PUBLIC VERSION

FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

In the Matter of: **ROBERT S. CATANZARO and JOHN C. PONTE,** as institution-affiliated parties of Independence Bank East Greenwich, Rhode Island (Insured State Nonmember Bank)	Docket Nos.: FDIC-22-0109e FDIC-22-0110k FDIC-22-0143b FDIC-22-0112e FDIC-22-0113k

ORDER NO. 32: DENYING RESPONDENT PONTE'S MOTION FOR SUMMARY DISPOSITION ON THE IAP ISSUE[1]

(June 10, 2024)

[1] This order is being issued under temporary seal for the reason provided in note 8 *infra*. By June 17, 2024, Enforcement Counsel shall notify the undersigned's office whether any portion of this order should remain under seal in furtherance of the public interest. If so, this order will remain sealed and the undersigned will issue a redacted, public version. If not, this order will be deemed unsealed and will be posted in its entirety at https://www.ofia.gov/decisions in accordance with normal practice.

I. Introduction

On February 10, 2023, the Federal Deposit Insurance Corporation ("FDIC") commenced this action against John C. Ponte ("Respondent Ponte") and two other individuals[2] in their capacities as institution-affiliated parties ("IAPs") of Independence Bank ("IB" or "the Bank"), filing a Notice of Charges ("Notice") that seeks, *inter alia*, an order of prohibition, an order of restitution, and the imposition of a $74,000 civil money penalty against Respondent Ponte pursuant to 12 U.S.C. §§ 1818(b), 1818(e), and 1818(i). With respect to Respondent Ponte, the Notice alleges that, through his company Greenwich Business Capital LLC ("GBC"), then known as Ponte Investments LLC ("Ponte Investments"), Respondent Ponte committed various forms of actionable misconduct, including the issuance of improper bridge loans and the charging of impermissible fees, in connection with his large-scale referral of small-business applicants to the Bank for loans backed by the U.S. Small Business Administration ("SBA"), the origination of which was "the Bank's sole business strategy" ("SBA Loan Program"), from June 2017 through 2019 ("Relevant Times").[3]

On March 3, 2023, Respondent Ponte filed an Answer in which he raised a series of affirmative defenses to the Notice's allegations, including that he is not an IAP of the Bank and that the FDIC therefore has no jurisdiction to bring this action against him. On April 4, 2023, the undersigned identified this affirmative defense as "a *prima facie* element of the FDIC's case" and "a central question that must be resolved during the pendency of these proceedings."[4] When

[2] One of these individuals, Danielle M. Desrosiers, has since settled with the FDIC and is no longer a respondent in this case. *See* March 13, 2024 Notice of Settlement.

[3] Notice ¶ 3; *see id.* ¶¶ 16 (alleging that "during the Relevant Times, approximately 76% of the dollar amount of SBA Loans approved and funded by the Bank was from such loans referred by Respondent Ponte"), 36-61 (allegations of Respondent Ponte's misconduct).

[4] Order No. 9: Granting in Part and Denying in Part Enforcement Counsel's Motion to Strike Respondent Ponte's Affirmative Defenses (April 4, 2023) at 11.

Respondent Ponte signaled in November 2023 that he intended to file a standalone motion for summary disposition on the IAP issue, the undersigned encouraged him to do so as soon as possible, noting that "such a threshold issue, which is determinative of whether the proceeding can be maintained against a respondent, can and should be decided promptly."[5]

After spending months using his asserted non-IAP status as a reason not to fulfill his discovery obligations,[6] Respondent Ponte finally moved for summary disposition on that issue on March 12, 2024 ("Motion"). In conjunction with the Motion, Respondent Ponte submitted a thirteen-page, self-serving affidavit, a Statement of Undisputed Facts drawn directly and wholly from that affidavit, and no other supporting exhibits.[7] On May 2, 2024, Enforcement Counsel for the FDIC ("Enforcement Counsel") filed an Opposition to Respondent Ponte's Motion, along with a Counterstatement of Material Facts, its own corresponding Statement of Material Facts, and one hundred exhibits in support.[8] On May 3, 2024, in contravention of the undersigned's Ground Rules

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[5] Order No. 19: Denying Motion to Strike or Deny the FDIC's Motion for Issuance of Subpoena *Duces Tecum* Directed to Non-Party Greenwich Business Capital, LLC (December 11, 2023) at 2 n.3.

[6] *See* Order No. 23: Denying Respondent Ponte's Motion for Protective Order and Non-Party Greenwich Business Capital, LLC's Motion to Quash Subpoena *Duces Tecum* (March 15, 2024) at 2-4 (describing Respondent Ponte's dilatory behavior); Order No. 26: Denying Respondent Ponte's Motion for Reconsideration or, in the Alternative, Modification of Order No. 23 (March 27, 2024) at 2 (same).

[7] *See* March 12, 2024 Affidavit of John C. Ponte; March 12, 2024 Statement of Undisputed Facts ("Resp. SOF").

[8] *See* May 2, 2024 Counterstatement to Respondent John C. Ponte's Statement of Undisputed Facts and FDIC Statement of Material Facts; May 2, 2024 Exhibit List. Enforcement Counsel's counterstatement and statement were filed as one document and will be cited as "CSOF" and "EC SOF," respectively, while exhibits submitted along with Enforcement Counsel's Opposition are styled as "EC-OPP," the number of the exhibit, and then the designation "C" if Enforcement Counsel has determined that certain parts of that exhibit are confidential and filed the exhibit under seal. *See* 12 C.F.R. § 308.33(b). For exhibits that are so designated, the undersigned will take care not to disclose any information deemed confidential, so that this Order and these proceedings might remain public to the fullest possible extent. On June 6, 2024, at the undersigned's request, Enforcement Counsel filed public, redacted versions (with the designation "P") for exhibits determined to contain confidential information, as well as an updated and revised exhibit list indicating that certain exhibits previously designated as confidential had been determined upon review to contain only public information and redesignated accordingly. In connection with this filing, Enforcement Counsel informed the undersigned and respondents' counsel that the Reports of Examination submitted as exhibits EC-OPP-3C, EC-OPP-4C, and EC-OPP-31C would remain fully confidential, at least temporarily, while the FDIC conferred with the State of Rhode Island as to which portions of those exhibits may be made public. Because notes 34 and 35 of this Order quote three brief passages from EC-OPP-4C that were alluded to or quoted in Enforcement Counsel's counterstatement, the Order is issued under temporary seal pending Enforcement Counsel's determination whether disclosure of those passages would be contrary to the public interest. *See also* note 1 *supra.*

in this matter, Respondent Ponte submitted a five-page letter to this Tribunal professing to be a renewed request for a hearing on his summary disposition motion[9] but in fact acting as an unauthorized reply to Enforcement Counsel's Opposition and purporting to dispute—through bare assertion, and again without evidentiary support—a number of factual points adduced therein.[10]

Now, having reviewed the Motion and Opposition and their associated filings, and without placing any weight on the arguments and assertions made by Respondent Ponte in his improperly submitted letter, the undersigned concludes that disputed questions of material fact exist at this juncture as to whether Respondent Ponte is an IAP of the Bank that are more appropriately resolved through consideration of Enforcement Counsel's merits briefing submitted on May 28, 2024 and Respondent Ponte's response to the same, or at hearing as necessary.[11] Accordingly, and for the reasons set forth below, Respondent Ponte's instant Motion for summary disposition on the IAP issue is hereby denied.

II. Summary Disposition Standard

The FDIC'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

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[9] In his Motion, Respondent Ponte requested "oral argument or a hearing in aid of the instant request for summary disposition." Motion at 2; *see* 12 C.F.R. § 308.29(c). It is not the undersigned's practice to hear oral argument on motions, and she likewise deems it unnecessary in this instance. Respondent Ponte's request is therefore denied.

[10] *See* Order No. 5: Issuance of Ground Rules (March 21, 2023) at 4 ("All motions and other requests for relief . . . must be submitted in written motion and not by letter.") & n.7 (noting that "[m]otions for leave to file a reply will not be granted automatically as a matter of course and should be reserved only for very limited situations in which the moving party believes that a reply is genuinely necessary to address a material misstatement of law or fact, a new argument raised in the opposing party's response, or an intervening change in controlling authority").

[11] All three parties in this action—Enforcement Counsel, Respondent Ponte, and Respondent Robert S. Catanzaro—were given the chance to submit motions for summary disposition on the merits of this case (separate from the solely jurisdictional question presented by the instant Motion) by that date, but only Enforcement Counsel did so. However, should he so desire, Respondent Ponte will have the opportunity to make any relevant substantive points raised in his unauthorized May 3, 2024 letter—supported by adequate documentary evidence—in his opposition to Enforcement Counsel's motion for summary disposition, which opposition is due by June 17, 2024. *See also infra* at 22-25.

any material fact," and (2) "[t]he moving party is entitled to a decision in its favor as a matter of law."[12] 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."[13]

The summary disposition standard "is similar to that of the summary judgment standard under Rule 56 of the Federal Rules of Civil Procedure."[14] Thus, when determining the existence of a genuine factual dispute, all evidence must be evaluated "in the light most favorable to the non-moving party."[15] 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.[16] In other words, as the Comptroller of the Currency has held, "in granting a motion for summary disposition[,] a trier of fact is not obliged to credit the non-moving party's factual assertions when they are not supported on the record."[17]

Any party moving for summary disposition of all or part of the proceeding must submit, along with such motion, "a statement of the material facts as to which the moving party contends there is no genuine issue."[18] A party that opposes summary disposition, moreover, must likewise "file a statement setting forth those material facts as to which the opposing party contends a genuine dispute exists."[19] In both cases, the enumeration of disputed or undisputed material facts

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[12] 12 C.F.R. § 308.29(a).

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

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

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

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

[17] *Blanton*, 2017 WL 4510840, at *6; *see also id.* ("[T]here is no genuine issue [of material fact] if the evidence presented in the opposing affidavits is of insufficient quality to allow a rational finder of fact to find for the non-movant. . . . When opposing parties tell two different stories, one of which is blatantly contradicted by the record, . . . a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.") (internal quotation marks and citation omitted).

[18] 12 C.F.R. § 308.29(b)(2).

[19] *Id.*

"must be supported by documentary evidence [in] the form of admissions in pleadings, stipulations, depositions, transcripts, affidavits, [or] any other evidentiary materials that the . . . party contends support [its] position."[20]

III. Summary of Facts

The following is an abbreviated summary of those facts relevant to the threshold IAP issue, as drawn from the briefs of Respondent Ponte and Enforcement Counsel (collectively, for purposes of this Motion, "the Parties"), their respective statements of facts, and the evidence submitted in support thereto. Where the Parties appear to be in genuine factual dispute, both accounts are noted; on the other hand, where Enforcement Counsel as the non-moving party adduces facts that are neither disputed nor otherwise addressed by Respondent Ponte, those facts are taken as true for purposes of the instant Motion.[21]

The SBA Loan Program

The SBA's Small Loan Advantage 7(a) lending program, or SBA Loan Program, is "designed to assist high-risk small business borrowers that have demonstrated an inability to secure credit from other sources."[22] Under the leadership of Robert S. Catanzaro ("Respondent Catanzaro"), the Bank's Chief Executive Office ("CEO") and the other respondent in this matter, it ultimately became the Bank's "sole business strategy" to originate loans through this program and then sell the SBA-guaranteed portion of those loans "in the secondary market at significant premiums."[23] The Bank's earnings were therefore "dependent upon" the volume of SBA Loans originated and sold in this fashion.[24]

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[20] *Id.*
[21] *See Anderson*, 477 U.S. at 255.
[22] EC SOF ¶ 3.
[23] *Id.* ¶¶ 4-5.
[24] *Id.* ¶ 6.

It is undisputed that "the Bank established policies and procedures pursuant to which its SBA Loan Program operated."[25] In addition, the Bank's SBA Loan Program was governed by various SBA rules, regulations, and standard operating procedures ("SOP") "that all parties were required to follow, including loan referral agents" (collectively "SBA Program Requirements").[26] The Parties dispute whether Respondent Ponte, a sophisticated and experienced lender who had previously "owned and operated . . . a national mortgage banking firm that was once licensed in fifty states for more than two decades,"[27] was familiar with the SBA Program Requirements or whether he solely "relied upon the instruction and guidance provided by [the Bank], as well as [the Bank's] policies and procedures that were established by [the Bank's] senior management with regard to the SBA Loan Program."[28]

Ponte Investments

In any event, Respondent Ponte, as the sole owner of a business then known as Ponte Investments, referred prospective SBA Loan applicants to the Bank from 2015 through 2019.[29] The Parties agree that Respondent Ponte was never an employee, officer, director, or shareholder of the Bank.[30] Rather, Ponte Investments was—in Respondent Ponte's words—"an independent loan originator or broker" whose "business relationship with [the Bank] was governed by" a series of contracts ("the Loan Referral Agreements"), beginning with an April 2015 Non-Exclusive Independent Selling Organization Agreement ("the 2015 Agreement") and ending with a

[25] CSOF ¶ 7.

[26] *Id.*; *see also id.* ¶¶ 5, 8.

[27] Motion at 9.

[28] *Id.* at 9-10 (asserting that "neither GBC nor Ponte were experienced with SBA lending"); *see* CSOF ¶ 8 (stating that the Bank's "policies and procedures included adherence to all SBA Program Requirements"); EC SOF ¶¶ 13, 31, 45-46, 55, 122-123 (adducing facts indicating that Respondent Ponte was made aware of at least certain SBA Program Requirements beyond the Bank's policies and procedures).

[29] *See* Resp. SOF ¶¶ 1-2, 4; CSOF ¶ 4. It appears undisputed that "Respondent Ponte had absolute control over and was involved in all aspects of Ponte Investments." EC SOF ¶ 8.

[30] *See* Resp. SOF ¶ 6; CSOF ¶¶ 6, 39.

November 2018 Loan Application Referral Agreement ("the 2018 Agreement") that "'replaced' the 2015 Agreement as the operative instrument governing the parties' business relationship."[31] (Pursuant to the question of Respondent Ponte's knowledge of the SBA Program Requirements, Enforcement Counsel notes that the 2018 Agreement specifically stated that Ponte Investments "agree[d] to comply with all applicable laws, regulations, and regulatory guidance.")[32] There is no dispute, then, that Ponte Investments "was an independent contractor originating potential SBA loan applicants for the Bank's SBA Loan Program" during the Relevant Times.[33]

While Ponte Investments was not the only independent contractor that the Bank used in connection with its SBA Loan Program, it was by far the most important, its referrals accounting for nearly 80 percent of the revenue from SBA Loans approved and funded by the Bank.[34] In fact, Enforcement Counsel adduces facts indicating that, given the Bank's sole focus on SBA lending, "Respondent Ponte became the main driver of the Bank's profitability."[35] Befitting this status, it appears that "as many as four Bank employees worked out of the offices of Ponte Investments" during the time period at issue, including Danielle Desrosiers, the Bank's Chief Operating Officer

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[31] Motion at 11-12; *see* Resp. SOF ¶ 4; CSOF ¶¶ 4-5; *see also generally* EC-OPP-9 (Loan Referral Agreements).

[32] CSOF ¶ 5; *see* EC-OPP-9 (Loan Referral Agreements) at 23 (2018 Agreement § 2).

[33] CSOF ¶ 40; *see also* Motion at 21 ("Per GBC's written agreements with IB, GBC was not 'employed' by IB. To the contrary, GBC was an unaffiliated, independent and non-exclusive originator of potential loan applications for the SBA Loan Program."); EC-OPP-9 (Loan Referral Agreements) at 30 (2018 Agreement § 13) (stating that "Referral Agent [i.e., Ponte Investments] ***shall be an independent contractor*** for all purposes and for all Services to be provided under this Agreement") (emphasis added).

[34] *See* CSOF ¶ 8 (noting that "the Bank's SBA Loans were predominantly sourced through Ponte Investments"); EC-OPP-4C (2018 Report of Examination ("ROE")) at 17 (stating that "Ponte generates approximately 80% of [SBA Loan] deal flow, while the bank generates approximately 20% internally"), 21 (stating that "Ponte is considered the institution's sole [independent sales organization ("ISO")]. . . . Management refers to other entities as referral agents."); *compare with* Motion at 12 (asserting that "GBC was merely one of approximately thirty independent loan originators or brokers from which IB accepted potential loan applications as part of its SBA Loan Program").

[35] EC SOF ¶ 25; *see* EC-OPP-4C (2018 ROE) at 17 ("High levels of earnings are derived by the bank's ability to gather sufficient loan referrals, originate loans, and sell the guaranteed portion in the secondary market. . . . [C]oncentration of revenue is derived from a single ISO, Ponte.").

("COO"), with whom Respondent Ponte had an intimate relationship.[36] Respondent Ponte also formed a close relationship with Respondent Catanzaro,[37] and Enforcement Counsel asserts that these three factors—Respondent Ponte's relationship with Ms. Desrosiers, his relationship with Respondent Catanzaro, and the importance of his referral business to the Bank's revenue—allowed Respondent Ponte to exert "significant influence" over the Bank and its loan process.[38]

Respondent Ponte's Influence and Post-Referral Involvement

The Parties offer conflicting accounts of Respondent Ponte's influence at the Bank and of his and his business's role in the Bank's SBA Loan process after the loans had been referred. According to Respondent Ponte, once the potential loan applications and supporting documentation had been uploaded to a file share portal established by the Bank for that purpose, Ponte Investments' "involvement in the origination process, which was [its] only function, was at an end."[39] Respondent Ponte states that "the review, underwriting, verification, and/or approval authority with regard to any potential loan applications originated by [Ponte Investments] and referred to [the Bank] was performed solely and exclusively by [Bank] employees," averring further that he personally did not have any "oversight, control and/or direction" of the Bank's SBA Loan Program, any role in the underwriting, approval, closing, or funding of SBA Loans, any rulemaking or policymaking authority at the Bank, or otherwise any involvement in the SBA Loan Program's administration or management.[40] If this was not sufficiently clear, Respondent Ponte

[36] CSOF ¶ 10; *see also* EC SOF ¶ 27; EC-OPP-5 (October 16, 2023 Affidavit of Danielle M. Desrosiers) ¶¶ 12-15; Motion at 7 (stating that "the primary interface between IB and GBC was [Ms.] Desrosiers").

[37] *See* EC SOF ¶¶ 26, 71; *see also* EC-OPP-51 (email chain including May 25, 2017 email from Respondent Ponte to Respondent Catanzaro) ("My loyalty and future is [sic] in your hands. I never will second guess you. I am your soldier. I truly love you sir. You mean the world to me.").

[38] Opposition at 4; *see also*, *e.g.*, CSOF ¶ 13; EC SOF ¶¶ 26-27.

[39] Resp. SOF ¶ 12.

[40] *Id.* ¶ 13; *see* Motion at 3, 10.

also asserts categorically that he "played no particular role in any of [Ponte Investment's] specific business dealings with [the Bank]" and "did not engage in any banking activity whatsoever."[41]

Enforcement Counsel offers emails and sworn statements disputing each of these points. First, Enforcement Counsel asserts that far from ending its involvement at the beginning of the Bank's origination process, "Ponte Investments remained the applicant's primary point of contact and advocate throughout the process, up to and including going over the DocuSign closing package and notifying the borrower when the Bank funded the SBA loan."[42] As for Respondent Ponte himself, Enforcement Counsel contends that he "was personally involved in pushing for loans to be approved after referral"; that "[h]e sought to, and succeeded in, determining which Bank employees could review loans he submitted"; and that "[h]e was even involved in and suggested changes to Bank policies and procedures."[43] Enforcement Counsel states that "Respondent Ponte routinely and aggressively lobbied Bank personnel at virtually all levels, up to and including Respondent Catanzaro, to approve and fund the SBA Loan applications he referred to the Bank—especially SBA Loans he referred with hidden Bridge Loans."[44] Enforcement Counsel also provides evidence that "[w]hen Respondent Ponte felt that the Bank was not responsive to his demands, he would send emails threatening to pull his business from the Bank."[45]

One concrete example of Respondent Ponte's post-referral influence at the Bank is worth discussing in additional detail. According to Enforcement Counsel, Respondent Catanzaro's son, then-Bank President Robert A. Catanzaro ("President Catanzaro"), was in charge of reviewing

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[41] Motion at 7, 19.

[42] CSOF ¶ 11; *see also id.* ¶ 10 (noting that "Ponte Investments was responsible for all communication with an applicant, even after referral to the Bank," and that "[w]hen loans defaulted, Ponte Investments was, at times, involved in performing collections for the Bank").

[43] *Id.* ¶ 10.

[44] *Id.* ¶ 28; *see infra* at 12-14.

[45] CSOF ¶ 29; *see* Opposition at 27-28.

SBA Loans referred by Ponte Investments.[46] Enforcement Counsel asserts that, in the course of this review, President Catanzaro "would often raise salient issues (e.g., fee overcharging, violations of SBA regulations and/or [SOPs], underwriting weaknesses) that were disruptive to Respondent Ponte's referral business."[47] In late May 2017, after President Catanzaro turned down a Ponte Investments-referred loan on multiple grounds, Respondent Ponte emailed Respondent Catanzaro, writing that "I don't know if I can work with your son."[48] Two weeks later, President Catanzaro declined another SBA Loan referred by Ponte Investments, again citing numerous concerns about the underwriting.[49] When Respondent Catanzaro forwarded this denial to Respondent Ponte, Respondent Ponte responded by stating that he would be terminating his relationship with the Bank "based on the actions of your bank president" unless President Catanzaro was "removed from his position and replaced by a responsible leader that knows, understands, and appreciates what we do for our clients, the bank, and the SBA loan program."[50] Enforcement Counsel asserts that, following this email, the Bank's Board of Directors "approved a reorganization of the Bank's lending department where President Catanzaro would run the Bank's separate internal lending program and Respondent Catanzaro would run the program that used Ponte Investments as the referral source for SBA Loans," thus "effectively isolat[ing] President Catanzaro from reviewing any loans referred to the Bank by Ponte Investments."[51]

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[46] EC SOF ¶ 31.

[47] *Id.*; *see id.* ¶¶ 45-50; CSOF ¶ 26.

[48] EC SOF ¶ 32 (quoting EC-OPP-25C (email chain including May 25, 2017 email from Respondent Ponte to Respondent Catanzaro) at 1; *see also* EC-OPP-25C (email chain including May 22, 2017 email from President Catanzaro) at 2 (noting that the denial was based, among other things, on the fact that the prospective borrower had excessive past due tax obligations, that the "SBA Loan would be subject to numerous IRS lien filings," and that the personal credit score of the prospective borrower was too low).

[49] *See* EC SOF ¶ 33; EC-OPP-26C (June 7, 2017 email chain including email from President Catanzaro to Respondent Catanzaro et al.) at 2-3.

[50] EC-OPP-26C (June 7, 2017 email chain including email from Respondent Ponte to Respondent Catanzaro) at 1; *see* EC SOF ¶ 34.

[51] EC SOF ¶ 35; *see* EC-OPP-29 (IB Board of Directors Meeting Minutes (July 26, 2017)) at 6.

The Bridge Loan Scheme

As part of his business strategy, Respondent Ponte would offer, and would direct his employees to offer, high interest rate interim extensions of credit, or "Bridge Loans," to SBA Loan applicants who were waiting for their SBA Loans to be approved and funded.[52] Although Respondent Ponte maintains that such loans were only offered to applicants "*after* potential loan application packages were submitted to [the Bank],"[53] Enforcement Counsel states that it has "numerous examples of Ponte Investments offering Bridge Loans prior to" the SBA Loan applications being referred.[54] The Parties also disagree how frequently such loans were offered, with Respondent Ponte asserting that "[t]his was not a wide-ranging offering,"[55] and Enforcement Counsel providing evidence that *all* SBA Loan applicants whose applications were referred to the Bank by Ponte Investments were encouraged to take out a Bridge Loan with Ponte Investments or its affiliate company Hydrangea Capital, which Respondent Ponte also fully owned.[56] Regardless, the Parties agree that somewhere between 200 and 300 of the SBA Loan referrals in question during the Relevant Times had associated Bridge Loans.[57]

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[52] *See* EC SOF ¶ 14 (noting that such interest rates ranged "from 50% to 100%"); Resp. SOF ¶ 17 (stating that "from time-to-time GBC offered and/or extended interim financing or so-called 'bridge loans' to potential loan applicants").

[53] Resp. SOF ¶ 17 (emphasis in original).

[54] CSOF ¶ 17.

[55] Resp. SOF ¶ 17.

[56] *See* CSOF ¶ 17 (stating that "Ponte Investments employees were required to offer Bridge Loans to all potential applicants"); Resp. SOF ¶ 14. While Respondent Ponte asserts that Hydrangea Capital "had no relationship, nexus or affiliation with [the Bank] whatsoever, Resp. SOF ¶ 17, Enforcement Counsel's expert, Kandace Zelaya, has averred that "Respondent Ponte used both Ponte Investments and Hydrangea Capital to provide Bridge Loans and used the two entities interchangeably in providing such financing." CSOF ¶ 17 (citing October 31, 2023 Expert Report of Kandace A. Zelaya ("Zelaya Report") at 15). Because it appears undisputed that "Respondent Ponte is the sole member and 100% owner of Hydrangea Capital," *id.*, any factual disputes regarding the precise nature of Hydrangea Capital's role in providing Bridge Loans to SBA Loan applicants of the Bank may be resolved as necessary at a later stage in this proceeding.

[57] *See* Resp. SOF ¶ 17 (asserting that "of the nearly 3,000 potential loan applications referred to IB, GBC extended interim financing to less than 300 applicants"); CSOF ¶ 17 (accepting that Ponte Investments or Hydrangea Capital "extended Bridge Loans to less than 300 SBA Loan applicants that Ponte Investments referred to the Bank"); *see*

Enforcement Counsel contends that "[i]n order to mitigate the risk of default, Respondent Ponte, whenever possible, arranged with the SBA Loan applicants to have his Bridge Loans paid off from the proceeds of the SBA Loans approved and funded by the Bank," a practice that was prohibited by SBA regulations.[58] Enforcement Counsel further asserts that the existence of these Bridge Loans was "not documented on the SBA Loan application or supporting documents sent to the Bank by Ponte Investments" or otherwise disclosed to the SBA, which was likewise contrary to SBA Program Requirements.[59] According to Enforcement Counsel, Respondent Ponte and Respondent Catanzaro "knew that the SBA would not guarantee an SBA Loan if it knew the referral agent had extended a Bridge Loan" and therefore consciously sought to conceal the existence of the Bridge Loans from the SBA and the FDIC ("Bridge Loan Scheme"), as doing so permitted Respondent Ponte to profit from the high-interest Bridge Loans while referring "a large volume of SBA Loans to the Bank" for the Bank's own benefit.[60]

For his part, Respondent Ponte acknowledges that Ponte Investments did not disclose the existence of the Bridge Loans in SBA Loan applications or during the SBA Loan "underwriting, review and/or approval process," but asserts that this was done at the behest and direction of Respondent Catanzaro and other Bank personnel, who advised him that such disclosure was unnecessary under the applicable SBA Program Requirements.[61] Separately, it appears undisputed

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also EC SOF ¶ 36 (stating that "[b]etween late 2017 and early 2019, the Bank closed 201 SBA Loans with hidden Bridge Loans referred by Ponte Investments") (citing October 31, 2023 Expert Report of Mary A. Barry at 18).

[58] EC SOF ¶ 16; *see* Opposition at 18-19.

[59] EC SOF ¶ 15; *see* CSOF ¶ 8; Opposition at 17.

[60] EC SOF ¶¶ 20, 22; *see also id.* ¶ 21 (also asserting that Respondent Ponte and Respondent Catanzaro "knew that Bridge Loans had to be disclosed and could not be repaid with SBA Loan proceeds").

[61] Resp. SOF ¶ 22; *see also id.* ¶ 23 (asserting that the Bank "directed that GBC was not to provide IB with copies of interim financing agreements as part of the submission of potential SBA loan applications to IB by GBC"). The undersigned notes that this latter representation, that Ponte Investments was told not to provide documentation of Bridge Loans with the SBA Loan applications, appears to contradict Respondent Ponte's earlier assertion that Bridge Loans were only offered to SBA Loan applicants "after potential loan application packages were submitted to [the Bank]," *id.* ¶ 17 (emphasis omitted).

that Respondent Ponte "initially caused UCC-1 financing statements to be filed on the SBA Loan applicants that he referred to the Bank . . . [that] evidenced the existence of Bridge Loans,"[62] but then ceased this practice when the Bank instructed him "to terminate all UCC-1 financing statements that had been filed by [Ponte Investments], and to not file any in the future."[63]

Fees Charged by Ponte Investments

Respondent Ponte states that Ponte Investments would, "from time to time," charge application fees—which Enforcement Counsel calls "referral fees"[64]—and "overall business analysis fees" to SBA Loan applicants who it was referring to the Bank.[65] Enforcement Counsel disputes the assertedly low frequency of such fees, stating that it was able to identify approximately $4.5 million in total fees charged by Ponte Investments to approximately 1,500 SBA Loan applicants during the Relevant Times.[66]

The Loan Referral Agreements between Ponte Investments and the Bank generally provided that Ponte Investments could charge a maximum total fee of 2 percent of the prospective loan amount to SBA applicants that it referred to the Bank.[67] For example, the June 2018 Non-Exclusive Independent Services Agreement states as follows:

> Any fees not expressly permitted in 13 C.F.R. Section 120.221, or SBA SOP 50-10-5(j), subpart B VI are prohibited. . . . [Ponte Investments] ***may charge a fee of no more than two percent (2%) of the principal amount of the loan funded by the Bank for services benefitting a prospective borrower*** such as consulting as to the

[62] CSOF ¶¶ 18, 23; *see* Resp. SOF ¶ 18 (stating that Ponte Investments "initially filed UCC-1 Financing Statements as notice of the extension of interim financing").

[63] Resp. SOF ¶ 23; *see* CSOF ¶ 23.

[64] As used by Respondent Ponte and Enforcement Counsel in their respective Statements of Fact, the two terms appear to be interchangeable, or at least if there is a distinction, it is not made sufficiently clear.

[65] Resp. SOF ¶¶ 24, 27.

[66] *See* CSOF ¶¶ 24, 27 (further noting that the FDIC has found "numerous examples of the [business analysis] fee being charged").

[67] *See* EC SOF ¶ 12; Opposition at 16.

> amount and type of financing needed and determining the funding source for the borrowing.[68]

Moreover, Enforcement Counsel contends that "[t]he referral fee and the overall business analysis fee . . . are collectively capped at 2% of the loan amount" under the applicable "SBA regulations interpreted by the SOP" in addition to the Loan Referral Agreements.[69] As with the Bridge Loans, Respondent Ponte offloads responsibility for his application fees and business analysis fees to the Bank, stating that he was never told that the application fees were improper[70] and that Respondent Catanzaro "specifically advised" him that Ponte Investments could "charge the overall business analysis fee in certain circumstances per the SBA SOP."[71]

According to Enforcement Counsel, the pre-approval congratulation letters sent to SBA Loan applicants by Respondent Ponte demonstrate that Ponte Investments "routinely" exceeded the 2 percent fee cap that it was permitted to charge borrowers.[72] Enforcement Counsel adduces multiple instances of congratulation letters reflecting a 3.75 percent fee due to Ponte Investments (on top of a 2 percent fee for the Bank) and a separate invoice for an "overall business analysis" fee of more than $1,000 that the borrower was also required to pay.[73]

SBA Form 159

SBA regulations require any party that receives compensation from SBA Loan applicants or lenders for services provided in connection with an SBA loan, including referral agents such as

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[68] EC-OPP-9 (Loan Referral Agreements) at 16 (emphasis added); *see also* EC SOF ¶ 13.

[69] CSOF ¶ 27; *see* Zelaya Report at 38-39; Opposition at 19-20.

[70] *See* Resp. SOF ¶ 26. Enforcement Counsel disputes this, stating that "Respondent Ponte was reprimanded by Bank President Catanzaro, on at least one occasion, for charging impermissible fees." CSOF ¶ 26.

[71] Resp. SOF ¶ 27; *see also* Motion at 16 ("At no time did IB ever inquire of GBC on a loan closing by loan closing basis whether GBC charged an applicant an application fee or overall business analysis fee even though it was well aware that from time to time GBC charged either or both.").

[72] Opposition at 20; *see* CSOF ¶ 27 (stating that the congratulation letters would "outlin[e] the Bank's fee and Ponte Investments' referral fee (typically greater than 2%) and an invoice for an 'overall business fee'").

[73] *See* CSOF ¶¶ 29, 30; EC SOF ¶¶ 60, 93-94.

Ponte Investments, to execute and provide to the SBA an agreement known as SBA Form 159, which "governs the compensation charged for services rendered or to be rendered to the Applicant or lender."[74] Through this form, a referral agent must disclose, *inter alia,* any and all fees charged to an SBA Loan applicant, and further certify that "the compensation described in the form is the only compensation that has been charged to or received from the Applicant or that will be charged to Applicant for services covered by this form."[75] The form warns that "[f]alse certifications can result in criminal prosecution under 18 U.S.C. § 1001 and other penalties provided by law."[76]

It appears undisputed that the Bank generally prepared the SBA Form 159 for signature (by Respondent Ponte or a Ponte Investments employee), using information provided by Ponte Investments regarding the fees charged in each instance.[77] According to Enforcement Counsel, "Ponte Investments regularly provided the Bank with an invoice for the 2% fee that would be included on the SBA Form 159 without providing the Bank with an invoice for any other fees charged."[78] As a result, the form habitually reflected only "a 2% referral fee (of the loan amount) for loans referred by Ponte Investments and closed by the Bank,"[79] even when Ponte Investments had charged the borrower for other or higher fees. For example, the SBA Form 159 for a particular loan identified by Enforcement Counsel only "disclosed that Ponte Investments charged a 2% fee" even though the congratulations letter for that loan indicated both that the fee in question was

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[74] 13 C.F.R. § 103.5; *see* EC SOF ¶¶ 120-121; *see also*, *e.g.*, EC-OPP-9 (Loan Referral Agreements) at 22 (2018 Agreement stating that "[a]ll fees charged to the borrowers by the Referral Agent must be promptly reported on SBA Form 159 (7a) and agreed to by borrower").

[75] EC SOF ¶ 122 (quoting EC-OPP-75 (SBA Form 159 executed December 26, 2017) at 2).

[76] *Id.*

[77] *See* Resp. SOF ¶¶ 29-31; CSOF ¶ 30; *see also* EC SOF ¶ 123 (attesting that "Respondent Ponte frequently signed the SBA Form 159"). Respondent Ponte asserts that Ponte Investments "reasonably relied upon [the Bank], as the authorized SBA lender, to properly complete the SBA Form 159 provided to [Ponte Investments]." Resp. SOF ¶ 30.

[78] CSOF ¶ 30.

[79] *Id.* ¶ 29; *see* Resp. SOF ¶ 29.

actually 3.75 percent and that Ponte Investments had charged a $1,395 business analysis fee on top of that.[80]

Effect of the Alleged Conduct on the Bank

Enforcement Counsel asserts that "Respondent Ponte's participation in the Bridge Loan Scheme (and the charging of impermissible fees) . . . caused significant loss, risk of loss, and a significant adverse effect on the Bank."[81] To begin with, it contends that the arrangement of payment of Bridge Loans from SBA Loan proceeds by already high-risk borrowers had the effect of shifting default risk from Ponte Investments to the Bank and the SBA, leading to a much higher default rate on the SBA Loans with associated Bridge Loans (89 of 201 loans, or 44 percent) than to those without (15 percent)—which in turn caused the Bank to charge off $1.55 million in defaulted SBA Loans with Bridge Loans.[82]

Second, Enforcement Counsel states that because the extension of SBA Loans to borrowers with hidden Bridge Loans was a violation of SBA Program Requirements, Respondent Ponte's use of Bridge Loans could have caused the SBA to seek repayment of its guarantee from the Bank, which would have required the Bank "to absorb the entire loss" on the defaulted loans, or as much as $9 million.[83] The Bank could also have been required to refund to borrowers any excessive fees charged by Ponte Investments.[84]

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[80] EC SOF ¶ 104; *see id.* ¶¶ 93-94, 105.

[81] Opposition at 21-22; *see* EC SOF ¶¶ 36-44.

[82] *See* Opposition at 18-19, 22; EC SOF ¶¶ 36-38.

[83] EC SOF ¶ 42; *see id.* ¶¶ 39-41; 13 C.F.R. § 120.524(a)(1) (stating that the "SBA is released from liability on a loan guarantee" if, among other things, "[t]he Lender has failed to comply materially with any Loan Program Requirement for 7(a) loans").

[84] *See* EC SOF ¶ 43; 13 C.F.R. § 120.221(a) (providing that the "Lender must refund any such fee considered unreasonable by [the] SBA").

Finally, Enforcement Counsel maintains that "[a]s a direct result of Respondent Ponte's misconduct regarding SBA Loans, there were increasing levels of past due loans and losses within the Bank's SBA Loan portfolio," causing the SBA to take "progressively more severe actions against the Bank culminating in the suspension of all lending activity on November 13, 2019."[85] This, according to Enforcement Counsel, "had a significant adverse effect on the Bank" given Bank management's inability "to execute a feasible alternative business strategy after the loss of their SBA lending authority."[86]

Respondent Ponte, on the other hand, asserts conclusorily that "the FDIC has not, nor will it be able to demonstrate that [the Bank] suffered or probably will suffer financial loss as a result of [Ponte Investments] originating potential loan applications for the SBA Loan Program,"[87] and does not provide any further detail or support for this conclusion.

IV. Analysis

The relevant statute defining the boundaries of the term "institution-affiliated party" is 12 U.S.C. § 1813(u), which sets forth several categories of individuals against whom the FDIC and other federal banking agencies are entitled to bring Section 1818 administrative enforcement actions. Respondent Ponte claims that the FDIC cannot "sufficiently establish" his status as an IAP of the Bank under any of the statutory categories.[88] Enforcement Counsel, by contrast, contends that there are, at the very least, genuine material facts in dispute as to whether Respondent Ponte falls within the definitions of IAP offered in both 12 U.S.C. §§ 1813(u)(3) and 1813(u)(4), either

[85] EC SOF ¶ 44.
[86] Opposition at 23.
[87] Motion at 6.
[88] *Id.* at 1.

one of which would be enough to defeat Respondent Ponte's Motion.[89] The undersigned agrees with Enforcement Counsel.

It should be noted at the outset that Respondent Ponte's argument as to why he is not, and cannot be, an IAP of the Bank does not directly invoke 12 U.S.C. § 1813 at any point, instead haphazardly combining factual assertions relevant to the threshold IAP issue—such as whether he ever served as an employee or officer of the Bank, which are components of Section 1813(u)(1) that Enforcement Counsel does not contest, or whether he ever "engage[d] in any banking activity whatsoever," which is salient to Section 1813(u)(3)—with assertions regarding statutory elements of 12 U.S.C. § 1818 such as personal dishonesty and continuing or willful disregard that bear on the merits of the charges against him but have nothing to do with his status as an IAP and therefore nothing to do with the instant Motion.[90] It is also worth noting again, as Enforcement Counsel does,[91] that Respondent Ponte makes numerous affirmative statements of fact throughout with no support for those statements other than his own affidavit. For example, even when Respondent Ponte's Statement of Material Facts ostensibly quotes an email, the email itself is not presented as the "documentary evidence" required by the Uniform Rules; rather, it is his affidavit, and his affidavit alone, that is cited.[92] In assessing the merits of Respondent Ponte's Motion, the undersigned takes this into account.

Viewed appropriately through the lens of 12 U.S.C. § 1813, and as examined below, the instant Motion presents two core questions. First, is there evidence that Respondent Ponte

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[89] *See* Opposition at 6.

[90] *See*, *e.g.*, Motion at 4-5 (describing elements of 12 U.S.C. § 1818(e)), 5-7 (arguing that these elements have not been met). As noted previously, Respondent Ponte had an opportunity to move for summary disposition on the merits of the charges against him, as distinct from the question of whether he is an IAP of the Bank, by May 28, 2024, but did not do so.

[91] *See*, *e.g.*, Opposition at 2 (asserting that "the only evidence that Respondent Ponte has submitted to support the Motion is a self-serving affidavit rife with mischaracterizations and omissions").

[92] *See*, *e.g.*, Resp. SOF ¶ 25. Nor does the affidavit offer the email in question or anything else as support.

participated in the conduct of the affairs of the Bank within the meaning of IAP in Section 1813(u)(3)? Second, is there evidence that Respondent Ponte was an independent contractor of the Bank who knowingly or recklessly committed misconduct that caused the Bank actual or likely financial loss or some other adverse effect, pursuant to the definition of IAP in Section 1813(u)(4)? If one or both of these questions can be answered in the affirmative, or if there is a genuine factual dispute pertaining to any part of them, then Respondent Ponte's Motion must be denied.

Participating in the Conduct of the Bank's Affairs (12 U.S.C. § 1813(u)(3))

Pursuant to 12 U.S.C. § 1813(u)(3), the scope of the term IAP includes "any [] person as determined by the [FDIC] . . . who participates in the conduct in the affairs of an insured depository institution."[93] According to Enforcement Counsel, Respondent Ponte participated in the conduct of the affairs of the Bank during the Relevant Times by virtue of the influence he wielded "as the main driver of the Bank's profitability" and through his close relationships with then-Bank COO Desrosiers and Respondent Catanzaro.[94] Enforcement Counsel offers email and testimonial evidence that Respondent Ponte, *inter alia*, involved himself with the Bank's internal SBA Loan approval and underwriting processes by "routinely and aggressively lobb[ying] Bank personnel at virtually all levels, up to and including Respondent Catanzaro, to approve and fund the SBA Loan applications he referred to the Bank," by using "his influence to dictate to the Bank what underwriters could work on the SBA Loans that he referred"—in particular by engineering the removal of President Catanzaro from the review of loans referred by Ponte Investments after President Catanzaro denied several such loans on numerous grounds—and by "threatening to pull his business from the Bank" when he felt that it "was not responsive to his demands."[95]

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[93] 12 U.S.C. § 1813(u)(3).

[94] Opposition at 25-26.

[95] EC SOF ¶¶ 28-30; *see id.* ¶¶ 31-35; Opposition at 25-28.

Set against Respondent Ponte's bare and unsupported assertions that he "had no oversight, control, and/or direction" over the Bank's review, underwriting, and approval of loans,[96] "played no particular role in" Ponte Investments' business dealings with the Bank,[97] and simply "did not engage in any banking activity whatsoever,"[98] it is plain that, at the very least, the question of Respondent Ponte's participation in the Bank's affairs is a matter of genuine factual dispute sufficient to defeat his Motion on that score. In other words, in order to be entitled to a summary determination that he cannot be considered an IAP under Section 1813(u)(3) as a matter of law, Respondent Ponte would have to offer materially undisputed evidence in support of his assertion that he did not participate in the Bank's affairs. He has not done so, and it is not a close call.

Independent Contractor (12 U.S.C. § 1813(u)(4))

The other relevant statutory provision, 12 U.S.C. § 1813(u)(4), provides that IAPs include "any independent contractor" of an insured depository institution "who knowingly or recklessly participates in" some form of actionable misconduct, including "any violation of any law or regulation" and "any unsafe or unsound practice," as long as that misconduct "caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on," the depository institution in question.[99]

Multiple elements must be met, then, for Respondent Ponte to qualify as an IAP under this provision.[100] He must have been an independent contractor of the Bank during the Relevant Times.

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[96] Motion at 13.

[97] *Id.* at 7.

[98] *Id.* at 19.

[99] 12 U.S.C. § 1813(u)(4).

[100] *See* Opposition at 5. The undersigned notes that the elements of Section 1813(u)(4) largely mirror the merits elements—misconduct, culpability, effect—for the entry of an order of prohibition in 12 U.S.C. § 1818(e) and the assessment of a civil money penalty in 12 U.S.C. § 1818(i). In other words, any finding that an independent contractor is an IAP under Section 1813(u)(4) essentially presupposes that liability exists under Sections 1818(e) and 1818(i) because the contractor has, by definition, committed actionable misconduct, *see* 12 U.S.C. §§ 1818(e)(1)(A), 1818(i)(2)(B)(i), with the requisitely culpable state of mind, *see id.* §§ 1818(e)(1)(C),

He must have committed some misconduct in that capacity. That misconduct must have been knowing or reckless on his part. And the misconduct must have caused, or been likely to cause, some sufficiently serious harm to the Bank. In order for Respondent Ponte to succeed on the instant Motion, he must show that one or more of these factors cannot be established by Enforcement Counsel in light of the material undisputed facts presented. As with Section 1813(u)(3) above, Respondent Ponte does not clear that evidentiary bar.

First, by Respondent Ponte's own admission and by the terms of the Loan Referral Agreements, Ponte Investments was an independent contractor of the Bank during the applicable time period.[101] Respondent Ponte argues that Ponte Investments' status as an independent contractor should not be imputed to him personally, because he was not a party to the Loan Referral Agreements governing that business relationship and was "merely" his company's "managing member."[102] In response, Enforcement Counsel states that Respondent Ponte was not simply the managing member of Ponte Investments, but also its sole owner who "had absolute control over and was involved in all aspects of" the company.[103] Enforcement Counsel also argues that any violations of law or regulations by Ponte Investments are attributed to Respondent Ponte under 12 U.S.C. § 1813(v) to the extent that he caused, brought about, participated in, or otherwise aided or abetted them.[104] The undersigned finds that, at minimum, Enforcement Counsel has offered material facts regarding Respondent Ponte's personal status as an independent contractor of the Bank for purposes of Section 1813(u)(4)—specifically, his level of control over Ponte

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1818(i)(2)(B)(i)(II), and causing some sufficiently adverse effect on the institution, *see id.* §§ 1818(e)(1)(B), 1818(i)(2)(B)(ii).

[101] *See*, *e.g.*, Motion at 11, 21; *see supra* at 7-8.

[102] Motion at 3.

[103] EC SOF ¶ 8; *see also* CSOF ¶ 1.

[104] *See* Opposition at 3 & n.6.

Investments, which undeniably holds independent contractor status in its own right—that Respondent Ponte should, and presumably will, address in his response to Enforcement Counsel's May 28, 2024 summary disposition motion, which argues affirmatively that Respondent Ponte is an independent contractor of the Bank who meets the other qualifications of Section 1813(u)(4) and is therefore an IAP.[105]

Likewise, Enforcement Counsel's Opposition to Respondent Ponte's Motion adduces numerous facts in dispute of Respondent Ponte's unsupported assertion that he is not an IAP under Section 1813(u)(4) because he did not commit actionable misconduct.[106] These disputed facts, which by their nature go to the merits of the charges against Respondent Ponte,[107] are sufficient to defeat summary disposition in Respondent Ponte's favor on the IAP issue (since, as above, Respondent Ponte cannot offer material undisputed facts establishing that his actions do not constitute misconduct), and Respondent Ponte will have the opportunity to respond to them both on the merits and regarding his status as an IAP in his opposition to Enforcement Counsel's summary disposition motion, which opposition is due on June 17, 2024.[108]

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[105] *See* May 28, 2024 FDIC's Motion for and Memorandum in Support of Summary Disposition or Partial Summary Disposition ("EC MSD") at 32 (arguing that "[a]s the principle [sic] of Ponte Investments, actively working on the loan referrals, Respondent Ponte was an independent contractor of the Bank"); *see also* 12 C.F.R. § 308.29(b)(2) ("Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which the opposing party contends a genuine dispute exists."); Order No. 5: Issuance of Ground Rules (March 21, 2023) at 5 (providing that oppositions to summary disposition motions "must also be accompanied by a submission ('counterstatement') either accepting or refuting, by reference to the corresponding paragraph number, each statement of material fact set forth by the moving party").

[106] *Compare* Motion at 6 (contending that "Ponte himself did not engage in any misconduct, meaning that he did not knowingly or recklessly violate or deviate from any [SBA] rule, guideline or directive in effect at the time GBC conducted business with IB. . . . Moreover, Ponte neither engaged nor participated in any unsafe or unsound banking practice with IB.") *with*, *e.g.*, Opposition at 17-21, 23-25 (arguing that Respondent Ponte's participation in the Bridge Loan Scheme and his charging of impermissible or excessive fees to SBA Loan applicants constitute violations of various SBA regulations and unsafe or unsound banking practices); *see also supra* at 12-17.

[107] *See* 12 U.S.C. §§ 1818(e)(1)(A), 1818(i)(2)(B)(i) (misconduct elements for order of prohibition and second-tier civil money penalty).

[108] The undersigned warns that it will be insufficient for Respondent Ponte to dispute Enforcement Counsel's material facts through a self-serving affidavit alone. Actual record evidence will be required. *See Blanton*, 2017 WL 4510840, at *6 ("[I]n granting a motion for summary disposition[,] a trier of fact is not obliged to credit the non-moving party's factual assertions when they are not supported on the record."); *see also* 12 C.F.R. § 308.29(b)(2)

With respect to the "knowing or reckless" component of Section 1813(u)(4), the conclusion is largely the same. Respondent Ponte asserts that he did not have the requisite scienter to meet this component because he was an inexperienced SBA lender who reasonably relied on the Bank to comply with SBA Program Requirements in connection with the loans he referred and the fees he charged.[109] Enforcement Counsel rejoins that "[i]t is inconceivable, and at a minimum reckless, for a sophisticated businessman to refer nearly $4.5 billion (30,000 loans times the average SBA Loan size of $150,000) of SBA Loans to the Bank and not have knowledge of the SBA program requirements."[110] Enforcement Counsel also adduces evidence indicating that Respondent Ponte was in fact made aware of the relevant SBA Program Requirements regarding both the Bridge Loans and the impermissible fees.[111] And Enforcement Counsel notes that "[e]ven if, *arguendo*, Respondent Ponte was 'wholly unaware' of the SBA regulations, both the warning on SBA Form 159 and the Loan Referral Agreements make clear that all compensation has to be disclosed on SBA Form 159," which Respondent Ponte did not do.[112] This genuine dispute regarding Respondent Ponte's state of mind means that whether Respondent Ponte's actions were knowing or reckless is a question that cannot be resolved at the present time, and it serves as (yet another) independent basis for denial of the instant Motion.[113]

(providing that oppositions to summary disposition motions "must be supported by evidence of the same type as that submitted with the motion for summary disposition").

[109] *See*, *e.g.*, Motion at 9-10, 12, 16.

[110] Opposition at 2-3; *see also id.* at 13 ("[A]s an experienced lender, with over two decades of lending experience, Respondent Ponte should have known that the SBA had significant regulations regarding SBA lending. Moreover, a referral agent that engages in SBA lending must be knowledgeable about the products, rules, and documentation specific to SBA loan programs.").

[111] *See id.* at 14-17; *see also*, *e.g.*, EC SOF ¶¶ 45-57.

[112] Opposition at 17.

[113] *See*, *e.g.*, *Miller v. FDIC*, 906 F.2d 972, 974 (4th Cir. 1990) (noting "the general rule that summary judgment is seldom appropriate in cases wherein particular states of mind are decisive elements of a claim or defense"); *Gomez v. Trustees of Harvard Univ.*, 677 F. Supp. 23, 24 (D.D.C. 1988) (noting that "intent and state of mind [are] areas that are particularly ill-suited for summary disposition"); *but cf. Blanton*, 2017 WL 4510840, at *6 ("[T]here is no genuine issue [of material fact] if the evidence presented in the opposing affidavits is of insufficient quality to allow a rational finder of fact to find for the non-movant."); *Brodie v. Dep't of HHS*, 715 F. Supp. 2d 74, 81-82

Finally, Respondent Ponte asserts that the Bank did not and could not have suffered financial loss as a result of his conduct, but does not support that statement in any way.[114] Enforcement Counsel, by contrast, adduces facts regarding the disproportionate default rate of the Bank's SBA Loans with associated Bridge Loans and their concomitant charge-offs; the potential costs the Bank could have incurred had the SBA sought recompense for Respondent Ponte's alleged violations of SBA Program Requirements; and the adverse consequences suffered by the Bank when its SBA lending authority was suspended following "increasing levels of past due loans and losses within the Bank's SBA Loan portfolio."[115] Here, again, there are disputed material facts sufficient to defeat Respondent Ponte's Motion on the IAP issue, and it will be incumbent on Respondent Ponte to respond on the merits to Enforcement Counsel's evidence of loss, potential loss, and adverse effect with something other than bare assertions if he wishes to argue that a genuine factual dispute exists when opposing Enforcement Counsel's May 28, 2024 motion for summary disposition on the same topic.

(D.D.C. 2010) (affirming ALJ's summary disposition against respondent where "the record . . . supported only one reasonable inference regarding [respondent's] state of mind: [that he] had been either knowing or reckless with regard to the falsification of information," and where respondent "had failed to offer any specific facts or evidence at the summary disposition stage that would support his claims of blamelessness or counter [the agency's] evidence").

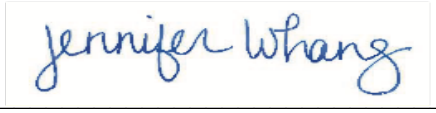
[114] *See* Motion at 6.

[115] EC SOF ¶ 44; *see id.* ¶¶ 36-43.

V. Conclusion

For the reasons set forth above, and in light of the disputed questions of material fact that have been identified on the present record, the undersigned hereby denies Respondent Ponte's Motion in all respects. Within seven days of the date of this order, Enforcement Counsel is to contact the undersigned's Senior Attorney Jason Cohen, at jcohen@fdic.gov, as to whether any portion of this order should remain under seal.[116] In the interim, the order will remain under temporary seal. Upon review of Enforcement Counsel's submission, the undersigned will issue a public version of this order.

SO ORDERED.



Issued: June 10, 2024

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication

[116] *See* note 8 *supra*.

PUBLIC VERSION

CERTIFICATE OF SERVICE

On June 17, 2024, I served a copy of the foregoing **Order (PUBLIC VERSION*)** upon the following individuals via email:

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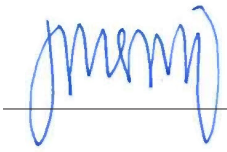

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*A confidential version of this order was issued on June 10, 2024. It should be noted that no redactions to this order were necessary in issuing this public version