FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

In the Matter of: **ROBERT S. CATANZARO, DANIELLE M. DESROSIERS, and JOHN C. PONTE,** as institution-affiliated parties of Independence Bank East Greenwich, Rhode Island (Insured State Nonmember Bank)	Docket Nos.: FDIC-22-0112e, FDIC-22-0113k, FDIC-22-0107e, FDIC-22-0108k, FDIC-22-0143b, FDIC-22-0109e, FDIC-22-0110k

ORDER NO. 9: GRANTING IN PART AND DENYING IN PART ENFORCEMENT COUNSEL'S MOTION TO STRIKE RESPONDENT PONTE'S AFFIRMATIVE DEFENSES

The Federal Deposit Insurance Corporation ("FDIC") commenced this action against John C. Ponte ("Respondent Ponte") and two other individuals in their capacities as institution-affiliated parties ("IAPs") of Independence Bank ("the Bank") on February 10, 2023, filing a Notice of Charges ("Notice") that seeks, *inter alia*, an order of prohibition, an order of restitution, and the imposition of a $74,000 civil money penalty against Respondent Ponte pursuant to Section 8 of the Federal Deposit Insurance Act, 12 U.S.C. §§ 1818(b), (e), and (i). On March 3, 2023, Respondent Ponte filed an Answer in which he raises a series of thirty-seven affirmative defenses to the Notice's allegations against him.

Enforcement Counsel for the FDIC ("Enforcement Counsel") now moves to strike each of Respondent Ponte's thirty-seven affirmative defenses on the grounds that they are variously "improperly pled, irrelevant, duplicative, or factually and legally without merit." [1] Motion to Strike Respondent Ponte's Affirmative Defenses ("Motion") at 1. Respondent Ponte opposes this Motion

[1] On March 20, 2023, the other two respondents in this case, Robert S. Catanzaro and Danielle M. Desrosiers, filed their respective Answers to the Notice of Charges. As of the issuance of this Order, Enforcement Counsel has not moved to strike any affirmative defenses set forth in those Answers.

("Response"). Having considered the Motion and Response, the undersigned will grant the Motion in part and deny it in part for the reasons and to the extent detailed below.

The undersigned begins by noting that the FDIC's Uniform Rules of Practice and Procedure ("Uniform Rules"), 12 C.F.R. § 308 *et seq.*, contain no specific provision regarding the mechanics of this Tribunal's consideration of a motion to strike a party's affirmative defenses. To the extent that the Uniform Rules mention motions to strike, it is in the context of discovery requests rather than the disposition of a respondent's substantive defenses to the claims asserted against him. *See* 12 C.F.R. § 308.25(d) (permitting parties who object to a discovery request to "file a motion . . . to strike or otherwise limit the request"). Consequently, in addressing the instant Motion, the undersigned will adopt and apply as appropriate the standards set forth with respect to motions to strike affirmative defenses under Rule 12(f) of the Federal Rules of Civil Procedure ("Federal Rules"),[2] as interpreted under D.C. Circuit and First Circuit law.[3]

Before this Tribunal, as in both the D.C. Circuit and the First Circuit, motions to strike affirmative defenses "are a drastic remedy that courts disfavor."[4] For this reason, the undersigned cautions Enforcement Counsel that such motions should not be regular occurrences in the course of proceedings such as these. Before filing future motions to strike affirmative defenses, Enforcement Counsel should be particularly mindful of the resources expended to contest and resolve them, and should only proceed to the degree that the motion is truly necessary to the efficient disposition of the proceedings.[5]

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[2] *See* Fed. R. Civ. Pro. 12(f) (providing that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter').

[3] The D.C. Circuit and the First Circuit are the twin fora to which Respondent Ponte is entitled to appeal any final decision of the FDIC Board. *See* 12 U.S.C. § 1818(h)(2).

[4] *Moore v. United States*, 318 F. Supp. 3d 188, 190 (D.D.C. 2018); *accord*, *e.g.*, *Manning v. Boston Med. Ctr. Corp.*, 725 F.3d 34, 59 (1st Cir. 2013).

[5] With respect to the instant Motion, for example, it is generally unnecessary for Enforcement Counsel to move to strike any defenses that a respondent terms as an affirmative defense but that actually function as a denial of factual

When considering a motion to strike affirmative defenses, a court should "draw all reasonable inferences in the pleader's favor and resolve all doubts in favor of denial of [that] motion."[6] Such motions should be granted only if "it can be shown that under no set of circumstances could the defenses succeed."[7] Further, before granting a motion to strike on even legally insufficient defenses, courts often require some showing that the removal of the affirmative defense from the case "would avoid wasting unnecessary time and money litigating the invalid defense," that the defense "would tend to significantly complicate the litigation," or that the existence of the defense is otherwise demonstrably prejudicial to the moving party.[8] And an affirmative defense is sufficiently pleaded as long as it "give[s] the opposing party notice of the defense and [] permit[s] the opposing party to develop in discovery and present both evidence and argument . . . responsive to the defense."[9]

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allegations or a negation of the agency's *prima facie* case—that is, defenses that the respondent is unquestionably permitted to assert but do not *per se* constitute "affirmative" defenses that must be pleaded in an answer—unless discovery into such defenses would be genuinely and significantly oppressive, irrelevant, or burdensome. Even in such situations, moreover, Enforcement Counsel will often be better served by seeking to limit the scope of discovery into those defenses within the framework of the motions provided for in Uniform Rules 24(b) and 25(d), *see* 12 C.F.R. §§ 308.24(b), 308.25(d), rather than moving to strike the defenses and thus deny discovery preemptively on the grounds that they have been incorrectly styled as affirmative defenses.

[6] *Moore*, 318 F. Supp. 3d at 190.

[7] *Mastrocchio v. Unnamed Supervisor Special Invest. Unit*, 152 F.R.D. 439, 440 (D. R.I. 1993); *accord*, *e.g.*, *United States v. DynCorp Int'l LLC*, 282 F. Supp. 3d 51, 55 (D.D.C. 2017) (stating that "a motion to strike should only be granted 'if the insufficiency of the defense is clearly apparent' and that "even when the defense presents 'a purely legal question, federal courts are very reluctant to determine disputed or substantial issues of law on a motion to strike'") (quoting 5C Wright & Miller, *Federal Practice and Procedure* § 1381 (3d ed. 2011)).

[8] *SEC v. Gulf & Western Indus.*, 502 F. Supp. 343, 345 (D.D.C. 1980); *accord*, *e.g.*, 5C Wright & Miller, *Federal Practice and Procedure* § 1381 (3d ed. 2011) (absent a showing of prejudice, Rule 12(f) motions often not granted "even when technically appropriate and well-founded").

[9] *Moore*, 318 F. Supp. 3d at 193 (internal quotation marks and citations omitted); *accord*, *e.g.*, *Lawless v. Town of Freetown*, ___ F. 4th ____, 2023 WL 2594264, at *2 (1st Cir. Mar. 22, 2023). In resolving the instant motion, the undersigned need not and does not determine the precise extent to which the "'plausibility' standard by which federal courts examine whether a complaint should be dismissed for inadequacy of the pleading," as set forth in the Supreme Court's *Twombly* and *Iqbal* decisions, supersedes "the traditional notice standard set by Rule 8(c)" with respect to affirmative defenses. *Moore*, 318 F. Supp. 3d at 193 (discussing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Drawing all reasonable inferences in Respondent Ponte's favor, and considering the weight of the caselaw in the D.C. Circuit and Third Circuit following *Iqbal* and *Twombly*, the undersigned finds that her conclusions below regarding the sufficiency, or lack thereof, of Respondent Ponte's affirmative defenses would be the same whichever the applicable standard. *See Paleteria La Michoacana v. Productos Lacteos*, 905 F. Supp. 2d 189, 190-93 (D.D.C. 2012) (discussing and ultimately rejecting

Affirmative defenses are defenses asserted in response to a pleading that preclude liability even if all of the allegations against the respondent are true and all of the elements of the opposing party's claim are proven.[10] All such defenses must be set forth in a respondent's answer to the FDIC's Notice of Charges.[11] By contrast, any defense that "merely negates some element of [the] plaintiff's *prima facie* case is not truly an affirmative defense and need not be pleaded."[12] Nor are denials or contestations of the factual allegations that form the basis of the claim against a respondent considered affirmative defenses.[13]

In the present instance, Enforcement Counsel groups Respondent Ponte's affirmative defenses into several distinct categories, all of which it argues should be stricken and, presumably, Respondent Ponte prohibited from further asserting or developing here. First, Enforcement Counsel contends that affirmative defense 1 is based on the improper and unfounded ground that the Notice fails to state a claim upon which relief can be granted. *See* Motion at 7. Second, Enforcement Counsel argues that affirmative defenses 2-11 and 13 should be stricken as impermissibly vague. *See id.* at 8. Third, Enforcement Counsel asserts that affirmative defenses 2-

application of *Twombly* and *Iqbal* to pleading standard for affirmative defenses); *Hansen v. Rhode Island's Only 24 Hour Truck & Auto Plaza, Inc.*, 287 F.R.D. 119, 122-23 (D. Mass. 2012) (same).

[10] *See Sterten v. Option One Mortg. Corp.*, 479 F. Supp. 2d 479, 482 (E.D. Pa. 2007) ("An affirmative defense is an assertion raising new facts and arguments that, if proven, defeat the plaintiff's claim even if the allegations in her complaint are true."); *accord* 2 Moore's Federal Practice § 8.07[1] (3d ed. 2019); *Affirmative Defense*, Black's Law Dictionary (11th ed. 2019). *See also* Fed. R. Civ. P. 8(c) (listing examples of affirmative defenses and requiring that "any avoidance or affirmative defense" be asserted when responding to a party's pleading).

[11] *See* 12 C.F.R. § 308.19(b) (providing that "[t]he answer must set forth affirmative defenses, if any, listed by the defendant").

[12] *LG Philips LCD Co. v. Tatung Co.*, 243 F.R.D. 133, 137 (D. Del. 2007); *accord*, *e.g.*, *United States v. Williams*, 836 F.3d 1, 13 (D.C. Cir. 2016) (defense that defendant did not possess requisite mental state to commit homicide was not a "legally recognized justification[] or excuse" but rather "[a]n argument that a required element of a crime is missing"); *United States v. Sandoval-Gonzalez*, 642 F.3d 717, 723 (9th Cir. 2011) ("Classic affirmative defenses are those . . . that do not negat[e] any of the elements of the crime but instead go to show some manner of justification or excuse which is a bar to the imposition of . . . liability."); *Elliott & Frantz, Inc. v. Ingersoll-Rand Co.*, 457 F.3d 312, 320-21 (3d Cir. 2006) (failure to plead defense challenging *prima facie* element of cause of action did not result in waiver).

[13] *See Sterten*, 479 F. Supp. 2d at 482-83; *see also*, *e.g.*, *Reis Robotics USA v. Concept Indus.*, 462 F. Supp. 2d 897, 906 (N.D. Ill. 2006) (affirmative defenses "require[] a responding party to admit a complaint's allegations") (internal quotation marks, citation, and emphasis omitted).

5 and 35—for estoppel, waiver, laches, and unclean hands—should be stricken on the grounds that "they do not meet the standards for claims against the government." *Id.* at 8, 9. Fourth, Enforcement Counsel argues that affirmative defenses 6 and 7 improperly challenge the authority of this Tribunal to adjudicate the proceeding. *See id.* at 10-11. Fifth, Enforcement Counsel asserts that affirmative defense 9 should be stricken because this action was timely filed under the applicable statute of limitations. *See id.* at 11. Finally, Enforcement Counsel contends that affirmative defenses 12, 15-34, 36, and 37 should be stricken because they "merely point[] out a defect in the *prima facie* case" and are therefore not properly styled as affirmative defenses. *Id.* at 13. The undersigned addresses each of the arguments in turn.[14]

Affirmative defense 1 (failure to state a claim)

The Notice comprises three hundred and ninety-three paragraphs of detailed pleadings that, as Respondent Ponte himself acknowledges, are "littered with allegations and averments adverse to [him]."[15] Response at 3. There is therefore, as Respondent Ponte also acknowledges, "no dispute that the Notice of Charges satisfies the 'notice pleading' requirement." *Id.* (agreeing further that the Notice "sufficiently pleads the FDIC's position relative to Ponte"). To the extent that Respondent Ponte challenges Enforcement Counsel's "ability to sustain its burden of proof upon specific allegations and averments set forth in the Notice of Charges" (*id.* at 4)—that is, to the

[14] In addition, Enforcement Counsel challenges the sufficiency of affirmative defense 14 as a matter of law. *See* Motion at 12-13. In response, Respondent Ponte concedes that this affirmative defense is now moot and does not oppose it being stricken from his Answer. *See* Response at 6. Affirmative defense 14 is thus duly stricken. The undersigned notes additionally that, in contravention of Rule 1.3 of the undersigned's Ground Rules, Respondent Ponte's submission in opposition of Enforcement Counsel's motion to strike contains no page numbers and is therefore difficult to easily reference and cite. *See* March 21, 2023 Issuance of Ground Rules (Order No. 5) at 2. Respondent Ponte's counsel will take care to avoid this in the future.

[15] *See* Notice ¶¶ 36-88 (detailing Respondent Ponte's alleged participation in a "Bridge Loan Scheme" in connection with Small Business Administration ("SBA") loans that resulted in the fraudulent transfer of risk to the SBA and the Bank and the concealment of material information from the Bank's underwriters and the SBA, constituted a violation of SBA regulations and was otherwise unsafe or unsound, caused loss and risk of loss to the Bank, and unjustly enriched Respondent Ponte); *see also* Motion at 2-5 (summarizing allegations against Respondent Ponte).

extent that he *disputes the factual accuracy of the charges against him or challenges any element of Enforcement Counsel's prima facie case*—he of course may do so. But a brief, perfunctory assertion that the Notice fails to state a claim is no proper vehicle for that, and Enforcement Counsel's motion to strike affirmative defense 1 is accordingly granted.[16]

Affirmative defenses 2-11 and 13

Respondent Ponte suggests that by proffering the names of affirmative defenses with no supporting detail behind them—"Ponte affirmatively pleads waiver," "Ponte affirmatively pleads unclean hands," "Ponte affirmatively pleads negligence"[17]—he is merely preserving his ability to raise those defenses later in these proceedings.[18] But the sufficiency of an affirmative defense is measured against the same notice pleading requirement as that of the Notice itself: the Answer must "give the opposing party notice of the defense and [] permit the opposing party to develop in discovery and present both evidence and argument . . . responsive to the defense."[19] The undersigned agrees with Enforcement Counsel that simply stating "waiver" or "lack of privity" does not provide such notice in a seemingly fact-intensive case such as this one. Waiver of what? Lack of privity by whom? It should not fall to Enforcement Counsel or this Tribunal to guess what is meant. There need not be great detail, but there must be some, and the defenses identified by Enforcement Counsel here largely fail to clear that meager bar.

[16] *See Reis Robotics USA*, 462 F. Supp. 2d at 906 (affirmative defenses "require[] a responding party to admit a complaint's allegations") (internal quotation marks, citation, and emphasis omitted). Moreover, in light of Respondent Ponte's admission that the Notice *does*, in fact, satisfy the notice pleading standard, the undersigned finds that giving Respondent Ponte leave to amend affirmative defense 1 would be futile.

[17] Answer at 85-86.

[18] *See* Response at 4-5 ("Any failure and/or refusal by Ponte to assert and include the same with his timely filed Answer herein may be construed as a waiver of the same, thereby precluding Ponte from raising any such affirmative defense(s) at a later date.").

[19] *Moore*, 318 F. Supp. 3d at 193 (internal quotation marks and citations omitted).

That being said, the undersigned notes that certain of Respondent Ponte's other affirmative defenses essentially replicate some of these defenses, but with more information. It is one thing to claim vaguely that the FDIC lacks jurisdiction (affirmative defenses 6-7); it is another to contend that "at all times relevant hereto, the FDIC has no jurisdiction relative to Ponte insofar as Ponte was not and is not an institution-affiliated party of [the Bank]" (affirmative defense 32). The latter defense, unlike the former, gives Enforcement Counsel some purchase in developing its discovery and presenting its evidence and argument in response. The undersigned therefore grants Enforcement Counsel's motion to strike affirmative defenses 6-7 (lack of jurisdiction), 8 (lack of privity), 10 (negligence), 11 (misfeasance of a third party), and 13 (failure to name a necessary and indispensable party) as impermissibly vague[20]—but concludes that these defenses may yet be asserted to the extent that they have been fleshed out through other, more detailed affirmative defenses that Respondent Ponte has already pled. In other words, Respondent Ponte is not precluded from arguing lack of privity, for example, as an affirmative defense, if he has provided enough information in his Answer to give Enforcement Counsel a good faith understanding of the thrust of that legal theory in the context of this case. But the words alone are not enough.

Affirmative defenses 2-5 and 35 (equitable defenses)

Enforcement Counsel separately argues that affirmative defenses 2-5 (estoppel, waiver, laches, unclean hands) and affirmative defense 35 (asserting that the FDIC had "previously determined" that he was not an IAP of the Bank) should be stricken because (1) "[a] federal agency seeking the enforcement of its own rights is not subject to equitable defenses" and (2) Respondent Ponte has not pled facts that could support an estoppel claim against the FDIC. Motion at 8, 9. The undersigned agrees.

[20] Affirmative defenses 2-5 (estoppel, waiver, laches, unclean hands) and 9 (statute of limitations) are addressed separately below.

First, it is well-settled that equitable defenses such as laches and unclean hands "may not be invoked against a government agency which is attempting to enforce a congressional mandate in the public interest," as the FDIC is assuredly doing here.[21] Courts have been clear that banking agency enforcement actions "clearly implicate public rights."[22] As a result, Respondent Ponte is precluded from asserting these affirmative defenses.

With respect to the defense of waiver, parties must establish government conduct that constitutes "an intentional relinquishment or abandonment of a known right . . . by one having the authority to do so."[23] Not only has Respondent Ponte adduced no facts in his Answer in support of this affirmative defense, but when provided the opportunity in his Response to elaborate upon the grounds for this and the other equitably grounded defenses, he failed to address Enforcement Counsel's arguments in any way.[24] The waiver defense is therefore stricken as well.

Finally, "[a]lthough the fundamental principle of equitable estoppel applies to government agencies as well as private parties, the standard for estopping the government is an exacting one."[25] Among other things, any party asserting estoppel as an affirmative defense against a government agency must show that the agency "engaged in affirmative misconduct," which Respondent Ponte has not done here even to the notice pleading standard.[26] Furthermore, the undersigned agrees with

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[21] *Gulf & Western Indus.*, 502 F. Supp. at 348; *accord DynCorp*, 282 F. Supp. 3d at 57 ("[L]aches and unclean hands are both unavailable as a matter of law when, as here, the government acts in the public interest.") (internal quotation marks and citation omitted), 58 (holding that defendant "cannot sustain an affirmative defense asserting [that] the government engaged in inequitable conduct").

[22] *Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995); *see also*, *e.g.*, *Simpson v. OTS*, 29 F.3d 1418, 1423 (9th Cir. 1994) (stating that "[b]y instituting the cease-and-desist proceedings, the [Office of Thrift Supervision] served a public purpose of the sort Congress envisioned in providing for administrative adjudication"); *Akin v. OTS*, 950 F.2d 1180, 1186 (5th Cir. 1992) (characterizing Section 1818 enforcement proceedings as "a proper adjudicative forum for adjudicating public rights").

[23] *United States v. Honeywell Int'l, Inc.*, 841 F. Supp. 2d 112, 114 (internal quotation marks and citation omitted).

[24] *Compare* Motion at 8-10 (arguing that Respondent Ponte's equitable defenses fail "because they do not meet the standards for claims against the government") *with* Response *generally* (offering no rebuttal to this argument).

[25] *DynCorp*, 282 F. Supp. 3d at 44 (internal quotation marks and citation omitted).

[26] *Morris Commc'ns, Inc. v. FCC*, 566 F.3d 184, 191 (D.C. Cir. 2009). Nor has Respondent Ponte pled any of the other elements of equitable estoppel. *See id.*; *see also* Motion at 8-9 (setting forth elements and further noting that

Enforcement Counsel that Respondent Ponte's assertion in affirmative defense 35 that the FDIC had previously determined that he was not an IAP of the Bank would not, even if true, amount to a successful affirmative defense, because "a change of position . . . does not constitute affirmative misconduct."[27] The Motion is thus also granted as to affirmative defenses 2 and 35.[28]

Affirmative defenses 6-7 (jurisdiction)

Enforcement Counsel argues that Respondent Ponte's jurisdictional defenses "should be stricken because this Tribunal has been specifically given the authority to adjudicate this proceeding." Motion at 10. While true, the undersigned finds that it would be premature to foreclose Respondent Ponte from making any and all jurisdictional arguments. If Respondent Ponte were asserting that this Tribunal has no jurisdiction because there is no authorizing statute, for instance, then Enforcement Counsel's point would be well-taken; such a defense could not succeed "under [any] set of circumstances,"[29] and striking it would be appropriate. But Respondent Ponte's assertions in affirmative defenses 19-22 and 30-32—that he did not participate in the conduct of the affairs of the Bank, that he is not an IAP or a financial institution, that "he is not subject to the FDIC's applicable regulatory scheme"—broadly go towards the agency's ability to bring charges against him and this Tribunal's ability to hear those charges, and he is entitled to develop those claims in discovery to the extent that he can. The undersigned will therefore not grant Enforcement Counsel's Motion in this regard, except that—as noted above—affirmative defenses 6 and 7 are stricken on vagueness grounds.

"[a]ffirmative misconduct requires an affirmative misrepresentation or affirmative concealment of a material fact by the government") (internal quotation marks and citation omitted).

[27] Motion at 9; *see De La Fuente II v. FDIC*, 332 F.3d 1208, 1220 (9th Cir. 2003) (no equitable estoppel where FDIC brought action against individual for conduct "that had been previously investigated by agency inspectors" and not reported as a violation).

[28] As discussed *supra* and *infra*, this does not preclude Respondent Ponte from raising the defense that he is not an IAP of the Bank and is therefore not a proper subject of an FDIC enforcement action, but merely prevents him from relying on any previous agency determinations of his IAP status as part of that defense.

[29] *Mastrocchio*, 152 F.R.D. at 440.

Affirmative defense 9 (statute of limitations)

Enforcement Counsel argues that the limitations period for bringing this enforcement action has not yet run and that, as a result, Respondent Ponte should be precluded from raising the statute of limitations as an affirmative defense. *See* Motion at 11-12. In support, Enforcement Counsel adverts to the five-year statute of limitations for banking agency enforcement actions, 28 U.S.C. § 2462, and attaches a tolling agreement entered into by the FDIC and Respondent Ponte on March 9, 2022, both of which together render this action timely filed in Enforcement Counsel's view. *See id.* at 11. Enforcement Counsel also argues that there is no statute of limitations that is "applicable to the FDIC's authority to issue orders of restitution to provide equitable relief to consumers." *Id.* at 12. The undersigned finds that these are arguments implicating "substantial issues of law" that are more appropriately addressed following discovery through fuller briefing at the summary disposition stage.[30] She therefore denies Enforcement Counsel's Motion to strike affirmative defense 9.

Affirmative defenses 12, 15-34, 36, and 37

Enforcement Counsel challenges the remainder of Respondent Ponte's defenses on the grounds that "they specifically address allegations made in the Notice, which are sufficiently disputed in the Answer," and are therefore not properly termed affirmative defenses. Motion at 13. In addition, Enforcement Counsel states that sixteen of these defenses—which it identifies as numbers 12, 15-34, 36, and 37—all relate in some way to Respondent Ponte's status as an IAP and should therefore be stricken as duplicative. *See id.* The undersigned agrees in part.

[30] *See DynCorp*, 282 F. Supp. 3d at 55 ("[E]ven when the defense presents 'a purely legal question, federal courts are very reluctant to determine disputed or substantial issues of law on a motion to strike'") (quoting 5C Wright & Miller, *Federal Practice and Procedure* § 1381 (3d ed. 2011)).

The defenses at issue here can be generally grouped by topic. As Enforcement Counsel points out, a number of the defenses disclaim in one way or another that Respondent Ponte had the requisite connection to the Bank to be a proper subject of an FDIC enforcement action. The undersigned identifies the defenses that fall within this category as affirmative defenses 12, 15, 17-19, 21-22, 30-32, and 37. Enforcement Counsel correctly notes that these defenses are largely duplicative of each other, and they will be treated as a general averment that Respondent Ponte is not an "institution-affiliated party" within the meaning of 12 U.S.C. §§ 1813 and 1818.[31] Regardless whether or not this can be considered a true affirmative defense—something that depends on whether Respondent Ponte's status as an IAP is a *prima facie* element of the FDIC's case or simply a prerequisite for liability to attach—it is a central question that must be resolved during the pendency of these proceedings, and Respondent Ponte will not be foreclosed from asserting it or developing it as a defense.

Certain other of Respondent Ponte's defenses—specifically, affirmative defenses 20, 23-24, 34, and 36—amount to denials that Respondent Ponte engaged in actionable misconduct or with the requisite culpability.[32] Enforcement Counsel is correct that these defenses are not affirmative defenses. They do not purport to justify or excuse Respondent Ponte's alleged actions in a way that would enable him to avoid liability for otherwise actionable conduct, but rather offer reasons why his conduct was not actionable as a matter of law in the first instance. In essence, they are no different from the generalized denials of misconduct already present in Respondent Ponte's

[31] *See* 12 U.S.C. §§ 1813(u) (defining "institution-affiliated party"), 1818(b)(6) (limiting orders of restitution to insured depository institutions or IAPs), 1818(e)(1)(A) (limiting orders of prohibition to IAPs), 1818(i) (limiting assessment of civil money penalties to insured depository institutions or IAPs).

[32] *See*, *e.g.*, Answer at 88 (affirmative defense 20 pleading that Respondent Ponte "has not knowingly and/or recklessly violated any law and/or regulation with regard to [the Bank]"), 91 (affirmative defense 34 pleading that, during the relevant period, Respondent Ponte was "in compliance with SBA ethical policies, rules, and/or regulations then in effect).

Answer. *See*, *e.g.*, Answer at 10 (denying paragraph 43 of the Notice, which alleges that "Respondent Ponte concealed, or caused to be concealed, information regarding the Bridge Loans and, where applicable, their repayment from SBA Loan proceeds").

Having said this, however, the undersigned finds that no purpose would be served by striking these defenses now. As Enforcement Counsel acknowledges, through these defenses Respondent Ponte is rebutting the allegations against him, something that he is unquestionably permitted to do at this stage of the proceedings. *See* Motion at 13. Even if these defenses are not "affirmative" defenses, he is entitled to develop them through discovery and assert them in dispositive motions or at the hearing. To avoid unnecessarily limiting Respondent Ponte's ability to contest the allegations against him, then, the undersigned will deny Enforcement Counsel's motion to strike affirmative defenses 20, 23-24, 34, and 36.

A third category of defenses asserted by Respondent Ponte are those that seek to argue that the Bank, or certain individuals at the Bank, bear responsibility for the alleged misconduct. *See* Motion at 13-14. To the extent that these defenses—affirmative defenses 16, 25-29, and 33—suggest that other entities are wholly responsible for some or all of the complained-of actions and that Respondent Ponte himself *did not engage in them*, they are effectively denials of misconduct by Respondent Ponte and may be treated as such in accordance with the defenses described above. *See* Answer at 89 (affirmative defense 26 pleading that Respondent Ponte "had no involvement, control, direction, oversight, and/or management with regard to [the Bank's] underwriting processes as part of [the Bank's] SBA Loan Program").

On the other hand, if Respondent Ponte seeks through any of these defenses to argue that he bears no responsibility for the alleged misconduct—even if he did engage in it—because, for example, the Bank's senior management team "exerted complete and total domination, control,

management, and/or influence" over the Bank's loan program and over Respondent Ponte himself (affirmative defense 27), or because the Bank required Ponte to adhere to its SBA Loan Program policies (affirmative defense 29), this is not an affirmative defense or a defense of any kind in these proceedings. As Enforcement Counsel observes (*see* Motion at 14), the FDIC Board has held that a respondent in an enforcement action under Sections 1818(e) and 1818(i) "cannot escape liability simply because others have contributed to the bank's loss as well."[33] Furthermore, it is no defense to say that Respondent Ponte's actions were in conformance with Bank policy if the policy itself constituted actionable misconduct and it can be shown that Respondent Ponte acted with a culpable state of mind.[34] The undersigned will therefore permit the assertion of these defenses only to the degree that they function as a denial of misconduct by Respondent Ponte, rather than a sharing of the blame or an assertion that he was only following orders.

Summary and Conclusions

As discussed more fully above, the undersigned will strike (1) affirmative defenses 1-5, 14, and 35 in their entirety; (2) affirmative defenses 6-8, 10-11, and 13 except to the extent that they are more specifically detailed elsewhere in Respondent Ponte's Answer; (3) affirmative defenses 12, 17-19, 21-22, 30-32, and 37 as duplicative except to the extent that they are subsumed within Respondent Ponte's averment in affirmative defense 15 that he was not an IAP of the Bank; and (4) affirmative defenses 16, 25-29, and 33 except to the extent that they function as outright denials of misconduct that, though not strictly affirmative defenses, Respondent Ponte may

[33] *In the Matter of Michael R. Sapp*, Nos. 13-477(e) & 13-477(k), 2019 WL 5823871, at *15 (Sep. 17, 2019) (FDIC final decision); *see also Landry v. FDIC*, 204 F.3d 1125, 1139 (D.C. Cir. 2000) (IAP responsible for misconduct causing loss even if "others may have been more guilty"); *In the Matter of Jeffrey Adams*, No. 93-91(e), 1997 WL 805273, at *5 (Nov. 12, 1997) (FDIC final decision) (noting that "multiple factors, and individuals, may contribute to a bank's losses" without absolving respondent of liability).

[34] *See* Motion at 14 ("The only issue material to this proceeding is whether Respondent Ponte's conduct satisfies the statutory criteria for the violations and the unsafe or unsound practices.").

develop through discovery. The undersigned denies Enforcement Counsel's motion to strike affirmative defenses 9, 15, 20, 23-24, 34, and 36 (and those defenses in (2), (3), and (4) above to the extent detailed), as she finds that they are adequate to give Enforcement Counsel fair notice and allow it "to develop in discovery and present both evidence and argument . . . responsive to the defense."[35]

SO ORDERED.

Issued: April 4, 2023

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication

[35] *Moore*, 318 F. Supp. 3d at 193 (internal quotation marks and citation omitted).

CERTIFICATE OF SERVICE

On April 4, 2023, I served a copy of the foregoing **Order** upon the following individuals via email:

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