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

In the Matter of: **NEIL BASSI**, Former President, Chief Executive Officer, and Chairman of the Board cfsbank Charleroi, Pennsylvania	OCC Docket No.: AA-ENF-2020-85

ORDER NO. 13: 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 Neil Bassi ("Respondent") on December 17, 2020, filing a Notice of Charges ("Notice") that seeks a personal cease-and-desist order and the imposition of a $30,000 civil money penalty against Respondent pursuant to Section 8 of the Federal Deposit Insurance ("FDI") Act, 12 U.S.C. §§ 1818(b) and (i). The Notice alleges that Respondent, in his capacity as President, Chief Executive Officer ("CEO"), and Chairman of the Board of Directors ("the Board") for cfsbank, Charleroi, Pennsylvania ("the Bank"), engaged in actionably unsafe or unsound practices and breached his fiduciary duty to the Bank in connection with Respondent's alleged failures (1) to adequately supervise the execution of his delegated overdraft approval authority by a Bank employee termed "Employee-1," *see* Notice ¶¶ 11-34; (2) to implement sufficient overdraft controls at the Bank, *see id.* ¶¶ 36-44; (3) to ensure compliance with the Bank's overdraft policy, *see id.* ¶¶ 46-57; and (4) to disclose to the Board the overdraft activity of a particular customer termed "Customer-1" during relevant loan decisions, *see id.* ¶¶ 59-69.

On January 6, 2021, Respondent filed an Answer in which he raised a series of thirty-six affirmative defenses to the Notice's allegations against him. *See* Answer at 26-33. Enforcement Counsel for the OCC ("Enforcement Counsel") has now moved to strike certain of Respondent's affirmative defenses—specifically, Respondent's first through fifth, eleventh, thirteenth, fourteenth, eighteenth through twenty-first, twenty-third, twenty-fourth, and twenty-seventh through thirty-fifth affirmative defenses—on various grounds. Having considered the parties' briefing, and for the reasons set forth below, the undersigned will grant Enforcement Counsel's March 25, 2021 Motion to Strike ("Motion") in the following respects:

- striking Respondent's third, fourth, twenty-first, twenty-third, twenty-fourth, and twenty-ninth affirmative defenses in their entirety;
- striking Respondent's eighteenth, nineteenth, and thirty-fifth affirmative defenses to the extent that those defenses assert that Respondent is shielded from liability for his alleged overdraft-related misconduct by the business judgment rule;
- striking Respondent's eleventh, twentieth, twenty-seventh, and twenty-eighth affirmative defenses to the extent that they address topics not directly pertinent to Respondent's alleged overdraft-related misconduct; and
- striking Respondent's fifth affirmative defense to the extent that it argues that the OCC is estopped from bringing this action.

The undersigned begins by noting that the OCC's Uniform Rules of Practice and Procedure ("Uniform Rules"), 12 C.F.R. § 109.1 *et seq.*,[1] contain no specific provision regarding the mechanics of this Tribunal's consideration of a motion to strike a party's affirmative defenses. To the extent that the Uniform Rules mention motions to strike, it is in the context of discovery requests rather than the disposition of a respondent's substantive defenses to the claims asserted against him. *See* 12 C.F.R. § 109.25(d) (permitting parties who object to a discovery request to "file a motion . . . to strike or otherwise limit the request"). Consequently, in addressing

[1] The Bank is a federal savings association within the meaning of 12 U.S.C. § 1813(b)(2) and 12 U.S.C. § 1462(3) and as such is governed by the Uniform Rules set forth in 12 C.F.R. Part 109. *See* Notice ¶ 3; 12 C.F.R. § 109.1.

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"),[2] as interpreted under D.C. Circuit and Third Circuit law.[3]

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

When considering a motion to strike affirmative defenses, a court should "draw all reasonable inferences in the pleader's favor and resolve all doubts in favor of denial of [that] motion."[6] Before granting such motions, courts often require some showing that the existence of an affirmative defense "will substantially complicate the discovery proceedings and the issues at

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

[3] The D.C. Circuit and the Third 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 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").

[4] *Moore v. United States*, 318 F. Supp. 3d 188, 190 (D.D.C. 2018); *accord*, *e.g.*, *Mifflinburg Telegraph, Inc. v. Criswell*, 80 F. Supp. 3d 566, 572 (M.D. Pa. 2015) (noting that such motions "rarely are granted").

[5] With respect to the instant motion, for example, it is generally unnecessary for Enforcement Counsel to move to strike any defenses that a respondent terms as an affirmative defense but that actually function as a denial of factual allegations or a negation of the agency's *prima facie* case—that is, defenses that the respondent is unquestionably permitted to assert but do not *per se* constitute "affirmative" defenses that must be pleaded in an answer—unless discovery into such defenses would be genuinely and significantly oppressive, irrelevant, or burdensome. Even in such situations, moreover, Enforcement Counsel will often be better served by seeking to limit the scope of discovery into those defenses within the framework of the motions provided for in Uniform Rules 24(b) and 25(d), *see* 12 C.F.R. §§ 109.24(b), 109.25(d), rather than moving to strike the defenses and thus deny discovery preemptively on the grounds that they have been incorrectly styled as affirmative defenses.

[6] *Moore*, 318 F. Supp. 3d at 190; *accord Senju Pharm. Co. v. Apotex, Inc.*, 921 F. Supp. 2d 297, 301 (D. Del. 2013).

trial" or is otherwise demonstrably prejudicial to the moving party.[7] Further, while it is true that motions to strike "may serve a useful purpose by eliminating insufficient defenses and saving the time and expense which would otherwise be spent in litigating issues which would not affect the outcome of the case,"[8] they should not be granted "unless the insufficiency of the defense is clearly apparent."[9] And an affirmative defense is sufficiently pleaded as long as it "give[s] the opposing party notice of the defense and [] permit[s] the opposing party to develop in discovery and present both evidence and argument . . . responsive to the defense."[10]

Affirmative defenses are defenses asserted in response to a pleading that preclude liability even if all of the allegations against the respondent are true and all of the elements of the opposing party's claim are proven.[11] All such defenses must be set forth in a respondent's answer to the

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[7] *Newborn Bros. Co. v. Albion Engineering Co.*, 299 F.R.D. 90, 99 (D.N.J. 2014) (internal quotation marks and citation omitted); *accord, e.g.*, 5C Wright & Miller, *Federal Practice and Procedure* § 1381 (absent a showing of prejudice, Rule 12(f) motions often not granted "even when technically appropriate and well-founded").

[8] *Mifflinburg Telegraph*, 80 F. Supp. 3d at 573 (internal quotation marks and citation omitted).

[9] *United States v. Gilead Sciences, Inc.*, ___ F. Supp. 3d. ____, 2021 WL 289544, at *4 (D. Del. Jan. 28, 2021) (quoting *Cipollone v. Liggett Grp., Inc.*, 789 F.2d 181, 188 (3d Cir. 1986)). In the Third Circuit, indeed, "an affirmative defense can be stricken [on the pleadings] only if the defense asserted could not possibly prevent recovery under any pleaded or inferable set of facts." *Eagle View Tech., Inc. v. Xactware Solutions, Inc.*, 325 F.R.D. 90, 95 (D.N.J. 2018) (internal quotation marks and citation omitted).

[10] *Moore*, 318 F. Supp. 3d at 193 (internal quotation marks and citations omitted); *see also*, *e.g.*, *U.S. Bank Nat'l Assoc. v. Gerber*, 380 F. Supp. 3d 429, 439 (M.D. Pa. 2018) (fair notice where opposing party is "alerted to the existence of the issue for trial") (internal quotation marks and citation omitted). In resolving the instant motion, the undersigned need not and does not determine the precise extent to which the "'plausibility' standard by which federal courts examine whether a complaint should be dismissed for inadequacy of the pleading," as set forth in the Supreme Court's *Twombly* and *Iqbal* decisions, supersedes "the traditional notice standard set by Rule 8(c)" with respect to affirmative defenses. *Moore*, 318 F. Supp. 3d at 193 (discussing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Drawing all reasonable inferences in Respondent's favor, and considering the weight of the caselaw in the D.C. Circuit and Third Circuit following *Iqbal* and *Twombly*, the undersigned finds that her conclusions below regarding the sufficiency, or lack thereof, of Respondent's affirmative defenses would be the same whichever the applicable standard. *See Paleteria La Michoacana v. Productos Lacteos*, 905 F. Supp. 2d 189, 190-93 (D.D.C. 2012) (discussing and ultimately rejecting application of *Twombly* and *Iqbal* to pleading standard for affirmative defenses); *Tyco Fire Products LP v. Victaulic Co.*, 777 F. Supp. 2d 893, 896-903 (E.D. Pa. 2011) (same).

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

OCC's Notice of Charges.[12] By contrast, any defense that "merely negates some element of [the] plaintiff's *prima facie* case is not truly an affirmative defense and need not be pleaded."[13] Nor are denials or contestations of the factual allegations that form the basis of the claim against a respondent considered affirmative defenses.[14]

In the present instance, Enforcement Counsel groups certain of Respondent's affirmative defenses into four broad categories, all of which it argues should be stricken and, presumably, Respondent prohibited from further asserting or developing here. First, Enforcement Counsel contends that affirmative defenses 1-2, 13-14, and 30-35 are not proper affirmative defenses because they deny elements of the OCC's *prima facie* case. *See* Motion at 3-6. Second, Enforcement Counsel asserts that affirmative defenses 18-19 and (again) 35 should be stricken because they rely on a business judgment rule that is inapplicable in these proceedings. *See id.* at 6-7. Third, Enforcement Counsel maintains that affirmative defenses 3-5, 11, 20-21, 23-24, and 27-29 are effectively irrelevant because they would not preclude Respondent's liability if the allegations set forth in the Notice are true and if Enforcement Counsel proves the elements of its causes of action. *See id.* at 7-12. Finally, Enforcement Counsel argues that affirmative defenses 4-5 and 21 are additionally insufficient to the extent that they are premised on a legally inadequate

[12] *See* 12 C.F.R. § 109.19(b) (providing that "[t]he answer must set forth affirmative defenses, if any, listed by the defendant").

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

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

estoppel claim against the government. *See id.* at 12-13. The undersigned addresses each of these arguments in turn.

Affirmative Defenses 1-2, 13-14, and 30-35

The above-referenced affirmative defenses generally amount to denials that Respondent's alleged conduct meets the standard necessary for the imposition of a personal cease-and-desist order under 12 U.S.C. § 1818(b) or the assessment of a second-tier civil money penalty under 12 U.S.C. § 1818(i). Respondent's first affirmative defense, for example, contends that Respondent "never engag[ed] in unsafe or unsound banking practices or breach[ed] his fiduciary and oversight duties," as Enforcement Counsel would be required to prove to satisfy the misconduct elements of its Section 1818 enforcement action.[15] Answer at 26. Similarly, Respondent's second affirmative defense avers that "[w]hen running the Bank, Respondent consistently acted . . . in the best interests of the Bank and in accordance with industry best practices," *id.*, an assertion that speaks both to whether Respondent committed actionable misconduct and whether any factors exist that should mitigate the size of the civil money penalty assessed as a result.[16] Respondent's thirteenth, fourteenth, and thirtieth through thirty-fifth affirmative defenses also seek to negate the elements of the OCC's causes of action or otherwise dispute the appropriateness of the requested sanctions in various ways.[17]

[15] Specifically, the OCC is entitled to impose a personal cease-and-desist order under Section 1818(b) if it can demonstrate, *inter alia*, that an institution-affiliated party ("IAP") has engaged in unsafe or unsound practices in conducting the business of a depository institution. *See* 12 U.S.C. § 1818(b)(1). The agency may likewise fulfill the misconduct criterion for the assessment of a second-tier civil money penalty under Section 1818(i) if it can show that an IAP has breached any fiduciary duty owed to the affiliated institution. *See id.* § 1818(i)(2)(B)(i)(III). There are other ways in which the agency can demonstrate actionable misconduct for purposes of these provisions, such as proving that the IAP has committed a legal or regulatory violation, but the OCC does not allege them here. *See* Notice ¶¶ 71 (seeking cease-and-desist order "because Respondent engaged or participated in unsafe or unsound practices"), 72 (seeking civil money penalty because "Respondent breached his fiduciary duty").

[16] *See* 12 U.S.C. § 1818(i)(2)(G) (providing that an agency must consider factors such as the respondent's "good faith," "the gravity of the violation," and "such other matters as justice may require" when determining the amount of civil money penalty to be assessed).

[17] Respondent's thirteenth affirmative defense contends that Respondent was not aware of the allegedly excessive overdrafts being granted by the subordinate to whom he had delegated his overdraft approval authority. *See* Answer

Enforcement Counsel is correct that these defenses are not affirmative defenses. They do not purport to justify or excuse Respondent's alleged actions in a way that would enable him to avoid liability for otherwise actionable conduct, but rather offer reasons why his conduct was not actionable as a matter of law in the first instance. Put another way, these defenses dispute the facts set forth in the Notice rather than admitting those facts, as affirmative defenses must, and asserting that Respondent should nevertheless not be held liable. To the extent that these defenses function as specific responses to the Notice's factual allegations, they belong wholly in the body of the Answer alongside each relevant paragraph from the Notice in the form demanded by the Uniform Rules, rather than being styled as affirmative defenses.[18]

Having said this, however, the undersigned finds that no purpose would be served by striking these defenses now. As Enforcement Counsel acknowledges, through these defenses Respondent is rebutting the allegations against him, something he is unquestionably permitted to do at this stage of the proceedings. *See* Motion at 5. Regardless of whether or not these defenses are "affirmative" defenses, he is entitled to develop them through discovery and assert them in dispositive motions or at the hearing in any event—indeed, the failure to raise these defenses before this Tribunal would constitute their waiver if and when this matter reaches the Comptroller of the Currency ("Comptroller") for final disposition.[19] Nor does Enforcement Counsel make any representation that allowing Respondent to assert these particular defenses would "substantially

at 28. Respondent's fourteenth affirmative defense is that this delegation of authority was "appropriate[] and consistent with his legal duties and obligations." *Id.* at 29. Respondent's thirtieth through thirty-fourth affirmative defenses deny that Respondent's alleged conduct posed any risk to the Bank or caused the Bank to sustain any loss. *See id.* at 32-33. And Respondent's thirty-fifth affirmative defense argues broadly that a cease-and-desist order and civil money penalty would be inappropriate in light of a number of assertedly mitigating factors. *See id.* at 33.

[18] *See* 12 C.F.R. § 109.19(b).

[19] *See, e.g.*, *id.* § 109.39(b) (providing that the Comptroller will not consider a party's exceptions to the administrative law judge's proposed findings of fact and conclusions of law "if the party taking exception had an opportunity to raise the same objection, issue, or argument before the administrative law judge and failed to do so").

complicate the discovery proceedings and the issues at trial" or be otherwise prejudicial.[20] To avoid unnecessarily limiting Respondent's ability to contest the allegations against him, then, the undersigned will deny Enforcement Counsel's motion to strike Respondent's first, second, thirteenth, fourteenth, and thirtieth through thirty-fifth affirmative defenses.

Affirmative Defenses 18-19 and 35

Enforcement Counsel argues that Respondent's eighteenth, nineteenth, and thirty-fifth affirmative defenses are insufficient because they rely on the business judgment rule, a matter of state law that is inapplicable to Section 1818 administrative enforcement proceedings.[21] *See* Motion at 6-7. The undersigned agrees with Enforcement Counsel that bank officers cannot be shielded from liability before this Tribunal for allegedly unsafe or unsound practices or other actionable misconduct based on some presumption of good faith or honesty, grounded in state law, regarding their exercise of business judgment.[22] To the extent that Respondent seeks to invoke the business judgment rule as a bar to inquiry into his exposure under the relevant statutes and any potential consequences arising therefrom, then, he is precluded from doing so.

The undersigned declines to strike the defenses in question in full, however. Each one makes factual assertions which, viewed in the light most favorable to Respondent, implicate aspects of Enforcement Counsel's *prima facie* case and the appropriateness of the amount of civil money penalty it seeks to assess. Respondent's eighteenth affirmative defense,[23] for example,

[20] *Newborn Bros. Co.*, 299 F.R.D. at 99 (internal quotation marks and citation omitted).

[21] Generally speaking, "[t]he business judgment rule operates as a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in honest belief that the action was in the best interests of the company." *Waters v. Armenian Genocide Museum & Memorial*, 692 F. Supp. 2d 57, 64 (D.D.C. 2010) (internal quotation marks and citation omitted) (applying D.C. law).

[22] *See* Final Decision, *In the Matter of Steven Haynes*, Nos. 11-370e & -371k, 2014 WL 4640797 at *11 n.19 (FDIC July 15, 2014) (no application of state law business judgment rule in Section 1818 proceedings).

[23] As with the defenses discussed earlier, these defenses are not "affirmative defenses" in the classical sense, but are referred to as such here for ease of comprehension and judicial economy when identifying their usage in the Answer.

avers that the forensic audit firm directed to examine the Bank's allegedly unsafe and unsound overdraft activity concluded that the Bank's decisions in waiving a particular customer's overdraft fees "were business judgment considerations[] and therefore not sources of harm or injury to the Bank." Answer at 29; *see also* Notice ¶¶ 16-22 (allegations regarding forensic audit). While Respondent may not escape liability by arguing that his alleged misconduct was rooted in business judgment, an assertion that the overdraft fee waivers did not cause the Bank harm or injury is relevant to the OCC's allegation that Respondent's conduct "caused or was likely to cause more than a minimal loss to the Bank," Notice ¶ 72(b), which in turn is part of the agency's cause of action for the assessment of a second-tier civil money penalty.[24]

Likewise, the business reason offered by Respondent's nineteenth affirmative defense for the waiver of overdraft fees—"to assist the customer and maintain a continual profitable relationship"—has no bearing on Respondent's liability, but the question of how frequently the fees were waived for the customer termed "Customer-1" relative to other bank customers[25] is arguably relevant to a determination of Respondent's "good faith" or "the gravity of the violation" as potentially mitigating factors.[26] And Respondent's thirty-fifth affirmative defense, as previously noted, asserts that "[t]he OCC's proposed sanction and civil money penalty . . . do not sufficiently take into account" aspects of the Bank's relationship with Customer-1 that might have prompted the Bank to be liberal in its approval of Customer-1's overdrafts and the waiver of Customer-1's overdraft fees.[27] Answer at 33. Again, Respondent cannot present these factors as an affirmative

[24] *See* 12 U.S.C. § 1818(i)(2)(B)(ii)(II) (loss to institution satisfies statutory causation element).

[25] In full, Respondent's nineteenth affirmative defense reads: "The Bank sometimes chose to waive overdraft fees on customer accounts, including Customer-1's, to assist the customer and maintain a continual profitable relationship. At times, the Bank did charge Customer-1 overdraft fees." Answer at 30.

[26] 12 U.S.C. § 1818(i)(2)(G).

[27] The information that Respondent's thirty-fifth affirmative defense claims that the OCC is not fully considering includes "how long Customer-1 had been a Bank customer, the relative size of their accounts, . . . their responsiveness to Bank management, their timely and consistent payment and honoring of loans, . . . the sufficient

defense of business judgment that insulates him from liability, but they are relevant to whether Respondent's alleged conduct was "contrary to generally accepted standards of prudent operation" as necessary to constitute actionably unsafe or unsound practices.[28] The undersigned will not preclude Respondent from arguing that his conduct "was in accord with industry practices and standards and his legal and regulatory duties as a bank officer" as part of his defense.[29]

Affirmative Defenses 3-5, 11, 20-21, 23-24, and 27-29

These defenses draw a relatively far-ranging picture of the Bank as a healthy and profitable entity under Respondent's leadership and the Bank's overall relationship with Customer-1 as one of great stability, minimal risk, and mutual benefit. Enforcement Counsel argues that the defenses should be stricken because they would not defeat the claims in the Notice even if taken as true. *See* Motion at 9-10. Specifically, Enforcement Counsel contends that the topics such as Respondent's past management performance (Affirmative Defenses 3 through 5), the Bank's workout solutions for Customer-1's loans (Affirmative Defense 23), and the Bank's capital and leverage ratios (Affirmative Defenses 27 and 28) "are irrelevant to whether Respondent failed to supervise Employee-1, failed to ensure the adequacy of or compliance with the Bank's overdraft policy, and failed to disclose the overdrafts to the Board as part of loan review." *Id.* at 10. Enforcement Counsel also maintains that permitting Respondent to assert these defenses would necessitate substantial document and deposition discovery on peripheral-at-best subjects[30] that

collateral and security securing their loans, and their generally prompt curing of overdrafts in their accounts." Answer at 33.

[28] *See* Final Decision, *In the Matter of Patrick Adams*, No. AA-EC-11-50, 2014 WL 8735096, at *3 (OCC Sep. 30, 2014) (referring to this phrase as part of "[t]he authoritative definition" of unsafe or unsound practices for purposes of Section 1818).

[29] Respondent's April 15, 2021 Brief in Opposition to the OCC's Motion to Strike Respondent's Affirmative Defenses ("Opposition") at 8.

[30] For example, in addition to the topics listed above, Enforcement Counsel asserts that discovery would be necessary "on Customer-1's banking history (Affirmative Defense 11), the relative size of Customer-1's accounts at the Bank (Affirmative Defense 20), the Bank's third-party loan reviews and audits (Affirmative Defense 21), . . . how much

would "be resource intensive, time consuming, burdensome, and expensive for the OCC" as well as "futile for Respondent." *Id.* at 11.

In response, Respondent states that the affirmative defenses in question are relevant to whether Respondent's alleged misconduct constitutes unsafe or unsound practices and a breach of fiduciary duties under the applicable standards, and in particular whether Respondent fulfilled his duties as a bank officer and director and whether the overdraft activity exposed the Bank to abnormal risk of loss. *See* Opposition at 8-10. Respondent asserts that the defenses "are highly detailed and factually and logically connected to this action" and therefore should not be stricken. *Id.* at 9. Respondent also cites to a prior decision by the OCC that, he says, considered factors such as a bank's capital and leverage ratios and a particular borrower's provided security in determining whether the honoring of frequent and large overdrafts by that borrower constituted unsafe or unsound practices. *See id.* at 9-10 (citing *In re Blanton*, No. AA-EC-2015-24, 2017 WL 4510840 (OCC July 10, 2017), *aff'd Blanton v. OCC*, 909 F.3d 1162 (D.C. Cir. 2018)). Respondent does not address Enforcement Counsel's contention that these defenses would require extensive and burdensome discovery on topics not central to the alleged misconduct.

As before, the undersigned finds that the defenses in question are not affirmative defenses. Enforcement Counsel's assertion regarding the burden of broad discovery into third-party loan reviews and other peripheral topics is also well-taken. A detailed look into the "substantial cash flow" and banking history of Customer-1, described in Respondent's eleventh affirmative defense, is particularly unnecessary. Enforcement Counsel is also correct that a finding that Respondent's alleged misconduct exposed the bank to abnormal risk of loss "does not depend on an assessment of the Bank's profitability." Motion at 9 (citing authority).

Customer-1's loans were sold for to a third party (Affirmative Defense 24), . . . and the Bank's usage (or lack thereof) of [its Federal Home Loan Bank] line of credit (Affirmative Defense 29)." Motion at 11.

On the other hand, it is true that the Comptroller in *Blanton* used the lack of collateral securing the overdrafts in that case as evidence of unsafe or unsound practices, as well as the disproportionate size of the risk to that bank's capital that was tied to the unsecured overdrafts.[31] And Respondent's lack of prior violations or sanctions as the Bank's President, as set forth in his fifth affirmative defense, is a mitigating factor that the OCC is bound to consider when assessing the appropriate amount of civil money penalty.[32]

In consideration of the above, the undersigned will therefore permit Respondent generally to assert as a defense that Respondent's alleged misconduct regarding the overdrafts did not expose the Bank to abnormal risk due to the various contextual factors set forth in, or following naturally from, the Comptroller's *Blanton* decision, but will exercise her discretion under the Uniform Rules to limit any discovery in this area to matters that are *directly pertinent* to the overdraft activity itself.[33] Affirmative defenses 3, 4, and 29, regarding the profitability and solvency of the Bank during Respondent's tenure and Respondent's general performance as Bank President, are irrelevant and will be stricken in their entirety. Affirmative defense 11, regarding the Bank's relationship with Customer-1, will be stricken except that Respondent is permitted to assert, and undertake discovery on, the statement that "Employee-1 consistently reassured Respondent and other Bank Directors that he had or was addressing Customer-1's overdraft activity." Answer at 28. Affirmative defenses 20, 27, and 28 will be stricken except to the extent that they bear on the risk of loss or damage posed to the Bank by Customer-1's overdrafts and the Bank's overdraft policies. And affirmative defenses 21, 23, and 24, relating more broadly to the Bank's handling of its loans to Customer-1 rather than its approval of Customer-1's frequent overdrafts, are irrelevant

[31] *See* Final Decision, *Blanton*, 2017 WL 4510840, at **10-11.
[32] *See* 12 U.S.C. § 1818(i)(2)(G)(III).
[33] *See* 12 C.F.R. § 109.24(b) (no discovery of material that is "excessive in scope" or "unduly burdensome").

and will be stricken in their entirety. Finally, Respondent may assert affirmative defense 5, regarding his lack of previous regulatory violations, as a mitigating factor to the appropriate amount of civil money penalty assessed.

Affirmative Defenses 4, 5, and 21

Enforcement Counsel moves to dismiss Respondent's fourth, fifth, and twenty-first affirmative defenses for the additional reason that they are arguably premised on a legally inadequate estoppel claim against the government. *See* Motion at 12-13. Taken together, the defenses assert in relevant part that the OCC and other regulatory agencies had not raised concerns regarding Respondent's performance or the Bank's lending relationship with Customer-1 prior to the "Analysis Period" beginning January 1, 2016.[34] The undersigned agrees with Enforcement Counsel that these defenses do not advert to any affirmative misconduct on the part of the government or otherwise give the OCC fair notice of the basis for the necessary elements of a claim that the agency should be estopped from bringing this action.[35] Furthermore, even assuming that the OCC was aware of potentially unsafe or unsound overdraft activity at the Bank prior to the Analysis Period that it left unaddressed (which is nowhere asserted in the Answer), it is well-established that a lack of regulatory action regarding a given banking practice in the past does not

[34] Respondent's fourth affirmative defense reads, in full: "During Respondent's tenure as Bank President, his management performance continually received high marks from [Office of Thrift Supervision ("OTS")] and OCC examiners." Answer at 26. His fifth affirmative defense reads: "Respondent led an unblemished banking career. Prior to this matter, Respondent had never been sanctioned by the OCC, OTS, or any other state or federal regulator." *Id.* And Respondent's twenty-first affirmative defense reads, in relevant part: "The Bank's loans to Customer-1 accounts were reviewed by Capital Partners Group, an outside entity the Bank relied on for loan review and auditing. Prior to the Analysis Period, neither the OTS[] nor the OCC . . . ever criticized [or] raised concerns about Capital Partners Group. On information and belief, prior to the Analysis Period, neither OTS[] nor the OCC . . . ever criticized or raised concerns about the Bank's relationship with Customer-1." *Id.* at 30; *see also* Notice ¶ 17 (defining "Analysis Period").

[35] *See Keating v. FERC*, 569 F.3d 427, 434 (D.C. Cir. 2009) (reciting necessary elements of estoppel claim against government).

"enjoin the OCC from taking action in the future."[36] Granting Respondent leave to amend these defenses to provide more detail would therefore be futile, and Respondent is hereby precluded from arguing that this action cannot be maintained on the basis of estoppel.[37]

Summary and Conclusions

As discussed more fully above, the undersigned will strike (1) affirmative defenses 3, 4, 21, 23, 24, and 29 in their entirety; (2) affirmative defenses 18, 19, and 35 to the extent that they assert that Respondent is shielded from liability by the business judgment rule; (3) affirmative defenses 11, 20, 27, and 28 to the extent that they address topics, and seek discovery, not directly pertinent to Respondent's alleged overdraft-related misconduct; and (4) affirmative defense 5 to the extent that it argues that the OCC is estopped from bringing this action. The undersigned denies Enforcement Counsel's motion to strike the remaining defenses that are the subject of this instant dispute, as she finds that they are adequate to give Enforcement Counsel fair notice and allow it "to develop in discovery and present both evidence and argument . . . responsive to the defense."[38]

SO ORDERED.

Dated: April 29, 2021

Jennifer Whang
Administrative Law Judge
Office of Financial Institution Adjudication

[36] *Blanton*, 2017 WL 4510840, at *11 ("[T]he fact that the OCC may have been aware the Bank was engaged in a particular banking practice does not mean that practice was safe and sound, even if the OCC did not take immediate action.").

[37] As previously noted, Respondent may assert that his lack of prior regulatory violations, as articulated in his fifth affirmative defense, are reason to modify the amount of the civil money penalty assessed against him in the event that the OCC otherwise proves the elements of its Section 1818(i) cause of action.

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