

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

In the Matter of:

JOHN C. PONTE,
as an institution-affiliated party of

Independence Bank
East Greenwich, Rhode Island
(Insured State Nonmember Bank)

Docket Nos.:
FDIC-22-0109e
FDIC-22-0143b

**ORDER NO. 42: GRANTING IN PART AND DENYING IN PART
ENFORCEMENT COUNSEL'S MOTIONS FOR SANCTIONS¹**

I. Motion for Sanctions Regarding Greenwich Business Capital

On April 16, 2024, Enforcement Counsel for the Federal Deposit Insurance Corporation (“FDIC”) filed a Motion for Sanctions against John C. Ponte for Inducing Greenwich Business Capital, LLC’s Failure to Comply with a Document Subpoena (“Motion for Sanctions-GBC”). On May 8, 2024, Respondent John C. Ponte (“Respondent”) filed an Objection to the FDIC’s Motion for Sanctions against John C. Ponte for Inducing Greenwich Business Capital, LLC’s Failure to Comply with a Document Subpoena (“Response to Motion for Sanctions-GBC”).²

Upon request of Enforcement Counsel, on December 11, 2023, the undersigned signed a document subpoena to non-party Greenwich Business Capital, LLC (“GBC”)³ which called for

¹ On August 9, 2024, Enforcement Counsel filed a “Notice of Settlement with Robert S. Catanzaro” and “Order of Removal from Office and Prohibition from Further Participation and Voluntary Dismissal of Notice of Assessment of Civil Money Penalty and Order to Pay” against Respondent Robert S. Catanzaro. Accordingly, this action is terminated as to Mr. Catanzaro and his name and associated docket number (FDIC-22-0112e) has been removed from the case caption.

² Respondent attempted to file his response on May 7, 2024; however, the filing was rejected for failing to comply with the undersigned’s ground rules, which require multipage documents to be paginated. The undersigned permitted the document to be refiled by the end of the day on May 7, 2024 but Respondent failed to do so. On May 8, 2024, Respondent moved for leave to refile his response, which is hereby granted.

³ GBC was formerly known as Ponte Investments, LLC (“Ponte Investments”). Respondent is the sole owner and managing member of GBC. *See* Motion for Sanctions-GBC at 1.

GBC to produce documents by December 22, 2023.⁴ The deadline to produce documents was extended twice by agreement of the parties, and also by this Tribunal’s Order No. 22, which granted GBC’s request for an extension until March 12, 2024.⁵

On March 12, 2024, GBC filed a Motion to Quash the Subpoena *Duces Tecum*. On March 15, 2024, this Tribunal issued “Order No. 23: Denying Respondent John C. Ponte’s Motion for Protective Order and Non-Party Greenwich Business Capital LLC’s Motion to Quash Subpoena *Duces Tecum*,” which ordered GBC to provide subpoena responses prior to the close of the discovery period, which closed on April 12, 2024.⁶

On April 15, 2024, which is *after* the close of the discovery period, GBC sent Enforcement Counsel a letter detailing what documents that it would and would not be producing.⁷ In that letter, GBC indicated that it would not be producing documentation related to fees or finances because it does not have any documents responsive to the discovery request.⁸ Enforcement Counsel asserts that this is “blatantly false” because GBC has already produced some documents related to fees charges to some borrowers.⁹ In addition, Enforcement Counsel asserts that a previous representation by Respondent’s counsel regarding an “audit” of bridge loan files that are at issue in this matter shows that GBC maintains records regarding fees and that Respondent has failed to produce those records in discovery.¹⁰ Finally, Enforcement Counsel asserts that neither

⁴ *Id.* at 2 (citing Exhibit A to Motion for Sanctions-GBC (“Document Subpoena”)).

⁵ *Id.* at 2; *see also* Order No. 22: Granting Respondent Ponte’s Unopposed Motion to Modify the Procedural Schedule (issued on February 29, 2024).

⁶ *See* Order No. 23 at 4; *see also* Order No. 22 at 2.

⁷ Motion for Sanctions-GBC at 2-3 (citing Exhibit B to Motion for Sanctions-GBC (“4/15/24 Mulhearn Letter”)). In addition, Enforcement Counsel states that, as of the date it filed the motion for sanctions, GBC had begun uploading documents responsive to the subpoena, but that GBC had not completed its document production. *Id.* at 2.

⁸ *Id.* at 3; *see also* 4/15/24 Mulhearn Letter.

⁹ Motion for Sanctions-GBC at 3 (citing Exhibits C-F to Motion for Sanctions-GBC).

¹⁰ *Id.* at 3-4 (citing Exhibit G to Motion for Sanctions-GBC (“3/14/23 Mulhearn Letter”)).

Respondent nor GBC had ever indicated that the requested documents regarding fees did not exist until the April 15, 2024 Mulhearn Letter.¹¹

Respondent asserts that there are no documents responsive to subpoena requests one and two related to fees and finances because all such documents have already been produced.¹² Respondent also asserts that the FDIC could have obtained the documents requested in the subpoena “from any number of other sources.”¹³

Under the FDIC’s Uniform Rules of Practice and Procedure, sanctions may be imposed when any counsel or party has

- (a) ...acted or failed to act, in a manner required by applicable statute, regulations, or order, and that act or failure to act:
 - (1) Constitutes contemptuous conduct;
 - (2) Has in a material way injured or prejudiced some other party in terms of substantive injury, incurring additional expenses including attorney’s fees, prejudicial delay, or otherwise;
 - (3) Is a clear and unexcused violation of an applicable statute, regulation, or order; or
 - (4) Has unduly delayed the proceeding.¹⁴

In addition, the Uniform Rules state that sanctions may be imposed on a party “who induces a failure to comply with subpoenas.”¹⁵ According to Enforcement Counsel, Respondent induced GBC not to produce relevant documents, therefore, sanctions are justified.¹⁶

The undersigned finds that Respondent, as the sole owner and managing member of GBC, induced GBC to fail to comply with the document subpoena, which caused Enforcement Counsel harm by unduly delaying the proceedings. If, as Respondent has asserted, GBC did not have any documents responsive to the document subpoena, it should have stated so back in December 2023.

¹¹ *Id.* at 4.

¹² Response to Motion for Sanctions-GBC at 2.

¹³ *Id.* at 7.

¹⁴ 12 C.F.R. § 308.108(a).

¹⁵ *Id.* § 308.26(c).

¹⁶ Motion for Sanctions-GBC at 5-6.

At that time, when discovery was still open, Enforcement Counsel could have requested the documents “from any number of other sources”; however, with discovery closed long ago, Enforcement Counsel can no longer do so. Even if GBC did not state that it did not have any responsive documents back in December 2023, it could have done so in March 2024 in compliance with Order No. 23. At that time, discovery was still open and Enforcement Counsel could have pursued requesting the documents “from any number of other sources.” Therefore, Respondent also induced GBC to violate the undersigned’s order. The undersigned finds that the failure to timely respond to the subpoena request and to the undersigned’s order constitutes contemptuous conduct.

Having found that sanctions are warranted under 12 C.F.R. § 308.108(a), we now turn to what type of sanction is warranted. The FDIC’s Uniform Rules of Practice and Procedure permits the undersigned to impose a sanction such as

- (2) Rejecting or striking any testimony or documentary evidence offered, or other papers filed, by the party;
- (3) Precluding the party from contesting specific issues or findings;
- (4) Precluding the party from offering certain evidence or from challenging or contesting certain evidence offered by another party.¹⁷

Enforcement Counsel moves to preclude Respondent from offering certain evidence related to the material sought in Enforcement Counsel’s subpoena. Specifically, Enforcement Counsel requests that undersigned make the following findings, which is in effect asking the undersigned to make certain adverse inferences against Respondent for inducing GBC not to respond to the document subpoena.¹⁸

¹⁷ 12 C.F.R. § 308.108(b)(2)-(4).

¹⁸ Motion for Sanctions-GBC at 9.

(1) that GBC charged at least \$9,329,190 outside of the Small Business Administration (“SBA”) Loan closing process that was not documented on an SBA Form 159 to 3,000 borrowers referred to Independence Bank (“the Bank”);

(2) that GBC charged at least \$4,506,000 outside of the SBA Loan closing process that was not documented on an SBA Form 159 to 1,449 borrowers referred to the Bank;¹⁹

(3) that any amount that GBC charged to or received from borrowers referred to the Bank was for fees related to an SBA loan; and

(4) that any fees that GBC charged to or received from borrowers referred to the Bank that were not documented on an SBA Form 159 in the Bank’s loan files were impermissible under the SBA’s regulations and Standard Operating Procedures.

Proposition two is based on the Declaration of Lori A. Kohlenberg (submitted with Enforcement Counsel’s Motion for Summary Disposition) and proposition one is based on extrapolating the average amount found in proposition two to the total number of loans GBC referred to the Bank that closed.²⁰ As noted in Order No. 41, under the FDIC’s Uniform Rules of Practice that were in place when the Notice of Charges was filed, depositions were not permitted, so Respondent has not had the chance to depose Ms. Kohlenberg regarding the contents of her submission.²¹ In Order No. 41, the undersigned ruled that Respondent should be given the opportunity to cross-examine Ms. Kohlenberg at the upcoming hearing before any findings are made based on her declaration;²² therefore, the undersigned will not make adverse inferences as to propositions one and two. Although the undersigned is not adopting these two findings,

¹⁹ According to Enforcement Counsel, the amount identified represents the average amount identified by Lori A. Kohlenberg in her declaration.

²⁰ Motion for Sanctions-GBC at 5.

²¹ See Order No. 41: Granting in Part and Denying in Part Enforcement Counsel’s Motion for Summary Disposition (August 8, 2024), at 8 & n.26.

²² See *id.* at 8.

Respondent may not introduce any documentary evidence at hearing that has not already been produced in this matter. The procedural schedule in this matter has strict deadlines for the exchange of hearing exhibits, and Respondent will not be permitted to introduce any evidence at the hearing that was not already exchanged by the deadline set forth in the procedural schedule. Respondent should be prepared to show that all documents presented at the hearing were previously produced in discovery.

As to the third proposition, it is apparently Respondent's position in this matter that the "Overall Business Analysis" fees charged by GBC (then Ponte Investments) during the period at issue were not related to SBA Loans, and (construing evidence in favor of the non-moving party at the summary disposition stage) the undersigned ruled in Order No. 41 that this is a disputed fact to be addressed at hearing.²³ Accordingly, the undersigned will not preclude Respondent from arguing that not all of the amount that GBC charged to or received from borrowers referred to the Bank was for fees related to an SBA loan. Therefore, the undersigned partially grants Enforcement Counsel's motion for sanctions with regard to proposition three and finds that any amount that GBC charged to or received from borrowers referred to the Bank was for fees related to an SBA loan, with the exception that Respondent may contest whether or not overall business analysis fees are related to the SBA loans. In supporting his position, Respondent may not introduce any documents or witness statements that were not previously produced, but he may elicit testimony about it from witnesses and may testify about it himself.

Finally, the undersigned does not agree with Enforcement Counsel that Respondent should be precluded from challenging the fourth proposition that "any fees that GBC charged to or received from borrowers referred to the Bank that were not documented on an SBA Form 159 in

²³ See *id.* at 18 & 54 n.229.

the Bank’s loan files were impermissible under the SBA’s regulations and Standard Operating Procedures” because this is more of a legal question, rather than a factual one. While Respondent will be allowed to argue that the fees in question were not impermissible, he will not be able to introduce any documentary evidence that has not already been produced in discovery in this matter in support of that argument, as stated above.

II. Motion for Sanctions

On April 17, 2024, Enforcement Counsel filed a Motion for Sanctions against John C. Ponte for Failure to Comply with Discovery Request and Order (“Motion for Sanctions”). On May 8, 2024, Respondent filed an Objection to the FDIC’s Motion for Sanctions against John C. Ponte for Failure to Comply with Discovery Request and Order (“Response”).²⁴ On May 8, 2024, Enforcement Counsel filed a Motion for Leave to Reply to Respondent, John C. Ponte’s Objection to the FDIC’s Motion for Sanctions against John C. Ponte for Failure to Comply with Discovery Request and Order, which was granted.²⁵ On May 10, 2024, Enforcement Counsel filed a Reply to Respondent, John C. Ponte’s Objection to the FDIC’s Motion for Sanctions against John C. Ponte for Failure to Comply with Discovery Request and Order (“Reply”).

Enforcement Counsel served discovery requests on Respondent on August 15, 2023, which called for Respondent to produce documents within 60 days.²⁶ The deadline to produce documents was extended numerous times by agreement of the parties, and also by this Tribunal’s Order No. 22, which granted Respondent’s request for an extension until March 12, 2024.²⁷

²⁴ Respondent attempted to file his response on May 7, 2024; however, the filing was rejected for failing to comply with the undersigned’s ground rules, which require multipage documents to be paginated. The undersigned permitted the document to be refiled by the end of the day on May 8, 2024, which Respondent complied with.

²⁵ See Order No. 29: Granting Enforcement Counsel’s Motion for Leave to File a Reply (May 10, 2024).

²⁶ Motion for Sanctions at 2.

²⁷ *Id.*; see also Order No. 22.

Instead of responding to the discovery request, on March 12, 2024, Respondent filed a Motion for Summary Disposition²⁸ and a Motion for Protective Order.²⁹ As noted above, on March 15, 2024, this Tribunal issued Order No. 23, which ordered Respondent to provide discovery responses prior to the close of the discovery period, which closed on April 12, 2024.³⁰

On April 12, 2024, which was the last day of discovery, Respondent stated that he might need assistance in transmitting the discovery responses on behalf of himself and GBC.³¹ As noted above, on April 15, 2024, which is after discovery closed, Respondent and GBC sent Enforcement Counsel a letter detailing what documents that they would be producing.³² At the time Enforcement Counsel filed its motion for sanctions on April 17, 2024, Enforcement Counsel stated that it had not received any update from Respondent regarding his document production.³³ Respondent disputes this and states that he sent Enforcement Counsel an update on April 16, 2024;³⁴ however, Enforcement Counsel asserts that the letter was “backdated” because Respondent did not actually send the letter to Enforcement Counsel until April 17, 2024.³⁵

According to Enforcement Counsel, Respondent has failed to produce any documents and sanctions are therefore justified. Specifically, Enforcement Counsel moves to preclude Respondent from offering certain categories of evidence, described below, related to the material sought in Enforcement Counsel’s discovery requests. Respondent asserts that the undersigned cannot find that he was in non-compliance without an evidentiary hearing,³⁶ which is hereby rejected.

²⁸ On June 10, 2024, this Tribunal issued “Order No. 32: Denying Respondent Ponte’s Motion for Summary Disposition on the IAP Issue.”

²⁹ Motion for Sanctions at 2.

³⁰ See Order No. 23 at 4; *see also* Order No. 22 at 2.

³¹ Motion for Sanctions at 2; *see also* Exhibit D to Motion for Sanctions (“4/12/24 email chain”).

³² Motion for Sanctions at 2-3.

³³ *Id.* at 3.

³⁴ See Response at 2.

³⁵ Reply at 2 (citing 4/12/24 email chain).

³⁶ Response at 2.

Respondent then asserts that the imposition of certain of the requested sanctions would violate his due process and other constitutional rights.³⁷

Similar to above, the undersigned agrees with Enforcement Counsel that Respondent's failure to respond to the discovery requests constitutes contemptuous conduct that caused undue delay in the proceedings and was in violation of the undersigned's previous orders. Accordingly, the undersigned finds that sanctions are warranted.

Expert Testimony

Enforcement Counsel moves to preclude Respondent from calling any expert witnesses to offer expert testimony.³⁸ Order No. 15, which set the initial procedural schedule in this matter, had a number of deadlines related to experts, including an October 2, 2023 date to identify expert witnesses and provide their curriculum vitae, an October 31, 2023 date to exchange initial expert reports, and a December 15, 2023 deadline to exchange rebuttal expert reports.³⁹ If, during discovery, a party belatedly realized that it would be beneficial to call an expert at a point that was beyond the deadline set forth in the procedural schedule, that party could have moved for leave to identify an expert out of time. Respondent failed to meet any of these deadlines and never timely moved for leave; therefore, Enforcement Counsel's motion to preclude Respondent from calling any expert witnesses to offer expert testimony is granted.

Respondent's Testimony

Enforcement Counsel moves to preclude Respondent from offering any testimony beyond the affidavit dated March 12, 2024.⁴⁰ While the nature of Respondent's lack of compliance with Enforcement Counsel's discovery request and this Tribunal's orders to produce said discovery by

³⁷ *Id.* at 4-5.

³⁸ Motion for Sanctions at 5-6.

³⁹ *See* Order No. 15 at 2.

⁴⁰ Motion for Sanctions at 6.

the close of discovery is not condoned, the undersigned finds Enforcement Counsel's request to be unwarranted and agrees that Respondent has a due process right to testify in his case-in-chief, if he chooses to do so. Although Respondent retains the right to testify in his case-in-chief, he may not, as stated above, testify about any documents that were not already produced in discovery. Accordingly, Enforcement Counsel's motion to preclude Respondent from offering any direct testimony during his case in chief is hereby denied.

Witness Statements

Enforcement Counsel moves to preclude Respondent from "introducing or utilizing statements of witnesses not produced by other parties to this proceeding or third parties that responded to a subpoena from this Tribunal."⁴¹ Enforcement Counsel asserts that this is appropriate because Respondent failed to comply with the discovery request for "any and all declarations made by any individual known to you that relate to the Notice or any of the allegations in the Notice or that relate in any manner to any denial or defense stated in your Answer" or "any notes, transcripts, or recordings of conversations with any current or former member of the Bank's board of directors since the Ponte 15 day letter."⁴² The undersigned agrees with Enforcement Counsel that Respondent's failure to produce responsive documents precludes Respondent from introducing any witness statements that were not previously produced in discovery.

Documents

Enforcement Counsel moves to preclude Respondent from introducing any documents not produced by other parties to this proceeding or third parties that responded to a subpoena from this Tribunal.⁴³ Enforcement Counsel asserts that this is appropriate because Respondent failed to

⁴¹ *Id.*

⁴² *Id.* at 6 n.11 (citing Exhibit B to Motion for Sanctions).

⁴³ *Id.* at 6.

produce documents supporting his denials, statements, and affirmative defenses listed in his Answer or “any and all communications, including emails and text messages, related [sic] any of the allegations in the Notice of that relate in any manner to any denial or defense stated in your Answer.”⁴⁴ The undersigned agrees with Enforcement Counsel that Respondent’s failure to produce responsive documents precludes Respondent from introducing any documents that were not previously produced in discovery.

Affirmative Defenses

Enforcement Counsel moves to preclude Respondent from offering evidence or pursuing the affirmative defenses listed in his Answer.⁴⁵ Enforcement Counsel asserts that this is appropriate because Respondent failed to produce “any and all documents that support the allegations contained in the Affirmative Defenses in [his] Answer.”⁴⁶ The undersigned does not agree with Enforcement Counsel regarding Respondent’s affirmative defenses. Respondent is free to pursue the affirmative defenses raised (as discussed in Order No. 9: Granting in Part and Denying in Part Enforcement Counsel’s Motion to Strike Respondent Ponte’s Affirmative Defenses, issued on April 4, 2023) to the extent he is relying on documents that were produced in discovery and that are identified as hearing exhibits by the deadline set forth in the procedural schedule.

Ability to Pay

Enforcement Counsel moves to deem Respondent to have the financial resources and ability to pay any civil money penalty.⁴⁷ Given that Enforcement Counsel has filed a notice that it

⁴⁴ *Id.* at 6 n.11 (citing Exhibit B to Motion for Sanctions).

⁴⁵ *Id.* at 6.

⁴⁶ *Id.* at 6 n.12 (citing Exhibit B to Motion for Sanctions).

⁴⁷ Motion for Sanctions-GBC at 9; Motion for Sanctions at 6.

is now forgoing its claims for civil money penalties in this matter,⁴⁸ the undersigned finds that this issue is moot.

SO ORDERED.



Issued: August 12, 2024

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication

⁴⁸ See “FDIC’s Notice of Foregoing [sic] Claims for Civil Money Penalties” filed on July 24, 2024.

CERTIFICATE OF SERVICE

On August 12, 2024, I served a copy of the foregoing **Order** upon the following individuals via email:

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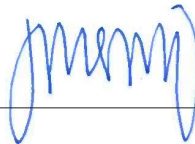
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