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

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| In the Matter of:<br><br>**LAURA AKAHOSHI,**<br>Former Chief Compliance Officer<br><br>RABOBANK, N.A.<br>Roseville, California | Docket No.:<br>AA-EC-2018-20 |

**ORDER GRANTING IN PART AND DENYING IN PART ENFORCEMENT COUNSEL'S MOTION TO STRIKE AFFIRMATIVE DEFENSES**

The Office of the Comptroller of the Currency ("OCC") commenced this action against Respondent Laura Akahoshi ("Respondent") on April 17, 2018, filing a Notice of Charges ("Notice") that seeks an order of prohibition and the imposition of a $50,000 civil money penalty against Respondent pursuant to Section 8 of the Federal Deposit Insurance ("FDI") Act, 12 U.S.C. §§ 1818(e) and (i). The Notice alleges that Respondent, in her capacity as Chief Compliance Officer for Rabobank, N.A. ("the Bank"), "continuously concealed" from OCC examiners during March and April 2013 the existence of a third-party auditor's report ("the Crowe Report") regarding deficiencies in the Bank's Bank Secrecy Act and Anti-Money Laundering compliance program. Notice ¶¶ 40, 46. The Notice further alleges that "Respondent's continuous concealment of the Crowe Report" in the face of the OCC's requests for that document—and her false statements and misrepresentations in furtherance thereof—constituted continuing violations of 12 U.S.C. § 481 and 18 U.S.C. § 1001 as well as actionably unsafe or unsound practices in conducting the Bank's affairs. *Id.* ¶ 46; *see also id.* ¶ 48(a).

On May 7, 2018, Respondent filed an Answer in which she raised a series of twenty affirmative defenses to the Notice's allegations against her. *See* Answer at 13-15. Enforcement Counsel for the OCC ("Enforcement Counsel") has now moved to strike Respondent's first through fifth and seventh through ninth affirmative defenses on various grounds. Enforcement Counsel also argues that Respondent's sixth and tenth through twentieth affirmative defenses should be stricken "to avoid re-litigating certain issues that no longer impact this present proceeding." For the reasons set forth below, the undersigned will grant Enforcement Counsel's June 25, 2020 Motion to Strike ("Motion") as to Respondent's fifth through ninth affirmative defenses and deny the Motion in all other respects.

The undersigned begins by noting, as Respondent does in her Opposition to Enforcement Counsel's Motion, that the OCC's Uniform Rules of Practice and Procedure ("Uniform Rules"), 12 C.F.R. § 19 *et seq.*, contain no specific provision regarding the mechanics of this tribunal's consideration of a motion to strike a party's affirmative defenses. *See* Opposition to Enforcement Counsel's Motion to Strike Respondent's Affirmative Defenses ("Opposition") at 5. To the extent that the Uniform Rules mention motions to strike, it is in the context of discovery requests rather than the disposition of a respondent's substantive defenses to the claims asserted against her. *See* 12 C.F.R. § 19.25(d) (permitting parties who object to a discovery request to "file a motion . . . to strike or otherwise limit the request"). Consequently, in addressing Enforcement Counsel's Motion, the undersigned will adopt and apply as appropriate the standards set forth with respect to motions to strike affirmative defenses under Rule 12(f) of the Federal Rules of Civil Procedure ("Federal Rules"),[1] as interpreted under D.C. Circuit and Ninth Circuit law.[2]

[1] *See* Fed. R. Civ. Pro. 12(f) (providing that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter").

[2] The D.C. Circuit and the Ninth Circuit are the twin fora to which Respondent is entitled to appeal any final decision of the Comptroller. *See* 12 U.S.C. § 1818(h)(2) (parties may obtain review of agency final decisions in Section 1818

In both the D.C. Circuit and the Ninth Circuit, motions to strike affirmative defenses "are a drastic remedy that courts disfavor."[3] Moreover, when considering a motion to strike, a court should "draw all reasonable inferences in the pleader's favor and resolve all doubts in favor of denial of [that] motion."[4] While an affirmative defense should be stricken under the Federal Rules if it is insufficient as a matter of law or pleading,[5] the Ninth Circuit has held "the fair notice required by the pleading standards only requires describing the defense in general terms."[6] And in the D.C. Circuit, likewise, "the common practice of presenting each affirmative defense in a single sentence" will suffice as long as it "give[s] the opposing party notice of the defense and [] permit[s] the opposing party to develop in discovery and present both evidence and argument . . . responsive to the defense."[7] Finally, "[e]ven if a motion to strike is granted, leave to amend an affirmative defense to cure a pleading deficiency . . . should be liberally granted in the absence of prejudice to the opposing party."[8]

enforcement actions in "the circuit in which the home office of the depository institution is located, or in the United States Court of Appeals for the District of Columbia Circuit").

[3] *Moore v. United States*, 318 F. Supp. 3d 188, 190 (D.D.C. 2018); *accord, e.g., Nguyen v. Durham School Svcs.*, 358 F. Supp. 3d 1056, 1062 (C.D. Cal. 2019) (noting that such motions "should rarely be granted").

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

[5] In resolving the instant motion, the undersigned need not and does not determine the precise extent to which the "'plausibility' standard by which federal courts examine whether a complaint should be dismissed for inadequacy of the pleading," as set forth in the Supreme Court's *Twombly* and *Iqbal* decisions, supersedes "the traditional notice standard set by Rule 8(c)" with respect to affirmative defenses. *Id.* at 193 (discussing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Drawing all reasonable inferences in Respondent's favor, and considering the weight of the caselaw in the D.C. Circuit and Ninth Circuit following *Iqbal* and *Twombly*, the undersigned finds that striking the bulk of Respondent's affirmative defenses would be inappropriate whichever the applicable standard. *See* Opposition at 9-10 (citing cases); *see also Paleteria La Michoacana v. Productos Lacteos*, 905 F. Supp. 2d 189, 190-93 (D.D.C. 2012) (discussing and ultimately rejecting application of *Twombly* and *Iqbal* to pleading standard for affirmative defenses).

[6] *Kohler v. Flava Enterprises, Inc.*, 779 F.3d 1016, 1019 (9th Cir. 2015) (internal quotation marks and citation omitted); *see also Gomez v. J. Jacobo Farm Labor Contractor, Inc.*, 188 F. Supp. 3d 986, 990-93 (E.D. Ca. 2016) (discussing application of *Kohler* to Rule 12(f) pleading standard).

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

[8] *Gomez*, 188 F. Supp. 3d at 993.

Affirmative defenses are defenses asserted in response to a pleading "that preclude[] liability even if all of the elements of the [opposing party's] claim are proven."[9] In the present instance, Enforcement Counsel groups Respondent's affirmative defenses into four broad categories, all of which it argues should be stricken and Respondent precluded from further asserting. First, Enforcement Counsel asserts that Respondent's third, fourth, and fifth affirmative defenses, which generally advert to Respondent's alleged conduct being excused by "the OCC's own actions, omissions, and conduct,"[10] are legally deficient and inadequately pled. *See* Motion at 5-9. Second, Enforcement Counsel contends that Respondent's first, second, seventh, eighth, and ninth affirmative defenses, which concern the timeliness and legal sufficiency of the OCC's claims, should be stricken to the extent that the undersigned denies Respondent's May 28, 2020 Amended Initial Dispositive Motion ("Dispositive Motion") on those issues, which the undersigned largely has done in an order issued on October 16, 2020.[11] *See id.* at 9-10. Third, Enforcement Counsel argues that Respondent's sixth affirmative defense, that the OCC and the Comptroller of the Currency lack authority to enforce Title 18 of the U.S. Code, should be stricken because Respondent has verbally waived that defense. *See id.* at 11. Fourth, Enforcement Counsel maintains that Respondent's tenth through twentieth affirmative defenses—those "relating to the validity of this tribunal and the Notice,"[12]—should be stricken because they have already been decided on the merits and preserved for appeal. *See id.* The undersigned addresses each of these arguments in turn.

[9] *Id.* at 990; *see also* Fed. R. Civ. P. 8(c) (listing examples of affirmative defenses and requiring that "any avoidance or affirmative defense" be asserted when responding to a party's pleading).

[10] Answer at 13.

[11] In that Order, the undersigned recommended the dismissal of the OCC's claims that were based on Respondent's alleged violation of 12 U.S.C. § 481, on the grounds that those claims are barred by the applicable statute of limitations, but denied Respondent's Motion in all other respects. *See* Order Recommending the Grant in Part and Denial in Part of Respondent's Initial Dispositive Motion (OFIA October 16, 2020) ("Dismissal Order").

[12] Opposition at 6.

Respondent's Third, Fourth, and Fifth Affirmative Defenses

In her third, fourth, and fifth affirmative defenses, Respondent asserts that the claims against her are barred due to some conduct on the part of the OCC or some characteristic of its examination during the relevant time period. Specifically, these affirmative defenses state that the Notice's claims against Respondent are barred because "the alleged rights, claims, and obligations that the OCC seeks to enforce . . . have been excused from performance by the OCC's own actions, omissions, and conduct" (third affirmative defense); "because the OCC had knowledge of, approved of, consented to, and/or ratified each and every act or event complained of" (fourth affirmative defense); and generally "because of the inequitable conduct of the OCC" (fifth affirmative defense). Answer at 13. Enforcement Counsel now argues that these defenses are inadequately pled and legally deficient. *See* Motion at 5-9. The undersigned agrees that Respondent's fifth affirmative defense does not provide the agency with fair notice of its claim and fails as a matter of law. With respect to Respondent's third and fourth affirmative defenses, however, the undersigned finds that Respondent is entitled to develop those defenses more fully and assert them at the appropriate stage of the proceedings.

Respondent explains in her opposition that her third, fourth, and fifth affirmative defenses are centered on two things: a purported conflict of interest by the individual who was Assistant Deputy Comptroller for the OCC's San Francisco Field Office at the time of the Notice's allegations and oversaw the examination in question, *see* Opposition at 11-12, and "a maladroit sting attempt by OCC examiners against the [B]ank and its executives," *id.* at 13. The undersigned agrees with Enforcement Counsel that a vague charge that the Notice's claims are barred by the OCC's "inequitable conduct," as Respondent asserts in her fifth affirmative defense, fails to

provide the agency with fair notice of either the alleged conflict of interest or the alleged "sting" aspect of the OCC's communications with Respondent. *See* Motion at 8.

More importantly, the undersigned finds that giving Respondent leave to amend her fifth affirmative defense to include more details would be futile: the assertion that the OCC may not pursue its claims against Respondent because the agency acted inequitably is at its heart an "unclean hands" defense, and such defenses "may not be invoked against a government agency which is attempting to enforce a congressional mandate in the public interest," as the OCC assuredly is doing here.[13] To be sure, Respondent attempts to distinguish her claim by stating that "the OCC's actions are not being challenged in its regulatory capacity, but in its capacity as an actual participant in the allegations." Opposition at 13. But this is a distinction without a difference for purposes of applying the unclean hands doctrine to the Notice's allegations—as the undersigned has explained in a previous order in this matter, "that the OCC is alleged to have known about the [Crowe Report] all along," including when requesting the report from Respondent, "has no bearing on the imprudence of Respondent's decision to conceal it, except to the extent that it made it more likely that Respondent's falsehoods and machinations would be detected."[14] Respondent may certainly argue that she did not do what the Notice alleges or that the government has otherwise failed to prove an essential element of its claim, but she may not seek to avoid liability by arguing that the OCC acted "inequitably" in its interactions with her, and her fifth affirmative defense must accordingly be stricken.

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[13] *SEC v. Gulf & Western Ind., Inc.*, 502 F. Supp. 343, 348 (D.D.C. 1980); *accord United States v. DynCorp Int'l LLC*, 282 F. Supp. 3d 51, 58 (D.D.C. 2017) (holding that defendant "cannot sustain an affirmative defense asserting [that] the government engaged in inequitable conduct"); *United States v. Philip Morris*, 300 F. Supp. 2d 61, 75 (D.D.C. 2004) ("Where . . . the Government acts in the public interest[,] the unclean hands doctrine is unavailable as a matter of law."); *see also* Dismissal Order at 57 (holding that OCC enforcement action implicates public rights and protects the public interest).

[14] Dismissal Order at 52.

By contrast, the undersigned finds that Respondent should not be precluded from arguing that she unknowingly misled OCC examiners, that she had no intent to conceal the Crowe Report from the agency, or that she believed herself to have been excused from fulfilling the OCC's requests for the Crowe Report and other materials. To the extent that Respondent's third and fourth affirmative defenses are premised on these or similar assertions, then, they should not be stricken. It must be said, however, that these defenses challenge the OCC's ability to prove an essential element of its claims—whether Respondent acted "knowingly and willfully" with respect to a potential 18 U.S.C. § 1001 violation,[15] and whether Respondent's alleged actions in fact "demonstrate[d] willful or continuing disregard" for the Bank's safety and soundness,[16] or created an "abnormal risk" of loss or damage to the Bank,[17] as necessary to undergird a claim of unsafe or unsound banking practices.[18] As such, they are not, classically speaking, affirmative defenses at all.[19] Nevertheless, the undersigned declines to grant Enforcement Counsel's motion to strike those defenses, because Respondent is entitled to pursue and develop them within the bounds of the discovery previously authorized by this tribunal—that is, concerning the agency's examinations or other supervision of the Bank in the relevant time period of 2012 and 2013.[20]

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[15] 18 U.S.C. § 1001(a).

[16] 12 U.S.C. § 1818(e)(1)(C).

[17] *Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before the House Comm. on Banking and Currency*, 89th Cong., 2d Sess. 49 (1966) (statement of John H. Horne, Chairman of the FHLBB), 122 Cong. Rec. 26,474 (1966); *see also* Dismissal Order at 16-17, 51-53 (discussing Horne Standard for claim of unsafe or unsound practices under 12 U.S.C. §§ 1818(e) and 1818(i)).

[18] In other words, for example, Respondent's assertion that the OCC "approved of [and] consented to . . . each and every act complained of" (Answer at 13) would, if true, have some bearing whether the agency can prove that Respondent knowingly concealed the Crowe Report, as it must to satisfy the elements of 18 U.S.C. § 1001, or whether her conduct could be characterized as unsafe or unsound for purposes of 12 U.S.C. §§ 1818(e) and 1818(i).

[19] *See United States v. Sandoval-Gonzalez*, 642 F.3d 717, 723 (9th Cir. 2011) ("Classic affirmative defenses are those . . . that do not negat[e] any of the elements of the crime but instead go to show some manner of justification or excuse which is a bar to the imposition of . . . liability."); *accord United States v. Williams*, 836 F.3d 1, 13 (D.C. Cir. 2016) (defense that defendant did not possess requisite mental state to commit homicide was not a "legally recognized justification[] or excuse" but rather "[a]n argument that a required element of a crime is missing").

[20] *See* April 24, 2020 Order Reviewing Prior Administrative Law Judges' Prehearing Actions ("April 24, 2020 Order") at 14-15.

Respondent's First, Second, Seventh, Eighth, and Ninth Affirmative Defenses

Enforcement Counsel argues that Respondent's first, second, seventh, eighth, and ninth affirmative defenses should be stricken to the extent that the arguments underlying those defenses as presented in Respondent's Dispositive Motion has been resolved in the OCC's favor. *See* Motion at 9-10. Specifically, Respondent's first and second affirmative defenses concern the statute of limitations and the doctrine of laches respectively, and Respondent argued in her Dispositive Motion that the claims against her should be dismissed on those bases. *See* Dispositive Motion at 12-19, 24-25. Likewise, Respondent's seventh, eighth, and ninth affirmative defenses assert that "[t]he Notice fails to state a claim" (seventh affirmative defense), that "[t]he Notice does not allege facts to support a claim that any wrongdoing occurred" (eighth affirmative defense), and that "[t]he purported claims against Respondent and the allegations upon which they are based are improperly vague, ambiguous, and confusing, contain misstatements of fact, and omit certain other material facts" (ninth affirmative defense),[21] all of which are also arguments made to various degrees in Respondent's Dispositive Motion. *See id.* at 2-4, 20-24.

Although the undersigned did deny Respondent's statute of limitations arguments in large part and Respondent's laches argument in its entirety, *see* Dismissal Order at 44-48, 56-57, she nevertheless finds that such arguments have been preserved for later review by the Comptroller and that striking the corresponding affirmative defenses would therefore be inappropriate. On the other hand, the undersigned concludes that Respondent's seventh, eighth, and ninth affirmative defenses should be stricken to the extent that the undersigned has already rejected Respondent's argument that the Notice's allegations fail to state an actionable claim. Courts in the Ninth Circuit have routinely held that "failure to state a claim is not a proper affirmative defense but, rather,

[21] Answer at 13-14.

asserts a defect in [the opposing party's] *prima facie* case and is more properly brought as a motion."[22] Similarly, where a tribunal "has previously made a legal determination that a [p]laintiff's complaint stated a claim for relief," as has happened here,[23] the undersigned concurs with courts that have held that an "affirmative defense claiming failure to state a claim or to properly plead should [thence] be stricken."[24] Moreover, to the extent that Respondent's ninth affirmative defense argues that the Notice's allegations "contain misstatements of fact," it is not a proper affirmative defense and should not be treated as such.[25] Respondent may of course argue, if she chooses, that the Notice does not tell the whole story or that it does not accurately represent what happened during the relevant period, but that is not a basis for an affirmative defense. The undersigned accordingly grants Enforcement Counsel's motion to strike Respondent's seventh, eighth, and ninth affirmative defenses.

Respondent's Sixth Affirmative Defense

In her sixth affirmative defense, Respondent asserts that the claims against her must fail because "[t]he OCC and the Comptroller lack authority to enforce Title 18 of the U.S. Code." Answer at 14. Enforcement Counsel argues that this defense should be stricken because Respondent verbally waived it during the parties' scheduling conference on April 23, 2020 and

[22] *Kaiser v. CSL Plasma, Inc.*, 240 F. Supp. 3d 1129, 1134 (W.D. Wash. 2017) (internal quotation marks, ellipses, bracketing, and citation omitted); *accord, e.g.*, *Hernandez v. County of Monterey*, 306 F.R.D. 279, 288 (N.D. Cal. 2015) ("[F]ailure to state a claim . . . is more akin to a denial, which is improper in the context of an affirmative defense") (internal quotation marks and citation omitted); *Satanic Temple, Inc. v. City of Scottsdale*, 423 F. Supp. 3d 776, 778 (D. Ariz. 2010) ("Courts generally hold that failure to state a claim is not an affirmative defense.") (citing cases).

[23] *See* Dismissal Order at 33-35, 48-50, 51-53.

[24] *United States ex rel. Landis v. Tailwind Sports Corp.*, 38 F.R.D. 1, 4-5 (D.D.C. 2015) (internal quotation marks and citation omitted); *see also, e.g.*, *Chao Chen v. Geo Group, Inc.*, 297 F. Supp. 3d 1130, 1134-35 (W.D. Wash. 2018) (holding that affirmative defense of failure to state a claim should be stricken as redundant when the court previously "squarely reached the merits of whether the [c]omplaint fail[ed] to state a claim").

[25] *See* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining affirmative defense as "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, *even if all the allegations in the complaint are true*") (emphasis added).

reaffirmed that waiver when the parties met and conferred on June 24, 2020. Respondent confirms in her Opposition that she no longer "intend[s] to pursue her sixth affirmative defense." Opposition at 4-5; *see also id.*, Exhibit E. Accordingly, because there is no need to preserve for the Comptroller an affirmative defense that Respondent has no intention of continuing to assert, the undersigned will grant Enforcement Counsel's motion to strike Respondent's sixth affirmative defense.

Respondent's Tenth Through Twentieth Affirmative Defenses

Broadly speaking, Respondent's tenth through twentieth affirmative defenses are so-called "tribunal" objections that challenge the validity of the issuance of the Notice, the appointment of the undersigned, and the commencement and adjudication of these proceedings before this tribunal on various constitutional and other grounds. *See* Answer at 14-15. On April 24, 2020, the undersigned issued an order rejecting, *inter alia*, Respondent's objections to these proceedings on the bases articulated in her tenth through twentieth affirmative defenses.[26] In so doing, the undersigned concluded that further briefing of Respondent's "tribunal" objections before this tribunal would be duplicative and inappropriate, as Respondent's arguments had been considered and rejected on their merits and were now preserved for later review and determination by the Comptroller.[27] Enforcement Counsel argues that Respondent's tenth through twentieth affirmative defenses should therefore be stricken "to avoid re-litigating . . . issues that no longer impact this proceeding." Motion at 10. As with Respondent's first and second affirmative defenses, *supra*, the undersigned concludes that striking Respondent's tenth through twentieth affirmative defenses is unnecessary and would serve no purpose, given that such defenses are now preserved and may yet

[26] *See* April 24, 2020 Order at 2-9.

[27] *See id.* at 11.

be asserted before the Comptroller at the appropriate later stage of the proceedings. The undersigned accordingly denies Enforcement Counsel's motion in this regard.

Summary and Conclusion

As discussed more fully above, the undersigned will strike (1) Respondent's fifth affirmative defense because a claim that the OCC acted inequitably is legally insufficient and will not preclude her own liability based on the Notice's allegations; (2) Respondent's sixth affirmative defense because she represents that she no longer intends to assert it; and (3) Respondent's seventh, eighth, and ninth affirmative defenses because the assertion that the Notice does not state a claim for relief has now been decided on its merits before this tribunal and those defenses do not otherwise accept the allegations in the Notice as true as necessary for a properly asserted affirmative defense. The undersigned will not strike Respondent's first, second, and tenth through twentieth affirmative defenses, because they have been properly asserted and are now preserved for later review and determination by the Comptroller. The undersigned also will not strike Respondent's third and fourth affirmative defenses, even though they may not be proper affirmative defenses *per se*, because Respondent is entitled to develop and present the argument that her alleged actions did not constitute a knowing and willful violation of 18 U.S.C. § 1001 or amount to unsafe or unsound banking practices under 12 U.S.C. §§ 1818(e) and 1818(i) as necessary to sustain the agency's claims against her.

**SO ORDERED.**

Dated: October 27, 2020

Jennifer Whang
Administrative Law Judge
Office of Financial Institution Adjudication