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

In the Matter of: **SAUL ORTEGA,** Former Chief Financial Officer, Director, President, Chief Executive Officer, and Chairman of the Board, And **DAVID ROGERS, JR.,** Former Chairman of the Board First National Bank Edinburg, Texas	Docket Nos.: AA-EC-2017-44 AA-EC-2017-45

ORDER DENYING ENFORCEMENT COUNSEL'S MOTION FOR PARTIAL SUMMARY DISPOSITION AND GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION FOR SUMMARY DISPOSITION ON THE STATUTE OF LIMITATIONS

The Office of the Comptroller of the Currency ("OCC") commenced this action against Respondents Saul Ortega and David Rogers, Jr. ("Respondents") on September 25, 2017, filing a Notice of Charges ("Notice") that seeks an order of prohibition and the imposition of a first- and second-tier civil money penalty against each Respondent pursuant to 12 U.S.C. §§ 1818(e) and (i). Enforcement Counsel for the OCC ("Enforcement Counsel") and Respondents have now filed cross-motions for summary disposition on the issue of whether the Notice against Respondents was timely filed under the five-year statute of limitations, 28 U.S.C. § 2462, that both parties agree governs OCC enforcement actions.[1]

[1]Enforcement Counsel also has moved for summary disposition on Respondents' affirmative defense that this proceeding violates the Due Process Clause of the United States Constitution and the Administrative Procedures Act, and that it otherwise denies Respondents "a meaningful opportunity to be heard." Answer at 9 (Ninth Affirmative

For the reasons set forth below, and to the extent elaborated herein, the undersigned denies the OCC's Motion for Partial Summary Disposition ("OCC Mot.") and grants in part and denies in part Respondents' Motion for Summary Disposition ("Resp. Mot."). Specifically, the undersigned ***grants*** summary disposition in favor of Respondents as to the following:

- accounting-related allegations against Respondents in Articles III, IV, and V, except that summary disposition is denied as to such allegations against Respondent Ortega with respect to the four Call Reports issued after September 25, 2012;
- lending-related allegations against Respondents in Articles III and IV, to the extent that Enforcement Counsel alleges that the Bank first incurred a loss on the loans at issue prior to September 25, 2012;
- any assessment of a first-tier civil money penalty against Respondents in Articles III, IV, V, and VI, except to the extent that such penalty is warranted in connection with (1) the accounting-related allegations against Respondent Ortega with respect to the four Call Reports issued after September 25, 2012, or (2) any lending-related allegations against Respondent Ortega for misconduct occurring on or after September 25, 2012; and
- any assessment of a second-tier civil money penalty against Respondents in Articles III, IV, V, and VI, except to the extent that such penalty is warranted in connection with (1) alleged misconduct by either Respondent that first caused the Bank more than minimal loss on or after September 25, 2012, or (2) allegations against Respondent Ortega in Articles III, IV, or V that formed part of a pattern of

Defense); *see* OCC's Motion for Partial Summary Disposition ("OCC Mot.") at 16-21. As discussed *infra* in Part V, the undersigned will deny Enforcement Counsel's motion for summary disposition on this issue without prejudice subject to a submission by Respondents clarifying whether they still intend to assert this defense.

misconduct extending beyond September 25, 2012.

Correspondingly, the undersigned ***denies*** summary disposition in favor of Respondents as to the following:

- accounting-related allegations against Respondent Ortega in Articles III, IV, and V with respect to the four Call Reports issued after September 25, 2012;
- lending-related allegations against Respondents in Articles III and IV, except that Respondents may raise the statute of limitations as an affirmative defense as to alleged misconduct in connection with any loan with respect to which the Bank first incurred a loss prior to September 25, 2012;
- lending-related allegations against Respondent Rogers in Article VI, except that Respondent Rogers may raise the statute of limitations as an affirmative defense as to allegations regarding all loans at issue in Article VI to the extent that ***any*** of those loans first caused the Bank to incur loss prior to September 25, 2012;
- any assessment of a first-tier civil money penalty in connection with (1) allegations against Respondent Ortega in Articles III, IV, or V regarding the four Call Reports issued after September 25, 2012, or (2) any alleged lending-related misconduct by Respondent Ortega occurring on or after September 25, 2012; and
- any assessment of a second-tier civil money penalty in connection with (1) alleged misconduct by either Respondent that first caused the Bank more than minimal loss on or after September 25, 2012, or (2) allegations against Respondent Ortega in Articles III, IV, or V that formed part of a pattern of misconduct extending beyond September 25, 2012.

I. Background and Summary of Allegations

This action concerns alleged misconduct by Respondents in their respective capacities as officers and directors of First National Bank of Edinburg, Texas ("the Bank"). The parties agree that Respondent Rogers resigned from his position of Chairman at the Bank in or around November 2011 and had no further involvement in the Bank's affairs after that date. Notice ¶ 6; Answer at 2. Respondent Ortega, conversely, remained at the Bank until its closure in September 2013, serving as the Bank's President, Chief Executive Officer ("CEO"), and Chairman from sometime in 2012 through that final date. Notice ¶ 7; Answer at 2. Both Respondents served on the Bank's Board of Directors and as voting members of the Bank's Loan & Discount Committee ("L&D Committee") between 2008 and 2011. Notice ¶¶ 9-10; Answer at 2.

Enforcement Counsel alleges that, in their positions at the Bank, Respondents were responsible for, among other things, "ensuring that the Bank filed materially accurate Consolidated Reports of Condition and Income ("Call Reports"), which included ensuring the Call Reports were consistent with generally accepted accounting principles ("GAAP") and regulatory reporting requirements." Notice ¶ 14. Respondents also allegedly "were responsible for ensuring that the Bank complied with OCC enforcement actions and implemented corrective actions to address Matters Requiring Attention ("MRAs") in OCC Reports of Examination ("ROEs")." *Id.* ¶ 15.

The gravamen of Enforcement Counsel's allegations against Respondents, as described in Articles III, IV, and V of the Notice, is that "[b]eginning in or around late 2008, Respondents masked the Bank's deteriorating financial condition through misconduct that inflated earnings and capital and improperly reduced or delayed reported losses." *Id.* ¶ 28. Enforcement Counsel also alleges, in Article VI, that Respondent Rogers "placed the interests of a member of his immediate family above those of the Bank" in connection with "one series of unsafe or unsound loans" taking

place in or around April 2009 and January 2010. *Id.* ¶ 29; *see id.* ¶¶ 110-129.

In its summary disposition briefing, Enforcement Counsel distinguishes between two general categories of misconduct alleged in the Notice: "lending-related misconduct" and "improper accounting practices." OCC Mot. at 9. Enforcement Counsel likewise distinguishes between the actionable effects of each category of misconduct, stating that "the effects in this case are the *losses suffered by the Bank* as a result of the *lending-related misconduct* and the *prejudice to the Bank's depositors* as a result of the *improper accounting practices*." *Id.* at 10 (emphasis added). According to Enforcement Counsel, Articles III and IV of the Notice allege both lending-related misconduct and improper accounting practices, while Article V alleges only improper accounting practices and Article VI alleges only lending-related misconduct. *See id.* at 9-15.

Article III (Capital Raise Loans): With respect to lending-related misconduct, Article III alleges that "[f]rom approximately April 2009 to March 2011, Respondents originated, approved, and/or ratified unsafe or unsound loans to finance the purchase of stock in the Holding Company ("Capital Raise Loans") and then transferred the proceeds to the Bank to raise capital." Notice ¶ 31. Enforcement Counsel further alleges that 63 unsafe or unsound Capital Raise Loans ultimately were originated in this way, resulting in a sale of "approximately $21 million of Holding Company stock to the Capital Raise Loan borrowers." *Id.* ¶ 36. According to the Notice, "[t]he Bank incurred $387,241 in losses on two of the Capital Raise Loans in June 2013." *Id.* ¶ 42. The Notice also alleges that "[t]he [Deposit Insurance Fund ("DIF")] incurred approximately $3.8 million in losses on the Capital Raise Loans" following the Bank's closure.[2] *Id.* ¶ 43.

[2] In its Motion, Enforcement Counsel asserts that "losses attributable to the Bank" in connection with the Capital Raise Loans "include the losses incurred by the FDIC as receiver for the Bank on or after the Bank's failure on September 13, 2012." OCC Mot. at 5 n.4; *see also id.* at 5 (stating that "the Bank incurred approximately $4,195,299 in losses on the Capital Raise Loans on or after September 25, 2012"). The undersigned notes that the DIF and the FDIC as receiver for the Bank are entirely distinct entities and that losses suffered by one are not appropriately conflated with losses suffered by the other. *See*, *e.g.*, 12 U.S.C. §§ 1821(a)(4)(A) (establishment of DIF), 1821(d)(2) (powers of FDIC as receiver); *see also Zucker v. Rodriguez*, 919 F.3d 649, 655 (1st Cir. 2019) (noting that DIF "is ultimately

With respect to improper accounting practices, Article III alleges that "from June 30, 2009 to June 30, 2013, Respondents caused the Bank to improperly inflate its capital by including the proceeds of the Capital Raise Loans as regulatory capital in the Bank's [quarterly] Call Reports."[3] *Id.* ¶ 31. As a result, and because "Respondents never caused the Bank to correct [these] improper accounting practices," the Call Reports filed by the Bank during this period allegedly contained materially inaccurate information, causing the Bank's capital "to be overstated until the Bank closed in September 2013." *Id.* ¶ 51. Enforcement Counsel alleges that this overstatement of capital "masked the Bank's true financial condition and prevented the Bank's regulators and depositors from determining whether the Bank had adequate capital to safeguard deposits." *Id.* ¶ 53. In other words, as Enforcement Counsel elsewhere asserts, "[e]ach Call Report that the Bank filed with materially overstated capital caused prejudice to the interests of the Bank's depositors." OCC's Statement of Material Facts ("SOF") ¶ 21.

Article IV (OREO Lending Strategy): With respect to lending-related misconduct, Article IV alleges that "Respondents developed and implemented a new lending strategy from late 2008 through at least September 2011 designed to avoid further decreases to the Bank's capital ratios." Notice ¶ 55. This strategy allegedly involved the origination of "unsafe or unsound loans to finance the sales of the Bank's [Other Real Estate Owned ("OREO")] at above-market prices, which enabled the Bank to reduce or avoid reported losses that it would have otherwise recorded on sales

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backed by the full faith and credit of the United States government, making the taxpayers the final guarantors of losses") (internal quotation marks and citation omitted); *Bullion Svcs., Inc. v. Valley St. Bank*, 50 F.3d 705, 708-09 (9th Cir. 1995) (distinguishing between DIF and FDIC as receiver). For purposes of summary disposition at this stage, the undersigned will not treat the FDIC as receiver for the Bank as having incurred losses relating to the Capital Raise Loans, because the Notice does not so allege. As discussed *infra* in Part IV.A, the extent to which the Bank suffered losses relating to Capital Raise Loans other than the $387,241 alleged in the Notice is a question of fact to be dealt with at the appropriate stage of the proceedings.

[3] Specifically, Enforcement Counsel alleges that "Respondents caused the Bank to improperly include the proceeds from the sales of Holding Company stock financed with the Capital Raise loans in its regulatory capital instead of as a deduction from stockholder's equity as required by GAAP and regulatory guidance." Notice ¶ 48.

at fair market values." *Id.* Enforcement Counsel identifies allegedly unsafe or unsound loans made by the Bank as part of Respondents' strategy in 2009, 2010, 2011, and 2012. *Id.* ¶ 61. Enforcement Counsel also alleges that the Bank and Respondent Ortega "continued to implement elements of the OREO Lending Strategy" as late as April 2013, although the Notice does not identify any further loans made pursuant to the strategy during this time period. *Id.* ¶ 68. According to the Notice, "[t]he Bank incurred at least $42 million in recorded losses on loans issued in connection with the OREO Lending Strategy, including approximately $12.5 million in losses recorded between September 25, 2012 and the Bank's closing."[4] *Id.* ¶ 69. The OCC's Statement of Material Facts further clarifies this timeline, stating that "[t]he Bank suffered approximately $44,952,594 in losses on loans alleged to be part of the OREO Lending Strategy, *including approximately $14,036,302 in losses recorded on or after September 25, 2012*."[5] SOF ¶ 23 (emphasis added).

With respect to improper accounting practices, Article IV alleges that "Respondents caused the Bank to inaccurately risk rate loans and improperly recognize loans as accruing loans . . . in connection with the OREO Lending Strategy," with the result that "the OCC issued MRAs related to inaccurate risk rating and nonaccrual recognition every year from 2008 through 2012." Notice ¶ 67. Article IV further alleges that the Bank failed to correct these accounting practices in response to the MRAs, leading among other things to the issuance of a new MRA, in the OCC's

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[4] As before, there is an incongruity between the Notice and Enforcement Counsel's briefing in the instant cross-motions regarding the amount of alleged losses suffered by the Bank on or after September 25, 2012. While Enforcement Counsel asserts in its Statement of Material Facts and its Motion that the FDIC as receiver for the Bank suffered approximately $115 million in OREO lending-related losses after the Bank's September 2013 failure, the Notice alleges that those post-failure losses were suffered not by the receiver but by the DIF alone. *Compare* SOF ¶ 24 & OCC Mot. at 5 *with* Notice ¶ 70 ("The DIF incurred at least $103 million in losses on loans issued in connection with the OREO Lending Strategy"). The undersigned will treat this discrepancy in the same manner as the post-closure losses alleged in Article III as noted above.

[5] By this representation, therefore, Enforcement Counsel alleges that the remainder of that $44,952,594 in OREO lending-related losses, or approximately $30.9 million, was suffered by the Bank *prior to* September 25, 2012. *See also* OCC Mot. at 5 ("[T]he undisputed facts establish that the Bank incurred approximately $160,154,246 in recorded losses on loans made in connection with the OREO Lending Strategy, including approximately $129,237,954 in losses recorded on or after September 25, 2012.").

2011 ROE, "cit[ing] a violation of 12 U.S.C. § 161 for the Bank's failure to record discounts on loans to finance OREO sales with below-market interest rates" as required by GAAP. *Id.* ¶ 80. The Bank allegedly continued to improperly account for OREO-related loans even after the 2011 MRA. *Id.* ¶¶ 84-85. In addition, Article IV alleges that Respondents caused the Bank to file materially inaccurate Call Reports for every quarter from June 30, 2009 through June 30, 2013, in which the Bank's capital was overstated due to its allegedly improper accounting for OREO loans. *Id.* ¶¶ 86-87. This overstatement of capital "masked the Bank's true financial condition and prevented the Bank's regulators and depositors from determining whether the Bank had adequate capital to safeguard deposits." *Id.* ¶ 88. In other words, as Enforcement Counsel elsewhere asserts, "[e]ach Call Report that the Bank filed with materially overstated capital caused prejudice to the interests of the Bank's depositors." SOF ¶ 32.

Article V (Accrual of Interest on Nonaccrual Loans): With respect to improper accounting practices,[6] Article V alleges that "[b]eginning as early as 2007 and continuing until March 31, 2013, Respondents caused the Bank to artificially inflate earnings and capital by improperly accruing interest on nonaccrual loans using cash basis accounting without documented justification as required by the Call Report Instructions." Notice ¶ 90. Specifically, Article V alleges that in 2007, the Bank switched accounting systems and began the practice of "automatically accru[ing] interest on all nonaccrual loans using cash basis accounting." *Id.* ¶ 93. Article V then recounts a series of alleged instances in 2006, 2008, 2009, 2010, 2011, and 2012 in which the OCC directed the Bank to improve its accounting for nonaccrual loans, which the Bank did not do. *Id.* ¶¶ 94, 100. Enforcement Counsel alleges that "Respondents failed to ensure that the Bank was complying with [these] OCC directives and enforcement actions." *Id.* ¶ 95; *see id.*

[6] Article V does not allege standalone lending-related misconduct. *See* OCC Mot. at 9-10 (discussing allegations of lending-related misconduct in Articles III, IV, and VI).

¶¶ 101, 103. The Bank therefore allegedly "continued to accrue interest on all nonaccrual loans without justification until approximately March 2013." *Id.* ¶ 103.

Article V further alleges that because "Respondents never caused the Bank to correct [these] improper accounting practices," the Call Reports filed by the Bank during this period allegedly materially overstated the Bank's capital until April 2013, when the OCC required the Bank to refile its prior year Call Reports. *Id.* ¶ 106; *see id.* ¶ 105. Enforcement Counsel alleges that this overstatement of capital "masked the Bank's true financial condition and prevented the Bank's regulators and depositors from determining whether the Bank had adequate capital to safeguard deposits." *Id.* ¶ 108. In other words, as Enforcement Counsel elsewhere asserts, "[e]ach Call Report that the Bank filed with materially overstated capital caused prejudice to the interests of the Bank's depositors." SOF ¶¶ 21, 32; *see also* OCC Mot. at 13 (stating that "the misconduct resulted in prejudice to the Bank's depositors with each materially inaccurate Call Report filed within the limitations period").

Article VI (Preferential Treatment to Family Member): With respect to lending-related misconduct,[7] Article VI alleges that Respondent Rogers provided preferential treatment to an immediate family member "by arranging a series of transactions involving loans to finance OREO sales that provided direct financial benefit to [that family member] and released his personal liability on loans to the Bank." Notice ¶ 110. Enforcement Counsel identifies in Article VI four allegedly improper loans: (1) an April 2009 loan of $3.2 million to Company X, *id.* ¶ 117; (2) a January 2010 loan of $441,000 to Company Y, *id.* ¶ 121; (3) a January 2010 loan of $1.3 million to Company W, *id.* ¶ 124; and (4) a January 2010 loan of $1.3 million to Company Z, *id.* ¶ 125. Enforcement Counsel alleges that "the loans to Company X, Company Y, and Company Z resulted

[7] Article VI does not allege standalone improper accounting practices. *See* OCC Mot. at 11 (discussing allegations of improper accounting practices in Articles III, IV, and V).

in the Bank releasing [the family member's] personal guarantees on loans the individual had previously guaranteed with respect to Company W." *Id.* ¶ 127. Enforcement Counsel further alleges in Article VI that "[t]he Bank incurred a $432,000 loss on September 25, 2012 on the loan to Company X, and the DIF incurred an $88,946 loss."[8] *Id.* ¶ 120. The Notice does not allege any loss suffered by the Bank on the loans to Company W, Company Y, or Company Z.[9] However, the Notice does treat all four loans as an interrelated series of transactions, alleging, for example, that Respondent Rogers "failed to disclose to the L&D Committee the *plan to arrange the loans* to Company X, Company Y, and Company Z." *Id.* ¶ 127 (emphasis added).

II. Summary Disposition Standard

The OCC's Uniform Rules of Practice and Procedure ("Uniform Rules") provide that summary disposition on a given claim is appropriate when the "undisputed pleaded facts" and other evidence properly before this tribunal demonstrates that (1) "[t]here is no genuine issue as to any material fact," and (2) "[t]he moving party is entitled to a decision in its favor as a matter of law."[10] A genuine issue of material fact is one that, if the subject of dispute, "might affect the outcome of the suit under the governing law."[11] The summary disposition standard "is similar to that of the summary judgment standard under Rule 56 of the Federal Rules of Civil Procedure."[12] Thus, when determining the existence of a genuine factual dispute, all evidence must be evaluated

[8] Enforcement Counsel again conflates the DIF and the FDIC as receiver for the Bank in its various representations, averring in its Statement of Material Facts that the FDIC as receiver "suffered an additional $88,946 loss on the loan to Company X . . . on or after the Bank's failure on September 13, 2013." SOF ¶ 38. *See* notes 2 and 4, *supra*.

[9] Article VI of the Notice alleges that "[t]he DIF incurred a $170,979 loss to Company Y," while the Statement of Material Facts asserts that this loss was suffered by the FDIC as receiver for the Bank. *Compare* Notice ¶ 123 *with* SOF ¶ 39. Neither the Notice nor the Statement of Material Facts describe any loss directly related to the loans to Company W and Company Z.

[10] 12 C.F.R. § 1929(a).

[11] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[12] *In the Matter of William R. Blanton*, No. OCC AA-EC-2015-24, 2017 WL 4510840, at *6 (OCC July 10, 2017) ("*Blanton*"), *aff'd on other grounds*, *Blanton v. OCC*, 909 F.3d 1161 (D.C. Cir. 2018) ("*Blanton II*").

"in the light most favorable to the non-moving party."[13] That means that this tribunal must "draw 'all justifiable inferences' in the non-moving party's favor and accept the non-moving party's evidence as true," although "mere allegations or denials" will not suffice.[14]

Moreover, where, as here, the parties have filed cross-motions for summary disposition, "the underlying facts and inferences in each party's motion" are to be considered in the light most favorable to the opposing party,[15] and summary disposition will be granted "only if one of the moving parties is entitled to judgment as a matter of law upon material facts that are not genuinely disputed."[16] With respect to Respondents' assertion of the statute of limitations as an affirmative defense, Respondents must "make a showing sufficient to establish the existence of [all] element[s] essential to" that defense as a matter of law in order to survive summary disposition or justify a dispositive judgment on the affirmative defense in their favor.[17]

III. Analysis of Applicable Law

This action was filed on September 25, 2017. Under 28 U.S.C. § 2462, the statute of limitations that both parties agree governs OCC enforcement actions,[18] the agency has "five years from the date when the claim first accrued" in which to commence proceedings. Therefore, any claim in the Notice that "first accrued" prior to September 25, 2012—five years before filing—is

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[13] *Scott v. Harris*, 550 U.S. 372, 380 (2007).

[14] *Heffernan v. Azar*, 417 F. Supp. 3d 1, 7 (D.D.C. 2019) (quoting *Anderson*, 477 U.S. at 248, 255).

[15] *Schaerr v. Dep't of Justice*, ___ F. Supp. 3d ____, 2020 WL 435455, at *3 (D.D.C. Jan. 28, 2020).

[16] *Heffernan*, 417 F. Supp. 3d at 7 (internal quotation marks and citation omitted).

[17] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see Crescent Towing & Salvage Co. v. M/V Anax*, 40 F.3d 741, 744 (5th Cir. 1994) (party asserting affirmative defense has the burden of proof as to that defense at trial and accordingly has "the burden on summary judgment to establish each element of that defense as a matter of law"); *FDIC v. Giammettei*, 34 F.3d 51, 54 (2d Cir. 1994) ("Where a plaintiff uses a summary judgment motion, in part, to challenge the legal sufficiency of an affirmative defense[,] . . . [it] may satisfy its Rule 56 burden by showing that there is an absence of evidence to support an essential element of the non-moving party's case.") (internal quotation marks and citation omitted).

[18] *See* OCC Mot. at 8 (acknowledging application of Section 2462 in this case); Resp. Mot. at 9 (same).

untimely, and this tribunal cannot entertain it.[19] Conversely, any claim that first accrued on or after September 25, 2012 is timely if filed on September 25, 2017,[20] and Respondents are precluded from contesting the claim on that basis.

The parties offer contrasting views as to when the first accrual of a claim occurs for the purposes of enforcement actions for orders of prohibition under 12 U.S.C. § 1818(e) and civil money penalties under 12 U.S.C. § 1818(i). Respondents argue that the five-year limitations period begins to run "when the alleged misconduct occurs," contending that the Supreme Court's 2013 decision in *Gabelli v. Securities & Exchange Commission* compels this result.[21] Enforcement Counsel, by contrast, asserts that as long as some actionable effects arising from the alleged misconduct have occurred in the five years prior to the Notice being filed, the enforcement action has been timely brought.[22] Enforcement Counsel argues that *Gabelli* is inapposite and that this tribunal is bound by the District of Columbia Circuit's 2000 decision in *Proffitt v. Federal Deposit Insurance Corporation* and the 2017 decision *In the Matter of William R. Blanton* ("*Blanton*") by the Comptroller of the Currency ("Comptroller") to adhere to Enforcement Counsel's

[19] The full relevant text of Section 2462 is as follows: "Except as otherwise provided by Act of Congress, an action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462.

[20] Respondents argue in passing that claims that first accrue on the date of September 25, 2012 are untimely, presumably because the period between September 25, 2012 and September 25, 2017 could be considered to span five years and one day. *See* Respondent's Response and Opposition to OCC's Motion for Partial Summary Disposition ("Resp. Opp.") at 13. This distinction is potentially salient, given that the OCC has alleged in Article VI that the Bank incurred losses on September 25, 2012 relating to Respondent Rogers's alleged misconduct. *See* Notice ¶ 120. The undersigned notes that when computing periods of time under the Uniform Rules, "the date of the act or event that commences the designated period of time is not included." 12 C.F.R. § 19.12(a). By this computation method, the five-year limitations period for claims that first accrued on September 25, 2012 would begin the next day and stretch until September 25, 2017. In the absence of compelling authority from Respondents that the five-year period under Section 2462 is computed differently, the undersigned declines to grant summary disposition based on an interpretative quirk of arithmetic.

[21] Resp. Mot. at 4 (citing *Gabelli v. SEC*, 568 U.S. 442 (2013)).

[22] *See* OCC Mot. at 1 (arguing that lending-related claims are timely because "the Bank suffered losses within the five-year limitations period on all of the misconduct related to the loans described in the Notice"); Brief in Support of OCC's Opposition to Respondents' Motion for Summary Disposition on the Statute of Limitations ("OCC Opp.") at 9 (arguing that accounting-related claims are timely because "the improper accounting practices resulted in depositor prejudice within the limitations period").

interpretation of the applicable limitations period.[23]

It is the undersigned's considered view that neither side is correct. Respondents pay too little heed to the elements necessary for a claim to accrue under Sections 1818(e) and 1818(i); in many instances, their interpretation would start the limitations period before the OCC could even bring suit. On the other hand, Enforcement Counsel gives short shrift to Section 2462's clear direction that the clock begins to run when a claim "first accrues," not when the conditions necessary for accrual are fulfilled for a second time, or a third, or at some other convenient future point. While it may be true, as *Proffitt* holds, that different claims can accrue at different times under Sections 1818(e) or 1818(i) from the same alleged misconduct,[24] it cannot be the case under the relevant caselaw that the *same* claim can accrue for the first time on multiple occasions. Yet, as explained further below, that is the import of Enforcement Counsel's argument.

A. Statutory Elements of Sections 1818(e) and 1818(i)

As the Supreme Court states in *Gabelli*, "the 'standard rule' is that a claim accrues when the plaintiff has a complete and present cause of action" – that is, when all of the elements of an actionable claim have been met and can be pled.[25] It also follows that if not all of the elements of a cause of action have been met, then a claim has not accrued for purposes of a limitations period. Thus, any discussion of the accrual of claims under a given statute—in this case, Section 1818(e) for the agency's prohibition claims and Section 1818(i) for its civil money penalty claims—must begin with the statutory elements.

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[23] OCC Opp. at 9-15 (discussing *Proffitt v. FDIC*, 200 F.3d 855 (D.C. Cir. 2000), and *Blanton*, 2017 WL 4510840 (OCC July 10, 2017)).

[24] *See Proffitt*, 200 F.3d at 863 ("The same misconduct can produce different effects at different times, resulting in separate section [1818(e)] claims and separate accruals.").

[25] *Gabelli*, 568 U.S. at 448 (internal quotation marks and citation omitted); *see also*, *e.g.*, *Savory v. Cannon*, 947 F.3d 409, 427 (7th Cir. 2020) (all "essential element[s] of [a] claim" necessary for accrual); *Blanton II*, 909 F.3d at 1171 ("A claim normally accrues when the factual and legal prerequisites for filing suit are in place.") (quoting *Proffitt*, 200 F.3d at 862).

Here, "effect" is one of three necessary elements that must be satisfied before the agency may bring an action seeking an order of prohibition under Section 1818(e), distinct from "misconduct" and "culpability."[26] This means that an individual (1) who engaged in actionable misconduct under Section 1818(e)(1)(A) by, for example, engaging in unsafe or unsound practices in connection with a bank, and (2) who showed the requisite culpability under Section 1818(e)(1)(C) through, for example, demonstrating willful disregard of that bank's safety or soundness, nevertheless could not be the subject of an OCC prohibition action unless and until (3) the OCC also had determined that the individual's misconduct had caused some harmful effect under Section 1818(e)(1)(B).[27] In such a case, the OCC's cause of action might not become "complete and present," and its claim not yet accrued, until some lengthy time after the misconduct had occurred, and the limitations period likewise would not begin to run until then.[28]

Complicating matters further, Section 1818(e)(1)(B) lists multiple alternative triggers of the statute's "effect" element, any one of which independently is sufficient to cause a claim to accrue and permit the agency to institute prohibition proceedings. To wit, the "effect" prong of Section 1818(e) is satisfied when the agency makes a determination of any of the following:

> (i) such insured depository institution or business institution has suffered or probably will suffer financial loss or other damage;
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> (ii) the interests of the depository institution's depositors have been or could be prejudiced; or
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> (iii) such party has received financial gain or other benefit by reason of such violation, practice, or breach.[29]

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[26] *See Proffitt*, 200 F.3d at 862-63 (discussing elements of Section 1818(e)).

[27] *See id.* at 863.

[28] *See id.* (noting that "the question of accrual becomes complex when considerable time intervenes between the underlying conduct and the harmful effect").

[29] 12 U.S.C. § 1818(e)(1)(B).

Counting the multiple options within each subclause, there are six circumstances in which the conditions for the "effect" element could separately be met: probable loss or damage, actual loss or damage,[30] potential prejudice, actual prejudice, financial gain to the party in question, and other benefit to that party. Thus, an agency can bring a cause of action under Section 1818(e) (as long as the "misconduct" and "culpability" elements are also met) once it determines that an institution has suffered financial loss, even if there has been no actual or potential prejudice to the depositors, and vice versa. The question then becomes at what point the limitations period begins to run if two Section 1818(e)(1)(B) "effects" have occurred at different times and the agency chooses to premise its enforcement action on the later-occurring effect.

The assessment of civil money penalties under Section 1818(i) also contains an "effect" element of a sort, at least with respect to the criteria necessary for the imposition of the second-tier penalty sought by the OCC.[31] The statute authorizes different levels of money penalties contingent on an increasingly stringent showing by the agency regarding the nature and consequences of the alleged misconduct. The lowest level, a first-tier penalty, may be assessed solely upon a showing of misconduct: specifically, that an institution-affiliated party has violated some law, regulation, order, or written condition or agreement with a federal banking agency.[32] For a second-tier penalty to be assessed, by contrast, the agency must show not only misconduct,[33]

[30] To the extent that "other damage" encompasses harms such as probable or actual reputational harm distinct from financial loss, there arguably are eight effects that would be sufficient to complete an agency's claim and allow it to commence proceedings. *See Proffitt*, 200 F.3d at 865 (Silberman, J., dissenting) (qualifying effects for Section 1818(e) "would certainly include reputational harm").

[31] *See* 12 U.S.C. § 1818(i)(2)(B). The assessment of a third-tier civil money penalty similarly requires a showing of "effect," but the OCC does not seek such a penalty here, and it is accordingly unnecessary for the undersigned to discuss. *See id.* § 1818(i)(2)(C); Notice ¶¶ 133-36 (seeking first- and second-tier civil money penalties).

[32] 12 U.S.C. § 1818(i)(2)(A).

[33] In addition to the violations described in Section 1818(i)(2)(A), a second-tier showing of misconduct can be made as to a breach of a fiduciary duty or the reckless engagement in unsafe or unsound practices while conducting the institution's affairs. *Id.* § 1818(i)(2)(B)(i). In seeking a second-tier penalty, Enforcement Counsel alleges that Respondents "recklessly engaged in unsafe or unsound practices, breached their fiduciary duty of care, violated the law, . . . [and] violated final cease-and-desist orders." Notice ¶ 135(a).

but also some external consequence or characteristic of the misconduct: (1) that it "is part of a pattern of misconduct"; (2) that it "causes or is likely to cause more than a minimal loss to such depository institution"; or (3) that it "results in pecuniary gain or other benefit to such party."[34] As with Section 1818(e), fulfillment of this prong for the assessment of a second-tier money penalty does not require satisfaction of all three conditions; a second-tier penalty may be assessed (assuming misconduct has been shown) if the misconduct is part of a pattern even if it has not caused more than a minimal loss to the institution, and so forth. In that respect, the question of when a cause of action for a second-tier penalty is "complete and present" may similarly depend on which of the triggering conditions of Section 1818(i)(2)(B)(ii) the agency has chosen to base its claims.[35]

B. The Gabelli and Proffitt Decisions

The undersigned now addresses the parties' competing arguments regarding what caselaw binds this tribunal when considering the accrual of claims and the scope of limitations periods in agency enforcement actions. It is important, first, to observe that neither *Gabelli* nor *Proffitt* addresses the precise question at issue in the instant cross-motions: that is, the point at which a claim "first accrues" for the purposes of Section 2462 when (1) the underlying statute contains an "effect" element separate from the violative conduct that must be satisfied before a claim can be

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[34] 12 U.S.C. § 1818(i)(2)(B)(ii).

[35] Respondents argue that the so-called "effect" prong of Section 1818(i)(2)(B) is not an essential element of any cause of action for the assessment of a civil money penalty, but rather a list of "additional aggravating factors" which, if met, "allow the OCC to seek higher penalties" once it has brought its claim. Resp. Opp. at 14. According to Respondents, a claim for a civil money penalty necessarily "first accrues" at the point of the alleged violation, because the agency needs nothing more to file suit; a showing of misconduct is all that is required for the lowest-tier penalty to be assessed. *Id.* at 13-14; *see* 12 U.S.C. § 1818(i)(2)(A); *Blanton II*, 909 F.3d at 1171 ("A claim normally accrues when the factual and legal prerequisites for filing suit are in place.") (quoting *Proffitt*, 200 F.3d at 862). The undersigned agrees that there is some force to this logic, particularly given that one of the factors meriting a second-tier penalty, that the misconduct be "part of a pattern of misconduct," is not, properly speaking, an "effect" at all. Nevertheless, the Comptroller has unequivocally held in *Blanton* that "there are two prongs required for a Second Tier [penalty under Section 1818(i)]: misconduct and effect," *Blanton*, 2017 WL 4510840, at *16, and such a result forecloses any contrary interpretation of the statute.

brought; (2) that "effect" prong contains multiple alternative conditions that independently could serve to complete a cause of action at different points in time; and (3) the agency does not clearly allege that the "effect" on which it predicates the completion of each claim *first occurred* within the five-year period prior to institution of the enforcement action.

As discussed further below, the undersigned concludes that both *Proffitt* and *Gabelli* would preclude Enforcement Counsel from asserting any claims based on an "effect" that allegedly occurred within that five-year period if the same effect, arising from the same misconduct, first occurred prior to this period. Moreover, to the extent that the results in *Gabelli* and *Proffitt* are in tension—and they are, to a degree—the principles and reasoning articulated by the Supreme Court in *Gabelli* should be adhered to and given weighty consideration by the undersigned, at least to the extent possible in light of the different factual posture of that case.

Gabelli concerned the potential application of the fraud "discovery rule" to Section 2462 in the context of a Securities and Exchange Commission ("SEC") enforcement action.[36] The agency in that case argued that "because the underlying violations sounded in fraud," its claim should "first accrue," and the five-year limitations period should begin to run, not from the date of the allegedly fraudulent misconduct, but from the point at which the agency first became aware of the violations.[37] The Supreme Court unanimously rejected this argument, holding that it was inappropriate to apply the discovery rule to government enforcement actions for civil penalties given the wealth of investigative tools at the agency's disposal and the public policy considerations inherent in "set[ting] a fixed date when exposure to . . . [g]overnment enforcement efforts ends."[38] In so doing, the Court emphasized that "the basic objective of repose underlying the very notion

[36] *See Gabelli*, 568 U.S. at 447-48.
[37] *Id.* at 447.
[38] *Id.* at 448; *see id.* at 449-52.

of a limitations period" would be thwarted if parties were left "exposed to [g]overnment enforcement action not only for five years *after their misdeeds*, but for an additional uncertain period into the future."[39]

Enforcement Counsel disputes the applicability of *Gabelli* to this matter in two respects. OCC Opp. at 9-10. Enforcement Counsel first observes that, unlike Section 1818, the statute at issue in *Gabelli* contained no "effect" element that required the agency "to prove that certain 'effects' occurred as a result of [the respondent's] misconduct." *Id.* at 10. In this, Enforcement Counsel is largely correct: the essential elements of a cause of action under the statutory provisions under which the SEC had brought its claims in *Gabelli*, 15 U.S.C. §§ 80b-6 and 80b-9, were "complete and present" at the point of the violative misconduct.[40] Thus, absent application of the discovery rule to toll the beginning of the limitations period, there was no apparent dispute in *Gabelli* that the agency's claim would have "first accrued" upon the violation.[41]

Enforcement Counsel also contends that the result in *Gabelli* is inapposite because that case "concerned a legal theory not at issue here," namely the fraud discovery rule. OCC Opp. at 9. In that way, however, Enforcement Counsel's argument misses the mark. Enforcement Counsel asserts that *Gabelli*'s reasoning in refusing to delay accrual of the SEC's claims (and the attendant limitations period) due to fraud does not apply here "because the OCC does not argue that it was

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[39] *Id.* at 452 (internal quotation marks and citation omitted) (emphasis added).

[40] *See id.* at 445 (discussing Investment Advisers Act of 1940 and noting that SEC "is authorized to bring enforcement actions against investment advisers who violate the Act, or individuals who aid and abet such violations"). The undersigned notes that the provision under which the SEC sought civil money penalties in *Gabelli*, 15 U.S.C. § 80b-9(e), contains a three-tier penalty structure contingent on an increased showing by the agency, similar to 12 U.S.C. § 1818(i), and furthermore that one of the required conditions for an assessment of a third-tier penalty under that statute is that the violative conduct "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." 15 U.S.C. § 80b-9(e)(2)(C)(II). However, there is no indication from the Supreme Court's decision in *Gabelli* whether the agency in fact sought a third-tier money penalty in that case, and the Court did not discuss the possible ramifications of this quasi-"effect" element to its analysis in any event.

[41] *See Gabelli*, 568 U.S. at 448 (alternative to application of discovery rule would be that agency's claim accrues "when a defendant's allegedly fraudulent conduct occurs").

defrauded by Respondents or that its claims did not accrue until the OCC discovered the misconduct." *Id.* at 10. Yet if anything, the fact that fraudulent concealment of the misconduct is apparently not at issue here[42] should cause the reasoning in *Gabelli* to apply to the OCC's claims against Respondents with even greater force, not lesser.

This is so because *Gabelli* held that Section 2462's five-year limitations period should not be tolled or otherwise extended in federal civil enforcement actions even when the elements of an actionable claim have been concealed from the enforcing agency.[43] As the Court notes, the discovery rule arose "based on the recognition that something different [from the standard accrual rule] was needed . . . [when] a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded."[44] Where, as here, the elements of the agency's claims are alleged not to have been concealed but rather out in the open, there should be commensurately less reason based on *Gabelli*'s rationale to contemplate delaying the accrual of those claims, once the elements are met.[45] In other words, if fraud is not a sufficient reason to delay the beginning of Section 2462's limitations period because of the public policy considerations that favor "a fixed

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[42] It is worth noting that Enforcement Counsel's overarching allegation is that "Respondents *masked the Bank's deteriorating financial condition* through misconduct that inflated earnings and capital and improperly reduced or delayed reported losses," which certainly carries the connotation of fraud even if the agency asserts that it was not itself defrauded. Notice ¶ 28 (emphasis added); *see also*, *e.g.*, *id.* ¶¶ 53, 88, 108.

[43] *See Gabelli*, 568 U.S. at 451 ("The SEC . . . is not like an individual victim who relies on apparent injury to learn of a wrong. . . . Unlike the private party who has no reason to suspect fraud, the SEC's very purpose is to root it out, and it has many legal tools at hand to aid in that pursuit.").

[44] *Id.* at 449 (internal quotation marks and citation omitted) (emphasis in original).

[45] Indeed, the Notice appears to allege that the OCC was aware of at least some aspects of the Bank's allegedly improper accounting practices for years before bringing action in September 2017. *See*, *e.g.*, Notice ¶¶ 67 ("[T]he OCC issued MRAs related to inaccurate risk rating and nonaccrual recognition every year from 2008 through 2012."), 94 ("Between 2006 and 2012, the OCC repeatedly directed the Bank to improve its recognition and treatment of nonaccrual loans."). This is not to say that the agency was required to commence enforcement proceedings as soon as it had an actionable claim, *see Proffitt*, 200 F.3d at 864-65, only that it makes little sense to argue that accrual of claims for purposes of Section 2462's limitations period should be interpreted more stringently in cases where violations are not discovered until later than in cases where the agency had some alleged knowledge of the violations while they were occurring.

date when exposure to the . . . [g]overnment's enforcement efforts end,"[46] then lack of fraud should militate even more strongly against a flexible interpretation of when the clock under Section 2462 should begin to run.

Moreover, it is evident that *Gabelli* interprets Section 2462 generally, and that the principles articulated by the Supreme Court in that case are not limited to, and are applicable beyond, the fraud discovery rule. Throughout its analysis, the *Gabelli* Court takes care to underscore the value and importance of definite statutory limitation periods, especially in the context of government enforcement actions for civil penalties.[47] *Gabelli* expressly disfavors any interpretation of Section 2462 that would expose prospective respondents to the potential for enforcement proceedings "not only for five years after their misdeeds, but for an uncertain point into the future,"[48] and there is nothing about this pronouncement that limits its applicability to cases where fraud is alleged. This does not necessarily mean, of course, that the clock must start at the moment of the misdeed even for statutes like Section 1818(e) for which the cause of action may not be complete until a future date, Respondents' argument to the contrary notwithstanding.[49] But it is fair to say that *Gabelli* strongly emphasizes predictability and certainty in the determination of when a limitations period begins and ends, insofar as that goal can be achieved within the bounds of the statutory elements.

It is through that lens that the import of *Proffitt*, decided thirteen years before *Gabelli*, must be analyzed. There, the Federal Deposit Insurance Corporation ("FDIC") commenced an action in

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[46] *Gabelli*, 568 U.S. at 448.

[47] *See*, *e.g.*, *id.* at 448-49 (noting that "[s]tatutes of limitation are intended to promote justice by preventing surprises through the revival of claims that have been allowed to slumber," that they "provide security and stability to human affairs," and that they are "vital to the welfare of society") (internal quotation marks and citations omitted).

[48] *Id.* at 452.

[49] *See* Resp. Mot. at 11-12 (characterizing *Gabelli* as holding that "accrual under 2462 is triggered at the time of the 'misdeeds' of Respondents, i.e., when the wrongful conduct occurred") (quoting *Gabelli*, 568 U.S. at 452).

1996 seeking a Section 1818(e) order of prohibition on the grounds that the respondent had dishonestly committed actionable misconduct that had caused financial loss to the relevant depository institution.[50] The loss alleged by the FDIC as part of its claim stemmed from a 1994 Tennessee state court judgment assessing damages against the institution in connection with the respondent's misconduct.[51] The respondent argued that the FDIC's claim had "first accrued" in 1990, six years prior to the action being filed, because it was at that point that the agency "plainly could have determined" that the institution would "probably suffer financial loss" due to the respondent's actions, thereby satisfying the "effect" prong of Section 1818(e) and starting the limitations period.[52]

The District of Columbia Circuit issued a split panel decision disagreeing with the respondent and holding that an agency's claim could "first accrue" under Section 1818(e) based on actual loss to an institution even if the agency could previously have brought a claim based on probable loss.[53] The panel majority premised this holding on two more general conclusions: first, it reasoned that because there were multiple possible effects that could satisfy the "effect" element of a Section 1818(e) claim, this meant that "[t]he same misconduct can produce different effects at different times, resulting in separate [Section 1818(e)] claims and separate accruals."[54] Second, it concluded that because the statute was intended to provide enforcement agencies with some flexibility in determining when to bring actions, an agency was not required to commence proceedings based on the earliest-occurring effect of a respondent's misconduct.[55]

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[50] *See Proffitt*, 200 F.3d at 863.
[51] *See id.* at 859.
[52] *Id.* at 863.
[53] *See generally id.* at 862-64.
[54] *Id.* at 863.
[55] *See id.* at 864-65.

Synthesizing this analysis with respect to the specific question before it, the *Proffitt* majority observed that to begin the statute of limitations "as to *all* effects as soon as the first effect occurred" would mean that an agency's time to act would always chronologically be triggered by the "probable financial loss" effect before the "actual financial loss" effect, thus rendering the latter effect superfluous.[56] The majority noted that such a result would effectively "require the FDIC to speculate whether the Bank 'will probably suffer' harm or forfeit the removal action altogether," something that was particularly undesirable given the increased burden imposed by the task of "establishing probability" versus "establishing actuality."[57] The majority thus held that agency enforcement action "based on a later occurring effect" of Section 1818(e) was timely as long as it was initiated within five years of that effect's occurrence.[58]

The parties disagree on the extent to which *Gabelli* abrogated *Proffitt*'s interpretation of Section 2462. *See* Resp. Mot. at 12; OCC Opp. at 11-12. Yet the respective holdings of *Gabelli* and *Proffitt* largely can be reconciled when assessing the accrual of claims under Section 1818(e) and, as discussed further below, Section 1818(i). To begin with, there is nothing in *Gabelli* beyond the Court's general preference for definite limitations periods that would foreclose *Proffitt*'s holding that a separate claim can "first accrue" based on actual loss to an institution even if the agency could previously have determined that loss was probable—as noted, *Gabelli* concerned a statute for which the cause of action was complete at the point of the misconduct. Nor does *Gabelli* mandate that an agency must bring its enforcement action as soon as possible based on the earliest-occurring effect of the alleged misconduct, if a statute offers multiple ways to complete a cause of action with "effect" as a distinct and essential element.

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[56] *See id.* at 863-64 (emphasis in original).

[57] *Id.* at 864.

[58] *Id.* at 865.

Fundamentally, *Gabelli* does not shed direct light on whether, in a statute with multiple potential temporal trigger points at which an agency's right to bring an action can "come[] into existence,"[59] each separate trigger point should be treated as a fresh "first" accrual of the agency's claim. It is worth noting, however, that neither does *Proffitt* treat this issue as conclusively as Enforcement Counsel contends. And it is in the interstices between the principles articulated in *Gabelli* and the application of Section 1818(e)'s "effect" prong to Section 2462 in *Proffitt* that an answer to this question for the purpose of the instant cross-motions may be found.

Although its holding is framed more broadly, *Proffitt* confines its analysis to the two separate loss-related trigger points contained within the first subclause of Section 1818(e)(1)(B)'s "effect" prong: the point at which an institution "will probably suffer financial loss or other damage" and the point at which such loss has actually occurred.[60] It makes some sense to say that an agency should not be precluded from bringing an action following actual loss to an institution simply because the agency could have determined that loss was probable at some earlier point,[61] particularly given that the transition from probable to actual loss can be seen to represent a continuum along which the agency's claim progressively ripens.[62]

But this logic does not necessarily hold when comparing the actual or probable loss triggers to one of the other triggering effects in Section 1818(e)(1)(B)(ii) or (iii), namely potential or actual depositor prejudice and financial gain or other benefit to the charged party. *Proffitt* does not straightforwardly speak, for example, to whether an agency may forgo enforcement action based

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[59] *Gabelli*, 568 U.S. at 448 (internal quotation marks and citation omitted).

[60] 12 U.S.C. § 1818(e)(1)(B)(i).

[61] *But see Proffitt*, 200 F.3d at 866 (Silberman, J., dissenting) (arguing that "a new and distinct [agency] removal action should not arise at every point that evidence of new consequences flowing from that misconduct is uncovered").

[62] *See Proffitt*, 200 F.3d at 863-64 ("Whenever an institution 'has suffered' financial loss, an action based on the 'will probably suffer' language would have been available before the financial loss in fact occurred.").

on actual loss to an institution but then decide some years later, without the limitations clock having run in the interim, that depositors have now been prejudiced and that an order of prohibition is warranted.

It is here that the reasoning in *Gabelli* cautions against an overly expansive interpretation of claim accrual under Section 2462. That case made clear that the statutory clock begins to tick when a claim "first accrue[s]," which is the point when all the elements of a cause of action have been met.[63] If each of the six potential triggering effects in Section 1818(e)(1)(B) truly can serve as the "first accrual" of a distinct claim bound by its own five-year limitations period, as *Proffitt* suggests and as Enforcement Counsel implies,[64] then an agency can choose from up to six different limitations periods started at six different times to decide when to commence proceedings based on six distinct potential causes of action, all of which would be predicated on the same alleged misconduct that could have happened many years before.[65]

Such an outcome would, as Judge Silberman phrased it in dissent in *Proffitt*, "giv[e] the agency, as a practical matter, the power to determine when the statute of limitations will be triggered," which in turn would extend prospective respondents' uncertainty regarding when their exposure to enforcement proceedings would cease.[66] This does not seem consonant with the

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[63] *Gabelli*, 568 U.S. at 448 (quoting 28 U.S.C. § 2462).

[64] *See* OCC Mot. at 10 (arguing that "a prohibition action for misconduct is timely so long as it commenced within five years from the date of the last 'effect' that resulted from the misconduct").

[65] Perhaps in practice it is unrealistic to imagine a significant time gap between the effectuation of, say, actual loss and depositor prejudice, such that a respondent would be subject to the uncertainty of potential enforcement action well past the "five years after their misdeeds" that is the standard expectation under *Gabelli*. *Gabelli*, 568 U.S. at 452. It is notable, however, that in the case presently before this tribunal, Enforcement Counsel apparently alleges in at least one instance a four-year distance in actionable effects arising from different aspects of the same core alleged misconduct. *See* Notice ¶¶ 32 (alleging that practice of making unsafe or unsound Capital Raise Loans began in April 2009), 42 (alleging that the Bank incurred losses on two Capital Raise Loans in June 2013), 52-53 (alleging that materially inaccurate Call Reports related to the Capital Raise Loans caused depositor prejudice beginning with the quarter ending June 30, 2009); *see also* SOF ¶ 21 ("Each Call Report that the Bank filed with materially overstated capital caused prejudice to the interests of the Bank's depositors.").

[66] *Proffitt*, 200 F.3d at 865 (Silberman, J., dissenting).

concern expressed in *Gabelli* for a fixed and certain endpoint to limitation periods where one is feasible.[67] To that extent, the undersigned concludes that *Gabelli* casts some doubt on *Proffitt*'s holding, as a blanket matter, that "[t]he same misconduct can . . . result[] in separate [Section 1818(e)] claims and separate accruals" for each of the potentially triggering effects that would complete that statute's cause of action.[68]

Moreover, and more critically, nothing in *Proffitt* would appear to authorize an agency to treat separate occurrences of the *same* trigger as permitting fresh accrual of a claim for the purpose of Section 2462. While an agency can perhaps choose whether to take action based on the first occurrence of actual loss or the first occurrence of actual depositor prejudice, there is no plausible argument that the agency has timely acted so long as some actual loss has occurred within the limitations period, regardless of whether the first occurrence of actual loss took place more than five years before the action commenced. This result would truly make the concept of "first" accrual meaningless under Section 2462.[69] To the extent that Enforcement Counsel argues that its claims are timely merely because *some* loss took place after September 25, 2012, then, even *Proffitt* does not countenance such an interpretation.

In sum, under both *Proffitt* and *Gabelli*, the OCC cannot use actual loss that occurred during the five-year period prior to the commencement of enforcement proceedings as the point at which its claims against Respondents "first accrued" if, in fact, actual loss also had occurred prior to that period. Likewise, a claim based on depositor prejudice is not timely if the alleged misconduct first caused prejudice to depositors more than five years before the action was filed.

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[67] *See Gabelli*, 568 U.S. at 448-49, 452.

[68] *Proffitt*, 200 F.3d at 863.

[69] *Cf. id.* at 864 (concluding that "[s]eparate accrual for each alternative effect gives meaning to all of the statutory language").

However, new instances of alleged misconduct certainly can cause fresh claims to accrue and separate limitations periods to begin to run, even if the same kind of effect is alleged for each.

For example, Enforcement Counsel has alleged that every Call Report submitted for the quarter ending June 30, 2009 through the quarter ending June 30, 2013 was materially inaccurate in a way that prejudiced the interests of the Bank's depositors. Notice ¶¶ 52-53, 86-88, 106-108; *see also* SOF ¶¶ 21, 32; OCC Mot. at 13. If each Call Report constitutes a separate allegation of misconduct, as Enforcement Counsel alleges and as should be assumed for the purpose of Respondents' summary disposition motion,[70] then it is possible for an enforcement action filed on September 25, 2017 to be timely as to certain Call Reports and untimely as to others, despite the fact that depositor prejudice is the alleged triggering effect for all Call Report-related claims.[71]

C. Blanton and Section 1818(i)

Enforcement Counsel argues that the Comptroller's 2017 *Blanton* decision, which addressed in relevant part the application of the Section 2462 limitations period to assessments of second-tier civil money penalties under Section 1818(i), binds this tribunal insofar as it reinforces and endorses *Proffitt*'s holding that separate claims can accrue at separate times—and can "first" accrue at some time subsequent to the alleged misconduct—when the underlying statute contains an effects element.[72] OCC Opp. at 12-15. The undersigned agrees that *Blanton* is binding on this tribunal but disagrees that it compels the undersigned to adopt Enforcement Counsel's interpretation of Section 1818(i) and Section 2462.

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[70] *See Schaerr*, ___ F. Supp. 3d at ____, 2020 WL 435455, at *3; *see also* OCC Opp. at 13 (asserting that improper accounting practices "caus[ed] new violations of 12 U.S.C. § 161 with each materially inaccurate Call Report filed"); OCC Mot. at 13 (asserting that "Respondents' participation in the Bank's improper accounting practices prejudiced the Bank's depositors for four reporting periods within the five-year statute of limitations").

[71] *See* OCC Mot. at 10 ("[T]he effects in this case are the losses suffered by the Bank as a result of the lending-related misconduct and the prejudice to the Bank's depositors as a result of the improper accounting practices.").

[72] *See Blanton*, 2017 WL 4510840, at **16-17.

In *Blanton*, the Comptroller held that the statute of limitations did not bar an action seeking the assessment of a second-tier money penalty where the action was filed in June 2015 and the respondent's "pattern of misconduct ceased in September 2010."[73] The Comptroller found that the OCC's allegations that the respondent had allowed a bank customer "to continually overdraw his accounts" from April 2010 until September 2010 satisfied the "effect" prong of Section 1818(i)(2)(B), thus presenting the OCC with a complete cause of action at the time the misconduct ended even if the agency also could have instituted proceedings at an earlier point.[74] The Comptroller cited to *Gabelli* for the proposition that "a claim accrues when a plaintiff has a complete and present cause of action,"[75] and to *Proffitt* for the proposition that "a government agency is not required to take enforcement action at the first moment it could take the action."[76] Finally, the Comptroller noted that the respondent's argument that the limitations period should have begun to run in April 2010, at the point when the alleged misconduct began, "would have the absurd effect of allowing [the respondent] to evade liability for reckless unsafe or unsound actions that occurred well inside the five-year statute of limitations."[77]

The District of Columbia Circuit affirmed the Comptroller's decision in December 2018. Addressing the statute of limitations and drawing on the conclusions and reasoning in *Proffitt*, the Court held that a claim accrues for purposes of assessing a second-tier civil money penalty "each time a bank official recklessly engages in an unsafe or unsound banking practice as part of a pattern of misconduct."[78] Thus, "the initial onset of the Bank's ongoing . . . pattern of honoring the

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[73] *Id.* at *17.
[74] *Id.* at *16.
[75] *Id.* (quoting *Gabelli*, 568 U.S. at 448).
[76] *Id.* at *17 (citing *Proffitt*, 200 F.3d at 864).
[77] *Id.*
[78] *Blanton II*, 909 F.3d at 1171.

overdrafts did not alone trigger the limitations clock," because every subsequent time an overdraft was honored, "an unsafe or unsound banking practice occurred, continuing the pattern of misconduct and causing a new claim to accrue."[79] The Court therefore concluded that "each honored overdraft after June 30, 2010 (there were at least ten) constituted an actionable banking practice as a part of a pattern of misconduct," with respect to which the OCC's enforcement action was timely filed.[80]

The undersigned concurs with Enforcement Counsel that the Comptroller's decision in *Blanton* does not treat *Proffitt* as having been significantly limited by *Gabelli*. *See* OCC Opp. at 14-15. Nor does the District of Columbia Circuit's affirmance do so, although it was decided after briefing of these cross-motions was complete and the parties accordingly do not discuss it.[81] Respondents are thus incorrect to suggest that *Proffitt* is no longer good law. *See* Resp. Mot. at 12; Resp. Opp. at 11. The salience of *Blanton* to the case at hand is otherwise limited, however, by the scope of that decision and its dissimilar factual posture.

In the present case, Enforcement Counsel seeks an order of prohibition under Section 1818(e) and first- and second-tier civil money penalties under Section 1818(i). *Blanton*'s statute of limitations analysis, by contrast, solely concerns the timeliness of an assessment of a second-tier civil money penalty.[82] Any questions of when claims accrue under Section 1818(e)'s "effect" prong—or, for that matter, the timeliness of claims for first-tier money penalties, for which only misconduct is a necessary element—are therefore not addressed in *Blanton*. Moreover, the holding in *Blanton* hinges on the fact that the respondent's misconduct was "part of a pattern" that extended

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[79] *Id.* at 1171-72.

[80] *Id.* at 1172.

[81] The instant cross-motions and their responses were filed in January and February 2018. The previous administrative law judge assigned to this case, C. Richard Miserendino, retired in late 2018 prior to deciding the motions. The case was reassigned to the undersigned in January 2020.

[82] *See Blanton*, 2017 WL 4510840, at *15.

into the limitations period, one of the qualifying conditions to complete a cause of action under Section 1818(i)(2)(B).[83] Here, on the other hand, it is undisputed that one of the Respondents left the Bank in November 2011, nearly six years prior to commencement of the action, and, as a result, could not have engaged in any misconduct at the Bank, whether discretely or as part of a pattern, from September 25, 2012 to September 25, 2017.[84] That distinction is reflected in the pleadings, as Enforcement Counsel alleges that the "effect" element of Section 1818(i)(2)(B) is met not just by "a pattern of misconduct" but by virtue of such misconduct "caus[ing] more than a minimal loss to the Bank."[85] No part of the *Blanton* decision considers the issue of how new claims can accrue when that sub-prong of Section 1818(i)(2)(B) is pled.

This is more than an academic point. In premising the timeliness of claims exclusively on the respondent's pattern of misconduct, *Blanton* sometimes elides the distinction between claims that are timely because the alleged misconduct is part of a pattern and those that are timely because the alleged misconduct happened within the limitations period. Indeed, the Comptroller expressly states that it was unnecessary to decide whether alleged misconduct prior to June 30, 2010—the first day of the five-year window prior to the action being filed—was time-barred, because "the events after June 30, 2010 constitute a pattern of misconduct . . . that independently supports a [second-tier penalty]."[86] Likewise, the District of Columbia Circuit does not address the timeliness of claims arising from allegations of pre-June 30, 2010 misconduct, because the respondent had caused the bank to honor overdrafts without adequate risk controls "at least ten [times]" within the five-year limitations window, and each of those instances "caus[ed] a new claim to accrue . . .

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[83] *See id.* at **16-17.

[84] *See* Notice ¶ 6 (Respondent Rogers resigned from his Bank position in November 2011); Answer at 2 (same).

[85] Notice ¶¶ 135, 136; *see* 12 U.S.C. § 1818(i)(2)(B)(i), (ii).

[86] *Blanton*, 2017 WL 4510840, at *17.

[and] constituted an actionable banking practice as part of a pattern of misconduct."[87]

In other words, the civil money penalty in *Blanton* was assessed with respect to claims in which the misconduct itself affirmatively occurred within the limitations period. The bulk of the allegations in the present case, however, and all of the allegations against Respondent Rogers, concern alleged misconduct that concededly happened more than five years prior to commencement of the action[88]—that is, prior to September 25, 2012—but that Enforcement Counsel argues is rendered timely pursued by virtue of loss or prejudice arising from that misconduct occurring after September 25, 2012: the question regarding those allegations is not when the misconduct occurred, but when the "effect" element of the statute was met, thus completing the agency's cause of action.[89] Enforcement Counsel's invocation of *Blanton* for the proposition that "a claim may accrue 'once' and then a new, separate claim may accrue 'later'" is therefore inapposite, because the timely claims in *Blanton* accrued in a manner that is almost entirely not at issue here. *See* OCC Opp. at 14. There is a fundamental difference between a new claim accruing because of a new instance of misconduct, such as in *Blanton*, and a new claim accruing because of a new "effect" of a prior instance of misconduct, as alleged by Enforcement Counsel here.

Finally, the undersigned agrees with Enforcement Counsel that *Blanton* reiterates the holding in *Proffitt* that an agency is not required to commence enforcement proceedings at the first possible moment it can do so.[90] But this flexibility to bring an action remains subject to the statute

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[87] *Blanton II*, 909 F.3d at 1172.

[88] *See* SOF ¶¶ 14 (lending-related misconduct alleged in Article III occurred between April 2009 and March 2011), 22 (lending-related misconduct alleged in Article IV occurred between late 2008 and September 2011); Notice ¶¶ 117-125 (lending-related misconduct alleged in Article VI occurred in April 2009 and January 2010).

[89] *See* OCC Mot. at 1 (lending-related misconduct timely because "the Bank suffered losses within the five-year period on all of the misconduct related to the loans described in the Notice"), 2 (accounting-related misconduct timely in part because "the improper accounting practices resulted in depositor prejudice within the limitations period").

[90] *See Blanton*, 2017 WL 4510840, at *17; *Blanton II*, 909 F.3d at 1172.

of limitations in Section 2462, and the limitations clock for a given cause of action still begins ticking as soon as that cause of action is "complete and present."[91] An agency may choose to wait before bringing its claim, but it cannot extend the limitations period through this choice. As *Gabelli* states, "the cases in which a statute of limitations may be suspended by causes not mentioned in the statute itself are very limited in character[] and are to be admitted with great caution."[92] Only enforcement actions that are brought within five years of a claim "first accru[ing]" are timely under Section 2462, no matter if the agency acted on the first day it could or the thousandth.[93]

IV. Timeliness of Enforcement Counsel's Claims

The undersigned must now determine whether undisputed material facts exist with respect to any of Enforcement Counsel's claims that would conclusively render those claims either timely or untimely under Section 2462 as a matter of law. In making this determination, the undersigned declines to adopt Respondents' position that claims brought under Section 1818(e) and Section 1818(i) first accrue at the time of the alleged misconduct.[94] Nor does the undersigned concur with Enforcement Counsel's argument that such claims are timely so long as some effect resulting from the alleged misconduct occurred within the five-year window prior to the action being brought.[95]

Rather, the undersigned concludes, consistent with the holdings in *Gabelli*, *Proffitt*, and *Blanton*, that when a particular statutory "effect" is alleged—for example, loss to the Bank with respect to the allegations of lending-related misconduct and prejudice to depositors with respect to the allegations of improper accounting practices—then the cause of action for a given claim against

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[91] *Gabelli*, 568 U.S. at 448 (internal quotation marks and citation omitted).

[92] *Id.* at 454 (internal quotation marks and citation omitted).

[93] 28 U.S.C. § 2462.

[94] *See*, *e.g.*, Resp. Opp. at 4 ("A claim accrues under Section 2462 when the alleged misconduct occurs.").

[95] *See*, *e.g.*, OCC Mot. at 1, 2 (claims timely because "the Bank suffered losses within the five-year limitations period on all of the misconduct related to the loans described in the Notice" and because "the improper accounting practices resulted in depositor prejudice within the limitations period").

Respondents is complete, and the limitations period begins to run, upon the *first instance* of the alleged effect with respect to the misconduct at issue. Further instances of the same effect of the same alleged misconduct do not cause the limitations period to run anew, because that claim has already accrued.

When it is possible to identify from the pleadings and other evidence properly before this tribunal the point at which an alleged effect first occurred and a claim first accrued, drawing "all justifiable inferences in the non-moving party's favor,"[96] then summary disposition on that particular claim may be appropriate. When, on the other hand, there is some dispute or uncertainty as to a claim's first accrual, the undersigned will deny summary disposition but permit Respondents to raise the statute of limitations as an affirmative defense of that claim at a future point in the proceedings, if it is warranted.

In this regard, the undersigned must address Enforcement Counsel's assertion regarding the degree to which its allegations identify specific dates on which the Bank suffered loss as a result of Respondents' alleged misconduct. In its Opposition, Enforcement Counsel states that "[t]he undisputed facts establish that the Bank suffered losses on discrete dates on all of the loans described in the Notice." OCC Opp. at 11. It then contends that "[w]hile there are many dates of loss (and therefore accrual) in this matter simply due to the extensive nature of Respondents' misconduct . . . , *the dates of loss are definite and identifiable* as described in the SOF." *Id.* (emphasis added). Contrary to these statements, however, it is far from clear that either the Notice or the Statement of Material Facts in fact (1) identify the discrete dates that loss was suffered on *all* of the loans at issue or, where loss is alleged on a given date, (2) represent that this date was the *first time* the Bank suffered loss as the result of a given loan.

[96] *Heffernan*, 417 F. Supp. 3d at 7 (quoting *Anderson*, 477 U.S. at 248).

For example, the allegations of lending-related misconduct in Article III concern "approximately 63 Capital Raise Loans,"[97] yet both the Notice and the SOF identify only two Capital Raise Loans on which the Bank is alleged to have incurred losses.[98] Similarly, the allegations in Article IV state that "[t]he Bank incurred at least $42 million in recorded losses on loans issued in connection with the OREO Lending Strategy, including approximately $12.5 million in losses recorded between September 25, 2012 and the Bank's closing."[99] Enforcement Counsel alleges no details whatsoever regarding when the other approximately $30 million in losses on loans related to the OREO Lending Strategy was incurred, except that it necessarily must have been prior to September 25, 2012 and thus outside of any cognizable timely limitations period.[100] No "discrete dates" are mentioned in either case.

Given the difference between the scope of Enforcement Counsel's representations and the level of detail in the Notice's allegations, the undersigned is unable in many respects to discern whether and to what degree the allegations made in the Notice constitute the sum total of loss incurred by the Bank in relation to Respondents' alleged misconduct. Therefore, even in places

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[97] Notice ¶ 36. The SOF does not identify the number of Capital Raise Loans at issue. *See* SOF ¶¶ 14-21. While the SOF does contain reference to several demonstrative exhibits offered by Enforcement Counsel in support of its Motion that purport to provide some further detail regarding the loans at issue, the undersigned agrees with Respondents that such exhibits have not been properly offered and are not appropriately considered at this stage. *See* Resp. Opp. at 6-7. To the extent that the evidence underlying these exhibits demonstrates that the Bank first suffered loss with respect to certain loans on or after September 25, 2012, Enforcement Counsel will have the opportunity later in these proceedings to make that showing.

[98] *See* Notice ¶ 42 ("The Bank incurred $387,241 in losses on two of the Capital Raise Loans in June 2013."); SOF ¶ 15 (same). As noted above in Part I, the SOF muddies the waters by also stating that "[t]he FDIC, as receiver for the Bank, suffered at least $3,808,058 in losses on the Capital Raise Loans on or after the Bank's failure on September 13, 2013," SOF ¶ 16, an allegation that is not made in the Notice and that raises the possibility that loss was first incurred by the Bank on two Capital Raise Loans pre-closure and by the receivership on the rest of the Capital Raise Loans post-closure, in both instances within the limitations period. The undersigned addresses further below the ramifications to the instant cross-motions of Enforcement Counsel's conflation of the receivership and the DIF between the Notice and the SOF. *Compare* Notice ¶¶ 43, 70, 120, 123 (alleging that DIF incurred losses) *with* SOF ¶¶ 16, 24, 38-39 (stating that receivership incurred losses).

[99] Notice ¶ 69.

[100] The SOF confirms that this $30 million in OREO-related loan losses was recorded more than five years before the action was filed. *See* SOF ¶ 23.

where the Notice alleges only one instance of loss to the Bank with respect to a given claim, the undersigned will not infer that this is the first and only loss thus suffered; the allegations must be clear to merit summary disposition of Respondents' affirmative defense, and the undersigned declines to fill in the blanks in Enforcement Counsel's favor where they are not.

In the following sections, the undersigned will address the timeliness of claims relating to the allegations of lending-related misconduct and improper accounting practices in turn, first with respect to a Section 1818(e) order of prohibition and then an assessment of a civil money penalty under Section 1818(i). A claim is untimely if it first accrued prior to September 25, 2012: that is, if all elements of a statutory cause of action relating to the claim were "complete and present" before that date. Enforcement Counsel contends that "each loan and each materially inaccurate Call Report constitutes an additional instance of misconduct." OCC. Opp. at 14. Accordingly, to the extent that a claim is found to have "first accrued" for a given loan or Call Report earlier than September 25, 2012, whether on the pleadings or at some later stage of the proceedings, then allegations regarding that loan or Call Report will be deemed untimely.

A. Alleged Lending-Related Misconduct

Enforcement Counsel states that the "effect" element of Section 1818(e) is satisfied with respect to Respondents' alleged lending-related misconduct by "the losses suffered by the Bank as a result of [such] misconduct." OCC Mot. at 10. Therefore, a lending-related claim in Article III, IV, or VI is untimely if the Bank first incurred losses prior to September 25, 2012 due to a given instance of alleged misconduct (e.g., the origination, approval, and ratification of each allegedly unsafe or unsound loan), thus completing a statutory cause of action.

With respect to Article III (Capital Raise Loans), the Notice alleges that "Respondents ultimately originated, approved, and/or ratified approximately 63 Capital Raise Loans" from April

2009 through March 2011, thus financing the purchase of Holding Company stock by the borrowers of those loans and allegedly causing the Bank's capital to be materially overinflated. Notice ¶ 36; *see also id.* ¶¶ 31-35. The Notice further alleges that these loans were unsafe or unsound in various ways, and that Respondents caused the true purpose of the loans to be "obscure[d] . . . from the Bank's regulators."[101] *Id.* ¶ 40; *see id.* ¶¶ 37-39. According to the Notice, "most of the Capital Raise Loans were outstanding when the Bank closed in September 2013." *Id.* ¶ 41. In terms of loss to the Bank, the Notice states only that "[t]he Bank incurred $387,241 in losses on two of the Capital Raise Loans in June 2013." *Id.* ¶ 42.

With respect to Article IV (OREO Lending Strategy), the Notice alleges that Respondents originated, approved, and ratified an indeterminate number of unsafe or unsound loans from late 2008 through at least September 2011 as part of a lending strategy designed to "enable[] the Bank to reduce or avoid reported losses that it would have otherwise recorded on sales fair market values." *Id.* ¶ 55; *see id.* ¶¶ 57-60 (describing ways in which loans were unsafe or unsound). The Notice identifies and describes specific OREO-related loans made by the Bank in 2009, 2010, 2011, and 2012 as part of Respondents' strategy.[102] *See id.* ¶ 61. In terms of loss to the Bank, the Notice states only that "[t]he Bank incurred at least $42 million in recorded losses on loans issued in connection with the OREO Lending Strategy, including approximately $12.5 million in losses recorded between September 25, 2012 and the Bank's closing." *Id.* ¶ 69.

With respect to Article VI (Preferential Treatment), the Notice alleges that Respondent Rogers "provided preferential treatment to" an immediate family member "by arranging a series

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[101] The Notice does not allege any loss incurred by the Bank specifically as a result of the Respondents' alleged role in misleading Bank regulators regarding "the specific purposes of the loans." Notice ¶ 40.

[102] The Notice also alleges that the Bank and Respondent Ortega "continued to implement elements of the OREO Lending Strategy" as late as April 2013, but it does not identify any further loans made pursuant to that strategy, let alone loss suffered by the Bank as a result, during this time period.

of transactions involving loans" to Companies W, X, Y, and Z in April 2009 and January 2010. *Id.* ¶ 110; *see id.* ¶¶ 116-127. The Notice further alleges that these loans directly benefited Respondent Rogers's family member financially "and released his personal liability on loans to the Bank, thus causing harm to the Bank." *Id.* ¶ 110. In terms of loss to the Bank, the Notice states only that "[t]he Bank incurred a $432,000 loss on September 25, 2012 on the loans to Company X." *Id.* ¶ 120. The Notice does not allege that the Bank suffered any loss as a result of the loans to Company W, Company Y, or Company Z.

As noted earlier, the Notice also alleges that the Deposit Insurance Fund ("DIF") incurred losses on Capital Raise Loans, OREO-Related Loans, and the loans to Respondent Rogers's family member in connection with the alleged misconduct described in Articles III, IV, and VI respectively. *See id.* ¶¶ 43, 70, 120, 123. Enforcement Counsel offers no authority for the proposition that loss to the DIF should be considered loss to the Bank for the purposes of the accrual of claims under the "effect" prong of Section 1818(e), and the undersigned sees no reason why this should be so.

In its Statement of Material Facts, moreover, Enforcement Counsel states that the FDIC as receiver for the failed Bank incurred the losses that the Notice instead attributes to the DIF. *See* SOF ¶¶ 16, 24, 38-39. Again, however, Enforcement Counsel provides no authority for the proposition that loss to the receiver completes the agency's cause of action under the relevant statutory "effect" prong, nor does it acknowledge the discrepancy between the allegations in the Notice and the statements in the Statement of Material Facts. As a result, the undersigned will not take these allegations into consideration for the purpose of the instant motions. Whether any part of this alleged loss was suffered by the FDIC as receiver after the Bank's closure or only by the DIF is a question of fact to be resolved at the appropriate point in the proceedings; once that

question is resolved, then the parties at that juncture may seek leave to brief the issue of whether such loss counts as loss to the Bank under Section 1818(e) or Section 1818(i).

Lending-Related Conclusions:

1) The allegations in Article III do not provide sufficient information regarding when Enforcement Counsel's claims relating to each of the "approximately 63 Capital Raise Loans" first accrued. Respondents may raise the statute of limitations as an affirmative defense as to alleged misconduct in connection with any loan that is the subject of Article III allegations and with respect to which the Bank first incurred a loss prior to September 25, 2012.

2) The undersigned concludes from the allegations in Article IV that the Bank first incurred, at a minimum, approximately $29.5 million in losses relating to OREO-related loans prior to September 25, 2012. Claims relating to all such loans therefore "first accrued" more than five years before this action was filed and are untimely raised in the Notice. Respondents may raise the statute of limitations as an affirmative defense as to alleged misconduct in connection with any loan that is the subject of Article IV allegations and with respect to which the Bank first incurred a loss prior to September 25, 2012.

3) The undersigned finds that the loans comprising the "series of transactions" alleged in Article VI are interrelated and are properly considered as a unitary whole, at least at this stage of the proceedings.[103] Therefore, the fact that the Notice does not allege any loss to the Bank as a result of the loans to Company W, Company Y, or

[103] *See* Notice ¶ 127 (alleging that "[t]he loans to Company X, Company Y, and Company Z resulted in the Bank releasing Person W's personal guarantees on loans the individual had previously guaranteed with respect to Company W").

Company Z is not *per se* fatal to Enforcement Counsel's claims regarding those loans, given that loss is alleged as a result of the loan to Company X. However, Respondent Rogers may raise the statute of limitations as an affirmative defense as to the allegations regarding all loans at issue in Article VI to the extent that *any* of those loans first caused the Bank to incur loss prior to September 25, 2012.

B. Alleged Improper Accounting Practices

Enforcement Counsel states that the "effect" element of Section 1818(e) is satisfied with respect to Respondents' alleged improper accounting practices by the alleged "prejudice to the Bank's depositors" caused by those practices. OCC Mot. at 4. Enforcement Counsel then contends that "each Call Report that the Bank filed with materially overstated capital caused prejudice to the interests of the Bank's depositors."[104] SOF ¶¶ 21, 32. The Call Reports in question span from the quarter ending June 30, 2009 through the quarter ending June 30, 2013.[105] *See* Notice ¶¶ 52, 87, 107. The Notice also alleges generally that "[t]he foregoing accounting practices, and Respondents' failure to correct them, masked the Bank's true financial condition and prevented the Bank's regulators and depositors from determining whether the Bank had adequate capital to safeguard deposits." *Id.* ¶¶ 53, 88, 108.

At no point does Enforcement Counsel allege the approximate date on which any Call Report first caused depositor prejudice. Nevertheless, the undersigned concludes that it is fair to infer from the allegations that any prejudice to depositors resulting from the alleged overstatement

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[104] *See also* OCC Mot. at 13 (stating that "the misconduct resulted in prejudice to the Bank's depositors with each materially inaccurate Call Report filed within the limitation period").

[105] In connection with the alleged improper accounting practices set forth in Article V, the Notice alleges that the Bank's capital was inflated only until April 2013, at which point "examiners learned that the Bank's practice was to accrue interest on all nonaccrual loans and required the Bank to refile its Call Reports." Notice ¶ 104; *see id.* ¶¶ 105-106. Therefore, notwithstanding the Notice's boilerplate language elsewhere in that section, *see id.* ¶ 107, the undersigned finds that materially inaccurate Call Reports with respect to Article V are alleged only through the quarter ending March 31, 2013. *See* OCC Mot. at 13 (Call Report for quarter ending June 30, 2013 only allegedly misstated as to Articles III and IV).

of capital in a given Call Report first occurred relatively contemporaneously with the issuance of that Report, and in any event prior to September 25, 2012 for Call Reports that were filed before that date. Certainly, to the extent that the Bank's "true financial condition" was "masked" by inaccurate and improper accounting underlying the information in each Call Report, as Enforcement Counsel alleges, preventing depositors from ascertaining the Bank's true capital level, this state of affairs would be reflected in the Call Reports as filed. Unlike the prospect of actual financial loss to an institution, which could take time to effectuate, there is nothing intrinsic about depositor prejudice that would suggest a significant lag between the alleged misconduct in a misleading public filing and the first manifestation of the alleged effect.

The District of Columbia Circuit's decision in *Dodge v. OCC* accords with this conclusion. In that case, the agency brought an action for an order of prohibition alleging, among other things, that the respondent had overinflated the capital of a depository institution and thereby "could have prejudiced depositors," one of the other statutory "effect" triggers of Section 1818(e).[106] The *Dodge* Court agreed, observing that the fact that the institution "appeared well-capitalized" had "contribut[ed] to the risk of a liquidity crisis," which in turn "could have prejudiced depositors by compromising the [institution's] ability to meet its obligations to them.[107] Whether depositors in the present matter were actually prejudiced by materially inaccurate Call Reports is a matter for Enforcement Counsel to show at a later point on its remaining accounting-related claims, but taking the Notice's allegations as true for the purpose of Respondents' summary disposition motion, the undersigned concludes that the alleged depositor prejudice in Enforcement Counsel's claims first occurred at some point shortly after each Call Report was filed.

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[106] *Dodge v. OCC*, 744 F.3d 148, 158 (D.C. Cir. 2014).
[107] *Id.*

Accounting-Related Conclusions: Enforcement Counsel asserts that "Respondents' participation in the Bank's improper accounting practices prejudiced the Bank's depositors for four reporting periods within the five-year statute of limitations: September 30, 2012, December 31, 2012, March 31, 2013, and with respect only to the improper accounting for the OREO Lending Strategy and Capital Raise Loans, June 30, 2013." OCC Mot. at 13. With respect to Section 2462's limitations period, the undersigned agrees: Because the agency's claimed statutory "effect," prejudice to the Bank's depositors, occurred at or around the time that each allegedly inaccurate Call Report was filed, accounting-related claims against either Respondent concerning Call Reports filed before September 25, 2012 "first accrued" more than five years before this action was filed and are untimely raised in the Notice.

Furthermore, if each filing of a subsequent and still materially inaccurate Call Report is a "new violation[] of 12 U.S.C. § 161," OCC Opp. at 13, then Respondent Rogers cannot be responsible for any alleged inaccuracies in Call Reports filed after he left the Bank in 2011, and the undersigned grants summary disposition to Respondent Rogers on any claims arising from Call Reports filed after September 25, 2012 as well. However, the undersigned concludes that summary disposition is not warranted as to accounting-related allegations against Respondent Ortega with respect to the four Call Reports for the quarters ending September 30, 2012, December 31, 2012, March 31, 2013, and June 30, 2013.

C. Civil Money Penalties and Continuing Violations

Two preliminary notes regarding Enforcement Counsel's Section 1818(i) claims for the assessment of a civil money penalty are warranted here. First, the requirements for a first-tier money penalty contain no "effect" element;[108] in the ordinary course, then, claims under Section

[108] *See* 12 U.S.C. § 1818(i)(2)(A) (first-tier penalty warranted upon showing of violative conduct by party affiliated with insured depository institution).

1818(i)(2)(A) would first accrue without question at the point of the alleged misconduct, which for the vast majority of the Notice's allegations occurred prior to September 25, 2012.[109] Enforcement Counsel implicitly acknowledges this by arguing that all claims for a first-tier penalty from both before and after September 25, 2012 are timely insofar as they "collectively constitute a continuing violation." OCC Mot. at 14. The undersigned will address this argument, as well as Enforcement Counsel's identical argument regarding its second-tier penalty claims, below.

Second, as noted in the discussion of *Blanton* above, Enforcement Counsel's claims for a second-tier money penalty allege that the "effect" element of Section 1818(i)(2)(B) is satisfied both because the misconduct "was part of a pattern of misconduct" and because it "caused more than a minimal loss to the Bank."[110] It is undisputed that Respondent Rogers was not associated with the Bank following 2011.[111] Therefore, because no pattern of misconduct by Respondent Rogers could have caused the "first accrual" of a claim against him on or after September 25, 2012, the undersigned will only consider claims for a second-tier money penalty against Respondent Rogers to be timely to the extent that the alleged misconduct first "caused more than a minimal loss to the Bank" in the period from September 25, 2012 through September 25, 2017.

With respect to Enforcement Counsel's argument that "the improper accounting practices described in the Notice . . . [that] occurr[ed] before September 25, 2012 and after September 25, 2012 collectively constitute a continuing violation," OCC Mot. at 14, thus rendering the claims seeking first- and second-tier civil money penalties timely *per se*, the undersigned is not persuaded. Enforcement Counsel contends that "[u]nder the continuing violation theory, the statute of limitations does not bar actions based on misconduct if that misconduct is part of a series of acts

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[109] *See* note 87, *supra*.

[110] Notice ¶¶ 135, 136; *see* 12 U.S.C. § 1818(i)(2)(B)(ii) (effect element).

[111] *See* Notice ¶ 6 (Respondent Rogers resigned from his Bank position in November 2011); Answer at 2 (same).

that make up a common scheme that continues into the violations period." *Id.* It further argues that because Section 1818(i) provides for the assessment of money penalties for which a maximum amount may be levied "for each day during which such violation continues,"[112] then Respondents' alleged failure to correct the material misstatements in each quarterly Call Report constituted "a continuing unlawful practice" stretching from 2009 to 2013, well into the limitations period.[113]

Continuing violations as an exception to the general rule of claim accrual is a "muddled, intricate[,] and somewhat confusing" doctrine that has been applied intermittently in a wide range of contexts.[114] In its most common form, the doctrine is germane when the nature of the violation "is one that could not reasonably have been expected to be made the subject of a lawsuit when it first occurred because its character . . . did not become clear until it was repeated during the limitations period, typically because it is only its cumulative impact . . . that reveals its illegality."[115] This form of the doctrine does not "make actionable either a discrete unlawful act or the lingering effect of an unlawful act," and "the mere failure to right a wrong cannot be a continuing wrong."[116] Rather, the doctrine "applies if the fact of the violation becomes apparent only by dint of the cumulative effect of repeated conduct."[117]

The second version of the doctrine, which courts have "occasionally applied,"[118] is relevant "if the text of the pertinent law imposes a continuing obligation to act or refrain from acting."[119]

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[112] 12 U.S.C. § 1818(i)(2)(A); *see also id.* § 1818(i)(2)(B) (authorizing penalty assessment "of not more than $25,000 for each day during which such violation, practice, or breach continues").

[113] Opp Mot. at 15 (quoting *Courtney v. La Salle Univ.*, 124 F.3d 499, 505 (3d Cir. 1997)).

[114] *Earle v. Dist. of Colum.*, 707 F.3d 299, 306 (D.C. Cir. 2012); *see also*, *e.g.*, *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002) (hostile work environment claim); *Texas v. United States*, 891 F.3d 553, 561 (5th Cir. 2018) (Nuclear Waste Policy Act violation) (calling the doctrine "a muddled, difficult body of law that has long bedeviled courts and commentators alike") (internal quotation marks and citation omitted).

[115] *Taylor v. FDIC*, 132 F.3d 753, 765 (D.C. Cir. 1997) (internal quotation marks and citations omitted).

[116] *Earle*, 707 F.3d at 306 (internal quotation marks and citation omitted).

[117] *Id.*

[118] *Texas*, 891 F.3d at 563.

[119] *Earle*, 707 F.3d at 307.

In such a circumstance, "a new claim accrues each day the violation of the statute is extant[,] and . . . the statute of limitations is appropriately calculated from the latest violation,"[120] as with a statute requiring the proper disposal of toxic waste.[121] Whether an obligation is "continuing" under this theory depends upon the statutory text.[122] Further, as Enforcement Counsel indicates, the Fifth Circuit has held in its 1997 *Interamericas Investments, Ltd. v. Board of Governors of Federal Reserve System* decision that civil penalty provisions that "contemplate[] per diem penalties for violations," as Section 1818(i) does, may give rise to continuing violations of the kind described by this application of the doctrine.[123]

The undersigned concludes that the facts as alleged do not permit the agency to avail itself of the continuing violations doctrine however constituted. To begin with, the allegations here do not fit comfortably within the first version of the doctrine: it is not "only [the] cumulative impact" of the alleged improper accounting practices extending into the limitations period "that reveal[ed]" those violations;[124] rather, Enforcement Counsel alleges numerous instances in the years prior to September 25, 2012 in which bank personnel or the agency itself expressed concerns about how loans were being booked or transactions accounted for.[125] Indeed, both the method of accounting for OREO sales with below-market interest rates and the Bank's practice of accruing interest on nonaccrual loans were the subject of cautions, directives, and orders from the OCC on many alleged occasions from 2008 through 2012.[126] Enforcement Counsel cannot credibly argue that the

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[120] *Texas*, 891 F.3d at 563; *see also Earle*, 707 F.3d at 307 ("Where a statute imposes a continuing obligation to act, a party can continue to violate it until the obligation is satisfied and the statute of limitations will not begin to run until it does.") (internal quotation marks and citation omitted).

[121] *Newell Recycling Co. v. EPA*, 231 F.3d 204, 206-07 (5th Cir. 2000).

[122] *See Texas*, 891 F.3d at 563; *Earle*, 707 F.3d at 307.

[123] *Interamericas Investments, Ltd. v. Bd. of Governors of Fed. Reserve Sys.*, 111 F.3d 376, 382 (5th Cir. 1997).

[124] *Taylor*, 132 F.3d at 765 (internal quotation marks and citation omitted).

[125] *See*, *e.g.*, Notice ¶¶ 64-65, 72, 74-75, 96-99, 102.

[126] *See*, *e.g.*, *id.* ¶¶ 67 ("[T]he OCC issued MRAs related to inaccurate risk rating and nonaccrual recognition every year from 2008 through 2012."), 72 (2009 MRA "related to [the Bank's] accounting for OREO sales financed with

Bank's alleged violations only became apparent "by dint of the cumulative effect of repeated conduct" sometime after September 25, 2012.[127]

Nor does the per diem nature of the assessment of money penalties under Section 1818(i) mean that violations that are actionable under that provision must necessarily cause a new claim to accrue continuously each day under the second form of the continuing violation doctrine, extending the limitations period *ad infinitum* until the violation is corrected.[128] A comparison of Section 1818(i) with the statute at issue in the Fifth Circuit's *Interamericas Investments* decision demonstrates why this is so.

Interamericas Investments concerned the Bank Holding Company Act ("BHCA"), which in relevant part (1) requires companies to obtain approval of the Federal Reserve Board ("FRB") before taking actions making them bank holding companies ("BHCs") within the meaning of the statute; (2) requires companies that have become BHCs to register this status with the FRB within 180 days; and (3) prohibits BHCs from "acquir[ing] companies performing nonbanking functions."[129] The petitioners in that case violated all of those provisions, taking unapproved control of a bank in 1986, failing to comply with reporting requirements, and not relinquishing

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below-market rate loans"), 80 (2011 MRA related to "the Bank's failure to record discounts on loans to finance OREO sales with below-market interest rates"), 83 (requiring Bank in 2011 "to engage an accounting firm[] [and] record discounts on the Bank's entire loan portfolio of former OREO properties"), 94 ("Between 2006 and 2012, the OCC repeatedly directed the Bank to improve its recognition and treatment of nonaccrual loans.") (citing directives or orders in 2006, 2008, 2009, 2010, 2011, and 2012).

[127] *Earle*, 707 F.3d at 306. Furthermore, with respect to the improper accounting practice alleged in Article III in particular, the undersigned agrees with Respondents that there is no real allegation of any "continuing accounting practice," Resp. Opp. at 17, but rather a discrete alleged determination "to improperly include the proceeds from the sales of Holding Company stock financed with the Capital Raise Loans in its regulatory capital instead of as a deduction from stockholder's equity as required by GAAP and regulatory guidance." Notice ¶ 48. That this determination led to the Bank's capital being allegedly overstated until the time of its closure does not transform this allegation into one of continuing violations. *See Earle*, 707 F.3d at 306 (doctrine does not "make actionable either a discrete unlawful act or the lingering effect of an unlawful act").

[128] *See Texas*, 891 F.3d at 563; *Interamericas Invs.*, 111 F.3d at 382.

[129] *Interamericas Invs.*, 111 F.3d at 378, 382 (citing 12 U.S.C. §§ 1842(a)(1), 1843(a), 1844(a)).

control until commencement of the proceedings in 1994.[130] The Fifth Circuit held that the continuing violation doctrine applied to extend Section 2462's five-year limitation period, such that the FRB's action was timely despite the initial act of taking control of the bank and the failure to comply with reporting requirements occurring more than five years before the action commenced.[131] The Court based this holding in part on the fact that the statutory scheme the petitioners were alleged to have violated imposed per diem penalties for every day that violations of that statute continued.[132]

Here, while Section 1818(i) contains similar language regarding the per diem assessment of penalties, the nature of potential violations of the statute are otherwise very different. First, Section 1818(i) imposes potential liability not simply on parties that violate other provisions of that statute, but on the violation of "any law or regulation" at all.[133] Yet Enforcement Counsel argues that "where a violation gives rise to new statutory penalties each day it persists, a new claim accrues on each of those days for purposes of the continuing violation doctrine."[134] Under Enforcement Counsel's conception, then, any violation of any law, if committed by a party affiliated with an insured depository institution, arguably would be subject to assessment of a first-tier civil money penalty many years after the violation itself had occurred, as long as the "respondent's conduct was not undone or corrected" within five years prior to the action being filed, because the fact of the uncorrected violation would be subject to new daily penalties.[135]

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[130] *See id.* at 380-81.

[131] *See id.* at 382-83.

[132] *See id.* at 382 (citing 12 U.S.C. § 1847(b)(1)).

[133] *Compare* 12 U.S.C. § 1818(i)(2)(A) (assessment of money penalty authorized as to "any institution-affiliated party who . . . violates any law or regulation") *with* 12 U.S.C. § 1847(b)(1) (assessment of money penalty authorized as to "any company which violates . . . any provision of this chapter, or any regulation or order issued thereto").

[134] OCC Mot. at 14 (internal quotation marks and citation omitted).

[135] *Id.* at 15 (internal quotation marks and citation omitted).

Enforcement Counsel cabins this implication of an expansive interpretation of continuing violations under Section 1818(i) by arguing that Respondents' alleged misconduct here "is part of a series of acts that make up a common scheme that continues into the violations period," namely the fact that Call Reports from 2009 through 2013 continually "reflected inaccurate capital that had been improperly recorded over previous quarters."[136] This illuminates another significant difference between the facts here and in *Interamericas Investments*, however. In that case, it was fair to say that a failure to receive agency approval before taking control of a bank was a violation that would continue to accrue a new, actionable claim each day, because the first day of unapproved control happened only once and yet the control persisted. As the Fifth Circuit observed, "the BHCA—and, indeed, common sense—preclude control of a bank, in violation of the BHCA, simply because such continuing control began more than five years before the [FRB] initiated action."[137]

In the present matter, by contrast, each issuance of an allegedly inaccurate Call Report is a discrete act on which action may be premised. To the extent that Respondents had any "continuing obligation to act or refrain from acting" in connection with correcting the representations in the Call Reports,[138] it was an obligation that renewed itself regularly with the Bank's quarterly reporting requirements, as did the agency's opportunity to take corrective or punitive action.[139] The continuing violations doctrine as conceived in this form exists to remedy a situation where the violation has happened outside of the limitations period but the violative state of affairs extends within it. That is not the case here, because Enforcement Counsel has alleged that the Bank filed

[136] *Id.* at 14, 15 (internal quotation marks and citation omitted).

[137] *Interamericas Invs.*, 111 F.3d at 383.

[138] *Earle*, 707 F.3d at 307.

[139] *See Texas*, 891 F.3d at 564 (continuing violations doctrine appropriate for "ongoing durational conditions" rather than "discrete failures to act"); *Earle*, 707 F.3d at 306 ("[T]he mere failure to right a wrong cannot be a continuing wrong.") (internal quotation marks and citation omitted).

multiple materially inaccurate Call Reports within the putative limitations period, and this action is timely commenced on these claims as to the Respondent who remained in a position at the Bank at the time those Call Reports were filed.

<u>Civil Money Penalty Conclusions</u>:

1) Claims seeking the assessment of a first-tier money penalty against Respondent Rogers in Articles III, IV, V, and VI necessarily first accrued more than five years before this action was brought and are accordingly untimely.
2) The OCC's claims for a first-tier money penalty against Respondent Ortega in Articles III, IV, and V are timely asserted only to the extent that such a penalty is warranted in connection with (a) the four Call Reports issued after September 25, 2012, or (b) any allegations of lending-related misconduct occurring on or after September 25, 2012.
3) The OCC's claims for a second-tier money penalty against Respondents in Articles III, IV, V, and VI are timely asserted only to the extent that such penalty is warranted in connection with (a) alleged misconduct by either Respondent that first caused the Bank more than minimal loss on or after September 25, 2012, or (b) allegations against Respondent Ortega in Articles III, IV, or V that formed part of a pattern of misconduct extending beyond September 25, 2012.

Last, Enforcement Counsel argues that evidence of Respondents' alleged misconduct outside of the statute of limitations "is properly admissible, and indeed must be considered," when determining the amount of a civil money penalty even if claims related to that alleged misconduct are time-barred.[140] The question of the admissibility of such evidence is appropriately decided at

[140] OCC Opp. at 17 (internal quotation marks and citation omitted).

some future time, either at the motions *in limine* stage or at some other proper point upon mutual agreement of the parties.

V. Respondents' Ninth Affirmative Defense

Enforcement Counsel has moved for summary disposition on Respondents' affirmative defense that this proceeding violates the Due Process Clause of the United States Constitution and the Administrative Procedures Act, and that it otherwise denies Respondents "a meaningful opportunity to be heard." Answer at 9 (Ninth Affirmative Defense); *see* OCC Mot. at 16-21. Because "a defendant does not abandon an affirmative defense set forth in the answer simply by omitting it from a motion for summary judgment,"[141] the undersigned will deny Enforcement Counsel's motion for summary disposition on this issue without prejudice at this time.

In their Opposition to the OCC's Motion, Respondents state that they are reserving their rights to assert their Ninth Affirmative Defense subject to completion of briefing in this matter on the issue of the Appointments Clause of the United States Constitution. *See* Resp. Opp. at 22. Such briefing has now been completed, at least pending the resolution of Respondents' application for interlocutory review on the undersigned's March 17, 2020 Order Denying Respondents' Motion for Summary Disposition on the Appointments Clause. Respondents will accordingly make a submission, by May 1, 2020, clarifying whether they still intend to assert this defense. If so, and if Enforcement Counsel still intends to seek summary disposition on the Ninth Affirmative Defense at that time, a supplemental briefing schedule will be set.

VI. Conclusion

The undersigned hereby recommends the partial entry of summary disposition in favor of Respondents in the manner and to the extent detailed above. Under the Uniform Rules, a

[141] *Jones v. Bernanke*, 557 F.3d 670, 676 (D.C. Cir. 2009).

recommended decision regarding this determination will be deferred until after a hearing on the remaining issues is conducted.[142] Pursuant to the Notice Regarding March 16, 2020 Scheduling Conference and Order Setting Revised Procedural Schedule, such hearing is presently scheduled to begin on September 29, 2020, in the Southern District of Texas or at some other location mutually agreed to by the parties.

SO ORDERED.

Issued: April 9, 2020

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Jennifer Whang
Administrative Law Judge
Office of Financial Institution Adjudication

[142] 12 C.F.R. § 19.30.