**FEDERAL DEPOSIT INSURANCE CORPORATION**
**WASHINGTON, D.C.**

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| In the Matter of<br><br>**HARRY C. CALCUTT III**<br>Individually and as an Institution-Affiliated party of<br><br>NORTHWESTERN BANK<br>TRAVERSE CITY, MICHIGAN<br>(INSURED STATE NONMEMBER BANK) | FDIC-12-568e<br>FDIC-13-115k<br><br>ALJ McNeil |

## ORDER REGARDING MOTION TO STRIKE AFFIRMATIVE DEFENSES

On May 22, 2019, Respondent filed his Second Amended Answer to Notice, which included seven affirmative defenses.[1] On June 7, 2019, Enforcement Counsel for the FDIC filed a Motion seeking to strike each affirmative defense.[2] On July 1, 2019, Respondent filed his memorandum in opposition.[3]

Respondent's first affirmative defense is premised on the legal claim that the present proceeding "should be dismissed because it fails to comply with the Board's Order in Pending Cases, issued on July 19, 2019."[4] Enforcement Counsel aver the defense was "improperly pled as an affirmative defense as the perceived procedural deficiency would not void the Respondent's liability for the charged misconduct."[5] Respondent responded by noting the legal claim had been addressed by the FDIC Board in its June 20, 2019 Order on Respondent's Motion for Interlocutory Review, "granting in part Respondent's Motion on the same basis as alleged in the First Affirmative Defense."[6] Upon this premise, Respondent asserts the motion to strike is moot.[7]

Inasmuch as the Board's June 20, 2019 controls the procedures to be followed in this administrative enforcement action, the motion to strike is denied as moot. For the same reason, Enforcement Counsel's motion with respect to Respondent's Second, Third and Fourth Affirmative Defenses (addressing constitutional issues also raised in Respondent's Motion for Interlocutory Review) is denied, given the Board's clear instruction that the issues raised are to be addressed during the hearing.

[1] Second Amended Answer to Notice at 32-35.
[2] Motion to Strike Affirmative Defenses, dated June 7, 2019.
[3] Respondent's Opposition to the FDIC's Motion to Strike Affirmative Defenses from Respondent's Second Amended Answer.
[4] Second Amended Answer to Notice at 32.
[5] Motion to Strike Affirmative Defenses at 3.
[6] Respondent's Opposition to the FDIC's Motion to Strike Affirmative Defenses from Respondent's Second Amended Answer at 4.
[7] *Id.*

Respondent's Fifth Affirmative Defense is based on a claim that the "proceeding is barred by laches because the FDIC has failed to provide Respondent with a constitutional hearing for over five years."[8] Enforcement Counsel counter with the legal premise that laches, or "neglect of duty on the part of officers of the government" is "no defense to a suit to enforce a public right or protect a public interest."[9]

Enforcement Counsel advance their argument by noting the application of what both parties refer to as the *Summerlin* rule.[10] Under *Summerlin*, the Court established that the equitable doctrine of laches is not available in proceedings involving the preservation of "public rights, revenues, and property from injury and loss," against claims of the "negligence of public officers."[11]

Respondent asserts the question "is not as simple as the FDIC claims."[12] While not disputing the applicability of the *Summerlin* rule here, Respondent cites to *Gregor*[13] by noting that in that holding, the trial court found the question of whether laches existed as a defense was "an open and disputed question of law that the Court declines to decide" at that time.[14]

I find unpersuasive Respondent's assertion that the question presented is more complicated than it at first appears. In *Hatchett*,[15] the Sixth Circuit made plain the point, thus:

> It is well established that the Government generally is exempt from the consequences of its laches. See *United States v. Summerlin*, 310 U.S. 414, 416, 60 S.Ct. 1019, 84 L.Ed. 1283 (1940) ("It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights."); *Guar. Trust Co. v. United States*, 304 U.S. 126, 132, 58 S.Ct. 785, 82 L.Ed. 1224 (1938) (noting the continuing vitality of the rule that the sovereign is exempt from its own laches); *United States v. Peoples Household Furnishings, Inc.*, 75 F.3d 252, 254 (6th Cir.1996) ("The ancient rule ... 'that the sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations'—has enjoyed continuing vitality for centuries.") (citation omitted); *United v. Weintraub*, 613 F.2d 612, 618 (6th Cir.1979) ("The principle [that the Government is exempt for the consequences of its own laches] is well established in this country.").[16]

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[8] Respondent's Opposition to the FDIC's Motion to Strike Affirmative Defenses from Respondent's Second Amended Answer at 8.
[9] Motion to Strike Affirmative Defenses at 6, quoting *Utah Power & Light Co. v. United States,* 243 US. 389, 409 (1917).
[10] Motion to Strike Affirmative Defenses at 6, quoting *US. v. Philip Morris, Inc*., 300 F. Supp.2d 61, 64 (D.D.C. 2004), which quotes *United States v. Summerlin*, 310 US. 414, 416 (1940); Respondent's Opposition to the FDIC's Motion to Strike Affirmative Defenses from Respondent's Second Amended Answer at 9.
[11] Motion to Strike Affirmative Defenses at 6, quoting *US. v. Philip Morris, Inc*., 300 F. Supp.2d at 64, which quotes *Summerlin*, 310 US. at 416.
[12] "); Respondent's Opposition to the FDIC's Motion to Strike Affirmative Defenses from Respondent's Second Amended Answer at 9.
[13] *Resolution Tr. Corp. v. Gregor*, 1995 WL 931093 (E.D.N.Y. Sept. 29, 1995).
[14] *Id*., quoting *Gregor*, 1995 WL 931093 at *4.
[15] *Hatchett v. United States*, 330 F.3d 875 (6th Cir. 2003).
[16] *Hatchett*, 330 F.3d at 887.

Cases relied upon by Respondent (*Gladstone,*[17] *Clearfield Trust,*[18] *Occidental Life,*[19] *Herman,*[20] *PIE,*[21] *Admin. Enters.,*[22] *Vanderweele,*[23] *Lenz,*[24] *Roldan Fonesca,*[25] *O'Melveny & Myers,*[26] *PowerPick Player's Club,*[27] *and Royal Oak*[28])[29] do not compel a contrary finding.

*Gladstone* construed Massachusetts common law, and held that "[t]he defense of laches is not available to the defendants where the proceeding is brought by an authorized public agency to enforce the law of the Commonwealth."[30] The legal claims presented in *Clearfield Trust* did not include an application of *Summerlin*, instead involving an analysis of the rights and duties of the United States on commercial paper which it issues, claims that are inapplicable here, being governed by federal rather than state equitable principles.[31]

The Court in *Occidental Life* addressed *Summerlin*, but only through Justice Rehnquist's dissent, in which the dissenters restated the general rule that "the decisive fact which excepts the general applicability of these statutes is that the United States is suing to enforce '"its rights."'[32]

Also unpersuasive is Respondent's assertion that "[b]ecause the FDIC Board has held that a removal and prohibition order is in the "form of equitable or remedial relief, in the nature of an injunction," the equitable doctrine of laches should be fully applicable."[33] Given the limiting instructions provided by the Sixth Circuit in *Hatchett*, above, and finding no language in *Lenz* addressing the *Summerlin* rule, I find no legal basis to conclude that the FDIC's decision in *Lenz* somehow extended the doctrine of laches to these enforcement proceedings.

References to holdings in the First, Seventh, and Eleventh Circuits (*Roldan Fonesca*, *Vanderweele*, *Admin. Enters*., *PIE*, and *Herman*) do not provide a substantial legal basis to abrogate the Court of Appeals' holding in *Hatchett*.

Upon review of the authorities presented by the parties regarding Respondent's presentation of the laches affirmative defense, I find the claim is not properly before this Tribunal; specifically, that the *Summerlin* Rule applies to this administrative enforcement action, and that under that Rule Respondent's Fifth Affirmative Defense insufficient as a matter

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[17] *F.D.I.C. v. Gladstone*, 44 F. Supp. 2d 81 (D. Mass. 1999).
[18] *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 366 (1943).
[19] *Occidental Life Ins. Co. of California v. E.E.O.C.,* 432 U.S. 355, 382 (1977).
[20] *Herman v. S.C. Nat'l Bank*, 140 F.3d 1413, 1427 (11th Cir. 1998).
[21] *N.L.R.B. v. P*I*E Nationwide, Inc*., 894 F.2d 887, 893–94 (7th Cir. 1990).
[22] *United States v. Admin. Enters., Inc*., 46 F.3d 670, 673 (7th Cir. 1995).
[23] *Resolution Tr. Corp. v. Vanderweele*, 833 F. Supp. 1383, 1388 (N.D. Ind. 1993).
[24] *In re Lenz*, 2003 WL 23273837 (FDIC Dec. 4, 2003).
[25] *F.D.I.C. v. Roldan Fonseca*, 795 F.2d 1102 (1st Cir. 1986).
[26] *O'Melveny & Myers v. F.D.I.C.,* 512 U.S. 79, 83 (1994).
[27] *Att'y Gen. v. PowerPick Player's Club of Mich., LLC*, 783 N.W.2d 515, 535–36 (Mich. Ct. App. 2010).
[28] *Royal Oak Twp. v. Sch. Dist. No. 7, Royal Oak Twp*., 33 N.W.2d 908, 911 (Mich. 1948).
[29] Respondent's Opposition to the FDIC's Motion to Strike Affirmative Defenses from Respondent's Second Amended Answer at 9-00 and cases cited therein.
[30] *Gladstone,* 44 F. Supp. 2d at 90, quoting *Board of Health of Holbrook v. Nelson*, 351 Mass. 17, 217 N.E.2d 777 (1966) (citing *Town of Lincoln v. Giles*, 317 Mass. 185, 57 N.E.2d 554 (1944)).
[31] *Clearfield Tr. Co*., 318 U.S. at 366.
[32] *Occidental Life Ins. Co*., 432 U.S. at 382, quoting *Summerlin,* 310 U.S. at 416.
[33] Respondent's Opposition to the FDIC's Motion to Strike Affirmative Defenses from Respondent's Second Amended Answer at 10, quoting *In re Lenz*, 2003 WL 23273837, at *2.

of law and shall be stricken. Accordingly, Enforcement Counsel's Motion with respect to that Defense is GRANTED.

In Respondent's Sixth Affirmative Defense, Respondent asserts the FDIC should be barred from asserting its claims because of entrapment.[34] In support, Respondent identifies the following factual premises:

> "The FDIC set out to prove that Mr. Calcutt was dishonest by demanding a meeting on short notice two years after the events in question";
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> That the FDIC "conceal[ed] from Mr. Calcutt the reasons for its inquiries regarding certain loans and transactions with Nielson-related entities";
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> That the FDIC "with[eld] documents Mr. Calcutt had either not seen or been given an opportunity to refresh his recollection";
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> That the purpose of this conduct "was to elicit incorrect answers to questions the examiners posed to Mr. Calcutt";
>
> That a further purpose was to "deprive Mr. Calcutt of the opportunity to consult with counsel";
>
> And that the FDIC did so "in a manner documented only by the examiners' subjective and biased recollections."[35]

The Affirmative Defense is coupled with the following speculative statement:

> Had FDIC Examiners made Mr. Calcutt aware of their reasons or these documents and given Mr. Calcutt adequate notice and time to prepare, including by consulting counsel, then Mr. Calcutt would have had an opportunity to investigate and refresh his recollection prior to answering the Examiners' questions.[36]

As presented, the Sixth Affirmative Defense fails to state the elements required when presenting an entrapment defense. Such a defense is properly stated when it alleges the government agents either engage in impermissible conduct that would induce a law-abiding person situated similarly to the respondent to commit the crime, or engage in conduct so reprehensible that it cannot be tolerated by a civilized society.[37] "It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play."[38]

Respondent's factual allegations are that FDIC investigators required Respondent meet with them on short notice, without providing him with sufficient time to prepare for the meeting, intending to present questions that regarded information contained on documents he had not seen so as to permit him to provide correct responses. Nothing in this recitation of alleged facts suggests efforts by the Government to deceive Respondent, nor is it suggested that

[34] Second Amended Answer to Notice at 34.
[35] *Id*.
[36] *Id*.
[37] *People v. Williams*, 196 Mich. App. 656, 661, 493 N.W.2d 507, 510 (1992).
[38] *United States v. Russell*, 411 U.S. 423, 436 (1973).

by their conduct the Examiners induced or sought to induce Respondent to engage in unsafe or unsound banking practices.

Without more, the defense is insufficient on its face. Accordingly, Enforcement Counsel's Motion that Respondent's Sixth Affirmative Defense be stricken is GRANTED.

Respondent's Seventh Affirmative Defense alleged the Examiner's conduct violated the FDIC's own procedural rules.[39] Specifically, Respondent alleged Examiners questioned Mr. Calcutt in a manner that did not comply with 12 CFR § 308.145.[40]

The cited regulation provides as follows:

> An investigation shall be initiated only upon issuance of an order by the Board of Directors; or by the General Counsel, the Director of the Division of Risk Management Supervision, the Director of the Division of Depositor and Consumer Protection, or their respective designees. The order shall indicate the purpose of the investigation and designate FDIC's representative(s) to direct the conduct of the investigation. Upon application and for good cause shown, the persons who issue the order of investigation may limit, quash, modify, or withdraw it. Upon the conclusion of the investigation, an order of termination of the investigation shall be issued by the persons issuing the order of investigation.[41]

Respondent avers the FDIC's examiners proceeded in the investigation "without notifying him of the existence of the investigation, or without giving him the opportunity to consult with legal counsel before questioning him in a manner intended to elicit statements documented only by the examiners' subjective and biased recollections."[42] He asserts that "[t]his violates the *Accardi* principle, which obligates the FDIC to comply with its own procedural rules, as well as Respondent's constitutional right to due process."[43]

Nothing in the regulation relied upon by Respondent, however, required the FDIC to notify Respondent of the existence of the investigation (if in fact what is alleged in the Notice of Charges can be characterized as an investigation, instead of an examination); nor does the regulation provide Respondent with the right to consult with counsel before questioning begins. On its face, therefore, the affirmative defense is insufficiently pleaded.

Enforcement Counsel responded by asserting the absence of any factual claim that establishes the provisions of 12 CFR § 308.145 apply in this enforcement action.[44] They assert that "Calcutt's meetings and conversations with examiners were part of the supervisory examination of the Bank", a process not within the scope of 12 CFR § 308.145 – because that regulation applies only to investigations conducted pursuant to Section 10(c). According to Enforcement Counsel, 12 CFR § 308.145 describes conduct during investigations "conducted

[39] Respondent's Opposition to the FDIC's Motion to Strike Affirmative Defenses from Respondent's Second Amended Answer at 35.
[40] Id.
[41] 12 CFR § 308.145.
[42] Respondent's Opposition to the FDIC's Motion to Strike Affirmative Defenses from Respondent's Second Amended Answer at 35.
[43] Id.
[44] Motion to Strike Affirmative Defenses at 10.

pursuant to 10(c) of the FDIA."[45] An examiner asking questions of the highest officer of the Bank, Enforcement Counsel assert, "does not involve any of the hallmarks of a Section 10(c) [12 U.S.C. 1820(c)] investigation."[46]

Enforcement Counsel noted the provisions of 12 CFR § 308.145 apply only in those instances described in 12 CFR § 308.144:

> The procedures of this subpart shall be followed when an investigation is instituted and conducted in connection with any open or failed insured depository institution, any institutions making application to become insured depository institutions, and affiliates thereof, or with other types of investigations to determine compliance with applicable law and regulations, pursuant to section 10(c) of the FDIA (12 U.S.C. 1820(c)) or section 5(d)(1)(B) of HOLA (12 U.S.C. 1464(d)(1)(B)). The Uniform Rules and subpart B of the Local Rules shall not apply to investigations under this subpart.[47]

The Notice of Charges sets forth the statutory and regulatory basis for this enforcement action, where Respondent is notified that the FDIC seeks a prohibition order pursuant to Section 8(e) of the FDI Act, along with a monetary penalty pursuant to Section 8(1)(2) of that Act. There is in the record no factual basis for finding the provisions of 12 CFR § 308.145 apply.

Respondent asserts the following in support of his Seventh Affirmative Defense:

> The FDIC's argument that it is allowed to surreptitiously investigate Respondent is dangerously circular. The argument's premise is that the FDIC need only comply with investigatory procedures after it decides to launch an investigation but may use such procedures (or any other procedures) whether or not it has instituted an investigation. This cannot be correct. If the FDIC wants to use investigatory procedures and take Respondent's deposition for the record, then it must begin an investigation and afford Respondent the right to due process.[48]

Respondent offers no authority for this proposition, and from my review of the legal and factual premises presented by the parties I find the claim to be without merit.

Respondent asserted that "[u]nder *Accardi* and its progeny, it 'is an elemental principle of administrative law that agencies are bound to follow their own regulations.'"[49] There being

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[45] *Id.*
[46] *Id.*
[47] 12 C.F.R. § 308.144.
[48] Respondent's Opposition to the FDIC's Motion to Strike Affirmative Defenses from Respondent's Second Amended Answer at 17.
[49] *Id.*, quoting *Wilson v. Comm'r of Soc. Sec.,* 378 F.3d 541, 545 (6th Cir. 2004); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures."); *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954). "An agency's failure to follow its own regulations tends to cause unjust discrimination and deny adequate notice and consequently may result in a violation of an individual's constitutional right to due process"; *Sameena Inc. v. U.S. Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998) (quotation omitted) (holding government violated due process rights in failing to comply with binding regulations that require an evidentiary hearing).

no showing that the FDIC has failed to follow 12 CFR § 308.145 or any other regulation, the affirmative defense fails.

Respondent further asserts that his Seventh Affirmative Defense "requires this Court to resolve numerous difficult factual and legal issues," implicating Respondent's Fifth and Sixth Amendment rights.[50] This argument, based on Respondent's assertion that the FDIC has in some way failed to follow its own regulations, is rejected for the reasons set forth above.

Accordingly, Enforcement Counsel's Motion that Respondent's Seventh Affirmative Defense be stricken is GRANTED.

Respondent supplemented his responses to the specific affirmative defenses by asserting that through Enforcement Counsel's Motion to Strike, they are, in effect, "ask[ing] for partial summary disposition without allowing for any factual development." [51] The record does not support this assertion. The Motion on its face addresses only those claims presented by Respondent in his amended answer as affirmative defenses. The Motion (and Respondent's responses thereto) reflect the parties' intention that only those affirmative defenses that are properly pleaded should be addressed during the hearing.

Also included in his Response is the assertion that Enforcement Counsel's Motion is untimely.[52] Seeking to apply Federal Rule of Civil Procedure 12(f), Respondent asserts that motions to strike insufficient defenses must be presented within 21 days after service.[53] Reasoning that his First and Second Affirmative Defenses in his Second Amended Answer were "the same allegations" as had been presented in his First Amended Answer, Respondent asserts that inasmuch as Enforcement Counsel made no objection to these defenses when they first were raised, "the FDIC waited over four-and-a-half years to move to strike," rendering its Motion untimely.[54]

I find Respondent's reasoning to be unsound and unpersuasive. Respondent extended affirmative defenses in his Second Amended Answer, and Enforcement Counsel promptly raised objections to those defenses. Inasmuch as Respondent has provided no authority for the proposition that this administrative tribunal operates under the provisions of Fed. R. Civ. P. 12(f), and upon the finding that Enforcement Counsel's present motion was timely, Respondent's claim with respect to the timely objection to these defenses is without merit and is rejected.

For the foregoing reasons, Enforcement Counsel's Motion to Strike Respondent's First, Second, Third, and Fourth Affirmative Defenses is DENIED. Enforcement Counsel's Motion to Strike Respondent's Fifth, Sixth, and Seventh Affirmative Defenses is GRANTED.

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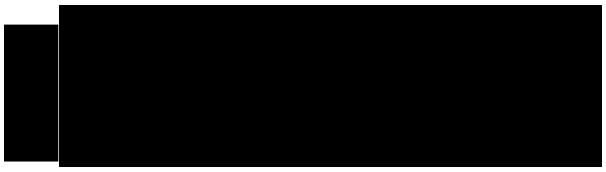
[50] Respondent's Opposition to the FDIC's Motion to Strike Affirmative Defenses from Respondent's Second Amended Answer at 16.
[51] Respondent's Opposition to the FDIC's Motion to Strike Affirmative Defenses from Respondent's Second Amended Answer at 12.
[52] *Id*. at 13.
[53] *Id*.
[54] *Id*.

SO ORDERED.

Dated: July 3, 2019



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

**CERTIFICATE OF SERVICE**

On July 3, 2019, I served by electronic mail the foregoing Order Regarding Motion to Strike Affirmative Defenses upon:

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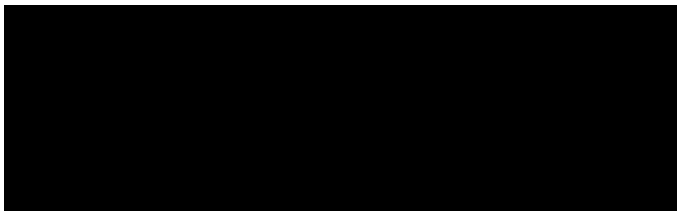

Christopher B. McNeil
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