to another national bank based in Miami for US$ 40 million and some contingent return on assets. Had those negotiations been completed and successful, there would have been no need to close Hamilton, and its shareholders would have received some return, albeit a modest one, on their investment. In addition, no loss to the FDIC insurance fund would have resulted. The OCC was aware of this effort when it closed Hamilton.

58. The FDIC receivership of Hamilton, which lasted approximately four years, was ultimately reported to have produced a loss of US$ 127 million to the FDIC insurance fund. For whatever reason, rather than Hamilton's being sold as a combination of liabilities and performing loans when it was seized, as is normally the case when a bank in this country is closed, at the time of Hamilton's closure only most of its deposit liabilities and three of its branch offices were transferred to a successor bank (the remaining six branches were closed). Hamilton's assets, primarily loans, some two-thirds of which were short-term, trade-related loans, which as already noted historically have widely been viewed in the banking industry as safer than other types of longer-term loans, were retained by the FDIC as receiver. At the time Hamilton was seized, those assets were reported to be about US$ 1.2 billion. Many of those assets were relatively small credits to debtors from abroad, meaning that collection of the credits could ultimately involve the great inconvenience of having to pursue debtors in foreign jurisdictions. Once Hamilton was closed, its receivership estate ceased being a source of potential renewed or additional funding for borrowers, eliminating one major incentive that borrowers have, as a practical matter, to service their loans. Moreover, when Hamilton went under, many of its borrowers were left without financing on existing or proposed transactions, causing them inconvenience and loss. When, combined with these considerations, those debtors learned that the FDIC as receiver, rather than chasing them in foreign countries, would accept deeply discounted payments in satisfaction of their outstanding loans, even very affluent borrowers from abroad wound up paying only a modest percentage of what they owed in settlement of their Hamilton loans. In addition, the customary FDIC fire sale of bank assets produced significant losses even on performing loans made to U.S. borrowers; for example, the block sale of a portfolio of US$ 140 million in performing loans to excellent corporate

borrowers in Florida by itself produced more than one-half of the FDIC fund's estimated total US$ 127 million in losses on Hamilton.

59. After Hamilton was seized, the FDIC launched its usual receivership investigations to determine who might have liability to it. As is often the case, this led to "agreed" fines and settlements with a series of officers and Directors at Hamilton. The FDIC also looked at the Transactions, including into the possible liability of Greenberg and its attorneys (including Mr. Loumiet) relating to the investigation and two reports. In the course of its investigations, the FDIC obtained, and later shared with the OCC, all documents (including e-mails) at Hamilton relating to Greenberg, and vice-versa.

60. Under federal law, when a bank fails and costs the FDIC insurance fund more than US$ 100 million, the Treasury OIG must prepare a report to Congress assessing the collapse, including the performance of Government regulators involved. In the case of Hamilton, the Treasury OIG issued a report highly critical of the way the OCC had handled the Hamilton situation, though not for any of the grounds brought to the attention of the OIG by Mr. Loumiet in his letters. In fact, the report failed to make any mention of Mr. Loumiet's two letters to the OIG, or of the civil rights complaint filed against the OCC in December 2001, or anything discussed in those writings. This seems particularly noteworthy in that those letters and complaint were precisely about the conduct of the OCC staff at Hamilton, that as noted, was the general subject of the Treasury OIG's report. Incredibly, the OIG's report discussed all other litigation between the OCC and Hamilton, omitting only this particular complaint. In other words, besides never investigating the merits of the matters described in the two letters or in that complaint, the

Treasury OIG did not feel any need to even mention those matters in its report to Congress.

61. On information and belief, from even before Hamilton was seized, defendants Rardin, Sexton and Schneck, all embarrassed and angered by Mr. Loumiet's whistle-blowing, began discussing how to retaliate against him for his temerity, and continued doing so as events unfolded from 2002 to 2006. In fact, all three of these defendants were actively involved in the case brought by the OCC against Mr. Loumiet and described below. Again on information and belief, largely at the instigation of those defendants, in the Summer of 2005 Mr. Loumiet received a "15-day letter" asking Mr. Loumiet, Greenberg and the securities shareholder involved in the Hamilton matter why the OCC should not commence an action against them relating to the Hamilton investigation and the two Greenberg reports. Counsel to Greenberg, Mr. Loumiet and the other shareholder responded with a lengthy submission. The OCC never responded to the points raised in that submission, but simply ignored them, even though many of the same arguments contained in that submission would be equally valid years later, when raised at Mr. Loumiet's trial, and would eventually appear in the administrative law judge's Recommended Decision. In other words, the entire process of giving the potential accused an opportunity to respond before a decision was taken to proceed or not—due process—was a sham, no more real than the earlier meaningless ombudsman process had been for Hamilton.

62. In early 2006 Greenberg settled the FDIC action. As part of that settlement, Mr. Loumiet was asked to exchange releases with the FDIC, and did so.

THE OCC SUES MR. LOUMIET

63. The Individual Defendants caused the OCC to notify that an administrative action would be brought against Greenberg, the securities shareholder and Mr. Loumiet in the Summer of 2006.

64. In the early Fall of 2006 in Washington, D.C., OCC officials met with Greenberg's counsel, who sought to persuade the OCC not to proceed individually against Mr. Loumiet and the securities shareholder. After all, it was Greenberg, not those shareholders, that had been hired by Hamilton; those attorneys had acted solely as employees of Greenberg on all matters relating to Hamilton, and they had never acted in a personal capacity or individually received any benefits from Hamilton or anyone connected to it. The response from defendant Sexton was that the language used in the Greenberg reports had "gone too far," and therefore Mr. Loumiet and the securities shareholder themselves "had to pay."

65. When he learned of this statement, Mr. Loumiet was shocked because he strongly believes that, as later eloquently stated by the court in *Vinluan v. Doyle*, 60 A.D. 3d 237, 251 (N.Y. App. Div. 2009), and as highly pertinent to this case, "A prosecution which would … potentially inflict punishment for the good faith provision of legal advice is, in our view, more than a First Amendment violation. It is an assault on the adversarial system of justice upon which our society, governed by the rule of law rather than individuals, depends."

66. Federal courts have held for years, without seeing the need for much discussion in upholding such a self-evident point, that the Government cannot interfere except under extreme circumstances with an individual's right to speak to an attorney. *See, e.g.*, *Martin v. Lauer*, 740 F 2d 36 (D.C. Cir. 1984). However, an individual's protected right to speak to his attorney is worth little if the attorney in

responding does not enjoy similar protection, but can be punished by the Government because it—not the client—does not approve of how the attorney responds. Essentially, that was the situation at issue in connection with the Greenberg reports. In 2001, the U.S. Supreme Court held that attorney speech to clients was, in fact, protected speech, when it held that, under the First Amendment, Congress could not condition financial support to The Legal Services Corporation on its attorneys' not giving certain types of advice that Congress disliked. *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001). (In that decision the Court specifically referred to the attorneys' First Amendment rights in speaking to their clients.) Thus, by the time this action was under consideration several years later, the precedent that an attorney's communications with his client were protected from Government sanction by the First Amendment for what he said was established. The OCC simply chose to ignore this First Amendment protection throughout this proceeding, even though it was raised early and often by Mr. Loumiet. In fact, in the briefing at the D.C. Circuit level in connection with Mr. Loumiet's later successful action for legal fees and expenses under the Equal Access to Justice Act (EAJA), the OCC declined to take any position at all on this fundamental Constitutional question, knowing that there was nothing it could say that would not either elicit widespread public criticism and rejection or, alternatively, condemn its own behavior in bringing and prosecuting this case. As to the FDIC Act's "institution-affiliated party" statute under which the OCC proceeded against Mr. Loumiet, as discussed immediately below, nothing in that statute or its legislative history suggests that Congress intended for bank regulators to ignore the Constitution in bringing enforcement actions under the statute, not that Congress could so authorize anyway under the terms of the First Amendment itself.

67. It was now even more obvious that the various charges that the OCC was threatening to bring against Mr. Loumiet, discussed below, were trumped-up, contrived and pretextual. The statute under which the OCC was proceeding was the FDIC Act's "institution affiliated party" (IAP) statute, 12 U.S.C. 1818(e) (2011). As relevant to this complaint, that statute allows federal bank regulators to punish outside service providers to FDIC-insured institutions, including accountants and lawyers, who have been hired as "independent contractors" by a bank, through a federal administrative proceeding. (Of course, in his case, it was Greenberg, and not Mr. Loumiet, who had been contracted, a point that the OCC also simply chose to ignore. In effect, the OCC took the position that under that statute it may punish not only any company or firm hired by a national bank, of which there are likely tens of thousands in this country, but also any employee of any such entity, of whom there are likely millions.) This punishment is above and beyond, and independent of, any damages the FDIC as receiver might collect from the advisors. As applicable to outside service providers, the statute expressly contains three noteworthy safeguards intended to protect against excessive Government enforcement. The first is that the provider must have been "conducting the affairs of the bank." (See discussion below.) A second is that the wrongdoing charged has been committed with "scienter'—i.e., either knowingly or recklessly—that is, with "conscious disregard." (The OCC in the past has lobbied Congress to modify the statute to allow it to pursue persons for mere negligence, because, it has claimed, the higher standard of culpability is too difficult to prove; and it was frequently apparent throughout the proceeding against Mr. Loumiet that the OCC had simply chosen to ignore that higher culpability standard Congress had set and subsequently refused to alter.) Third, that the wrongdoing have caused more than "minimal financial loss" to, or have had a "significant adverse effect" on, the institution involved. The

IAP statute not only permits potentially huge fines to be imposed, but also allows the regulator to ban the "independent contractor" involved from rendering any further services to any FDIC-insured bank for life, or for such shorter period as the regulator might propose. Obviously, to anyone dependent on the banking industry for a living, the statute is a huge club that renders that person very vulnerable to the wielding federal bank regulator. In fact, just being pursued publicly under the statute is enough to destroy a person's career in banking. While the three standards that the statute imposes should theoretically protect the accused individual to some degree, as will be seen from Mr. Loumiet's own case, a regulator can simply allege that the standards are met and force a resisting individual into a long and costly (economically, psychologically and reputationally) administrative proceeding where the regulator ultimately need make no serious effort to establish that those conditions were met. Where bank regulators act in bad faith, the best that an accused individual can hope for is a Pyrrhic victory.

68. Compounding the threat created by the IAP statute is that the proceeding involved is conducted before an ALJ, and is an administrative proceeding. Unlike "real" Article 3 federal judges, federal ALJs are hired on a renewable (or not) contract basis by the Cabinet department or agency whose cases they hear. (In Mr. Loumiet's case, the ALJ was employed by the Treasury Department, which the OCC forms part of.) As to the nature of administrative proceedings, because as explained below the ultimate decision is taken not by them, but by the head of the federal agency involved, ALJs tend to be reluctant to rule based on dispositive legal issues; and particularly as concerns evidentiary matters, the proceedings are far less defined than in federal court actions as to what may be taken under consideration. (For example, in the case against Mr. Loumiet, the OCC claimed privileges—such as that certain

documents were "secret," or were protected by a very broad and undefined "investigation" privilege—that would be highly unlikely to apply in a federal District Court action and that limited what OCC-produced documents and evidence Mr. Loumiet could present in the administrative proceeding.) Moreover, as already suggested, the ultimate decision-maker in the case is not the ALJ, who at least has some training as a judge and an inclination to seeing justice done, even though the Government agency involved pays his or her salary. Instead, while the ALJ hears the evidence and presents a recommended decision, it is the head of the agency himself, whose staff is prosecuting the accused and who at times is far more invested in the decision to prosecute than any reasonable person would deem appropriate for a supposedly "impartial" judge, who makes the final decision. Moreover, it is usually the agency's staff that write the final decision for the agency head, who is understandably too busy to sit down at a keyboard and start drafting. It is within that agency head's discretion to ignore the ALJ's recommended decision, subject to appeal to a federal Court of Appeals by the accused should the agency head's final decision be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." 5 U.S.C. § 706 (2)(A).

69. Beyond the obvious risk of unfairness inherent in the process, the accused is in a fight where his opponent has far greater resources and can take as long as necessary to exhaust the accused's resources and pound him into submission. When you combine both factors, small wonder that one experienced banking lawyer who handled such matters told Mr. Loumiet at the time that more than 90% of contested administrative proceedings involving federal bank regulators are won by the regulators.

70. Greenberg was legally responsible for the behavior of its attorneys at Hamilton because they were its employees, and the same principle applies to the OCC's

responsibility for its own staff. However, no principle of law made Mr. Loumiet liable for work done by other Greenberg attorneys on this matter. This was particularly true in the case of a statute such as the IAP statute, which requires knowledge or "conscious disregard" (i.e., "recklessness") by the accused. Neither of these standards can logically be met vicariously. As will be seen, this did not stop the OCC from repeatedly attempting to hold Mr. Loumiet responsible for other Greenberg attorneys' alleged misbehavior, while offering no legal basis for doing so.

71. Once the decision to bring suit was finally made by the OCC, Greenberg elected to settle, on information and belief, in order to avoid the costs protracted litigation with the OCC would have on the firm's banking practice. Again on information and belief, the securities shareholder was then required by Greenberg to also settle, since his continuance in the case would have effectively meant Greenberg's continuance in it as well. Both agreed as part of the settlement to cooperate with the OCC. As a result of the settlement, Mr. Loumiet ceased to be represented by counsel and was left on his own. The OCC set a deadline of October 31, 2006, for Mr. Loumiet to settle. In mid-to-late October 2006, Mr. Loumiet, in a last-minute effort to convince the OCC that its case was entirely without merit, sent the OCC a lengthy letter explaining why its proposed case against him made no sense, again citing many of the reasons that would appear in the ALJ's Recommended Decision almost two years later. The OCC never responded.

72. Mr. Loumiet alleges and will establish at trial that in deciding to bring and in bringing the action against him, the OCC, unduly influenced by defendants Rardin, Sexton and Schneck, failed to follow its own internal stipulated rules and procedures for such a decision and the prosecution of such an action.

73. As already suggested, the Notice of Charges filed against Mr. Loumiet failed to differentiate what he had done from what other Greenberg lawyers had done, in essence blaming Mr. Loumiet for the behavior of other Greenberg attorneys and making it appear as if Mr. Loumiet had been involved in and responsible for all of that behavior. However, the actual charges against Mr. Loumiet were based on five supposed behaviors by him, subsumed under the broad umbrellas of "breach of fiduciary duty" and engaging in "unsafe and unsound banking practices": 1) that he had reached the "wrong" conclusion in the two Greenberg reports as to the truthfulness of the Hamilton officers; 2) that he had failed to conduct a proper investigation; 3) that there were five statements in the two reports that were "materially false and misleading"; 4) that he had been involved in an impermissible conflict of interest; and 5) that he had "suppressed material evidence" in the form of a "missing" fax cover sheet.

74. Taking these charges sequentially, the one relating to Mr. Loumiet's failure to reach the "right" conclusion in the two Greenberg reports was, as noted, particularly ironic because the OCC as of its mid-June 2001 Examination Report—issued three months after the second Greenberg report—as discussed above had similarly failed to reach that same conclusion, notwithstanding a far longer investigation and with far greater powers and resources. In fact, it was not that the Greenberg reports had reached the "wrong" conclusion; it was that, like the OCC, they had been unable to reach a conclusion at all. Nevertheless, it was apparent that the OCC was angry at Mr. Loumiet and his colleagues for failing to do the OCC's job for it by reaching the conclusion the OCC itself wished it had reached. Prosecuting Mr. Loumiet individually for this faulty "non-conclusion" also ignored that while Mr. Loumiet was the principal author of the two reports, they were a joint effort contributed to and approved by several Greenberg attorneys,

and also prior to publication had been commented on without significant objection by Deloitte (the long-term auditors of Hamilton and Bancorp) and as concerned the second report, Arnold & Porter, regulatory counsel to Hamilton, both of which had their own fiduciary duties to Hamilton and had already looked at the matter extensively. Beyond this, a prosecution based on someone's reaching the "wrong" factual conclusion obviously raises troublesome Free Speech issues. This was not the type of legal conclusion to which there was a right or wrong answer based on statutes, regulations or case law; this was a situation where reasonable individuals could differ on what the assembled facts showed. Of course, the power to punish is the power to control. It therefore seems rather pointless and hypocritical to extol Free Speech if the Government can, instead of punishing the speech itself, punish Americans for the conclusions they reach through their thought processes—a necessary precursor to speaking. A final irony is that the OCC, which had deliberately misled Mr. Loumiet by telling him and his Greenberg colleagues that the OCC knew of no other pertinent information that what was reflected in their first report while deliberately withholding information from them, would then sue Mr. Loumiet for not reaching the "right" conclusion in reliance on the information he did have.

75. The first thing to note about the second charge—that Mr. Loumiet had conducted a faulty investigation— is that allowing the Government to punish citizens because it does not like the way they investigate facts before reaching a conclusion obviously creates another tremendous gap in First Amendment protection. Of what importance is it that under the First Amendment the Government cannot punish you for the conclusions you reach, or the way you express them, if the Government can instead punish you for, in its opinion, doing an inadequate job in the fact-gathering and organizing that necessarily precedes both that conclusion and speech? Moreover, as

noted above, the Greenberg time sheets clearly showed that Mr. Loumiet had played a very small role in the investigation that had led to the initial Greenberg report in the Fall of 2000, so it was far from clear why Mr. Loumiet should be held responsible personally for that investigation. In point of fact, out of the thousands of pages reviewed, the numerous witnesses interviewed and facts analyzed in the course of the Greenberg investigation, the matter ultimately devolved at trial to the OCC's claim that the Greenberg investigators had failed to appreciate the significance of how a handful of the debts purchased had been treated on some of Hamilton's internal reports after their purchase. (It should be noted that this issue, at the time, had also apparently been overlooked by Deloitte, Arnold & Porter and the OCC itself, since it was never raised until after the enforcement action against Mr. Loumiet began.) In other words, on reflection, what may have been most disturbing and telling about this charge was the OCC's willingness to impose extremely severe sanctions on Mr. Loumiet—including a *lifetime* ban on representing FDIC-insured banks—over a very minor issue supposedly "missed" in the investigations conducted by the Greenberg attorneys and all others. (This predisposition should be of grave concern to anyone conducting a similar investigation of a national bank at any time in the future; fail to "properly" value in the OCC's opinion any relatively minor fact produced in the total investigation, and that may be used as an excuse to impose severe personal sanctions.) Finally, this charge was, again, "ironic" in light of the OCC's having intentionally misled the Greenberg lawyers as to the information the OCC itself had: how do you rationalize punishing someone for supposedly failing to "properly" appreciate all of the information at his disposal, while deliberately and misleadingly concealing from him other information that could be pertinent?

76. The third charge had to do with five allegedly "materially false and misleading" statements contained in

four sentences in the two Greenberg reports. The two reports together were 41 single-spaced pages long, and comprised some 550 sentences. The OCC did not claim the reports as a whole were materially false and misleading, but only those five separate, unrelated statements. Moreover, the OCC did not allege that those five statements were any more significant than statements contained in the other 546 or so sentences whose accuracy was not questioned, or that those five statements had actually misled anyone or caused anyone to do anything. There is abundant judicial authority in related speech areas such as defamation and obscenity logically holding that statements may not be judged in isolation without taking into account their over-all context. The OCC attempted no such thing. As discussed below, to challenge several of the statements the OCC even had to ignore prior relevant sworn Government testimony, even though that testimony was expressly brought to its attention. Moreover, to attack the statements the OCC also had to, and intentionally did, ignore its own then-well-established distinctions between how securities acquired by a bank after being underwritten as loans (IULs), and securities purchased by a bank's Treasury Department on established markets, are treated on a bank's books. After analyzing and rejecting the OCC's charges, the ALJ in her Recommended Decision reached the following impeccably logical, though masterfully understated, conclusion: "That five sentences out of two lengthy legal memoranda totaling 40 pages may, when taken out of context, appear in isolation to be inaccurate, does not, under the circumstances, evidence a breach of Respondent's duty of care or candor."

77. The fourth charge had to do with a supposed unresolved legal conflict of interest that Mr. Loumiet had suffered as a result of Greenberg's having undertaken the class action litigation in January 2001 while he continued the work for the Audit Committee commenced the previous Fall. Mr. Loumiet had not been involved in the arrival of that

case at Greenberg, did not at the time perceive an unwaivable legal conflict (neither did the ALJ in her Recommended Decision), had understood that conflicts had been cleared by his firm, had consciously stayed out of that case once undertaken, and had concluded that, as the ALJ would later observe in her Recommended Decision, his ethical duty of loyalty to the client would not be served by dropping work he had already been involved in for some time because his law firm was choosing to undertake other work with the knowledge, consent and conflict waiver of the client. At trial, the undisputed evidence was that the conflict situation had been discussed and waived, and the ALJ so found.

78. The fifth and final charge was based on the OCC's widely-publicized "smoking gun" in the case against Mr. Loumiet— the "material" evidence he had supposedly "suppressed"—i.e., the infamous "missing" fax cover sheet. Just days before the trial defendant Straus, knowing that there was no evidence whatsoever to support his defamatory statement, told the press that this "missing" fax cover sheet would be Mr. Loumiet's "downfall." Then, in his Opening Statement at trial he melodramatically tore a piece of paper from a sheath he held in his hands and tossed it to the ground to dramatize how Mr. Loumiet, according to the OCC, had ripped off and discarded the fax cover sheet to make the loan purchase and sale transactions look separate. As intended, the press just lapped it up. So what happened once the press left after the first day of proceedings, and the trial continued? The undisputed evidence at trial showed: 1) that it was the OCC itself that had removed that fax cover sheet when it turned the fax over to Deloitte, who then gave it to Greenberg leading to its attachment as an exhibit to the first Greenberg report in the same manner received, without the cover sheet the OCC itself had removed; 2) that Mr. Loumiet never saw that fax cover sheet until after the OCC turned it into the "smoking gun" in this action; 3) that it was

a young associate, not Mr. Loumiet, who attached the exhibits to the first Greenberg report, with no interference by Mr. Loumiet; 4) that the same point evidenced by the fax cover sheet—that one bank in these transactions had served only as an intermediary, and the loan purchases and sales had been done through the other bank alone— was touched on in at least six different places in the two Greenberg reports, meaning there was no possible reason to omit the cover sheet; 5) that a couple of exhibits behind in the same Greenberg report was another fax to both banks, this time **with** its cover sheet, which showed the same thing that the first fax, together with cover sheet, showed; and 6) that the transmission information on the fax itself made it easy to tell that both banks had received the same fax. No evidence whatsoever was ever introduced supporting the OCC's widely— and publicly—broadcast, defamatory version of what Mr. Loumiet had "intentionally" done. While the ALJ found in Mr. Loumiet's favor on this issue in her Recommended Decision, she did not mention all of the details that were particularly embarrassing for the OCC, including that it was OCC representatives themselves who had sent missing the "smoking gun" in the first place. Mr. Loumiet derived some small satisfaction when, at Closing Argument months later, before an ALJ trying very hard to maintain a straight face, Mr. Loumiet's own counsel exactly mimicked the press-grabbing, theatrical behavior of the OCC counsel in his Opening Statement, while pointing out all of the obvious problems cited above with this supposed "smoking gun."

79. These five, then, were the essential behavior for which Mr. Loumiet was prosecuted by the OCC. Beyond the sheer absurdity of the charges themselves, there was the fact that the OCC never tried to establish that the challenged behavior—supposedly grievous enough to warrant a lifetime ban on Mr. Loumiet's pursuing his career — had ever caused anyone to do anything. No member of

Hamilton's Audit Committee or Board was called to say that those bodies or any of their members had ever perceived any impropriety by Mr. Loumiet, or had relied on his "misbehavior" in any decision or action taken. In other words, the OCC felt free to completely disregard the actual attorney-client relationship that was at the core of the alleged misbehavior, and punish Mr. Loumiet in the abstract for behavior the OCC, not the client, deemed inappropriate. Even worse, the OCC had evidence in its possession that even if the Greenberg reports had reached a different conclusion on the issue of the three officers' truthfulness, it could well have made little difference to Hamilton's Board. Specifically, the OCC had in its possession, but of course did not bring up before the ALJ—claiming that it was "secret"—a deposition given by the Vice-Chairman of Hamilton's Board of Directors where the OCC directly asked him, twice, what the Board would have done had the Greenberg reports concluded that the three officers had lied. His response was that the Board would have hired another law firm and sought a second opinion. Consequently, the OCC prosecuted Mr. Loumiet for behavior that not only could not be shown to have disappointed the client in any way, or caused anyone to do anything (other than concluding, as the OCC had desired, that an "adjusted price trade" had occurred), but that the relevant information the OCC had in hand indicated would likely have made no difference had it instead been perfectly to the OCC's particular tastes.

80. Compounding the frivolity of the charges and the fact that Mr. Loumiet's alleged misbehavior had influenced no one, were the sanctions that the OCC sought to impose on Mr. Loumiet—a fine of US$ 250,000 and a lifetime prohibition on representing FDIC-insured banks. Mr. Loumiet at the time the OCC sued him had been representing FDIC-insured banks as a very important of his livelihood for more than 28 years. In our country there is abundant judicial authority that the Government's banning

a citizen from pursuing his livelihood, much less for life, is a very serious sanction that should not be lightly imposed. The OCC ostensibly sought to punish Mr. Loumiet in this way for behavior described in the preceding paragraphs that no objective human being could possibly conclude warranted such extreme punishment. In fact, Mr. Loumiet during the course of the litigation surveyed all of the instances since the beginning of 2000 where the OCC had sanctioned individuals, and provided to The Florida Bar and the OCC a chart of that survey's results. The chart showed that the rare times when comparable sanctions had been imposed by the OCC on any person had involved situations of outright fraud on a financial institution by the penalized individual, for example, by a loan officer setting up shell company borrowers, making loans to them and pocketing the money for himself. No individual not on a vendetta could possibly compare this type of behavior to the charges against Mr. Loumiet, yet the sanctions sought were equally severe.

81. This, then, was the situation that Mr. Loumiet faced in late October 2006. He knew that the charges against him were frivolous, but also that the full weight of a large federal Government agency, with its unlimited resources, was about to come crashing down on him. He knew that the administrative forum where this would all be fought was the OCC's home turf, that the OCC had unlimited staying power, that much of his legal practice and livelihood would disappear once the action began and became known, and that he would be on his own, Greenberg and his fellow former shareholder having settled. He also knew that at best he would win a hollow victory, since—regardless of outcome—the very fact that he had been prosecuted by a federal Government agency would likely never be lived down, and that—if he lost—his career would be difficult to salvage. He knew that not just he, but his wife and children, would suffer. All of the moral and philosophical considerations he had faced 5 1/2 years before, when

deciding whether or not to blow the whistle on the OCC's bad behavior at Hamilton, as described above, were again present, but this time the consequences of his decision were much, much heavier and far more immediate.

82. The settlement deadline came and went. On November 6, 2006, the OCC filed the Notice of Charges against him. The action was assigned to an ALJ who years earlier had ruled against Hamilton, and for the OCC, in one of the various administrative actions the two had fought, which simply heightened Mr. Loumiet's anxiety. Aside from— as already noted— deliberately confusing Mr. Loumiet's role in the various activities conducted by Greenberg for Hamilton with that of other Greenberg lawyers, so as to make Mr. Loumiet appear more culpable, the Notice accused Mr. Loumiet of intentionally misbehaving, when the OCC knew fully well that there was not a shred of evidence that Mr. Loumiet intentionally did anything wrong. Utilizing such defamatory words to describe Mr. Loumiet's behavior as "concealed crimes," "suppressed material evidence" and "purposely" covering up officers' misconduct, when the OCC knew there was no basis to think he had done any of it, the Notice was vindictively intended to damage his reputation and career to the maximum extent possible. (In fact, the incident described above and discussed in the second Greenberg report, concerning the grilling of the Hamilton bank officer arranged by Mr. Loumiet in an attempt to break him down, in and of itself showed conclusively that Mr. Loumiet had not been trying to conceal anything.) In reality, the OCC would make **no** effort whatsoever in the proceeding to establish that Mr. Loumiet had ever knowingly done anything wrong.

83. Indicative that the defendants knew from the outset that their harshly-worded claims against Mr. Loumiet were meritless was the way defendants handled

publicity at the time they filed suit against Mr. Loumiet. While defendants widely publicized their settlements with Greenberg and the securities shareholder, contrary to standard OCC practice they gave no publicity whatsoever to their filing of a Notice of Charges against Mr. Loumiet. It was only some six weeks later, when an enterprising reporter, having read of the settlement with Greenberg and the securities shareholder and wondering what had happened with Mr. Loumiet—the other Greenberg shareholder involved in the matter—through Freedom of Information Act requests to the OCC learned of the Notice of Charges that had been filed against Mr. Loumiet and wrote a lengthy story on the filing, that the OCC publicly admitted the suit. On information and belief, this delay in making the suit against Mr. Loumiet public until there was no alternative was attributable to defendants' knowing from the beginning that their claims against Mr. Loumiet were frivolous.

84. Prominent in the legislative history of the IAP statute that the OCC was using to prosecute Mr. Loumiet, was the Congressional intent that the statute not be used to pursue outside attorneys who had acted in good faith. Notwithstanding all of the harsh language used to describe Mr. Loumiet's behavior by the OCC in the Notice of Charges and in other public statements, the OCC never suggested at trial that Mr. Loumiet had ever acted other than in good faith. This created a dichotomy where, for press and public consumption, Mr. Loumiet was depicted as evil, while in the proceeding itself, when the press was not present, he was graciously described before the court as "eminent," "leading," "distinguished" and "learned," as already noted. Leaving aside this additional "ironic" behavior by the OCC, the immediate point is that, in prosecuting Mr. Loumiet, the OCC paid as little heed to the Congressional instruction that attorneys acting in good faith not be sued under the IAP statute, as it had to the statutory requirement that it set up

a fair ombudsman process for national banks. In addition, in February 2008, some three months after Mr. Loumiet's trial had been completed, the D.C. Circuit held in the case Grant Thornton LLP v. Office of the Comptroller of the Currency, 514 F. 3d 1328 (D.C. Cir. 2008), that the accounting firm, Grant Thornton, which had conducted an audit of another failed national bank, did not qualify as a IAP because as an outside auditor it could not be said to have "conducted the affairs of the bank." Since all Mr. Loumiet had done was briefly represent an audit committee in an internal investigation— a much lesser activity than auditing a bank— Mr. Loumiet immediately sought dismissal of the action against him on the basis of this direct legal authority. Instead of accepting this direct authority, the OCC, without any valid reason for doing so, opposed dismissal. (In his Final Decision 17 months later dismissing all charges against Mr. Loumiet, the Comptroller agreed without much discussion that the holding in Grant Thornton applied to Mr. Loumiet as well.)

85. Typical of the deliberately damaging misinformation that the OCC in bad faith disseminated publicly about Mr. Loumiet was that he had been driven to misbehavior by his "greed" to share in profits from US$ 1.6 million in fees that Greenberg collected from Hamilton and Bancorp in 2001 and 2002. This accusation was contained both in the Notice of Charges and in subsequent press releases and statements to the press by representatives of the OCC's Enforcement and Compliance Division prosecuting the action against Mr. Loumiet, among other OCC representatives. (Those press releases contained other defamatory statements as well, such as the statement that Mr. Loumiet had intentionally removed and concealed the missing "smoking gun" fax cover sheet.) In fact, since Mr. Loumiet had left Greenberg at the end of April 2001, before any of those profits were distributed, this was just plain wrong. Contrary to the OCC's assertion, Mr. Loumiet, rather

than being driven by "greed" to share in those profits, had knowingly and voluntarily left any compensation related to those profits behind when he left Greenberg at the end of April 2001. This was a fact that the OCC knew and that could be found out by simply asking Greenberg, which, as part of its settlement with the OCC, was committed to cooperating with the OCC. Moreover, notwithstanding being told by Mr. Loumiet early on that the statement was simply not true, the OCC maliciously continued to repeat it publicly, even in its press release on the eve of trial. Of course, once trial began only a few days later, the OCC made no effort to prove this flat-out-wrong defamatory statement.

THE PROSECUTION OF THE CASE

86. If the premise and charges for the OCC's action against Mr. Loumiet were silly and morally offensive, then equally or more so was the way the OCC handled the litigation. One cannot review the prosecution of the case by the OCC and not see immediately the pretextual way the OCC handled a case that the Individual Defendants and others at the OCC knew all along had no merit, but that they intended to drag out as long as possible so as to exact revenge on Mr. Loumiet.

87. In March of 2007 Mr. Loumiet, wrote to the OCC legal counsel pointing out that the former President of Hamilton had given sworn testimony that he and fellow conspirators had lied to those who had investigated those matters internally at Hamilton. Since that had to mean the Audit Committee, it also had to include Greenberg (and Mr. Loumiet) as the counsel that had conducted that committee's investigation. The response from the OCC was that this made no difference. Subsequently, Mr. Loumiet provided the OCC with numerous pages containing sworn testimony by Government witnesses in another proceeding that supported the accuracy of the allegedly "materially false and

misleading" five statements in the two Greenberg reports. Consistent with the reality demonstrated over and over in this proceeding that the facts in this case simply made no difference to its agenda against Mr. Loumiet, the OCC simply proceeded with its case.

88. As an example of the silliness of this case, the first two persons that the OCC deposed (after Mr. Loumiet himself) could not remember ever meeting or dealing with Mr. Loumiet, making them hugely irrelevant in a case where the issue was Mr. Loumiet's own knowing or reckless behavior. (Evidencing the difficulties that a private-sector investigation can encounter, one of them was the former Assistant Treasurer of Hamilton at the time the Transactions occurred, who admitted having told the investigating Greenberg lawyers—who did not include Mr. Loumiet—who had contacted him after he had left the bank for other employment, that he had nothing to say.) By the time discovery was concluded, the evidence against Mr. Loumiet, to be very charitable to the OCC, was circumstantial and minimal, to the extent it existed at all. As a result, in the absence of any significant direct evidence, the OCC decided to prosecute its case relying overwhelmingly on defendant Rardin, its own former EIC at Hamilton, and on two paid "expert" witnesses. As to defendant Rardin, prior to assuming the function of EIC at Hamilton, he had been EIC at Peoples National Bank of Commerce, then the only African-American owned bank in Miami-Dade County, which had been closed by the OCC in September 2009, and in connection with that closing had received an award from the OCC. As Hamilton EIC subsequently, he had been very involved in the misbehavior at Hamilton that Mr. Loumiet had criticized, as well as, by his own admission, in the OCC's decision to prosecute Mr. Loumiet, so that his testimony could not be deemed "objective" from any perspective. The two paid expert witnesses were a criminal law professor who was to testify

principally as to the investigation conducted by Greenberg; and a professor of legal ethics who was to testify principally on the alleged conflicts.

89. When Mr. Loumiet sought discovery from the OCC in order to defend himself, he was told that the OCC had 145,000 pages of documents that complied, and that Mr. Loumiet would have to pay US$ 29,000—20 cents per page—in copying costs in order to obtain discovery from the OCC. This, in an action brought by the OCC against Mr. Loumiet. The result was a hearing where the ALJ ordered the OCC to make all of these documents available to Mr. Loumiet's counsel on a disc, allow counsel to review the documents and select the ones it wished to have copied, and have Mr. Loumiet pay only for the copying of those select documents.

90. Mr. Loumiet unsuccessfully sought to introduce into the administrative action against him the issues of bias and retaliation by the OCC discussed above. He also sought to have the ALJ address the obvious and troubling First Amendment issues also discussed above, again to no avail. The ALJ declined to allow Mr. Loumiet to explore in the proceeding the OCC's behavior at Hamilton and the way the decision to prosecute Mr. Loumiet had been taken. Similarly, the ALJ expressed no view on the First Amendment issues raised by Mr. Loumiet.

91. After the inevitable press reports came out trumpeting the OCC's language that Mr. Loumiet had "suppressed material evidence," "concealed crimes," and "purposely" covered up the Hamilton officers' misconduct, the Florida Bar in late January 2007, on its own launched an investigation into the behavior by Mr. Loumiet that had provoked such scandalous language from an agency of our Government, presumably on the mistaken assumption that such harsh words would not be lightly used by such a supposedly responsible federal agency. The press found out

about the investigation, and of course, blared it prominently. In response to the investigation, Mr. Loumiet sent the Bar three letters in the Spring of 2007, explaining why the case against him was ridiculous. Mr. Loumiet heard nothing until June 2007, when counsel for the Bar telephoned Mr. Loumiet and told him that this was the strangest case of alleged misbehavior by a Bar member that he'd ever encountered, and that the Bar was suspending its own investigation until the OCC's administrative action was completed. The press later reported that three days after the Comptroller voluntarily dismissed the action against Mr. Loumiet, the Bar closed its own suspended investigation.

92. Knowing that the OCC would otherwise simply bleed and outlast him, Mr. Loumiet from the outset insisted that this matter go to trial as soon as possible, without any extensions of time whatsoever. As a result, the case went to trial in October 2007, 11 months after the action was initially brought.

93. Prior to trial, Mr. Loumiet moved to exclude the "expert" testimony of the criminal law professor, on the basis that his criminal investigative experience was irrelevant to the handling of an Audit Committee investigation such as had taken place at Hamilton. In his pre-trial deposition the professor had freely acknowledged that he knew little if anything about banks, banking transactions or operations, banking law, corporations, corporate law, corporate transactions or corporate governance, accounting, the practice of commercial law or the field of securities law, and had never represented a corporation, Audit Committee or Board of Directors. All of this made him a thoroughly unqualified choice to comment as an "expert" on how a law firm such as Greenberg should have handled the representation of an Audit Committee of a bank owned by a publicly-traded holding company. Given the million-plus members of the Bar in the United States, a not-insignificant

number of whom have at some time conducted corporate investigations, the apparent inability of the OCC to find someone who had actually done something similar and who was willing to criticize Greenberg and Mr. Loumiet, spoke volumes. The ALJ agreed that the professor was not qualified to testify as an "expert" on what Greenberg attorneys should have done, and the professor's proposed testimony was excluded on the basis of *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993), and its progeny. In his Final Decision dismissing the charges against Mr. Loumiet, the Comptroller attacked the ALJ for this decision, of course not mentioning why the professor had been deemed unqualified, then proceeded to discuss at length the testimony the professor would have given on the Greenberg investigation (in which, as noted, Mr. Loumiet had played a small role) had he been allowed to testify. Among other things, this ignored the hornbook-law fact that an expert witness is free to change his testimony at any time prior to giving it at trial, as the OCC's own expert on ethics in fact did in this case in changing the basis of her opinions, as discussed below, as well as the elemental due process concept, reflected in the OCC's own rules of evidence, that a decision in a judicial proceeding may rely only on evidence admitted at trial and to which the accused has therefore had the opportunity to respond. It did, however, allow the OCC to further bad-mouth Mr. Loumiet publicly in the Final Decision as a parting shot.

94. Of course, since the OCC's entire case against Mr. Loumiet was contrived from the outset, the exclusion of this "expert" made no difference to the OCC. Instead, it offered at trial as an "expert" on Greenberg's conduct of the investigative phase defendant Rardin, whose behavior Mr. Loumiet had criticized years earlier in his letters to the OIG and who also admitted at trial to having been actively involved in the OCC's decision to sue Mr. Loumiet. All of this quite likely established new lows in American jurisprudence

in terms of an "expert" witness' supposed objectivity and impartiality (though see the discussion below as to the testimony from the professor of legal ethics). Beyond this, defendant Rardin was not a lawyer, admitted he did not have experience in hiring or employing lawyers, and did not pretend to be expert on what lawyers do. In terms of the Greenberg investigation that Mr. Loumiet had had little involvement in, defendant Rardin proceeded to remarkably testify under oath, among other extraordinary things, that there is a "universal standard" on how investigations related to banks must be conducted, which supposedly Greenberg had violated. That standard, though supposedly "universal"—i.e., applicable to all banks and all persons—*had never before (nor since)* been mentioned *anywhere* by *anyone* else. According to defendant Rardin, the universe could ascertain the standard it must meet by piecing together even-today-unidentified sections of the Comptroller's Manual for National Bank Examiners. The ALJ summarily dismissed this "universal" standard as being of the EIC's "own design," noting that it was "uncodified, in part unwritten, not previously publicized, and neither adopted by any professional entity nor known to be regularly employed by one." It is, of course, profoundly disturbing to see a senior Government official just making up sworn testimony on a witness stand.

95. As another example of his inventiveness on the witness stand, in an effort to establish that the Greenberg reports had had a "material adverse effect" on Hamilton, defendant Rardin also opined that had those reports concluded that the Hamilton officers had lied, one or more of them would have been removed. Of course, as the D.C. Circuit noted in its later opinion in Mr. Loumiet's EAJA action against the OCC, defendant Rardin provided no support whatsoever for that proposition. What the D.C. Circuit decision did not mention was that the only evidence the OCC then had relevant to this statement , as noted

above, was the deposition from the former Vice-Chairman of Hamilton saying the exact opposite, a deposition that, as noted, the OCC did not allow to be presented at the trial against Mr. Loumiet.

96. Realizing how monumentally silly and indefensible defendant Rardin's "universal standard" for bank investigations was, in its post-hearing brief the OCC changed tack and advanced another perhaps even more remarkable theory. According to the OCC's brief, its role as regulator of national banks under the National Bank Act allows it to set the standards as to how lawyers provide services to national banks, to do so after-the-fact, and to punish those attorneys who fail to observe those unknown standards. This, according to the OCC, justified its sanctions against Mr. Loumiet. Of course, due process allows none of this.

97. As noted above, the IAP statute being used to prosecute Mr. Loumiet requires that the misbehavior of the accused have caused more than "minimal financial loss" or a "significant adverse effect" to the bank. In the case of Hamilton, there was no evidence that anyone at the bank had done anything in reliance on the Greenberg reports other than agree with the OCC that an "adjusted price trade" had occurred. As a result, the OCC concocted the theory that the fees paid to Greenberg itself for its work had been the more than "minimal financial loss" required. Again not surprisingly, this theory does not appear to have ever been advanced before by anyone else anywhere. Beyond this, even if one accepts the proposition that a service provider's fee for services actually rendered could itself constitute the type of "loss" the IAP statute required, the OCC never made the least effort to explain why US$ 210,000 (the total fees paid Greenberg) constituted a more than "minimal financial loss" for a bank with assets of some US$ 1.2 billion. In fact, the OCC in this proceeding remarkably took the position that a

loss as small as US$ 5,000 sufficed, regardless of the size of the bank involved. There was no suggestion, much less evidence, at trial that the fee had been excessive for the work done—other than the fact that the OCC itself at trial loudly declared the reports "worthless"—or that the services contracted for had not been provided. Once again raising the question whom a banking lawyer truly serves, the client or the Government, the OCC's position simply amounted to its ignoring the view of Hamilton's Audit Committee and Board, for whom the services had been rendered, as to the worth and value of the reports, and substituting for that view its own dissatisfaction. Obviously, by converting the service provider's fee itself into the required more than "minimal financial loss," the OCC's position, from an enforcement perspective, conveniently made it possible to ignore one of the safeguards against abusive prosecution carefully built into the IAP statute itself by Congress. In the end, after the ALJ rejected the OCC's charges, even the Comptroller himself made the point in his Final Decision of expressly rejecting this position as unfounded. This did not prevent the OCC from raising the point to the D.C. Circuit in the subsequent action successfully brought by Mr. Loumiet to recover legal fees and expenses. Of course, the D.C. Circuit dismissed the argument there as well.

98. Turning to the supposed conflict of interest, at trial the OCC did not call any Hamilton Board member or officer (including internal lawyers) to testify as to the supposed conflict, and all of the first-hand evidence at trial established that oral waivers of the conflict—which was what Florida Bar rules then required—had been obtained. Instead, the OCC as its witness on the issue of conflicts produced a professor of legal ethics who provided "expert" testimony that can only be described as having been at times surreal—as if related to events in some alternative universe—given how disconnected it was with the evidence actually presented at trial.

99. To begin with, although no reason for the "assumption" was ever offered, the ethics professor's pre-trial expert report was based almost entirely on "assumed" significant social interaction by the Fall of 2000 between the Board Chairman of Hamilton and Mr. Loumiet. Since no evidence or explanation of any kind was presented by the OCC to support such an assumption, one can only wonder to what extent this "assumption" was based on the fact that both individuals were Cuban-American, both from South Florida, a few years apart in age, and spoke Spanish, including occasionally to each other. Of course, on this ethnic basis Mr. Loumiet would have "significant social interaction" with literally many thousands of other Hispanics in South Florida. However, perhaps most remarkable about this "assumed significant social interaction" was that when the FDIC had taken Mr. Loumiet's deposition years before—a deposition the OCC had in hand all along, used to depose and cross-examine Mr. Loumiet in this case, and even introduced into evidence at trial—some of the very first questions asked were about the extent of social interaction between Mr. Loumiet and the Board Chair back in 2000, to which Mr. Loumiet responded that it had been essentially non-existent. Even knowing this response, the OCC, without any evidence to the contrary, allowed its expert to "assume" an unfounded and troubling "foundation" for her pre-trial expert report that it knew to have no support.

100. The ALJ at the outset of the ethics Professor's trial testimony interrupted to note that she had read the Professor's pre-trial expert report, that it was almost entirely based on that assumption, and that there was simply no evidence on the record supporting this "assumed significant social interaction." At that point, the Professor pirouetted, announced without explanation that she was abandoning that foundation altogether, and segued to a supposed important business relationship between

Greenberg, Mr. Loumiet as a lawyer at Greenberg, and Hamilton, as the basis for her expert opinions to be expressed at trial. Following that, the Professor opined that Greenberg had been the de facto outside General Counsel to Hamilton in 2000, even though there was not a single statement or piece of paper anywhere from anyone at Hamilton or Greenberg introduced in support of that conclusion. On information and belief, Greenberg received no more than 10% or so of the total legal fees paid by Hamilton to outside law firms for 1999 and 2000, based on the numbers in the publicly-filed annual reports of Hamilton Bancorp itself for those years. Those percentages hardly suggest that Greenberg was then Hamilton's de facto outside General Counsel. Along these same lines, against all data and evidence actually produced at trial, and without relying on any financial or other information from within Greenberg or Hamilton, the Professor opined that Hamilton was already an important client (in size of business) for Greenberg in the early Fall of 2000, when the investigation was undertaken. (Of course, as noted earlier, the actual numbers showed otherwise.)

101. The Professor, against all of the Greenberg time sheets and other relevant evidence actually produced at trial, opined, based on the fact that Mr. Loumiet's name appeared first out of alphabetical order on the "from" line in the initial Greenberg report, where all three Greenberg attorneys who had been most active were named, that Mr. Loumiet had really been in charge of the investigation that preceded that initial report. This test, on its own, seems an outrageously flimsy foundation for an "expert" opinion. However, in this case it also ignored the obvious fact that Mr. Loumiet's name appeared **second** in the second Greenberg report issued March 14, 2001, even though Mr. Loumiet was unquestionably in charge of the process at that point in time. (Somehow one doubts the Professor would have applied the same alphabetical order test and concluded

that whoever's name appeared first in that second report must have been in charge at that point in time as well.)

102. Similarly, against the later sworn testimony at trial from current and former Greenberg shareholders that at that law firm there was no such thing as a "Relationship Partner"—i.e., a single partner responsible for and involved in all aspects of a client relationship—and without any evidence from within either Hamilton or Greenberg to support her conclusion, the "expert" opined that Greenberg in 2000 and 2001 had "Relationship Partners" because, according to her, big law firms do. (Perhaps the Professor knew this by virtue of having worked as a first-year associate at a law firm for one year some 30 years before, immediately upon graduating from law school.) Not only that, but she *could tell* that Mr. Loumiet was that "Relationship Partner" at Greenberg for the Hamilton relationship, again on the basis of no visible evidence. It followed, in her expert opinion that Mr. Loumiet *had to have been* involved in all aspects of the relationship between Greenberg and Hamilton. From there, it was an easy (though completely false) syllogism to conclude that Mr. Loumiet *must have been* actively involved in Greenberg's being engaged to undertake the class action for Hamilton in January 2001—again on the basis of no evidence, and against the sworn testimony from the former Greenberg litigation shareholder who actually brought the matter into the firm and led it. Not surprisingly, the Professor also opined against all of the first-hand evidence produced at trial that there had been no conflicts waivers obtained by Greenberg from Hamilton.

103. There was also a truly extraordinary exchange when the Professor—claiming that in Mr. Loumiet's brief intervention (8 to 9 hours total over four months) in the Summer of 2000 on the Consent Agreement, as discussed above, Mr. Loumiet had actually represented not the

Hamilton Board, but its individual members—sought to explain to a visibly incredulous ALJ, who specifically interrupted her testimony to question her on the issue, that an attorney can represent a person even though there are no apparent manifestations of such representation, no individual communications take place, no confidential personal information is ever exchanged, and neither the person nor the lawyer thinks or intends that to be the case.

104. The same Professor additionally maintained that, under Florida Bar ethical rules, an attorney representing a client has to be free to mislead a court by presenting facts and positions the attorney knows not to be true. This assertion on its face contravenes Florida Bar Rule of Professional Conduct Rule 4.3.3, entitled "Candor Toward the Tribunal." And so on and so on, culminating with the unforgettable statement that the Professor's expert opinions in her pre-trial report would not change regardless of what first-hand testimony might be produced at trial by individuals who had actually been involved in these matters or, stated another way, facts be damned.

105. The ALJ made short shrift of the ethics Professor in her Recommended Decision, finding her testimony "logically perplexing," "contradicted by the great weight of the evidence," and that therefore, it "cannot be credited." The OCC's presentation of its absurd "expert" testimony in this case went against all norms followed by reasonable lawyers in the use of such testimony. It is impossible to justify presenting such absurd testimony, and going through this ridiculous, expensive "expert" exercise at all, other than, again, to inflict maximum injury to Mr. Loumiet, who had to engage his own expert to respond. If "expert" testimony is not driven by substantial actual facts proven at trial, what possible value and justification can it have legally, morally and economically? Overall, it again seems "ironic" that, in a case where the OCC sued Mr.

Loumiet for having reached the "wrong" conclusion in the Greenberg reports, their "expert" witnesses were so free reaching their own wrong conclusions at trial based on no significant evidence, and often (as the ALJ herself noted) against the great weight of the evidence.

106. In short, the desire of certain officials at the OCC to retaliate against Mr. Loumiet for the embarrassment he had caused them drove the OCC to bring an action that it knew had no merit, based on charges that were both monumentally silly and completely out of proportion to the extremely harsh penalties sought to be imposed, then conduct the action in a manner befitting its utter lack of merit, while demonstrating profound disrespect for judicial process and legal ethics generally. Small wonder that the D.C. Circuit was able to conclude, without dissent, that the OCC's action against Mr. Loumiet had lacked "substantial justification," or stated another way, lacked any reasonable basis in law and fact, or under Florida law would be called "frivolous." However, while the OCC's case itself was always vengeful fantasy, its deleterious effect on Mr. Loumiet's life, including on a banking legal practice he had built over many years, was all too real. Until the OCC sued him, Mr. Loumiet had never been the subject of any public filing or complaint in almost 29 years of practicing law, and was respected in his profession, as evidenced by 16 consecutive years of receiving the highest rating possible from his colleagues in South Florida for both quality and ethical behavior in the Martindale-Hubbell Legal Directory. Once the OCC's suit became known, Mr. Loumiet's practice—particularly in the banking field— largely evaporated, as banks and other clients and prospective clients, mistakenly believing, like the Florida Bar, that there must be some substance to such powerful, inflammatory words from an agency of the Government aimed at a member of the Bar, stayed away. In the four years after the OCC filed its action, Mr. Loumiet's income dropped significantly, and

Mr. Loumiet fell six partnership levels at his then law firm. Based on national statistics, those were precisely the years of his practice that should have been Mr. Loumiet's peak earning years as a lawyer. Mr. Loumiet suffered significant economic damages as a result. Mr. Loumiet also suffered severe emotional distress as a result of the OCC's years-long vendetta and misconduct, as described above.

107. Again "ironically" in light of the ethical charges brought against Mr. Loumiet, as demonstrated by the foregoing description of the charges brought against Mr. Loumiet and the manner in which the case against him was conducted, in bringing and prosecuting this case defendants Straus and Sexton—both experienced trial lawyers who knew better—intentionally violated a series of ethical rules in the ABA's Model Rules of Conduct, and presumably of their State Bar rules of professional conduct as well, some on more than one occasion. The ethical rules violated include:

a. Rule 3.1 on bringing a proceeding, as well as on asserting or controverting an issue in a proceeding, without a basis for doing so that is not frivolous;

b. Rule 3.3(a)(1), on making a false statement of fact or law to a tribunal; and subsection

(3) on offering evidence that the lawyer knows to be false;

c. Rule 3.4(b), on counseling a witness to testify falsely;

d. Rule 3.4(d), on failing to make a reasonably diligent effort to comply with a legally proper discovery request;

e. Rule 3.4(e), generally, in numerous respects and instances;

f. Rule 3.6 on public communications with a substantial likelihood of materially prejudicing an adjudicative proceeding; and

g. Rule 4.1(a) on making a false statement of material fact to a third person in the course of representing a client.

108. The Counts numbers 1 through 7 that follow, which are against the Government, are based on Florida law and meet this FTCA requirements. Counts 8 and 9 are constitutional claims against the Individual Defendants: Count 8 is based on the First Amendment, *Bivens*, *Hartman*, and other similar cases; and Count 9 is based on *Bivens* and the Fifth Amendment (Due Process). Mr. Loumiet seeks no damages from the OCC's decision to intervene Hamilton, or does not ask this Court to hold that it was unwarranted. Mr. Loumiet instead asks this Court to decide on this case something that a federal court is extremely qualified to judge and which does not depend on finding that the OCC acted inappropriately at Hamilton. In fact, Mr. Loumiet only sets forth facts about Hamilton as background for his retaliatory prosecution claims. Further, even the Comptroller himself has conceded that Mr. Loumiet, as an outside lawyer who did not meet the statutory tests, was not an IAP under applicable federal banking laws. Therefore, the OCC had no statutory right whatsoever to do what it did to Mr. Loumiet, since it had no enforcement jurisdiction over him whatsoever as a non-IAP. In this case, the situation is analogous to an OCC official driving over a customer of a bank in a truck; nothing in federal banking law gives the OCC the authority to either run over a bank customer or bring an enforcement action against an individual who is not an IAP. Mr. Loumiet challenges the Government to point to

a single forum provided by federal banking law where claims relating to a retaliatory enforcement action can be brought; federal banking laws do not provide any such remedy. It is because there is no such alternative forum, and because the question "what for" can be easily answered in this case— "for" retaliatory prosecution— that allowing a Bivens action in this case is completely consistent with the Supreme Court's decision in *Wilkie v. Robbins*, 1275 S.Ct. 2588 (2007). There are many millions of persons employed in our nation's 8,000 or more banks and even more millions, like Mr. Loumiet, in service providers to those banks. In what might best be described as an *Alice in Wonderland* result, extending *Sinclair v. Hawke* to this scenario would place millions of bank employees and employees of providers of services to banks in a Constitutional position inferior to all other persons working in our nation's private sector, as well as even to federal prisoners, all of whom have at least some Constitutional rights that they may assert under Bivens against overreaching federal Government officials. It should be added that, as already suggested above in the context of the First Amendment, Congress has never suggested anywhere that in enacting the banking laws it meant to take away or in the least bit reduce the Constitutional rights of any of the untold millions of persons touched by our banking laws, or that a right to bring a Bivens claim by those persons would interfere in any way with the Congressional framework for banking.

109. In December 2010, Mr. Loumiet filed a Freedom of Information Act request with the OCC for all communications, e-mails, memos and correspondence, external or internal, mentioning the words "Loumiet" and "Hamilton" from 2000 until the filing of the OCC's action against Mr. Loumiet on November 6, 2006. That request was turned down without a single responsive document being provided.

110. On July 20, 2011—less than two years after the Comptroller's Final Decision on July 27, 2009—Mr. Loumiet filed with the OCC the six-months' notice of claims required by law before filing a FTCA action. On January 9, 2012, the OCC wrote back rejecting Mr. Loumiet's claims. Less than six months have elapsed since that rejection. As a result, all conditions precedent to the filing of the FTCA claim have been met, waived or otherwise performed.

111. Because the defendants' behavior failed to comply with the internal rules and procedures of the OCC itself, and also grossly offended the First and Fifth Amendments to our Constitution, the "discretionary activity" exclusion under the FTCA does not apply.

112. Mr. Loumiet has engaged the law firm Rivero Mestre to prosecute his claims here and has agreed to compensate them for the reasonable attorneys' fees and costs they incur in this case.

COUNT I – INTENTIONAL
INFLICTION OF EMOTIONAL DISTRESS
[Against the Government and Individual Defendants]

113. Mr. Loumiet repeats and restates paragraphs 1 through 8 and 15 through 112 as if fully set forth here.

114. Representatives of the OCC acted recklessly or intentionally in bringing charges against Mr. Loumiet and pursuing those charges when they had no basis in fact or law.

115. Individual Defendants were instrumental in the OCC's legal action against Mr. Loumiet. The conduct of the OCC and the Individual Defendants was extreme and outrageous because the charges had no basis in fact or law

and were brought with the ulterior purposes to retaliate against Mr. Loumiet and harm his reputation.

116. The defendants' misconduct caused Mr. Loumiet severe emotional distress because of their malicious, extreme and outrageous conduct detailed above.

WHEREFORE, Mr. Loumiet demands judgment against the Government and Individual Defendants for damages to be proven at trial to compensate for the severe emotional distress caused to Mr. Loumiet.

COUNT II – INVASION OF PRIVACY
[Against the Government and Individual Defendants]

117. Mr. Loumiet repeats and restates paragraphs 1 through 8 and 15 through 112 as if fully set forth here.

118. The OCC and Individual Defendants invaded Mr. Loumiet's privacy by making public through the Notice of Charges and their statements to the press and press releases, private facts that would not otherwise have become public concerning Mr. Loumiet's representation of Hamilton.

119. The facts disclosed would be offensive to any reasonable person.

120. Given that the OCC knew its charges against Mr. Loumiet were without merit from the outset, no privilege attaches to its actions.

WHEREFORE, Mr. Loumiet demands judgment against the Government and Individual Defendants in the amount indicated in paragraph 148 below.

COUNT III – ABUSE OF POWER
[Against the Government and defendants Schneck and Sexton]

121. Mr. Loumiet repeats and restates paragraphs 1 through 8 and 15 through 112 as if fully set forth here.

122. In bringing the OCC action, the OCC made an illegal, improper or perverted use of process against Mr. Loumiet.

123. As was known to the OCC and defendants, the OCC action was baseless from the outset. The defendants filed and prosecuted the meritless OCC action with the ulterior purposes of retaliation and inflicting as much injury as possible on Mr. Loumiet.

124. Mr. Loumiet has suffered damage as the result of the defendants improper abuse of process.

WHEREFORE, Mr. Loumiet demands judgment against the Government and defendants Schneck and Sexton in the amount indicated in paragraph 148 below.

COUNT IV—MALICIOUS PROSECUTION
[Against the Government and defendants Schneck and Sexton]

125. Mr. Loumiet repeats and restates paragraphs 1 through 8 and 15 through 112 as if fully set forth here.

126. The OCC and the Individual Defendants maliciously commenced and prosecuted its action against Mr. Loumiet.

127. In bringing the OCC action, the OCC made an illegal, improper or perverted use of process against Mr. Loumiet. As was known to the OCC and defendants, the

OCC action was baseless from the outset and the defendants had no probable cause. The defendants filed and prosecuted the meritless OCC action with the malicious ulterior purpose of retaliation and inflicting as much injury as possible on Mr. Loumiet.

128. Mr. Loumiet obtained a bona fide dismissal of the OCC action in favor of him.

129. Mr. Loumiet has suffered damage as the result of the defendants improper abuse of process and malicious prosecution.

WHEREFORE, Mr. Loumiet demands judgment against the Government and defendants Schneck and Sexton in the amount indicated in paragraph 148 below.

COUNT V – NEGLIGENT SUPERVISION
[Against the Government]

130. Mr. Loumiet repeats and restates paragraphs 1 through 8 and 15 through 112 as if fully set forth here.

131. The OCC owed a duty to Mr. Loumiet to adequately supervise its employees.

132. During the course of the Individual Defendants' employment, Mr. Loumiet notified the OCC of, or the OCC should have become aware of, problems with the Individual Defendants' unfitness, including, but not limited to, the problems alleged in paragraphs 49 and 52, among others.

133. Despite knowledge of the Individual Defendants' unfitness, the OCC failed to take further action such as investigation, discharge, or reassignment.

134. The OCC's failure to investigate or take corrective action was unreasonable.

135. But for the OCC's negligent failure to supervise the Individual Defendants, they would not have been able to retaliate against Mr. Loumiet when he sought the intervention of the Treasury OIG.

136. Mr. Loumiet has been harmed by the OCC's negligent supervision of the Individual Defendants.

WHEREFORE, Mr. Loumiet demands judgment against the Government in the amount indicated in paragraph 148 below.

COUNT VI – VIOLATION OF
MR. LOUMIET'S FIRST AMENDMENT RIGHTS
[Against Individual Defendants]

137. Mr. Loumiet repeats and restates paragraphs 1 through 8 and 15 through 112 as if fully set forth here.

138. The Individual Defendants intentionally violated Mr. Loumiet's First Amendment rights both in their frivolous attack on Mr. Loumiet's constitutionally-protected right to communicate with his client free of Government intimidation and punishment, and because that attack was driven by a desire to retaliate against Mr. Loumiet. As the D.C. Circuit Court of Appeals determined last year, the prosecution of Mr. Loumiet was without "substantial justification" —i.e., without "any reasonable basis in law and fact."

139. The Individual Defendants' constitutional violations caused harm to Mr. Loumiet.

WHEREFORE, Mr. Loumiet demands judgment against the Individual Defendants in the amount indicated in paragraph 149 below.

COUNT VII – VIOLATION OF MR. LOUMIET'S FIFTH AMENDMENT DUE PROCESS RIGHTS
[Against the Individual Defendants]

140. Mr. Loumiet repeats and restates paragraphs 1 through 8 and 15 through 112 as if fully set forth here.

141. The Individual Defendants intentionally violated Mr. Loumiet's Fifth Amendment rights both in their frivolous attack on Mr. Loumiet's constitutionally-protected right to communicate with his client free of Government intimidation and punishment, and because that attack was driven by a desire to retaliate against Mr. Loumiet. As the D.C. Circuit Court of Appeals determined last year, the prosecution of Mr. Loumiet was without "substantial justification"—i.e., without "any reasonable basis in law and fact."

142. The Individual Defendants' constitutional violations caused harm to Mr. Loumiet.

WHEREFORE, Mr. Loumiet demands judgment against the Individual Defendants in the amount indicated in paragraph 149 below.

COUNT VIII – CIVIL CONSPIRACY
[Against Government and Individual Defendants]

143. Mr. Loumiet repeats and restates paragraphs 1 through 8 and 15 through 112 as if fully set forth here.

144. Representatives of the OCC, including the Individual Defendants, agreed and conspired to do an unlawful act or to do a lawful act by unlawful means, that

is, to retaliate against Mr. Loumiet, ruin his reputation and career, commit the various torts as set forth in this Complaint, and therefore trample on his Constitutional rights as set forth in this Complaint.

145. Representatives of the OCC, including Individual Defendants committed overt acts in further of their conspiracy, including, but not limited to, the acts detailed in paragraphs 61 (the 15-day letter), 61 (the charges), 16 (the lawsuit), and 85 (statements to the press).

146. The defendants' conspiracy was, in fact, executed and led to the commission of all the other torts charged in the counts of this Complaint.

147. The conspirators illegal agreement, and their acts in furtherance, harmed Mr. Loumiet.

WHEREFORE, Mr. Loumiet demands judgment against the Government and Individual Defendants in the amount indicated in paragraph 149 below.

DAMAGES

148. For the FTCA claims under Counts 1 through 5 above, Mr. Loumiet requests damages against the Government and Individual Defendants in the amount of US$ 4 million, representing estimated losses over the 15 or so years from November 6, 2006 until Mr. Loumiet turns 70. Mr. Loumiet also requests reasonable attorneys fees and costs to the extent allowable by law.

149. For the Constitutional claims under Counts 6, 7, and 8 above, Mr. Loumiet requests damages against the Government and Individual Defendants for compensatory and punitive damages in such amount as the jury deems appropriate.

JURY

150. Mr. Loumiet requests a jury trial on all issues so triable.

Dated July 9, 2012

Respectfully submitted,

RIVERO MESTRE LLP
Attorneys for Carlos Loumiet
2525 Ponce de Leon Boulevard
Suite 1000
Miami, Florida 33134
Telephone: (305) 445-2500
Fax: (305) 445-2505
Email: jmestre@riveromestre.com
arivero@riveromestre.com
cwhorton@riveromestre.com

By: /s/Jorge A. Mestre
JORGE A. MESTRE
D.C. Bar No. 998301
ANDRES RIVERO
Florida Bar No. 613815
CHARLES E. WHORTON
Florida Bar No. 46894