

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

In the Matter of:

**ROBERT S. CATANZARO,
DANIELLE M. DESROSIERS, and
JOHN C. PONTE,**
as institution-affiliated parties of

Independence Bank
East Greenwich, Rhode Island

(Insured State Nonmember Bank)

Docket Nos.:

FDIC-22-0112e, FDIC-22-0113k,
FDIC-22-0107e, FDIC-22-0108k,
FDIC-22-0143b, FDIC-22-0109e,
FDIC-22-0110k

**ORDER NO. 18: GRANTING ENFORCEMENT COUNSEL’S MOTION TO MODIFY
ORDER NO. 12 (PROTECTIVE ORDER)**

On August 11, 2023, Enforcement Counsel for the Federal Deposit Insurance Corporation (“FDIC”) filed a Motion to Modify Protective Order (“Motion”), asserting that John C. Ponte (“Respondent Ponte”) has brought an action in the Superior Court of Rhode Island that improperly relies on information obtained from confidential sworn statements produced by Enforcement Counsel to him in discovery here, and seeking a modification of Order No. 12—the April 5, 2023 Protective Order governing this matter—as a result. For the reasons and to the extent detailed below, Enforcement Counsel’s Motion is GRANTED.

BACKGROUND

The FDIC initiated this action against Respondent Ponte and two other respondents (collectively “Respondents”), all allegedly institution-affiliated parties of Independence Bank (or “the Bank”), in a Notice of Charges (“Notice”) issued on February 10, 2023. Following the Respondents’ Answers to the Notice and prior to the commencement of discovery, Enforcement Counsel for the FDIC and counsel for each Respondent (collectively “the Parties”) submitted a

proposed protective order and proposed joint discovery plan, which the undersigned approved and issued as Order Nos. 12 and 13 on April 5, 2023.

On April 24, 2023, Respondent Ponte informed the undersigned via letter that he had filed a complaint in the United States District Court for the District of Rhode Island raising various constitutional challenges to the legitimacy of this Tribunal and to the administrative enforcement proceedings against him.¹ The letter further represented that Respondent Ponte’s continued participation in the instant action would be “inconsistent” with and “opposite of” the position he has taken in federal court and, as such, that Respondent Ponte would not be participating any further until his case in federal court has been resolved.² Respondent Ponte did not attend the subsequent April 25, 2023 telephonic scheduling conference for these proceedings, nor has he since indicated any willingness to resume participating in this action, at least prior to filing his response to the instant Motion.

After the scheduling conference on April 25, 2023, the undersigned issued Order No. 15 setting the procedural schedule for this case, including various discovery deadlines and a hearing date in October 2024. In that Order, the undersigned made it clear that this schedule and those deadlines applied equally to Respondent Ponte, notwithstanding his representation that he would not be participating during the pendency of his newly-filed federal court action.³

The following day, on April 26, 2023, Enforcement Counsel communicated by email with counsel for Respondent Ponte—which counsel also represents him in the federal court action and in the state action that is the subject of this Motion—“to advise him that the FDIC would only make productions of documents if he agreed to abide by the Protective Order given his client’s

¹ See Ponte Letter to Tribunal, dated April 24, 2023, at 1.

² *Id.* at 2; see *Ponte v. Fed. Deposit Ins. Corp., et al.*, No. 1:23-cv-00165-MSM-LDA (D. R.I.).

³ See Order No. 15: Setting the Procedural Schedule at 1 n.1.

position that orders issued by this Tribunal are not valid.”⁴ Counsel for Respondent Ponte responded that his client “would abide by the previously negotiated, and agreed-upon form of Protective Order entered by ALJ Whang.”⁵

THE RHODE ISLAND ACTION AND THE INSTANT MOTION

On June 28, 2023, Respondent Ponte brought an action in Rhode Island Superior Court against Independence Bank and several of its current and former officers and employees, seeking declaratory relief and damages for alleged misconduct in connection with the events described in the Notice and on which these proceedings are based.⁶ According to Enforcement Counsel, Respondent Ponte violated the April 5, 2023 Protective Order by premising the allegations in his Superior Court complaint in part on information contained in confidential documents that were produced to him in this action—specifically, sworn statements that the FDIC obtained from individuals at the Bank during the course of its investigation. *See* Motion at 3-4. Enforcement Counsel therefore seeks to modify the Protective Order to relieve it of the obligation to make further productions to Respondent Ponte and further asks the undersigned to direct Respondent Ponte to cease and desist any disclosure of confidential documents produced under the Protective Order. *See id.* at 4 (asserting that “Respondent Ponte will continue to violate the Protective Order as the further use or even production of the FDIC’s confidential sworn statements will be necessary to his proceeding to prove his allegations in the [Superior Court] Complaint”).

For his part, Respondent Ponte contends that Enforcement Counsel’s Motion is baseless and objects to the relief requested. *See* August 18, 2023 Objection to Motion to Modify Protective

⁴ Motion at 2; *see* Attachment One to Motion (April 26, 2023 email correspondence) at 2.

⁵ Attachment One to Motion (April 26, 2023 email correspondence) at 1.

⁶ *See* Attachment Two to Motion (June 28, 2023 Complaint in *Ponte vs. Independence Bank*, C.A. No. KC 2023-0536) (“Superior Court Complaint”).

Order (“Objection”) at 1-2.⁷ Respondent Ponte categorically denies reviewing “any materials, including sworn statements, made available [in this proceeding] by the FDIC,” maintaining as a blanket matter that neither he nor his counsel ever “reviewed or otherwise relied on anything produced by the FDIC in the preparation and filing [of] the [Superior Court] action.” *Id.* at 3, 4. Rather, Respondent Ponte states that the allegations in the Superior Court complaint are based on nothing more than reasonable inferences drawn from the contents of the Notice. *See id.* at 4. Respondent Ponte also protests that if the Motion is granted and he is precluded from receiving further discovery, he “would be wholly foreclosed from” developing the affirmative defenses he has asserted in his Answer, “thereby abjectly prejudicing him in this proceeding.” *Id.* at 5.

ANALYSIS

The April 5, 2023 Protective Order governs the Parties’ use of “all documents obtained from, produced by, or made available for inspection in this proceeding by each of the Parties” (hereinafter “Confidential Documents”) and provides, among other things, that any Party receiving such documents during the course of discovery “shall only use Confidential Documents in the preparation and hearing of this proceeding, including all available appeals, *and for no other purpose.*”⁸ This is unambiguous and unconditional; there are no exceptions.⁹

⁷ Enforcement Counsel sought and was granted leave to file a reply to Respondent Ponte’s Objection, which it did on August 29, 2023. *See* August 29, 2023 Reply to Objection to Motion to Modify the Protective Order (“Reply”). Later that day, Respondent Ponte moved for leave to file a surreply to Enforcement Counsel’s Reply to address what he characterizes as new arguments made by Enforcement Counsel. *See* August 29, 2023 Motion for Leave to File Surreply. For the reasons discussed *infra* at 8-9, Respondent Ponte’s Motion for Leave to File Surreply is DENIED. The information contained in that Motion, however, was considered and taken under advisement by the undersigned when determining whether to grant Enforcement Counsel’s instant Motion.

⁸ Protective Order at 1, 2 (emphasis added).

⁹ The Protective Order does state that it does not affect a Party’s use of Confidential Documents if those documents “have been provided or have been made available to the Receiving Party from a source other than a party during this proceeding or a non-party under a subpoena issued in this proceeding.” *Id.* at 2. Respondent Ponte makes no assertion, however, that he had access to the sworn statements at issue here by any means other than through their production by the FDIC pursuant to the Protective Order.

Having reviewed the Superior Court complaint in question, the undersigned concludes that, at the very least, Respondent Ponte *is representing there* that he has violated the terms of the Protective Order. In Respondent Ponte’s own words:

Subsequent to the commencement of the FDIC's administrative enforcement proceeding, ***and in the context of discovery therein, the Plaintiffs became apprised, for the very first time, through the FDIC's production,*** that the Defendants maliciously and intentional falsely fabricated a narrative ***in their sworn testimony or statements to the FDIC.***¹⁰

By his own averment, then, Respondent Ponte first became aware of the allegedly false sworn statements to which he refers through a review of the discovery provided by Enforcement Counsel, and subsequently filed the Superior Court complaint on the basis of those documents. There is no other reasonable interpretation of this paragraph. The undersigned therefore finds it difficult to credit Respondent Ponte’s representation to the contrary in his Objection—namely, that he has never “reviewed any of the sworn statements made available in this matter” by the FDIC, let alone used them when preparing and filing the Superior Court action.¹¹ Objection at 1 n.1.

Respondent Ponte posits that he could independently sustain the Superior Court complaint without relying on any documents produced by Enforcement Counsel. *See id.* at 3 (“The sworn statements the FDIC appears so concerned about are simply not necessary for Ponte to advance the Action.”). However, whether Respondent Ponte *needed* to use the information from the sworn statements as a basis for the Superior Court complaint is irrelevant to the question of whether he violated the Protective Order by doing so.

Furthermore, Respondent Ponte may not simultaneously refuse to participate in this proceeding while demanding discovery from Enforcement Counsel and asserting that any

¹⁰ Superior Court Complaint ¶ 58 (emphases added).

¹¹ *See also* Reply at 2 (noting that “the language of Respondent Ponte’s [Superior Court] Complaint is unambiguous and flatly at odds with Ponte’s [Objection]”).

modification of Enforcement Counsel’s discovery obligations would constitute a violation of his due process rights. *See id.* at 4-5. Respondent Ponte claims that granting the instant Motion would foreclose him from developing his affirmative defenses through discovery, *see id.* at 5, but it is Respondent Ponte himself who is preventing the development of those defenses so long as he takes the position that his active presence in this proceeding is unnecessary. *See id.* at 1 n.1 (stating that “consistent with the April 24, 2023 correspondence addressed to the [undersigned], and for the reasons set forth therein, neither Ponte nor his counsel has participated in any discovery in this matter up to this point”). He cannot have it both ways.

It is the undersigned’s obligation to make findings and recommendations regarding all three respondents in this case, whether they choose to participate or not—this action will proceed with or without Respondent Ponte taking an active role. Respondent Ponte is reminded, moreover, that all deadlines agreed to by the Parties¹² and set forth in the April 25, 2023 procedural schedule still apply to him. *See* Order No. 15. If he wishes to serve written discovery requests or request third-party subpoenas during this proceeding, for example, he must do so by October 31, 2023. Any motions to compel must be filed by January 31, 2024. Dispositive motions and responses thereto are due by April 30, 2024 and May 20, 2024, respectively. These and the other deadlines in this matter apply to Respondent Ponte regardless whether his district court action remains pending when they pass, and failure to abide by them may deprive Respondent Ponte of a full opportunity to present a case in his defense, at hearing or otherwise, in response to the allegations made in the Notice.¹³

¹² On April 4, 2023, Enforcement Counsel and counsel for all Respondents (including Respondent Ponte) jointly submitted a proposed procedural schedule that, other than the changing of certain deadlines by one day to avoid them falling on a weekend or holiday, was adopted in full by the undersigned in Order No. 15.

¹³ *See, e.g.*, 12 C.F.R. §§ 308.21 (“Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent’s right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice.”), 308.23(d)(2) (“The failure of a party to oppose a written motion or

In the interim, there is no reason why Enforcement Counsel—or, for that matter, either of the other Respondents—should be required to provide Respondent Ponte with document discovery in this case if he is not participating, particularly if he might use those documents improperly in other fora. Respondent Ponte may, of course, resume his participation in this matter at any point without prejudicing whatever ability he may have to raise his constitutional challenges to the validity of this Tribunal and this administrative enforcement proceeding, whether in the pending district court action or to the FDIC Board of Directors following issuance of a recommended decision. At that time, as long as it is before the close of the prescribed discovery period, Respondent Ponte will be entitled to receive whatever document discovery would otherwise have been produced to him but for his decision not to participate.

As for Respondent Ponte’s alleged past (and potential future) violation of the Protective Order, the undersigned emphasizes to Respondent Ponte in the strongest possible terms that violating orders entered in this case may expose Respondent Ponte and his counsel to sanctions under 12 C.F.R. § 308.108(a)(3). Respondent Ponte is likewise reminded that he is bound by the terms of Order No. 13 and the discovery provisions of the Uniform Rules to respond to timely discovery requests made by the other Parties, including the August 15, 2023 request for production from Enforcement Counsel to which he adverts in his Objection.¹⁴ *See* Objection at 4 n.12. Failure to do so may also be sanctionable and may result, at the very least, in an order compelling production of documents under 12 C.F.R. § 308.25(g). Further, to the extent that Respondent

an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.”), 308.39(b)(2) (“No exception [to a recommended decision] need be considered by the [FDIC] Board of Directors 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.”).

¹⁴ *See* April 5, 2023 Joint Discovery Plan (Order No. 13) at 4 (“After reviewing the provided hit counts and agreeing upon search terms . . . , the Parties will apply the search terms and produce all **responsive, relevant, non-privileged documents** subject to the terms of this Discovery Plan and Attachments A and B.”) (emphasis in original); *see also* 12 C.F.R. §§ 308.24 (“Scope of document discovery”), 308.25 (“Request for document discovery from parties”).

Ponte, through his lack of participation, does not adequately afford Enforcement Counsel the ability to develop in discovery evidence and argument responsive to any defenses (including affirmative defenses) that he may raise at summary disposition or at hearing, he risks jeopardizing his own ability to rely upon those defenses in this action.¹⁵

RESPONDENT PONTE’S MOTION FOR LEAVE TO FILE SURREPLY

On August 29, 2023, Respondent Ponte moved for leave to file a surreply in response to Enforcement Counsel’s Reply, which had been filed earlier that day.¹⁶ Having reviewed Respondent Ponte’s Motion for Leave and considered the representations therein, the undersigned concludes that a surreply—in addition to being greatly disfavored by this Tribunal—is unnecessary in this instance. Nothing in the five-page Motion for Leave attempts to rebut, or even address, Enforcement Counsel’s citation to the plain language of paragraph 58 of the Superior Court complaint, in which Respondent Ponte clearly represents that that action is based, at least in part, on allegedly false “sworn testimony or statements to the FDIC” that Respondent Ponte “became apprised [of], for the very first time, through the FDIC’s production” in these proceedings.¹⁷ Nor

¹⁵ The sanctions that the undersigned is authorized to impose with respect to a party’s “clear and unexcused violation[s] of an applicable statute, regulation, or order” include “[r]ejecting or striking any testimony or documentary evidence offered . . . by the party”; “[p]recluding the party from contesting specific issues or findings”; and “[p]recluding the party from offering certain evidence or from challenging or contesting certain evidence offered by another party.” 12 C.F.R. §§ 308.108(a)(3), (b).

¹⁶ The undersigned notes that both Respondent Ponte’s Objection and his Motion for Leave are procedurally deficient, lacking as they do any pagination in contravention of Rule 1.3 of the undersigned’s Ground Rules. *See* March 21, 2023 Issuance of Ground Rules (Order No. 5) at 2. This is no mere technicality, as the absence of page numbers places a thoroughly gratuitous burden on the time of this Tribunal and on opposing counsel by rendering a party’s filings arbitrarily difficult to reference and cite, particularly when printed. Moreover, this is the second time that the undersigned has had to bring such a deficiency to Respondent Ponte’s attention. *See* April 4, 2023 Order Regarding Enforcement Counsel’s Motion to Strike Affirmative Defenses (Order No. 9) at 5 n.14. A third such lapse will result in the filing being rejected by this Tribunal.

¹⁷ Superior Court Complaint ¶ 58. The undersigned recognizes that Respondent Ponte’s proposed surreply (as described in his Motion for Leave) would contain a number of other additional arguments and factual assertions in response to what Respondent Ponte characterizes as new arguments made in Enforcement Counsel’s Reply. To the extent that those arguments and assertions have been detailed in the Motion for Leave, they have been considered. But they do not admit to any alternative reading of paragraph 58 (or, indeed, mitigate Respondent Ponte’s lack of participation in this case) such that Enforcement Counsel’s requested relief would be inappropriate, and the undersigned did not rely on any arguments made solely in the Reply when reaching her decision in any event.

does the Motion for Leave acknowledge in any way the fundamental contradiction in Respondent Ponte’s position here—that Enforcement Counsel’s requested relief will deprive him of the opportunity to meaningfully participate in this action, when it is he who has stated—including in his Objection—that he has no present intention of meaningfully participating regardless.¹⁸ The answer to Respondent Ponte’s dilemma is a happily simple one, and entirely within his control: if (as he says) he wishes to receive discovery and otherwise participate in this proceeding, then he should participate in this proceeding. He can do so at any time.

CONCLUSION

Accordingly, and for the foregoing reasons, Enforcement Counsel’s Motion to modify the Protective Order in this case is hereby **GRANTED**. Unless and until Respondent Ponte resumes his participation in the instant action, the other Parties are relieved of the obligation to further produce documents to Respondent Ponte. Those Parties are **ORDERED** to record and track the documents they would produce, but withhold from Respondent Ponte under this Order, so that they may produce such documents if and when he timely chooses to present his side in this case. Respondent Ponte is also **ORDERED** to take great care in the future to abide by the terms of the Protective Order in all respects.

SO ORDERED.

Issued: August 30, 2023



Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication

¹⁸ Compare Motion for Leave at 4 (“[T]o relieve the FDIC of any further discovery obligations toward Ponte is extraordinarily [sic] and amounts to a gross violation of his inalienable due process and constitutional rights, which will most assuredly result in abject prejudice to his ability to defend, and even meaningfully participate, in the instant proceeding.”) with Objection at 1 n.1 (“[C]onsistent with the April 24, 2023 correspondence addressed to the [undersigned], and for the reasons set forth therein, neither Ponte nor his counsel has participated in any discovery in this matter up to this point”).

CERTIFICATE OF SERVICE

On August 30, 2023, I served a copy of the foregoing **Order** upon the following individuals via email:

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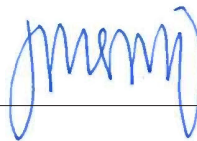
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