

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

In the Matter of:

HIREN PATEL,
Former Chairman of the Board,
Chief Executive Officer, and
Controlling Stockholder

The National Republic Bank of Chicago
Chicago, Illinois

Docket No.:

AA-EC-2018-89

**SUPPLEMENTAL ORDER REGARDING JOINT MOTION
TO MODIFY HEARING AND PREHEARING FILING DATES**

On September 1, 2021, Enforcement Counsel for the Office of the Comptroller of the Currency (“OCC”) (“Enforcement Counsel”) and Hiren Patel (“Respondent”) (collectively “Parties”) filed a “Joint Motion to Modify Hearing and Prehearing Filing Dates and Seek Leave to File a Supplemental Brief” (“Joint Motion”). In response, the undersigned granted the Parties’ requests to modify the procedural schedule and for the submission of supplemental briefing regarding the statute of limitations.¹ Within the Joint Motion, the Parties agreed that the in-person hearing currently scheduled to begin on Tuesday, October 19, 2021, should be postponed to Tuesday, April 25, 2022, in light of Respondent’s continued presence in India and his difficulty returning to the United States given the ongoing global pandemic. The Parties dispute, however, whether authority exists for the April 2022 hearing to take place virtually, if necessary, should Respondent not be able to appear in person at that time.

¹ See “Order Granting Joint Motion to Modify Hearing and Prehearing Filing Dates and Seeking Leave to Filing Dates and Seeking Leave to File a Supplemental Brief” issued on September 2, 2021. The parties duly filed their supplemental briefing on September 10, 2021 and September 24, 2021, respectively, and the statute of limitations issue will be addressed in conjunction with the Tribunal’s order regarding Enforcement Counsel’s July 13, 2021 motion for summary disposition.

Enforcement Counsel argues that the undersigned has the authority to decide if a hearing should be in-person or virtual. Joint Motion at 2. Specifically, Enforcement Counsel notes that the Administrative Procedures Act (“APA”)—the statutory framework under which hearings before this Tribunal are governed²—allows administrative law judges the ability to “regulate the course of the hearing,” subject to the rules of the relevant agency. *Id.* at 3 (quoting 5 U.S.C. § 556(c)(5)). Enforcement Counsel observes that the OCC’s regulations, in turn, state that “[t]he administrative law judge shall have all the powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.”³ *Id.* (quoting 12 C.F.R. § 19.5(a)). Enforcement Counsel contends that while neither the APA nor the OCC’s regulations address the issue of virtual hearings specifically, they “provide this Tribunal with broad flexibility to conduct hearings as [it] deems appropriate, so long as it does so in a fair and expeditious manner.” *Id.*

Enforcement Counsel asserts that a virtual hearing would be fair because “all participants would be able to view, listen to, and participate in the proceedings, as well as observe the appearance and demeanor of witnesses and participants.” *Id.* Enforcement Counsel argues that regardless whether the April 2022 hearing was in-person, virtual, or some mix of both, “[the] Parties would be able to present their cases through documentary evidence and witness testimony, and both Parties would be able to cross examine witnesses.” *Id.* at 4. Further, Enforcement Counsel maintains that “[t]he use of videoconferencing technology will afford the Parties a fair hearing and allow this case to avoid further unnecessary delay in the event an in-person hearing [in April 2022]

² See also 12 U.S.C. § 1818(h)(1) (providing that 5 U.S.C. § 501 *et seq.* governs enforcement hearings before this Tribunal).

³ See also 12 C.F.R. §§ 19.5(b)(5) (granting to the undersigned the power “[t]o regulate the course of the hearing and the conduct of the parties and their counsel”), 19.35(a)(1) (providing that “[h]earings shall be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has the right to present its case or defense by oral and documentary evidence and to conduct cross examination as may be required for full disclosure of the facts.”).

is not feasible.” *Id.* (internal quotation marks and citation omitted). And Enforcement Counsel offers examples of federal district courts “that have found that the current COVID-19 pandemic constitutes good cause and compelling circumstances to hold trials remotely,” even when one or both parties object.⁴

Finally, Enforcement Counsel states that in the event that Respondent has still not returned to the United States before the new hearing date, it would be unreasonably prejudicial and fundamentally unfair to the agency to postpone the hearing again rather than hold proceedings virtually. *See id.* at 4-5 (arguing that to delay holding the hearing as long as Respondent remains out of the country would “hold this matter in a state of perpetual uncertainty”). Enforcement Counsel also notes that “[a]t least one witness in this matter is now deceased and other important witnesses are elderly and suffering from health issues that may impact their ability to travel and provide in-person testimony at the hearing,” such that further postponement of the proceedings would amount to unnecessary delay and serve no good purpose. *Id.* at 4.

Respondent, by contrast, argues that this Tribunal does not have the authority to conduct a hearing virtually. Respondent points to 12 U.S.C. § 1818(h), which requires that the hearing “shall be held in the Federal judicial district or in the territory in which the home office of the depository institution is located unless the party afforded the hearing consents to another place.” *Id.* at 5 (quoting 12 U.S.C. § 1818(h)(1)). To Respondent, this provision simply does not allow for a virtual hearing without his consent. *See id.* Respondent also notes that the cases cited to by Enforcement Counsel involved trials in federal court subject to the Federal Rules of Civil Procedure (“FRCP”),

⁴ Specifically, Enforcement Counsel cites to *Goldstine v. FedEx Freight, Inc.*, 2021 WL 952354, at *10-11 (W.D. Wash. Mar. 11, 2021); *Bao Xuyen Le v. Rev. Dr. Martin Luther King, Jr. County*, ___ F. Supp. 3d ___, 2021 WL 859493, at *3 (W.D. Wash. Mar. 8, 2021); *Kieffaber v. Ethicon, Inc.*, 2021 WL 425822, at *2 (D. Kan. Feb. 8, 2021); *Gould Electronics v. Livingston County Rd. Comm.*, 470 F. Supp. 3d 735 (E.D. Mich. June 30, 2020); *Argonaut Ins. Co. v. Manetta Enters., Inc.*, 2020 WL 3104033, at *2 (E.D.N.Y. June 11, 2020); and *In re RFC & ResCap Liquidating Tr. Action*, 444 F. Supp. 3d 967 (D. Minn. Mar. 13, 2020).

which are not applicable in administrative proceedings. *See id.* at 6. Respondent further asserts that that even if FRCP 43(a), which allows for remote and contemporaneous transmission via video for good cause in compelling circumstances, were applicable, it should only extend to whether certain witnesses may testify remotely, not whether Respondent should be required to participate remotely in the hearing in its entirety. *See id.* at 6-7. Respondent maintains that forcing him to participate in this hearing virtually “would fundamentally affect his ability to meaningfully defend himself against [these] charges,” as his ability to participate in aiding counsel in formulating questions for witnesses and to prepare his own testimony would be hindered. *Id.* at 7. Respondent further adverts to the significant time difference between India and the United States as a way in which Respondent would be prejudiced by having to participate remotely, as a hearing taking place during the day in the Northern District of Illinois would mandate his participation “through the overnight hours.” *Id.* With respect to the prospect of an additional postponement, moreover, Respondent argues that “there is no emergency” or other compelling circumstance present, because Respondent has retired from banking since 2014 with no intent to return to the industry. *Id.*

The undersigned agrees with Enforcement Counsel that, if need be, this Tribunal has the authority and discretion to hold OCC enforcement hearings virtually. The undersigned is not persuaded by Respondent’s argument that having a virtual hearing—or, as described below, holding an in-person hearing with Respondent and other witnesses appearing via videoconference if necessary—would fundamentally affect his ability to meaningfully defend himself. Not only have there been several instances of federal district courts finding that virtual testimony is included within the “good cause and compelling circumstances” requirement in FRCP 43(a), as Enforcement Counsel notes, but other administrative tribunals have made similar rulings. For example, in finding that holding administrative hearings remotely during the pandemic was

appropriate “as opposed to giving up and indefinitely delaying all non-emergency proceedings,” an administrative law judge for the Federal Energy Regulatory Commission held that:

A virtual hearing is still consistent with due process because these hearings, like in-person hearings, will be secure and provide the safeguards and protocols that are also available to the participants in the hearing rooms. Specifically, the participants have been provided notice of the hearing, the hearing will take place before an impartial administrative law judge, the participants are represented by attorneys who will be present at the hearing, evidence can be presented, attorney will have the opportunity to cross-examine witnesses and rebut evidence presented by opposing parties. This process will culminate with a written decision by the Presiding Judge that will contain findings of fact and conclusions of law limited to the record evidence submitted at the hearing. Thus, the participants will have a meaningful opportunity to be heard, and their due process rights are sufficiently protected in this proceeding.⁵

Likewise, the Federal Trade Commission has observed that “numerous courts and agencies have been turning to virtual trials as the best mechanism for dealing with the pandemic.”⁶ And the National Labor Relations Board “has found that the ongoing COVID-19 global pandemic establishes good cause based on compelling circumstances for taking video testimony under [that agency’s rules].”⁷

The undersigned agrees with Enforcement Counsel that the hearing should not be delayed any further than April 25, 2022. And it is the undersigned’s intention to hold the hearing in person in the Northern District of Illinois, should circumstances permit, with Respondent appearing virtually if he is unable to return from India by that time. In such an event, the undersigned and the Parties’ counsel would be physically present in Chicago, and witnesses would be expected to

⁵ *MPLX Ozark Pipe Line LLC*, 171 F.E.R.C. P 63018, at *66140 (F.E.R.C.) (May 4, 2020).

⁶ *In the Matter of Altria Group, Inc.*, 2021 WL 915667 (F.T.C.) (Feb. 22, 2021) (citing cases); *see also In the Matter of Louisiana Real Estate Appraisers Bd.*, 2021 WL 719650 (F.T.C.) (Feb 12, 2021) (holding that a virtual hearing was appropriate due to pandemic-related concerns and noting that “courts and agencies have found that current video conferencing technology, properly used, can meet the requirements of fairness and due process for a trial or hearing”).

⁷ *Oxarc, Inc. et al.*, 2020 WL 5735979, at *1 (N.L.R.B) (Sep. 23, 2020) (citing cases) (noting that “[a] video hearing can also provide for the observation of witnesses for the purpose of credibility, as well as other due process concerns”).

attend in person unless they cannot do so due to COVID-19 concerns or travel restrictions, in which case they would testify remotely.⁸ If for some reason the above cannot be accommodated, the undersigned would prefer to hold a fully virtual proceeding on the currently scheduled date rather than postpone the hearing further, but as of now an in-person hearing is planned.

Regardless, should one be necessary, a fully virtual hearing would also allow for a fair and expeditious proceeding. With current technology, such a hearing would be conducted via a contemporaneous videoconference, which would allow all parties to be present in real time where evidence can be presented and rebutted, and witnesses may be cross-examined. Moreover, “to the extent [that] Respondent has a concrete, not speculative concern that cannot be ameliorated by the videoconferencing technology, or other pretrial accommodations or stipulations among the parties,”⁹ Respondent may raise it with the undersigned in the first instance as that concern arises, and this Tribunal will make every effort to alleviate any inconvenience or complication. As a different tribunal addressing these issues has noted, however, potential “technological and logistical problems and inconveniences do not outweigh the prejudice caused by indefinitely delaying proceedings ripe for adjudication.”¹⁰

It is the undersigned’s hope that Respondent will be able to return to the United States by April 25, 2022 and that it will not be necessary for him to appear remotely. If Respondent is still overseas on that date, however, the hearing will proceed with or without his physical presence.

⁸ This Tribunal has had success with witnesses testifying remotely in other OCC proceedings during the pandemic.

⁹ *William Beaumont Hospital & Mich. Nurses Assoc.*, 2020 L.R.R.M. (BNA) 306587, at *2 (N.L.R.B.) (Aug. 13, 2020).

¹⁰ *MPLX Ozark Pipeline LLC*, 171 F.E.R.C. P 63018, at *66141. To wit, while the undersigned is appreciative of Respondent’s concern regarding the time difference between India and Illinois and recognizes his potential inconvenience, this will not prevent an in-person hearing from beginning on April 25, 2022. Even if the undersigned were willing to hold the hearing outside of normal business hours in order to accommodate Respondent, she would be constrained by the building hours and security requirements of the courthouse in which such a hearing would be taking place.

The undersigned has the authority to conduct a hearing virtually, whether in full or in part, and she will do so if circumstances warrant.

SO ORDERED.

Issued: October 4, 2021

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication