UNITED STATES OF AMERICA

BEFORE THE

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

WASHINGTON, D.C.

In the Matter of	Docket No. 15-012-G-1
ROGER SCHAERER	Decision of the Board of Governors
Institution-Affiliated Party of	of the Federal Reserve System on
Credit Suisse AG	Request to Withdraw Notice of
Zurich, Switzerland	Prohibition

Summary

Petitioner Roger Schaerer ("Schaerer"), by letter dated June 3, 2015 (the "Request Letter"), requested that the Board of Governors of the Federal Reserve System ("Board") withdraw a Notice of Prohibition Issued Pursuant to Section 8(g)(1)(A) of the Federal Deposit Insurance Act (the "Notice of Prohibition") dated May 4, 2015. This matter was subject to an informal hearing on August 3, 2015, in accordance with the Board's Rules of Practice for Hearings.[1] After reviewing the recommendation of the presiding officers at the hearing, the Board has determined to deny Schaerer's request.

Statement of the facts

Schaerer was the head of the New York Representative Office of Credit Suisse AG, Zurich, Switzerland ("Credit Suisse" or the "Bank"), until his employment terminated in 2009. Schaerer and Credit Suisse signed a separation agreement on January 30, 2009, which specified a separation date of March 31, 2009.[2] The specific date on which Schaerer ceased to be an institution-affiliated party of Credit Suisse, however, is a contested issue and is discussed further below.

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[1] 12 CFR Part 263, Subpart D.

[2] The date at the top of the separation agreement is January 30, 2008, but Schaerer's signature line is dated the "30th day of 2009." At hearing, Schaerer's counsel attributed the 2008 date as a beginning-of-the-year oversight. Both Schaerer and Board enforcement counsel asserted that the separation agreement was signed on January 30, 2009. In addition, a declaration from two Credit Suisse attorneys as to the accuracy of the separation agreement copy provided to the Board states that the date of the agreement is January 30, 2009.

On July 21, 2011, Schaerer and other current and former employees of Credit Suisse were indicted by a Grand Jury in the United States District Court for the Eastern District of Virginia ("the Indictment"). Schaerer was charged with conspiring to defraud the United States by obstructing the Internal Revenue Service ("IRS") in the assessment and collection of U.S. income taxes. The Indictment alleges that Credit Suisse provided services to U.S. customers that allowed those customers to conceal their Swiss bank accounts (so-called "undeclared accounts") from U.S. tax authorities. The Indictment alleges that Schaerer aided U.S. customers in servicing their undeclared Swiss bank accounts through meetings at the Representative Office. The Indictment also alleges that Schaerer provided false and misleading information to the Federal Reserve Bank of New York regarding the role of the Representative Office in connection with these services.

Based on the conduct of Schaerer and others, on May 19, 2014, the Board issued a consent cease and desist order with Credit Suisse and assessed a $100 million penalty for unsafe and unsound practices and failure to comply with the federal banking laws governing its activities in the United States. The Board also announced that it was investigating specific individuals at Credit Suisse who may have been involved in the actions that resulted in Credit Suisse's violations of U.S. banking laws and noted that these individuals could be subjected to enforcement action, including an action to prohibit them from banking. Also on May 19, 2014, Credit Suisse pled guilty to aiding and abetting the preparation and presentation of false income tax returns to the IRS. As part of the plea agreement, Credit Suisse paid a $1.8 billion penalty to the Department of Justice.

Starting in March 2015, Board enforcement counsel and Schaerer's counsel engaged in a series of communications concerning the potential for Schaerer to cooperate with Board staff in its ongoing investigations of the individuals subject to the Indictment. The discussions also concerned an agreement to toll the statute of limitations with respect to certain actions that the Board could take against Schaerer. A tolling agreement was signed by Board enforcement counsel and Schaerer on March 24, 2015, under which the parties agreed to toll any limitations periods, for the period between March 11, 2015, and September 11, 2015, "with regard to any enforcement action commenced by the Board against Schaerer and any and all remedies that the Board may elect to pursue against Schaerer concerning Credit Suisse's and Schaerer's activities and practices in the United States and compliance with federal laws and regulations."

Discussions between Board enforcement counsel and Schaerer with respect to Schaerer's cooperation continued after the tolling agreement was signed. On April 7, 2015, Schaerer's counsel informed Board enforcement counsel that Schaerer, who was and remains in Switzerland, would seek authorization from the Swiss government for permission to talk to foreign government officials.

On May 4, 2015, the Board issued the Notice of Prohibition against Schaerer and four other former employees of Credit Suisse, served on Schaerer on May 6, 2015. The Notice prohibits Schaerer and the other former employees of Credit Suisse from participating in the affairs of any banking institution until the Indictment against them is finally disposed of or the Notice is otherwise terminated by the Board.

On June 3, 2015, Schaerer's counsel informed Board enforcement counsel that Schaerer's request to speak to Board staff had been formally granted by the Swiss authorities. On that same day, Schaerer filed his Request Letter asking that the Board withdraw the Notice of Prohibition. Schaerer requested an informal hearing in accordance with the Board's Rules of Practice for Hearings. Those rules provide that an institution-affiliated party who is suspended or removed from office or prohibited from participation in the institution's affairs may request an informal hearing within 30 days of service of the notice or order.[3] The informal hearing took place on August 3, 2015, before three presiding officers.[4] The presiding officers submitted their recommendation to the Board concerning this matter on September 14, 2015.

In the Request Letter and at hearing, Schaerer argued that the Notice of Prohibition was time-barred, because the applicable statute of limitations had expired before the tolling agreement was signed. Schaerer also argued that the Notice of Prohibition should be dismissed under principles of honesty and fair dealing because Board enforcement counsel led Schaerer to believe that his agreement to waive the statute of limitations would allow the Board more time to consider his cooperation in deciding what charges, if any, to bring against him, but the Board issued the Notice of Prohibition before any discussions with Schaerer occurred.[5] Board enforcement counsel contended that the tolling agreement was signed timely and that there is no support for finding that Board enforcement counsel misled Schaerer as to the actions the Board would or would not take during the period that the statute of limitations was tolled.

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[3] 12 CFR § 263.72(a).

[4] The presiding officers were Stephanie Martin, Associate General Counsel in the Board's Legal Division, Kevin Bertsch, Associate Director in the Board's Division of Banking Supervision and Regulation, and Christopher Calabia, Senior Vice President in the Financial Institutions Supervision Group of the Federal Reserve Bank of New York.

[5] In the Request Letter, Schaerer also asserted that the Board inexcusably delayed issuing the Notice of Prohibition for four years after the Indictment, arguing that if Schaerer represented a credible threat to public confidence in the bank, the Board should have acted sooner. An equitable claim for inexcusable delay (or "laches") requires a finding both that the plaintiff delayed inexcusably or unreasonably in filing suit and that the delay was prejudicial to the defendant. (*See Rozen v. District of Columbia*, 702 F.2d 1202, 1203 (D.C. Cir. 1983).) Schaerer offered no evidence in his submissions or at hearing of harm due to "inexcusable delay" and thus the Board finds no reason to withdraw the Notice of Prohibition based on the claim of inexcusable delay.

Question 1: Was the Notice of Prohibition time-barred?

The question of whether the Notice of Prohibition was issued by the Board after the limitation period had expired hinges on the question of when Schaerer ceased to be an institution-affiliated party of Credit Suisse. The Board issued the Notice of Prohibition pursuant to Section 8(g)(1)(A) of the Federal Deposit Insurance Act ("FDI Act"), which provides that the Board may suspend from banking any "institution-affiliated party" indicted for a felony involving dishonesty "if continued service or participation by such party posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution."[6] The term "institution-affiliated party" is defined to include "any director, officer, employee … of, or agent for, an insured depository institution."[7] Section 8(i)(3) of the FDI Act provides, "The resignation, termination of employment or participation, or separation of an institution-affiliated party … shall not affect the jurisdiction and authority of the" Board to issue any notice or order under Section 8(g) "if such notice or order is served before the end of the 6-year period beginning on the date such party ceased to be such a party [i.e., ceased to be an institution-affiliated party] with respect to such depository institution."[8] Once issued, the Board's suspension order remains in effect until the indictment is finally disposed of or until the suspension is terminated or modified by the Board.[9]

Under the statutory provisions cited above, the 6-year period would start on the date that Schaerer ceased to be an institution-affiliated party of Credit Suisse. Schaerer argues that his status as an institution-affiliated party ceased on January 30, 2009, the date he signed the separation agreement with Credit Suisse. If Schaerer is correct, the 6-year period within which the Board could issue the Notice of Prohibition would have ended on January 30, 2015, before the tolling agreement was signed on March 24, 2015. Board enforcement counsel contends that Schaerer was an institution-affiliated party until March 31, 2009, the separation date identified in the separation agreement and that the tolling agreement was signed before the end of the 6-year period (i.e., before March 31, 2015).

Paragraph 1 of the separation agreement between Schaerer and Credit Suisse provides:

> Effective as of March 31, 2009, your employment with Credit Suisse will terminate (such date is your "Separation Date" and the period of time from January 30, through your Separation Date is your "Notice Period"). During your Notice Period, you will be responsible for assisting the Bank

[6] 12 U.S.C. § 1818(g)(1)(A); *see also* 12 U.S.C. § 1818(g)(1)(E) (defining a "relevant depository institution" as the institution at which "the party is or was an institution-affiliated party" at the time the indictment or notice of prohibition was issued).
[7] 12 U.S.C. § 1813(u); *see also* 12 U.S.C. § 1818(b)(3) and (4), which in combination treat a foreign bank with a U.S. branch or agency (and any nonbank subsidiary of the foreign bank) as if it were a state member insured bank for purposes of applying various enforcement authorities in the FDI Act, including Section 8(g).
[8] *See* 12 U.S.C. § 1818(i)(3).
[9] *See* 12 U.S.C. § 1818(g)(1)(A) and (B).

> as it may instruct in the transition of your responsibilities, and will be entitled to continue to receive base salary and to participate in all benefit plans for which you are eligible (but not to receive any incentive performance bonus that might otherwise be paid in respect of such period). Except as the Bank may otherwise have specifically instructed, you will not be expected, required or permitted to come into the office during the Notice Period, and your access to electronic systems will be disconnected.

Schaerer argues that the March 31 date in the separation agreement is not the relevant date for purposes of calculating the limitation period. Rather, Schaerer maintains that January 30, 2009, was the date on which he ceased to be a Credit Suisse employee. Schaerer notes that, after that date, he was not expected, required, or permitted to come into the office, he had no access to any of the bank's computers or electronic systems, and he did not have any client contact. He further notes that the New York Representative Office at which he had been employed had closed at the end of 2008. Schaerer argues that the two-month window between the time he signed the separation agreement and the separation date is merely a notice period required by Swiss employment law to facilitate payment of final compensation and continuation of insurance benefits, and in no way suggests that Schaerer was an employee of Credit Suisse during the notice period.

In support of his argument as to when his employment ceased, Schaerer cites the legislative history of the 6-year limitation period in Section 8(i)(3) of the FDI Act, which states that Section 8(i)(3) "authorizes the banking agencies to take enforcement actions against culpable institution-affiliated parties who resign or otherwise depart from an institution, within 6 years of their leaving the institution."[10] Schaerer argues that he "left" the Bank when he "severed his ties" on January 30, 2009, citing *Stanley v. Board of Governors of the Federal Reserve System*[11] and *Proffitt v. Federal Deposit Insurance Corporation.*[12]

Although both of the cases Schaerer cites refer to the 6-year period in Section 8(i)(3) as beginning when an employee "severs ties" with an institution, in neither of the cases was the date at which employment ceased an issue. The issue in the *Stanley* case was whether the Board had jurisdiction over former directors of a failed institution, where the Board's enforcement action was served on the former directors before Section 8(i)(3) had been enacted. There was not a question as to whether the Board's action was served within 6 years of when the directors' employment ceased. The *Proffitt* case involved an analysis of the interaction of Section 8(i)(3) and other limitation periods in the FDI Act and, as in the *Stanley* case, the date on which the employment of the directors in question ceased was not at issue.

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[10] H.R. Conf. Rep. 101-222, 440, 1989 U.S.C.C.A.N. 432, 479.
[11] 940 F.2d 267, 271 (7th Cir. 1991).
[12] 200 F.3d 855, 862 (D.C. Cir. 2000).

Rather, in both cases, the reference to "severing ties" was dicta, descriptive of Section 8(i)(3) but not integral to the court's decision.

At hearing, Schaerer offered two additional cases in support of his arguments, *RTC v. Gallagher*[13] and *Ryan v Bonar*.[14] The issue in the *Gallagher* case was whether Section 21(k) of the FDI Act pre-empted federal common law and established a gross negligence standard of liability for officers and directors of failed financial institutions. The court referred to Section 8(i)(3) as an example of the comprehensive regulatory scheme established in the FDI Act and described the 6-year period as running from the date of "resignation or termination." Neither Section 8(i)(3) nor any employment-related date was at issue in the case. In the *Bonar* case, a former bank director alleged that a Temporary Cease and Desist Order served on him by the Office of Thrift Supervision was time-barred. The court noted that the applicable statute of limitations was the 6-year period in Section 8(i)(3), which began following "resignation or termination." However, the court further noted that the parties did not dispute that the action was brought within 6 years of Bonar's departure from the bank.

In sum, the cases cited by Schaerer provide some guidance, but are not dispositive, as to the meaning of "cease to be an institution-affiliated party (e.g., employee)" for purposes of Section 8(i)(3). Even if one accepts that "ceasing employment" means "severing ties," "severing a relationship," "resignation," or "termination," none of the cases provide assistance in determining what specific actions are required to satisfy the meaning of those terms. In the absence of specific statutory or case law provisions on what conditions cause employment to cease for purposes of Section 8(i)(3), Board enforcement counsel argues that the Board should be guided by the elements of "employment" as found in the common law of agency, which has been used by federal courts when interpreting the meaning of "employment" under federal statutes, such as *Spirides v. Reinhardt* (construing Title VII of the Civil Rights Act of 1964) and *Frankel v. Bally, Inc.* (construing the Age Discrimination Act of 1967).[15]

The courts in *Spirides* and *Frankel* looked to the common law of agency in deciding whether a person was an independent contractor or an employee. The court in *Spirides* stated, "Consideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative."[16] However, both courts focused on the extent of the employer's right to control the means and manner of the worker's performance as the most important factor to review.[17] With respect to Schaerer's relationship to Credit Suisse, the separation agreement specifically provided that Schaerer was

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[13] 10 F.3d 416 (7th Cir. 1993).
[14] 1992 WL 358911 (N.D. Ill. 1992).
[15] 613 F.2d 826 (D.C. Cir. 1979) and 987 F.2d 86 (2nd Cir. 1993), respectively.
[16] *Spirides* at 831.
[17] *Spirides* at 831; *Frankel* at 89, citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989).

responsible for assisting the bank as it may have instructed in the transition of his responsibilities until the separation date of March 31, 2009, and at the hearing Schaerer's counsel did not contest that fact.[18] Schaerer argues that in fact the bank made no such demands during the notice period between January 30 and March 31, 2009, that Schaerer was not expected, required, or permitted to come into the office, nor did he have access to Credit Suisse equipment or systems. However, the fact that the bank made no demands on Schaerer during the notice period does not change the fact that Schaerer was under a contractual obligation to perform such duties had they been required. Thus, Credit Suisse retained control over the manner and means of Schaerer's work during the notice period, whether that control encompassed requiring specific tasks or no tasks at all, consistent with the common law test of agency. The *Spirides* and *Frankel* courts also noted other factors in the common law test of agency that are present in this case, including the method of payment, the provision of employee benefits, and the tax treatment of the hired party.[19] The separation agreement provided that Schaerer continued to receive base salary (less applicable taxes) and participate in benefit plans until March 31, 2009. Given the clear existence of Credit Suisse's ability to instruct Schaerer with respect to performing tasks and Schaerer's continued receipt of salary and benefits, as well as the withholding of taxes by Credit Suisse, the key elements of employment were met until the separation date of March 31, 2009.[20]

In light of the foregoing, the Board finds that Schaerer was an institution-affiliated party of Credit Suisse until March 31, 2009. Therefore, the tolling agreement (absent any defect caused by misleading statements by Board enforcement counsel, as discussed further below) was signed before the end of the 6 -year time limit in Section 8(i)(3), thus effectively tolling the limitation period until September 11, 2015.

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[18] Hearing Transcript p. 32.

[19] *Spirides* at 832; *Frankel* at 89.

[20] Schaerer also argues that the interpretation of his employment status should not be predicated on his rights under Swiss law to receive payments for a "notice period" before leaving the formal employ of the bank (citing Section 335 of the Swiss Code of Obligations, which provides that "[t]he employment relationship may be terminated" with an advance notice of a certain number of months depending on years of service; *see* Attachment 6 to Schaerer submission "Affidavit of Colleen D. Kukowski"). The meaning of Section 8(i)(3), however, depends on *when* employment ceased, not *why* employment ceased at a particular time, such as at the end of a statutorily mandated notice period, particularly where, as here, the employer retained the ability to assign tasks to the employee and to provide salary and benefits. In addition, paragraph 15 of the separation agreement specifically provides that the agreement is to be "interpreted in accordance with the laws of the State of New York (without regard for the conflicts of law principles thereof)," and thus Swiss law would have no bearing on its interpretation.

Question 2: Should the Notice of Prohibition be dismissed because the tolling agreement was obtained through bad faith?

Schaerer argues that he was led to believe that his agreement to waive the statute of limitations would allow the government time to consider his cooperation in deciding what charges, if any, it would bring against him, but that the Notice of Prohibition was issued before any such cooperation occurred. Schaerer claims that Board enforcement counsel did not act in good faith in obtaining the tolling agreement and that the Notice of Prohibition should be dismissed under principles of honesty and fair dealing.

Board enforcement counsel contest Schaerer's characterization of the conversations leading up to execution of the tolling agreement and argue that Board staff did not give any indication that the Board would refrain from or delay any enforcement action against Schaerer. Further, Board enforcement counsel contend that the tolling agreement, as a contract between the Board and Schaerer, may be set aside only if procured through fraud, and the standards for fraud have not been met.

There were two relevant conversations that took place between Board enforcement counsel and Schaerer's counsel before the tolling agreement was signed. The first call occurred on March 5, 2015, between Board enforcement counsel Jason A. Gonzalez ("Gonzalez") and Schaerer's counsel Jodi L. Avergun ("Avergun"). In the Request Letter, Avergun stated that on this call Gonzalez first requested a tolling agreement and indicated that Schaerer's consent to toll the statute of limitations for six months would enable Board staff to explore Schaerer's potential cooperation with the Board.[21] Avergun also stated that she expressed the view on that call that any Board action was already time-barred but that Gonzalez disagreed and explained that he expected that without the waiver, the Board would bring charges against Schaerer, but with the waiver, the Board would seek Schaerer's cooperation against others involved in the case.[22] Board enforcement counsel describes a slightly different version of the March 5 call.[23] Gonzalez states that he explained to Avergun that the Board had legal authority to pursue a number of different enforcement actions against Schaerer, including certain actions that would be time-barred in the near future as a result of the applicable statute of limitations, referring Avergun to the legal authorities in Section 8 of the FDI Act, but that Avergun did not assert a belief that the Board's action was already time-barred. Board enforcement counsel's statement of what was discussed on the March 5 call is consistent with the affidavit supplied by Schaerer co-counsel Colleen D. Kukowski (who did not

[21] Request Letter p. 3. At hearing, Avergun clarified that Board staff's request for a tolling agreement first occurred on March 11. Hearing Transcript p. 35.

[22] Request Letter p. 3.

[23] Enf. Counsel Exhibit C, Declaration of Jason A. Gonzalez ("Gonzalez declaration"), para. 5.

participate on the call), who declared, "As I understand from Ms. Avergun, during that call the [Board] Staff described its authority to proceed against Mr. Schaerer; and referred Ms. Avergun to Section 8 of the [FDI Act] for further information."[24]

The second call occurred on March 11, 2015.[25] Schaerer's Request Letter states that during this call, Avergun informed Gonzalez that Schaerer would be willing to be interviewed by the Federal Reserve with a view toward cooperating with its investigation of other Credit Suisse employees and would agree to toll the statute of limitations for six months to effectuate that cooperation and an ultimate resolution.[26] Kukowski, who participated on this call, states that she memorialized the conversation at the time it occurred and that Gonzalez requested Schaerer's consent to toll the statute of limitations so that Board staff could explore Schaerer's cooperation with the Board. Kukowski stated that Gonzalez and Avergun had a discussion as to whether any Board action was already time-barred and the appropriate date for calculating the statute of limitations period. She also states that Gonzalez indicated that he expected that, without the waiver, Board staff would bring charges against Schaerer.[27] Kukowski further states that at no point during the March 5 or March 11 calls did Schaerer's counsel concede that the statute of limitations began running in March 2009 nor did Board staff indicate that it was going to seek a temporary Notice of Prohibition against Schaerer regardless of his decision to sign the tolling agreement.[28]

According to Board enforcement counsel's description of the March 11 call, Avergun informed Gonzalez of Schaerer's interest in participating in a discussion with Board staff and requested a copy of a tolling agreement that would extend the limitations period for approximately six months, until September 11, 2015. Gonzalez declared that Avergun stated that she believed the statute of limitations on Board actions would expire on March 25, 2015. According to the Gonzalez declaration, at no point during the calls did Gonzalez affirmatively state to Schaerer's counsel that the Board promised to delay taking action against Schaerer.[29] Schaerer's counsel did not dispute that statement; at the hearing, Avergun confirmed that there had been no "quid pro quo" discussed.[30]

After the tolling agreement was signed on March 24, 2015, there was a call on April 7, 2015, between Gonzalez and Avergun. Both sides agree that on that call Gonzalez informed Avergun that

[24] Affidavit of Colleen D. Kukowski, July 29, 2015 ("Kukowski affidavit"), para 3.
[25] Although the Request Letter identified the date of this call as March 16, 2015, both the Gonzalez declaration (para. 6) and the Kukowski affidavit (para. 4) identified the date as March 11, 2015.
[26] Request Letter pp. 3-4.
[27] Kukowski affidavit, para. 4.
[28] Kukowski affidavit, paras. 5 and 6.
[29] Gonzalez declaration, para. 6 and 7.
[30] Hearing Transcript p. 37.

Board staff planned to seek the Board's approval of a temporary Notice of Prohibition against Schaerer, and Avergun informed Gonzalez that Schaerer could not speak to Board staff without authorization from the Swiss government, which he planned to seek.[31] Although Schaerer's submissions indicate that Avergun expressed disappointment with Board staff's decision to proceed with a temporary Notice of Prohibition and questioned whether instead Schaerer could voluntarily refrain from working in the industry, neither side reported that there was any allegation or discussion on that call of bad faith based on previous statements or omissions by Board enforcement counsel.

Board enforcement counsel argues that the tolling agreement may be set aside only if procured through fraud, citing the principle of contract law that if a party's manifestation of assent is induced by a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.[32] Board enforcement counsel argues that the elements of a fraud claim are not present in this case (specifically, the elements of (1) false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) with intent to deceive, and (5) action taken in reliance on the representation).[33]

The tolling agreement contains an integration clause, which states, "The provisions of this agreement comprise all the terms, conditions, agreements, and representations of the parties respecting the tolling of the limitations period." Board counsel argues that, as the tolling agreement did not require the Board to refrain from any enforcement action during the tolling period, Schaerer cannot now claim that he was induced to sign the agreement by a representation or understanding that is not expressed in that agreement, citing *One-O-One Enterprises, Inc. v. Caruso*.[34] In that case, the U.S. Supreme Court declined to overturn a contract based on a "fraud-in-the-inducement" claim where the plaintiffs claimed that the defendants made material omissions regarding their future plans for the restaurants they were negotiating to purchase from plaintiffs. The court held that the plaintiffs "cannot overcome the written instrument here, and, particularly, the integration clause, by invoking the fraud-in-the-inducement exception to the parol evidence rule."[35] The court's reasoning is applicable in this case as well, as making

[31] Gonzalez declaration para. 10, Request Letter p. 4, Kukowski affidavit para. 10 and Attachment 2.
[32] Restatement (Second) of Contracts § 164(1) (1981).
[33] *U.S. v. Kiefer*, 228 F.2d 448 (D.C. Cir. 1955). In addition, Board enforcement counsel cites *Eli Research, Inc. v. United Communications Group, LLC*, 312 F. Supp.2d 748 (M.D.N.C. 2004), for the proposition that, where fraud by omission is alleged, the party that allegedly failed to speak must have had a duty to disclose the information, such as when there is a "relationship of trust and confidence between the parties," which relationship was not present in this case.
[34] 848 F.2d 1283 (D.C. Cir. 1988).
[35] *Ibid.* at 1287. The parol evidence rule is a common law concept that stands for the proposition that a written contract may not be modified by parol or oral evidence, provided that it has been legally executed by a person who intends for it to represent an integrated agreement constituting a final expression of the terms. *See, e.g.,* Restatement (Second) of Contracts § 213 (1981).

an exception to the clear language of the integration clause "would severely undermine the policy of the parol evidence rule, which is grounded in the inherent reliability of a writing as opposed to the memories of contracting parties."[36]

Based on a review of the record, the Board finds no evidence of fraud on the part of Board enforcement counsel in obtaining the tolling agreement. Nor did Schaerer make that claim: at the hearing, Schaerer's counsel stated that she did not disagree with the cases cited by Board enforcement staff nor was Schaerer accusing Board staff of fraud. Rather, Schaerer's position is that the tolling agreement should be overturned because of his claim that Board enforcement counsel acted in bad faith.[37] At the hearing, Schaerer's counsel asserted that Schaerer would not have signed the tolling agreement if he knew that the Board would move forward before speaking with Schaerer.[38] Schaerer, however, offered no case law or other precedent in support of his position that bad faith, absent the elements of fraud, is sufficient to overturn the agreement, nor was Schaerer specific as to which statements by Board enforcement counsel were in bad faith. Although there is no support in the record to conclude that the tolling agreement should be set aside on any basis other than fraud, the Board has considered whether there are arguments for overturning the tolling agreement for equitable reasons.

Schaerer appears to rely most heavily on the omission of any statement by Board enforcement counsel in advance of signing the tolling agreement that Board staff planned to pursue a temporary Notice of Prohibition before assessing the usefulness of Schaerer's cooperation.[39] Schaerer also cites a statement by Gonzalez (on either the March 5 call or the March 11 call) that the Board would likely bring charges without the waiver, but with the waiver Board staff would pursue cooperation. Board enforcement counsel argued that Schaerer did have motive to sign the tolling agreement and cooperate with Board staff regardless of whether the Board pursued the temporary Notice of Prohibition, because there were other remedies that they might pursue against Schaerer after considering his cooperation, such as a permanent prohibition notice and civil money penalties.[40]

Although Schaerer may have assumed that the Board would not take any action before his cooperation was assessed, that assumption is not well founded on any statements or omissions in the record made by Board enforcement counsel. The fact that Board enforcement counsel did not inform Schaerer of its intent to pursue a temporary Notice of Prohibition during the tolling period does not give

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[36] *Ibid.* at 1287, quoting *Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623, 630 (4th Cir. 1977), *cert. denied,* 434 U.S. 923 (1977).
[37] Hearing Transcript p. 41.
[38] Hearing Transcript p. 40.
[39] Hearing Transcript p. 40.
[40] Hearing Transcript p. 52.

rise to a reasonable assumption that the Board would take no action or that the omission was in bad faith. In fact, there is no evidence in the record concerning when Board staff decided to pursue a temporary Notice of Prohibition and whether that decision occurred before the tolling agreement was signed. As for the "charges" mentioned by Gonzalez on the March call(s), it is clear from the submissions of both parties that the Board staff was considering a variety of charges under Section 8 of the FDI Act, which include a temporary prohibition, a permanent prohibition, and civil money penalties. Thus, even if the Gonzalez statement could be interpreted to mean that his expectation was that the Board would not bring "charges" before assessing Schaerer's cooperation, there is no indication of what charges were being referenced. (As stated at hearing, Board enforcement counsel did, in fact, consider Schaerer's cooperation in considering whether to bring a permanent prohibition action and civil money penalties.)[41] Further, even if the charge being referenced was the temporary Notice of Prohibition, the statement is not a commitment to refrain from pursuing this action before conversing with Schaerer. Attributing bad faith to Board enforcement counsel on the basis of that statement would be, in the Board's view, an unreasonable stretch based on assumptions and recollections of Schaerer's counsel that are not adequately supported in the record nor the tolling agreement.

In light of the foregoing, the Board concludes that the tolling agreement may not be overturned absent a showing of fraud, and there has been no such showing here. Schaerer has not alleged any misstatement of material fact by Board enforcement counsel, and there is no evidence that Board staff made statements indicating that the Board would refrain from bringing any enforcement action before assessing Schaerer's cooperation. As indicated in the integration clause, the tolling agreement comprises all of the terms, conditions, agreements, and representations between the parties, and nothing in that agreement limited the Board's intention or ability to bring an enforcement action at any time. Even if the Board were to consider disregarding the tolling agreement under "principle of honesty and fair dealing," as requested by Schaerer, the Board cannot find adequate evidence of bad faith that would warrant overturning the tolling agreement.

[41] Hearing Transcript p. 52.

Because the Board finds that the tolling agreement was not time-barred and was not obtained by fraud or bad faith, the Board is not withdrawing the temporary Notice of Prohibition.

By order of the Board of Governors,[42] effective October 8, 2015.

Robert deV. Frierson
Secretary of the Board

[42] Voting for this action: Chair Yellen, Vice Chairman Fischer, and Governors Tarullo, Powell, and Brainard.