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

In the Matter of	
Carrie Tolstedt, Former Head of the Community Bank	OCC AA-EC-2019-82
Claudia Russ Anderson, Former Community Bank Group Risk Officer	OCC AA-ED-2019-81
James Strother, Former General Counsel	OCC AA-ED-2019-70
David Julian, Former Chief Auditor	OCC AA-ED-2019-71
Paul McLinko, Former Executive Audit Director	OCC AA-ED-2019-72
Wells Fargo Bank, N.A. Sioux Falls. South Dakota	ALJ McNeil

ORDER REGARDING ENFORCEMENT COUNSEL'S MOTION TO STRIKE RESPONDENTS' AFFIRMATIVE DEFENSES

On March 13, 2020, Enforcement Counsel for the Office of the Comptroller of the Currency (OCC) moved for an order striking certain affirmative defenses that have been presented in the answers of each Respondent.[1] Specifically, Enforcement Counsel aver that Respondent Julian's Second Affirmative Defense – which asserts the claims against him are barred because he "did not knowingly or recklessly engage in unsafe or unsound practices" – is improper as a matter of law, because it operates only to "negate an element of the plaintiff's *prima facie* case".[2]

Overlooking that he presented the claim not in his Answer but as an "Affirmative Defense," Respondent Julian counters that this is a "non-affirmative defense[]", one that he avers "can be raised in an answer."[3] He correctly observes that Enforcement Counsel "is required to prove each element of [their] case regardless of whether Mr. Julian's answer affirmatively

[1] Enforcement Counsel's Motion to Strike Respondents' Affirmative Defenses, dated March 13, 2020.
[2] *Id*. at 8, quoting *In re Rawson Food Serv., Inc*., 846 F.2d at 1349 (quoting *Ford Motor Co. v. Transp. Indem. Co.*, 795 F.2d 538, 546 (6th Cir. 1986).
[3] Respondents' Joint Response to Enforcement Counsel's Motion to Strike Certain Affirmative Defenses at 19.

challenges their *prima facie* case."[4] He also correctly observes that even if this Tribunal were to strike Mr. Julian's Second Affirmative Defense, he would not be prohibited from holding Enforcement Counsel to their burden of proof at trial or from seeking discovery relevant to each element."[5]

With this as his response, I find cause has been shown to strike Mr. Julian's Second Affirmative Defense, finding that as pleaded it functions only to negate an element of Enforcement Counsel's *prima facie* case, and as such is not a properly pleaded affirmative defense.

Next, Enforcement Counsel aver that Respondent Tolstedt's Ninth Affirmative Defense – which asserts that both the Comptroller and the OCC '"lack authority to enforce' Title 18 of the U.S. Code."[6] According to Enforcement Counsel, the Defense should be stricken as a matter of law first because the Defense "includes no factual basis" for asserting the defense, and second because "it is well established that 12 U.S.C. § 1818 means what it says and that enforcement actions can be based on the violation of "*any law* or regulation. . . ."[7]

Respondents counter that Enforcement Counsel's argument "conflicts with ordinary principles of statutory interpretation as well as the fundamental precept that administrative agencies are not entrusted to enforce federal criminal law."[8] Respondents support this legal premise with citation first to language in two places in 12 U.S.C. § 1818 in which the term "any law" appears: subsection (e), which governs removal actions, and subsection (i), regarding civil money assessments.[9] Asserting that the Supreme Court has provided guidance on the meaning of the word "any" in this context, Respondents argue that this Tribunal "should look to the remaining statutory text" to "look beyond that word itself" in order to determine the meaning of "any law" here.[10]

Respondents argue that "[r]eading the term 'any law' to embrace criminal law fails an 'elementary canon' of statutory construction that 'a statute should be interpreted so as not to render one part inoperative."[11] Their legal premise is that looking "beyond that word itself," so as to strip the OCC of its authority to maintain enforcement actions based on provisions of the criminal code, would avoid that outcome.[12]

I am not persuaded that construing the term "any law" to embrace criminal law fails, or even implicates, any principle of statutory construction. The term in the context of 12 U.S.C. §§ 1818(e) and (i) is relatively straightforward, and appears to be unambiguous in making no differentiation between civil and criminal law. I do not find that Enforcement Counsel's reading of 12 U.S.C. § 1818 makes subsection (g)'s content superfluous. Subsection (g) permits enforcement action in response to indictment for a set of identified criminal violations, but

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[4] *Id*. at 21.
[5] *Id*., citing Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1088 (9th Cir. 2002).
[6] Enforcement Counsel's Motion to Strike Respondents' Affirmative Defenses at 9.
[7] Enforcement Counsel's Motion to Strike Respondents' Affirmative Defenses at 10, citing 12 U.S.C. §§ 1818(e) and (i) (emphasis added).
[8] Respondents' Joint Response to Enforcement Counsel's Motion to Strike Certain Affirmative Defenses at 21.
[9] *Id*. at 22.
[10] *Id*., citing *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132 (2004), and *Small v. United States*, 544 U.S. 385, 388 (2005).
[11] Respondents' Joint Response to Enforcement Counsel's Motion to Strike Certain Affirmative Defenses at 22, citing *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).
[12] Respondents' Joint Response to Enforcement Counsel's Motion to Strike Certain Affirmative Defenses at 22.

nothing in the provisions in this subsection are thwarted by, or rendered inoperative by, actions taken under sections (e) or (i) as proposed in the Notice of Charges. I am guided by the clear and longstanding holding in *Ellsworth*: "A violation of criminal law may support a violation-based enforcement action pursuant to 12 U.S.C. § 1818."[13]

As a matter of pleading, Ms. Tolstedt's Ninth Affirmative Defense, which reads in full "The OCC and the Comptroller lack authority to enforce Title 18 of the U.S. Code" fails to provide sufficient factual context to permit an informed response. As a matter of law, based on a plain reading of the relevant sections of Title 12 U.S.C. § 1818, I find no legal basis has been advanced that would support such a claim as an affirmative defense in this administrative enforcement action. Upon these findings, Ms. Tolstedt's Ninth Affirmative Defense should be stricken.

Next, Respondent Tolstedt's Thirteenth Affirmative Defense avers that the Notice "and any proceeding pursuant to it are invalid" because the process by which the Comptroller or the OCC considered and initiated the administrative enforcement action "was tainted by the involvement of OCC personnel in the decision-making process who have conflicts of interest" or who "should have been recused from any involvement or participation" in the decision-making process.[14] Enforcement Counsel aver the Defense should be stricken as it is unsupported by any factual basis, is "inadequately pled, is an improper affirmative defense, and does not preclude Respondent Tolstedt's liability in this proceeding."[15]

Absent from the defense as pleaded is any set of facts that are tied to factual allegations against Ms. Tolstedt. Nor is this state altered by Respondents' joint response – which again fails to offer any context that would show how claims of conflicts of interest by persons not identified with respect to processes not named or fairly described. Respondents rely on *Jerrico* for the proposition that Ms. Tolstedt is entitled to "an impartial prosecutor" and that these rights limit "the partisanship of administrative prosecutors."[16]

In *Jerrico*, the Court elaborated on the issue thus:

> Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process, see *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973), and similar considerations have been found applicable to administrative prosecutors as well, see *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 414 (1958); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). Prosecutors need not be entirely "neutral and detached," cf. *Ward v. Village of Monroeville*, 409 U.S., at 62. In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law.[17]

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[13] *In the Matter of Steven Ellsworth*, OCC 2016 WL 11597958, at *11, citing *Van Dyke v. Bd. of Governors of the Fed. Reserve Sys.*, 876 F.2d 1377 (8th Cir. 1989).
[14] Respondent Carrie Tolstedt's Answer at 27.
[15] Enforcement Counsel's Motion to Strike Respondents' Affirmative Defenses at 11.
[16] Respondents' Joint Response to Enforcement Counsel's Motion to Strike Certain Affirmative Defenses at 25, citing *Marshall v. Jerrico*, 446 U.S. 238, 249 (1980).
[17] *Marshall*, 446 U.S. at 248. Nor is a different outcome warranted under *United States v. Dahlstrom*, 180 F.3d 677, 683 (5th Cir. 1999). In that case, where the same attorney who represented the Securities and Exchange Commission in a underlying civil action also participated in a subsequent criminal prosecution, the court held: "The two factors considered in reaching this decision were: (1) the level of participation by the U.S. Attorney; and (2) the extent of the particular agency attorney's involvement in the underlying civil suit." No violation occurred where it was clear

I find no set of factual allegations in Ms. Tolstedt's Affirmative Defense or Respondents' Joint Response that supports Ms. Tolstedt's Thirteenth Affirmative Defense. Finding no basis in fact or law that would permit the defense to survive Enforcement Counsel's Motion, the Defense shall be stricken.

Next, Enforcement Counsel aver that a series of Respondents' affirmative defenses – those "sounding in equity" – including laches, estoppel, waiver, ratification, acquiescence, or "other similar theory" – are invalid as barred by legal precedent, as insufficiently pled, and as failing to provide "fair notice of the nature of the defenses."[18]

Respondents counter with separate arguments for estoppel defenses and waiver-related defenses. In the former category are:

Tolstedt No. 6: "The claims set forth in the notice are barred because the OCC's actions, omissions, and conduct estops the OCC from bringing the claims"; and the claims "are barred by the doctrine of laches." [19]

Russ Anderson No. 4: "Because the OCC knew about the issues raised in the Notice of Charges and took no action for many years, its claims are barred by the doctrines of laches, estoppel and waiver";[20]

Strother No. 6: "The claims asserted in the Notice against Respondent Strother are barred, in whole or in part, by the doctrine of estoppel. Given the OCC's unfettered and continuing access to the Bank, including the Bank's personnel and records, as well as the OCC's awareness of the issues set forth in the Notice, the OCC knowingly and/or recklessly failed to exercise its regulatory authority to identify, detect, and address the putative sales practices misconduct problem. Respondent Strother relied upon the OCC to fulfill its obligations as regulator and suffered prejudice due to the OCC's failure";[21]

Julian No. 3: "The claims asserted in the Notice against Respondent Julian are barred, in whole or in part, on the basis of waiver, estoppel, ratification, and/or acquiescence, because the OCC was aware of, should have been aware of, and/or approved Respondent Julian's conduct and the conduct of the Bank";[22] and

McLinko No. 6: "The OCC's claims and prayer for relief are barred in whole or in part by the doctrine of estoppel. The OCC has had unfettered access to the Bank and its personnel for the entire duration that the OCC now alleges the Bank had a "sales practices misconduct problem." The OCC knowingly and/or recklessly failed to exercise its regulatory authority to stop the putative sales practices misconduct problem, despite having full and complete access to the Bank. Respondent McLinko relied upon the OCC to fulfill its obligations as regulator and suffered prejudice due to the OCC's failure."[23]

Affirmative defenses as pleaded by Respondents Tolstedt, Russ Anderson, and Julian are

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that the attorney "did not have control" over the subsequent prosecution." *Id*. No facts presented by Respondents identify an attorney or provide the factual context needed to establish grounds for such a defense.

[18] Enforcement Counsel's Motion to Strike Respondents' Affirmative Defenses at 18.

[19] Respondent Carrie Tolstedt's Answer at 27.

[20] Respondent Claudia Russ Anderson's Answer at 18.

[21] Respondent James Strother's Answer to Notice of Charges for Order to Cease and Desist and Notice of Assessment of a Civil Money Penalty at 50.

[22] Respondent Julian's Answer at 62.

[23] Respondents' Joint Response to Enforcement Counsel's Motion to Strike Certain Affirmative Defenses at 12.

insufficiently pled, offering no set of facts related to the factual claims in the Notice of Charges that would permit an informed response to the Defense. Upon that ground, those affirmative defenses claiming estoppel by Respondents Tolstedt, Russ Anderson, and Julian are stricken.

Respondents aver that "[s]triking an adequately pleaded defense of estoppel at this point 'would be premature'" and therefore "inappropriate."[24] They cite in support *Des Champs* and *Accusearch, Inc.*

In *Des Champs*, the SEC as plaintiffs sought to have defendants' estoppel defense stricken, with the SEC averring "that equitable estoppel is not available as a defense against the United States or its agencies "except in the most serious of circumstances." (# 37 at 6, quoting United States v. RePass, 688 F.2d 154, 158 (2d Cir .1982))."

Equitable estoppel in South Dakota law is described thus:

> There are four elements under South Dakota law that [defendant] must show for equitable estoppel to apply: "(1) [plaintiff] made false representations to or concealed material facts from [defendant]; (2) [defendant] did not have knowledge of the real facts; (3) the misrepresentations or concealment was made with the intention that it should be acted upon; and (4) [defendant] relied upon those misrepresentations or concealment to its prejudice or injury." *E. Side Lutheran Church of Sioux Falls v. NEXT, Inc*., 852 N.W.2d 434, 441 (S.D. 2014).
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> Equitable estoppel "requires an element of deception or gross negligence amounting to constructive fraud." *Am. Bank & Trust v. Shaull*, 678 N.W.2d 779, 791 (S.D. 2004). There can be no [equitable] estoppel if any of these essential elements are lacking, or if any of them have not been proved by clear and convincing evidence." *Cooper v. James*, 627 N.W.2d 784, 789 (S.D. 2001) (quoting Taylor v. Tripp, 330 N.W.2d 542, 545 (S.D. 1983)).[25]

Respondent Strother supported his Affirmative Defense in estoppel by alleging:

1. That the OCC had "unfettered and continuing access to the Bank, including the Bank's personnel and records,"

2. That the OCC was "aware[] of the issues set forth in the Notice,"

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[24] *Id*. at 15, quoting *SEC v. Des Champs*, No. 08-cv-01279, 2009 WL 3068258, at *3 (D. Nev. Sept. 21, 2009), and *FTC v. Accusearch, Inc*., No. 06-cv- 105, 2007 WL 9709752, at *2 (D. Wyo. Mar. 28, 2007);

[25] *LBC Holdings, LLC v. ResQSoft, Inc*., No. 4:17-CV-04135-RAL, 2018 WL 919748, at *3 (D.S.D. Feb. 14, 2018). To the same effect, see Fed. Trade Comm'n v. Accusearch, Inc., No. 06-CV-105-D, 2007 WL 9709752, at *2 (D. Wyo. Mar. 28, 2007): "The Supreme Court has expressly left open the question of whether an estoppel defense may lie against the government." *Heckler v. Community Health Services of Crawford County, Inc*., 467 U.S. 51, 60–61 (1984) ("Though the arguments the Government advances for the rule [that equitable estoppel may never be asserted against the government] are substantial, we are hesitant, when it is unnecessary to decide this case, to say that there are no cases in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government.")

3. That the OCC knowingly and/or recklessly failed to exercise its regulatory authority to identify, detect, and address the putative sales practices misconduct problem; and that

4. Respondent Strother "relied upon the OCC to fulfill its obligations as regulator and suffered prejudice due to the OCC's failure."

Respondent Strother makes no claim that he "did not have knowledge of the real facts," nor that the OCC's failure to exercise its regulatory authority was made with any specific intention, including the intention that Respondent Strother should act on such failure.

Similarly, Respondent McLinko supported his Affirmative Defense in estoppel by alleging:

1. That the OCC has had unfettered access to the Bank and its personnel for the entire duration that the OCC now alleges the Bank had a "sales practices misconduct problem."

2. That the OCC "knowingly and/or recklessly failed to exercise its regulatory authority to stop the putative sales practices misconduct problem," despite having full and complete access to the Bank; and that

3. Respondent McLinko relied upon the OCC to fulfill its obligations as regulator and suffered prejudice due to the OCC's failure."[26]

Here again, like Mr. Strother, Mr. McLinko did not include in the pleading any claim that he lacked knowledge of "the real facts," and made no claim that OCC's failure to exercise its regulatory authority was made with any specific intention, including the intention that Respondent McLinko should act on such failure.

Neither affirmative defense sufficiently claimed the requisite elements of estoppel under South Dakota law.

Equally significant, where the government is a party, is guidance from the Ninth Circuit, which has held that in addition to the four traditional elements of equitable estoppel, "a party seeking to estop the government must establish two additional factors: (1) the government has engaged in affirmative misconduct going beyond mere negligence and (2) the government's act will cause a serious injustice and the imposition of estoppel will not unduly harm the public interest."[27]

The Eighth Circuit offers further guidance. In *Morgan*, the court held:

> Although the Supreme Court has explicitly left undecided the question of whether a private party can ever estop the government, "it is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Cmty. Health Servs. of Crawford County, Inc*., 467 U.S. 51, 60 (1984). In addition to establishing the traditional elements of estoppel, a party seeking to estop the government must first establish that it engaged in affirmative misconduct. See *INS v. Miranda*, 459 U.S. 14, 19, (1982) (per curiam) (when evaluating estoppel claim asserted against government, courts should inquire "whether, as an initial matter, there was a showing of affirmative misconduct"); see also *Rutten v. United States*, 299

[26] Respondents' Joint Response to Enforcement Counsel's Motion to Strike Certain Affirmative Defenses at 12.
[27] *U.S. v. Gamboa–Cardenas*, 508 F.3d 491, 502 (9th Cir.2007) (quoting *Pauly v. U.S. Dep't of Agric*., 348 F.3d 1143, 1149 (9th Cir.2003).

> F.3d 993, 995–96 (8th Cir.2002). This is a heavy burden to carry. See *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 422 (1990) (noting that "we have reversed every finding of estoppel [against the government] that we have reviewed").[28]

Other circuits have found that equitable estoppel "is not available against the government except in the most serious of circumstances ... and is applied with the utmost caution and restraint." *Rojas–Reyes v. I.N.S.*, 235 F.3d 115 (2d Cir. 2000), citing *Estate of Carberry v. Commissioner of Internal Revenue*, 933 F.2d 1124, 1127 (2d Cir.1991) and *Drozd v. INS*, 155 F.3d 81, 90 (2d Cir.1998). "Specifically, estoppel will only be applied upon a showing of "affirmative misconduct" by the government.[29]

Additional case law from within the administrative enforcement jurisprudence establishes that the regulator – here the Securities and Exchange Commission, cannot be subject to estoppel at all. "In the context of a civil enforcement action by the SEC, courts have flatly rejected the estoppel defense for the reason that the Commission may not waive the requirements of an act of Congress nor may the doctrine of estoppel be invoked against the Commission." *SEC v. Keating*, 1992 WL 207918 *3 (citing *SEC v. Culpepper*, 270 F.2d 241, 248 (2d Cir.1959)). Moreover, in *SEC v. Blavin*, 557 F.Supp. 1304, 1310 (E.D.Mich.1983) (*aff'd* 760 F.2d 706 (6th Cir.1985)), the Sixth Circuit found that "the government cannot be estopped from bringing an action in the public interest simply because of alleged misconduct by one or more of its agents."

Guided by this body of law, and having examined the affirmative defenses sounding in estoppel by Mr. Strother and Mr. McLinko, I find both are insufficiently pleaded and should be stricken.

I also find no basis to extend to the other four respondents any claim sounding in estoppel by the claiming respondent, for example, as where Ms. Russ Anderson includes as an "affirmative defense" that she "adopts and incorporates all other affirmative defenses asserted by other Respondents to the extent applicable."[30] The incidents supporting estoppel are those experienced by the individual, such that once facts are established that support an estoppel argument there is no logical reason to conclude the same experiences happened to any other respondent. As such, defenses presented incorporating estoppel defenses by referring to the estoppel defenses of other respondents are stricken, as the claims supporting estoppel, as set forth above, are personal to the party making the claim.[31]

I further find no basis to permit Ms. Tolstedt's claim of laches,[32] or Ms. Russ Anderson's claim of laches and waiver,[33] as no facts are presented by which an informed response is possible. To the same effect, I find Mr. Strother's averment that the OCC has waived its right to bring an enforcement action in this matter given the "OCC's unfettered and continuing access to the Bank" and its "awareness of the issues set forth in the Notice" to be insufficient as a matter of law – as the Defense provides no factual guidance that would permit an informed response,

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[28] *Morgan v. Comm'r*, 345 F.3d 563, 566 (8th Cir. 2003).
[29] *Rojas-Reyes v. I.N.S.*, 235 F.3d 115, 126 (2d Cir. 2000) quoting *Drozd v. INS*, 155 F.3d 81, 90 (2d Cir.1998).
[30] Ms. Russ Anderson's Seventh Affirmative Defense.
[31] See *id*., and Mr. Strother's Ninth Affirmative Defense, Mr. Julian's Ninth Affirmative Defense, and Mr. McLinko's Tenth Affirmative Defense.
[32] Ms. Tolstedt's Second Affirmative Defense.
[33] Ms. Russ Anderson's Fourth Affirmative Defense.

thereby failing to give "fair notice" of the facts supporting the defense in even general terms.[34]

To establish a defense of waiver, Respondents must show the OCC "intentionally relinquished or abandoned a known right."[35] " The waiver defense presented by Mr. Julian avers only that waiver applies "because the OCC was aware of, should have been aware of, and/or approved Respondent Julian's conduct and the conduct of the Bank."[36] This averment is wholly silent regarding any claim that the OCC intentionally relinquished or abandoned a known right, and thus is insufficiently pleaded.

Similarly, Mr. McLinko's waiver defense relies upon the same language used to support his estoppel defense – that the OCC's "unfettered access" to the Bank and its "longstanding awareness of the issues set forth in the Notice" compel the conclusion that the OCC "impliedly approved of, consented to, acquiesced in, and or ratified the acts complained of, and/or waived its right to bring an enforcement action in this matter."[37] As was the case with Mr. Julian's waiver defense, Mr. McLinko's averment identified no known right and made no claim of the intentional relinquishment or abandonment of a known right. Accordingly, the waiver defenses by Mr. McLinko and Mr. Julian are insufficiently pleaded as a matter of law and shall be stricken.

Respondents jointly aver that "[r]atification, acquiescence, consent, and excuse are closely-related defenses, requiring similar proof of knowledge or consent by the government."[38] Each share a common thread in that they are based on claims pertaining to how each individual respondent interacted with and was affected by governmental action. The affirmative defenses offered by Respondents regarding ratification, acquiescence, consent and excuse lack sufficient factual averments to permit an informed response, and thus are insufficient as a matter of law. The response in opposition to Enforcement Counsel's motion to strike added little if any factual ballast to the issue – electing instead to support the ratification-related defenses by simply quoting what had already been presented in the Respondents' respective Answers.[39]

Upon the foregoing findings, the following Affirmative Defenses are STRICKEN:

Respondent Tolstedt's affirmative defenses: laches (No. 2); estoppel and equitable defenses (Nos. 3, 4, 5, 6, 7, 8); the OCC and the Comptroller lack authority to enforce Title 18 of the U.S. Code (No. 9); and conflicts of interest (No. 13).

Respondent Russ Anderson's affirmative defenses: laches, estoppel, and waiver (No. 4).

Respondent Strother's affirmative defenses: laches (No. 5); estoppel (No. 6); and waiver

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[34] *Kohler v. Flava Enters., Inc.*, 779 F.3d 1016, 1019 (9th Cir. 2015). See also *Raquet v. Allstate Corp.*, 348 F. Supp. 3d 775, 786 (N.D. Ill. 2018): "This Court agrees, because Defendant here pleads "waiver, estoppel, ratification, and/or acquiescence" without segregating which facts support each of those separate defenses. Defendant thus fails to apprise Plaintiff and this Court of the predicate for each claimed defense. For this reason alone, Defendant's Second Affirmative Defense must be dismissed."

[35] *United States v. Rite Aid Corp*., No. 2:12-CV-1699-KJM-EFB, 2020 WL 230202, at *6 (E.D. Cal. Jan. 15, 2020), quoting *Desert European Motorcars, Ltd*., 2011 WL 3809933, at *2 (citing *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997)); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

[36] Respondent Julian's Third Affirmative Defense.

[37] Respondent McLinko's Seventh Affirmative Defense.

[38] Respondents' Joint Response to Enforcement Counsel's Motion to Strike Certain Affirmative Defenses at 18.

[39] *Id*. at 18-19.

(No. 7).

Respondent Julian's affirmative defenses: Respondent Julian did not knowingly or recklessly engage in unsafe or unsound practices in conducting the affairs of the Bank or breach any fiduciary duties to the Bank (No. 2); waiver, estoppel, ratification, and/or acquiescence (No. 3); and laches (No. 8).

Respondent McLinko's affirmative defenses: laches (No. 5); estoppel (No. 6); and waiver, ratification, and/or acquiescence (No 7).

SO ORDERED.

Dated April 1, 2020

Christopher B. McNeil
Administrative Law Judge
Office of Financial Institution Adjudication

CERTIFICATE OF SERVICE

On April 1, 2020 I served by email transmission a copy of the foregoing Order Regarding Enforcement Counsel's Motion to Strike Respondents' Affirmative Defenses upon:

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