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-22-0143b FDIC-22-0112e

ORDER NO. 41: GRANTING IN PART AND DENYING IN PART ENFORCEMENT COUNSEL'S MOTION FOR SUMMARY DISPOSITION

(August 8, 2024)

I. Introduction

On February 10, 2023, the Federal Deposit Insurance Corporation ("FDIC") commenced this action against John C. Ponte ("Respondent Ponte"), Robert S. Catanzaro, and Danielle M. Desrosiers[1] in their capacities as institution-affiliated parties ("IAPs") of Independence Bank ("IB" or "the Bank"), filing a Notice of Charges ("Notice") that seeks (1) an order of prohibition against Respondent Ponte pursuant to 12 U.S.C. § 1818(e); and (2) an order of restitution in the amount of at least $324,000 against Respondent Ponte pursuant to 12 U.S.C. § 1818(b).[2] The Notice alleges that, through his company Greenwich Business Capital, LLC ("GBC"), then known as Ponte Investments, LLC ("Ponte Investments" or "PI"), Respondent Ponte committed various forms of actionable misconduct, centering around the issuance of improper interim financing ("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] The Notice further alleges that Respondent

[1] Ms. Desrosiers has since settled with the FDIC and is no longer a respondent in this case. *See* March 13, 2024 Notice of Settlement. On July 29, 2024, Enforcement Counsel for the FDIC notified the undersigned's office via email that a settlement had been reached with Mr. Catanzaro pending final issuance of an Order of Removal from Office and Prohibition from Further Participation by the FDIC Board of Directors. To date, a formal Notice of Settlement has not been filed; however, given Enforcement Counsel's representation, the undersigned has drafted this Order as if Respondent Ponte was the sole remaining respondent in the case—including referring to Mr. Catanzaro in places as "former respondent Catanzaro"—and has not addressed Enforcement Counsel's arguments regarding Mr. Catanzaro in the instant motion. In the event that a Notice of Settlement is ultimately not filed and Mr. Catanzaro remains a respondent going forward, the undersigned will issue a separate order regarding Enforcement Counsel's motion for summary disposition with respect to him.

[2] The Notice also sought the imposition of a $74,000 civil money penalty against Respondent Ponte pursuant to 12 U.S.C. § 1818(i). On July 24, 2024, however, Enforcement Counsel for the FDIC filed a notice with this Tribunal stating that the FDIC's claims for civil money penalties against Respondent Ponte and then-Respondent Catanzaro have been withdrawn. *See* July 24, 2024 Notice of Foregoing [sic] Claims for Civil Money Penalties.

[3] Notice at 1; *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).

Ponte worked with former respondent Catanzaro, who was the Bank's Chief Executive Officer ("CEO") during the Relevant Times, to ensure that the Bridge Loans were not documented in the Bank's records or disclosed to the SBA ("the Bridge Loan Scheme").

On May 28, 2024, Enforcement Counsel for the FDIC ("Enforcement Counsel") moved for summary disposition of its claims against Respondent Ponte, contending that there are no material facts genuinely in dispute that would preclude a resolution of all or part of this matter in its favor as a matter of law.[4] Specifically, Enforcement Counsel argues that each of the elements of misconduct, effect, and culpability required for the entry of a Section 1818(e) prohibition order have been met as to Respondent Ponte.[5] Enforcement Counsel also states that it "has submitted proof of at least $4,505,815 in impermissible fees" for which an order of restitution against Respondent Ponte is appropriate under Section 1818(b).[6] Finally, Enforcement Counsel seeks a determination that the FDIC has jurisdiction over Respondent Ponte as an IAP of the Bank.[7]

For the reasons set forth below, the undersigned concludes that it is premature to determine Respondent Ponte's status as an IAP. She further recommends, in the event that Respondent Ponte is determined to be an IAP of the Bank, the entry of summary disposition in Enforcement Counsel's favor with respect to the question of certain misconduct by Respondent Ponte relating to fees charged to SBA Loan applicants and the issue of Respondent Ponte's financial gain. The undersigned finds in all other respects that there remain genuine issues of disputed material fact

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[4] *See* May 28, 2024 Motion for and Memorandum in Support of Summary Disposition or Partial Summary Disposition ("MSD") at 4. As alluded to above, Enforcement Counsel's motion sought summary disposition as to its claims against both Respondent Ponte and then-Respondent Catanzaro, who filed a response to the motion on July 1, 2024 before ultimately reaching a settlement with the FDIC. Consequently, the undersigned here will only address arguments and factual assertions in the Motion directly involving Respondent Ponte.

[5] *See id.* at 4-5. Respondent Ponte submitted a response in opposition to Enforcement Counsel's summary disposition motion on June 17, 2024, which is hereby styled as "Ponte Opp."

[6] MSD at 31.

[7] *See id.* at 32-38.

that preclude summary disposition. Among other things, and as discussed further *infra*, the undersigned concludes in particular that summary disposition is premature as to any facts or conclusions adduced by Enforcement Counsel that are predicated on expert reports or fact witness declarations that Respondent Ponte has not yet had the opportunity to test through cross-examination at hearing.

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 any material fact," and (2) "[t]he moving party is entitled to a decision in its favor as a matter of law."[8] 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."[9]

The summary disposition standard "is similar to that of the summary judgment standard under Rule 56 of the Federal Rules of Civil Procedure."[10] 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."[11] 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.[12] In other words, as the Comptroller of the Currency has held in another matter arising from this Tribunal, "in granting a motion for summary disposition,

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[8] 12 C.F.R. § 308.29(a).

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

[10] *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 sub nom.*, *Blanton v. OCC*, 909 F.3d 1161 (D.C. Cir. 2018).

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

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

a trier of fact is not obliged to credit the non-moving party's factual assertions when they are not supported on the record," and the Tribunal "is not required to move a case past the summary [disposition] stage when inferences drawn from the evidence and upon which the non-moving party relies are implausible."[13]

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."[14] 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."[15] In both cases, the enumeration of disputed or undisputed material facts "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."[16] If this Tribunal determines that summary disposition is merited only on certain of the moving party's claims, it may recommend a grant of partial summary disposition and proceed to a hearing on the remaining disputed material issues.[17]

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[13] *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).

[14] 12 C.F.R. § 308.29(b)(2).

[15] *Id.*

[16] *Id.*

[17] *See id.* § 308.30.

III. Background and Summary of Facts

The following is drawn from the Parties' pleadings, Enforcement Counsel's statement of material facts and Respondent Ponte's separate response (or counterstatement) thereto, and the supporting exhibits submitted by Enforcement Counsel and Respondent Ponte.[18] Where the Parties appear to be in some genuine factual dispute, their competing accounts are noted as well as the evidence that each side has marshaled in support. The undersigned will then address where appropriate in this Order the extent to which these disputes implicate facts that are material to the resolution of some aspect of the instant action and should be further addressed as each side deems appropriate at the upcoming hearing.

In this instance, Enforcement Counsel has proffered one hundred and seventy-eight exhibits in support of its summary disposition motion,[19] including a fact witness declaration by FDIC examiner Lori Kohlenberg with fourteen related attachments ("Kohlenberg Declaration")[20] and the opinion reports of two expert witnesses, Mary Barry of the FDIC and Kandace Zelaya of

[18] Enforcement Counsel's statement of material facts is here identified as "EC SOF," while Respondent Ponte's counterstatement is identified as "RPF". To the extent that it is appropriate in limited circumstances in this Order to cite to former respondent Catanzaro's responses to Enforcement Counsel's motion and statement of facts, they are styled as "Catanzaro Opp." and "RCF". Although Respondent Ponte initially submitted his counterstatement on June 17, 2024, the undersigned requested that he refile that document with the addition of exhibit number citations for greater ease of comprehension, which he did as a "supplemental" counterstatement on June 21, 2024. It is to that supplemental counterstatement that this Order cites throughout.

[19] Exhibits submitted in support of Enforcement Counsel's motion are styled as "EC-MSD," the number of the exhibit, and then the suffix "P" if the exhibit cited is a public, redacted version of an exhibit that Enforcement Counsel has determined to contain some confidential information and also submitted, with the suffix "C", in unredacted form under seal. *See* 12 C.F.R. § 308.33(b).

[20] *See* EC-MSD-1 (May 28, 2024 Declaration of Lori A. Kohlenberg) & Attachments A-N. Enforcement Counsel has advised this Tribunal that there are no public versions of Attachments A-H and K-N because the contents are fully confidential, and the undersigned will take care not to cite directly to those exhibits as a result. *See* June 14, 2024 Second Revised Exhibit List to FDIC's Motion for Summary Disposition.

the SBA ("Barry Report" and "Zelaya Report").[21] Respondent Ponte offers twenty exhibits in opposition,[22] including his own sworn declaration.[23]

In his response to Enforcement Counsel's statement of material facts before reaching a settlement with the FDIC, then-Respondent Catanzaro objected to a number of paragraphs that are derived from, and cite to, the Kohlenberg Declaration, stating that the conclusions in those paragraphs are "based on a witness report that has not yet been subject to cross-examination and the credibility and accuracy of such opinion cannot be accepted as undisputed fact."[24] Although Mr. Catanzaro is no longer an active respondent in this case,[25] the undersigned finds that this

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[21] *See* EC-MSD-18 (October 31, 2023 Expert Report of Mary A. Barry); EC-MSD-22 (October 31, 2023 Expert Report of Kandace A. Zelaya). The versions of the Barry Report and Zelaya Report cited here, submitted as exhibits in connection with the instant motion, are public redacted versions of sealed, confidential expert reports filed on October 31, 2023.

[22] Exhibits submitted in support of Respondent Ponte's opposition are styled as "RP-OPP" and the number of the exhibit. On July 15, 2024, Respondent Ponte filed an unopposed motion to seal these exhibits on the grounds that they contain borrower names and other confidential information, which the undersigned now grants as to Exhibits 2-20; each of these unredacted exhibits will now be designated with a "C" suffix. (Exhibit RP-OPP-1, Respondent Ponte's declaration, was previously submitted unsealed in unredacted form, *see* note 23 *infra*, and Respondent Ponte has made no showing that it should now be considered confidential; a review of that exhibit does not reveal any borrower names or otherwise outwardly confidential information.) On July 15, 2024 and July 23, 2024, the Office of Financial Institution Adjudication emailed Respondent Ponte and requested that he submit proposed public redacted versions of his exhibits, redacting the information that is considered to be confidential and using the designation "P" after each exhibit number. This allows the undersigned to cite to unredacted sections of exhibits, as necessary, and keep this order public. To this date, Respondent Ponte has not done so, necessitating that this order remain temporarily under seal. At the hearing, confidential versions of exhibits will not be permitted unless there is a corresponding public version of such exhibit. If an entire exhibit is deemed confidential, then the public version of that exhibit shall state that the entire exhibit is redacted.

[23] *See* RP-OPP-1 (March 12, 2024 Affidavit of John C. Ponte) ("Ponte Aff."). The undersigned notes that this is the same declaration that Respondent Ponte submitted in connection with his March 12, 2024 motion for summary disposition—and, like that declaration, it contains no citations to record evidence or other support for the many factual assertions made therein. *See* Order No. 32: Denying Respondent Ponte's Motion for Summary Disposition on the IAP Issue (June 10, 2024) at 19, 23 n.108. To the extent that Respondent Ponte's response to Enforcement Counsel's statement of material facts in connection with the instant Motion relies on unsupported averments made in Respondent Ponte's declaration, the undersigned will accord such averments the appropriate degree of evidentiary weight. *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) (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").

[24] RCF ¶ 24; *see also*, *e.g.*, *id.* ¶¶ 31-32, 269-274.

[25] *See* notes 1 and 4 *supra*.

objection is nevertheless well-founded. Under the applicable Uniform Rules in effect for this proceeding, Respondents had no ability to depose any of Enforcement Counsel's fact or expert witnesses during the discovery period.[26] The undersigned will accordingly decline to treat any of Ms. Kohlenberg's factual assertions as undisputed for purposes of summary disposition or place any weight on the opinions and conclusions expressed by Ms. Barry and Ms. Zelaya until Respondent Ponte has had the opportunity to cross-examine these three witnesses regarding the contents of their submissions at hearing.[27] Contrary to this Tribunal's normal practice, moreover, and considering the particularly technical nature of some of the regulations at issue here,[28] it may be helpful for Ms. Barry and Ms. Zelaya to elaborate upon the conclusions reached in their reports on direct testimony rather than this Tribunal simply receiving the reports into evidence as the expert witnesses' testimony in chief.[29] For now, this Order will merely indicate where aspects of Enforcement Counsel's arguments in support of summary disposition are premised on the contents of the Kohlenberg Declaration or the Barry and Zelaya Reports, so that the Parties may give those issues due attention in their prehearing submissions and at the hearing stage.

On a separate note, the undersigned observes that neither Respondent Ponte's opposition to the instant motion nor his counterstatement of material facts provide any specific citations

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[26] The Uniform Rules have since been revised to permit discovery depositions in FDIC administrative enforcement proceedings initiated on or after April 1, 2024. *Compare* 12 C.F.R. § 308.107(e) (providing for "depositions of individuals with direct knowledge of facts relevant to the proceeding and individuals designated as an expert") *with* Appendix A to Part 308 (stating that "all adjudicatory proceedings initiated prior to April 1, 2024" are governed by the previous version of 12 C.F.R. § 308.107, which allowed for document discovery only). The instant proceeding commenced on February 10, 2023 and is therefore governed by the earlier version of the rule.

[27] The same is true, of course, of the factual assertions advanced in Respondent Ponte's affidavit; Enforcement Counsel will be given the chance to test those statements on cross-examination before the undersigned will draw any final conclusions regarding their credibility or accuracy.

[28] *See* Part IV *infra*.

[29] *See* Order No. 5: Issuance of Ground Rules (March 21, 2023) at 8 (stating that, in typical circumstances, "[t]he written expert report will be . . . received into evidence as the expert's testimony in chief" and that "[a]dditional direct testimony from the expert will not be allowed unless permitted by the ALJ").

within his proffered exhibits when purporting to dispute facts adduced by Enforcement Counsel. Given that a number of Respondent Ponte's exhibits comprise multiple distinct documents agglomerated indiscriminately, while others—such as the 210-page deposition transcript offered as RP-OPP-15C—are simply long, this failure to identify the bases for his ostensible disputes with any specificity places an untenable burden on this Tribunal to sift through the exhibits cited and attempt to guess why and how each cited exhibit supports Respondent Ponte's claim. To that end, where Respondent Ponte does not provide a pinpoint page citation within an exhibit or explanatory parenthetical for a given asserted factual dispute and the basis for that dispute is not readily apparent from an initial review of the exhibit or exhibits cited, the fact at issue will be treated as undisputed by Respondent Ponte.[30]

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."[31] Through this program, loans of up to $150,000 made to small businesses by participating lenders are 85% guaranteed by the SBA.[32] Under the leadership of

[30] The lack of pinpoint citations is particularly egregious because this Tribunal notified Respondent Ponte, via email communication to the Parties on June 18, 2024, that his failure to properly cite exhibits was burdensome and directed him to remedy this in a supplemental submission, which he did only partially. *See* note 18 *supra*. In any event, when exchanging exhibits for the hearing, each distinct, stand-alone document being offered as evidence by a Party shall be identified and offered as a separate exhibit. For example, if Respondent Ponte wishes to offer six different emails or email chains for the proposition that the Bank was aware of the fees being charged by Ponte Investments, those emails or email chains should be presented as six separate exhibits (and six separate .pdf files, when so transmitted), rather than a single exhibit combining all six documents. *See* RP-OPP-11C ("Email Communications Involving IB Evidencing Knowledge of Charging of Fees"). Moreover, all citations in post-hearing briefing to exhibits that are more than one page shall be accompanied to a pinpoint citation to the page being cited as well as a supporting quotation or explanatory parenthetical to the extent appropriate.

[31] EC-MSD-2 (March 23, 2023 Answer of former respondent Robert S. Catanzaro) ¶ 4; *see* EC SOF ¶ 307 n.305.

[32] *See* EC SOF ¶ 4.

former respondent Robert S. Catanzaro, who was the Bank's CEO and controlling shareholder,[33] it was the Bank's "sole business strategy" during the Relevant Times to originate loans under the SBA Loan Program and then sell the SBA-guaranteed portion of those loans on the secondary market.[34] It is undisputed that the Bank's SBA Loan Program was governed by various SBA rules, regulations, and standard operating procedures ("SOPs") that all parties were required to follow as applicable, including loan referral agents (collectively "SBA Program Requirements").[35]

Ponte Investments

Respondent Ponte was the sole owner, member, and manager of a business then known as Ponte Investments, which acted as "a referral agent for the Bank" during the Relevant Times, referring prospective applicants to the Bank for SBA loans and helping to originate their applications.[36] Ponte Investments also operated under the names SBA Loan Program and www.SBALoanProgram.com.[37] Although Respondent Ponte was not the only individual working at Ponte Investments,[38] it appears uncontroverted that he directed, controlled, and had the authority

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[33] *See id.* ¶¶ 6-7. Because Robert S. Catanzaro, CEO of the Bank and former respondent in this matter, and his son Robert A. Catanzaro, President of the Bank during the Relevant Times, are both referenced at times in this order, they will be referred to as "CEO Catanzaro" and "President Catanzaro" henceforth in exhibit citations for avoidance of ambiguity.

[34] EC SOF ¶ 3; *see* RCF ¶ 3.

[35] *See*, *e.g.*, MSD at 9 ("Lenders under the SBA 7(a) loan program are required, under 13 CFR § 120.180, to comply with the 'Loan Program Requirements.' These requirements come from a number of sources, including the SBA's Standard Operating Procedures ('SOPs')."). The specific SBA Program Requirements at issue in this matter and their applicability to Respondent Ponte are discussed in greater depth in Part IV *infra*.

[36] EC SOF ¶ 11; RCF ¶ 11; *see also* RPF ¶ 11 (characterizing Ponte Investments as an "independent originator[] of potential loan applications to IB for the SBA Loan Program"); Ponte Opp. at 2, 20 (referring to Ponte Investments as one of the Bank's "referral agents"); 13 C.F.R. § 103.1(f) (defining "Referral Agent" as "a person or entity who identifies and refers an Applicant to a lender or a lender to an Applicant. The Referral Agent may be employed and compensated by either an Applicant or a lender.").

[37] *See* EC SOF ¶ 9; RPF ¶ 9.

[38] Respondent Ponte asserts in his opposition that Ponte Investments "had upwards of fifty (50) employees attributable to its referral transactions with IB, as well as other SBA lenders for whom Ponte originated potential loan applications," Ponte Opp. at 11, although this figure is neither supported by documentary evidence nor referenced in his counterstatement.

to control its acts and practices, including its referral and origination of potential SBA Loan applications to the Bank and other institutions.[39] The Parties agree that Respondent Ponte himself was never an employee, officer, director, or shareholder of the Bank.

Further, while Ponte Investments was not the only referral agent that the Bank used in connection with its SBA Loan Program, it was by far the most important, as its referrals accounted for nearly 80% of the revenue from SBA Loans approved and funded by the Bank.[40] In fact, Enforcement Counsel adduces evidence that, given the Bank's heavy focus on SBA lending, "Respondent Ponte became the main driver of the Bank's profitability."[41] Respondent Ponte disputes this statement on the grounds that it was Ponte Investments, and not him personally, that was transacting business with the Bank and driving its profits.[42] Because Enforcement Counsel's assertion is qualitative and based in part on conclusions expressed in the Barry Report, the Parties may further explore the roles of Respondent Ponte and Ponte Investments in the Bank's profitability at hearing, to the extent it is material to their arguments.[43]

The Loan Referral Agreements

As a referral agent of the Bank, Ponte Investments was—in Respondent Ponte's words—"an independent contractor" whose business relationship with the Bank was governed by a series of contracts (together "the Loan Referral Agreements"), the operative versions of which during

[39] *See* EC SOF ¶ 10. Respondent Ponte disputes "that he formulated, directed, controlled, or participated in the acts and practices of PI relative to its origination of potential loan applications for IB's [SBA Loan Program]," RPF ¶ 10, but he provides no support for this statement and it is contradicted by the overwhelming weight of the evidence in this case, including his own admissions and representations elsewhere in his submissions.

[40] *See* EC SOF ¶ 24; EC-MSD-4P (2018 Report of Examination ("ROE")) at 17 (stating that "Ponte generates approximately 80% of [SBA Loan] deal flow"); *see also* RPF ¶ 295 (claiming that "[a]t all times PI had a pipeline in excess of $30 million at IB").

[41] EC SOF ¶ 25.

[42] *See* RPF ¶ 25.

[43] *See* EC SOF ¶ 25 n.26 (citing, *inter alia*, EC-MSD-18 (Barry Report) at 3, 10-11)).

the Relevant Times were executed in June 2015, December 2017, and June 2018 as "Non-Exclusive Independent Selling Agreements," and then in November 2018 as a "Loan Application Referral Agreement."[44] Each of these Agreements was signed and executed by Respondent Ponte on behalf of Ponte Investments.[45]

There are several provisions set forth in the Loan Referral Agreements that are salient to Enforcement Counsel's Motion and the instant proceedings. First, the Agreements establish that Ponte Investments was being engaged "to identify and/or obtain applications for the [SBA Loan] Program from prospective borrowers" and provide them to the Bank.[46] All of the Loan Referral Agreements expressly require Ponte Investments to comply with "any and all current SBA guidelines, regulations, and/or procedures,"[47] with the June 2018 and November 2018 Agreements imposing an affirmative obligation on Ponte Investments to become and "remain informed of" SBA Program Requirements.[48] The November 2018 Agreement also provides more broadly that Ponte Investments and "any employee or owner thereof" must "comply with all applicable laws, regulations, and regulatory guidance."[49]

With respect to fees charged to SBA Loan applicants, the June 2015 through June 2018 Agreements provide that the Bank and Ponte Investments shall each charge a prospective borrower

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[44] RPF ¶ 22; *see also* EC SOF ¶ 14; EC-MSD-14 (Loan Referral Agreements during the Relevant Times) ("Loan Referral Agreements") at 30 (November 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 the Agreement"). The first such agreement between the Bank and Ponte Investments was executed in April 2015 and was not in effect during the Relevant Times. *See* EC-MSD-15 (April 2015 Agreement).

[45] *See* EC SOF ¶ 13; RPF ¶ 13; EC-MSD-14 (Loan Referral Agreements) at 14 (November 2018 Agreement), 25 (June 2018 Agreement), 30 (December 2017 Agreement), 34 (June 2015 Agreement).

[46] EC SOF ¶ 15; *see* EC-MSD-14 (Loan Referral Agreements) at 1 (November 2018 Agreement), 19 (June 2018 Agreement), 26 (December 2017 Agreement), 31 (June 2015 Agreement).

[47] EC-MSD-14 (Loan Referral Agreements) at 22 (June 2018 Agreement), 29 (December 2017 Agreement), 34 (June 2015 Agreement); *see also id.* at 7 (November 2018 Agreement); *see* EC SOF ¶ 16.

[48] EC-MSD-14 (Loan Referral Agreements) at 7 (November 2018 Agreement), 22 (June 2018 Agreement).

[49] *Id.* at 3 (November 2018 Agreement).

fees of no more than "two percent (2%) of the principal amount of the loan funded by the Bank," to be paid by the borrower from the proceeds of that loan.[50] The December 2017 Agreement specifies that the Bank's fee is "for ***packaging services***," while the fee due to Ponte Investments would be "for ***other services***, including consulting as to the type of financing needed and determining which Bank the loan should be referred to."[51] The June 2018 Agreement preserves this dichotomy—changing the grounds for the fee to Ponte Investments from "other services" to "services benefitting a prospective borrower"—and adds that "[a]ny fees not expressly permitted in 13 C.F.R. Section 120.221 or SBA SOP 50-10-5(J), subpart B VI are prohibited."[52] And the November 2018 Agreement, for the first time, omits mention of a specific percentage fee cap entirely, instead (1) repeating the prohibition on fees not authorized by SBA regulation or SOP (which, as discussed *infra*, includes a 2% cap); (2) requiring Ponte Investments to "provide the Bank with an itemized invoice of all fees charged to the prospective borrower"; and (3) stating that "prior to the services being provided, the Referral Agent must advise the Applicant in writing that the Applicant is not required to obtain or pay for unwanted services."[53]

Next, it is undisputed that "[t]hree of the Loan Referral Agreements expressly required Ponte Investments to report all fees charged to borrowers on an SBA form 159."[54] Specifically, the June 2015 and December 2017 Agreements provide that "[a]ll fees ***whether paid from loan proceeds or received directly from the borrower*** must be reported on SBA Form 159," while the

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[50] *Id.* at 21 (June 2018 Agreement), 28 (December 2017 Agreement), 33 (June 2015 Agreement); *see* EC SOF ¶ 17.

[51] *See* EC-MSD-14 (Loan Referral Agreements) at 28 (December 2017 Agreement) (emphases added).

[52] *Id.* at 21 (June 2018 Agreement); *see id.* (stating that Ponte Investments would be earning its fee "for services benefitting a prospective borrower[] such as consulting as to the amount and type of financing needed and determining the funding source for the borrowing").

[53] *Id.* at 2 (November 2018 Agreement).

[54] EC SOF ¶ 18.

June 2018 Agreement forgoes the qualifier and states merely that "[a]ll fees charged to the borrowers" by Ponte Investments must be so reported.[55] The November 2018 Agreement does not mention SBA Form 159 directly, but its admonition that Ponte Investments as referral agent must comply with SBA regulations implicitly includes such a reporting requirement as well.[56]

Finally, three of the Agreements provide for some form of additional compensation or contribution paid by the Bank to Ponte Investments for its referral services under the contracts.[57] The June 2015 Agreement, for example, states that the Bank will pay Ponte Investments an additional 1% of the principal amount of each loan funded "as a bonus payment."[58] In comparison, the December 2017 and June 2018 Agreements provide that the Bank will periodically pay 2% of the total principal amount of loans originated through Ponte Investments as a contribution to Ponte Investments' "marketing expenses."[59] The November 2018 Agreement does not contain any similar provisions.

Fees Charged by Ponte Investments

Enforcement Counsel contends that Respondent Ponte, through Ponte Investments, frequently charged SBA Loan borrowers a "broker or referral fee" in excess of 2% of the principal balance of the funded loans and then failed to disclose the full fees charged as required by the Loan Referral Agreements and applicable SBA regulations.[60] In particular, Enforcement Counsel asserts

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[55] EC-MSD-14 (Loan Referral Agreements) at 21 (June 2018 Agreement), 28 (December 2017 Agreement), 33 (June 2015 Agreement) (emphases added).

[56] *See id.* at 7 (November 2018 Agreement); *see also infra* at 19-20 (discussing SBA Form 159).

[57] *See* EC SOF ¶ 19.

[58] EC-MSD-14 (Loan Referral Agreements) at 33 (June 2015 Agreement).

[59] *Id.* at 22 (June 2018 Agreement), 29 (December 2017 Agreement).

[60] *See* EC SOF ¶¶ 44-52. Although Enforcement Counsel's statement of material facts generally categorizes the fees in question here interchangeably as "broker fees" or "referral fees," *see*, *e.g.*, *id.* ¶¶ 95 ("broker fee"), 96 ("Referral Fee"), 97 ("Broker or Referral fee"), there is a passage in Enforcement Counsel's motion that asserts that Ponte Investments charged borrowers for packaging fees as well as referral fees at some point in time. *See* MSD at 17 ("Ponte Investments regularly listed fees of 2% of the loan amount for referral services on the SBA form 159 for

that, having successfully referred an SBA Loan to the Bank, Ponte Investments would receive a fee constituting 2% of the loan amount upon closing, "wired by the Bank directly from borrower loan proceeds[] and documented on an SBA form 159,"[61] and would then "collect the portion of the broker or referral fee that exceeded 2% . . . directly from the borrower, often shortly after the closing of an SBA Loan," which it would not disclose or document.[62] Enforcement Counsel further claims that Ponte Investments charged a separate fee called an "Overall Business Analysis" fee to most SBA Loan borrowers, which was likewise collected "directly from the borrower . . . , generally shortly after the borrower had been pre-approved for an SBA Loan at the Bank," which it also would not disclose to the SBA.[63] Enforcement Counsel also asserts that "[i]n 2016, Respondent Ponte was put on notice by [CEO Catanzaro's son] President Catanzaro that charging more than 2% of the SBA Loan amount was impermissible both under the SBA's regulations and the Loan Referral Agreements."[64] Drawing from the Kohlenberg Declaration and its supporting documents, Enforcement Counsel states that, despite this, Ponte Investments "charged fees exceeding 2% of the loan amount and not reported on an SBA form 159 to at least 1,449 SBA

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borrowers that it referred to the Bank. Further, in late 2018, Ponte Investments started charging fees of 2% of the loan amount for packaging services."). Not only is this latter sentence unaccompanied by any citation to the record, but it is unclear how it interacts with another unsupported assertion on that page, namely that "[n]one of the services being charged for [by Ponte Investments] were packaging, and either the Bank or Ponte Investments had already charged the borrowers for packaging." *Id.* at 17 n.45. Because the distinction between packaging services and referral services is pertinent to both the SBA regulatory framework and Enforcement Counsel's claims of fee-related misconduct by Respondent Ponte, *see* Parts IV and VII.A *infra* respectively, the undersigned suggests that Enforcement Counsel sets forth with clarity at the hearing whether, when, and to what extent it contends that Ponte Investments (1) performed packaging services for SBA Loan borrowers during the Relevant Times; (2) charged those borrowers packaging fees that were paid from loan proceeds at closing; (3) charged those borrowers packaging fees that exceeded 2% of the principal loan amount and were paid directly by the borrowers outside of closing; and (4) disclosed any such packaging fees on any SBA Form 159s.

[61] EC SOF ¶ 46.

[62] *Id.* ¶ 47.

[63] *Id.* ¶ 52; *see id.* ¶¶ 49-51.

[64] *Id.* ¶ 53; *see* EC-MSD-29P (December 8, 2016 email chain including email from President Catanzaro to Respondent Ponte) (relating borrower complaint that Ponte Investments "attempted to obtain an unauthorized 'extra fee' from the SBA Loan in the amount of $2,400 . . . in addition to the standard fee of 2% of the SBA Loan Amount").

Loan borrowers referred to the Bank" during the Relevant Times, for a total of "at least $4,505,815 in [undisclosed] fees charged outside of closing."[65]

In support of its claims regarding Ponte Investments' fee practices, Enforcement Counsel proffers documentation related to four SBA borrowers whose loans—which it terms "exemplar loans"—were referred by Ponte Investments and approved and funded by the Bank. For the purposes of Enforcement Counsel's fee-related claims at this stage, it is relevant to note three things about the exemplar loans: First, the preapproval letters sent by Ponte Investments (under the name "SBA Loan Program") to each of these borrowers reflect fees of between 3% and 4% to be paid to Ponte Investments, as well as separate "Overall Business Analysis" fees of between $1,395 and $1,995.[66] Second, citing the Kohlenberg Declaration, Enforcement Counsel avers that it has proof that payments were made to Ponte Investments by each of these borrowers outside of the loan closing process that correspond, with slight variation, to the balance of the fees reflected in the preapproval letters, in addition to the 2% fee paid to Ponte Investments from the proceeds of the loans at closing.[67] Third, Enforcement Counsel cites to the SBA Form 159s for each of the exemplar loans, on which Ponte Investments is required to disclose all fees charged in connection with a given loan application, but which on their face disclose only the amount paid at closing—

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[65] EC SOF ¶¶ 282, 287; *see also id.* ¶ 60.

[66] *See* EC-MSD-28P (SBA Loan A preapproval letter) (3.75% fee and additional business analysis fee of $1,295); EC-MSD-31P (SBA Loan B preapproval letter) (4% fee and $1,595 business analysis fee); EC-MSD-32P (SBA Loan C preapproval letter) (3.75% fee and $1,395 business analysis fee); EC-MSD-33P (SBA Loan D preapproval letter) (3.75% fee and $1,395 business analysis fee); EC-MSD-136P & -137 (2nd SBA Loan D preapproval letter) (3% fee and $1,995 business analysis fee); *see also* EC SOF ¶¶ 68-69, 106-108, 141-142, 201-202, 222-224.

[67] *See* EC SOF ¶¶ 99 (SBA Loan A), 109, 134 (SBA Loan B), 143, 166 (SBA Loan C), 203, 211 (SBA Loan D), 232 (2nd SBA Loan D). Enforcement Counsel also adduces facts regarding another SBA Loan to Borrower C, which it confusingly terms "the 3rd SBA Loan C" because there was an initial loan to Borrower C about which no specific allegations of misconduct are made, *see id.* ¶ 139. This final SBA Loan to Borrower C has no preapproval letter in the record, but Enforcement Counsel states that Borrower C paid Ponte Investments an additional fee in connection with the loan shortly after it was funded that was not disclosed on the corresponding SBA Form 159 or otherwise documented in the Bank files. *See id.* ¶¶ 188, 191-193.

that is, 2%—and not the additional payments.[68] (Enforcement Counsel relies on the Kohlenberg Declaration for the proposition that the Bank's files do not contain invoices or SBA Form 159s for the additional payments made to Ponte Investments by these borrowers.)[69] Enforcement Counsel then represents that the exemplar loans "typify [Respondent Ponte's] misconduct related to the charging of impermissible fees."[70]

Respondent Ponte disputes most, but not all, of Enforcement Counsel's fee-related assertions. With respect to referral fees, Respondent Ponte maintains that "[t]he sole broker or referral fee that PI received as part of the closing or funding of an SBA loan was reflected on the IB prepared SBA Form 159," and that the fees charged by Ponte Investments therefore at no point exceeded the 2% recorded on that form.[71] Respondent Ponte does not contest the authenticity of the preapproval letters proffered by Enforcement Counsel that reflect fees of greater than 2%,[72] nor does he offer any explanation for the apparent payments of the excess fees reflected in those

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[68] *See id.* ¶¶ 97 (SBA Loan A), 131 (SBA Loan B), 163 (SBA Loan C), 208 (SBA Loan D); *see also* EC-MSD-62P (Signed Closing Binder for SBA Loan A) at 33-34; EC-MSD-72P (Signed Closing Binder for SBA Loan B) at 36-37; EC-MSD-99P (Signed Closing Binder for SBA Loan C) at 41-42; EC-MSD-125P (Signed Closing Binder for SBA Loan D) at 41-42. There is no representation made regarding an SBA Form 159 for the 2nd SBA Loan D, *see* EC SOF ¶¶ 221-250, although (as mentioned) there is for the additional SBA Loan C. *See id.* ¶¶ 191-193; EC-MSD-112P (Signed Closing Binder for additional SBA Loan C) at 41-42.

[69] *See* EC SOF ¶¶ 100-101 (SBA Loan A), 111, 135-136 (SBA Loan B), 145, 167-168 (SBA Loan C), 204-205, 212-213 (SBA Loan D), 233-234 (2nd SBA Loan D).

[70] *Id.* ¶ 64; *see* EC-MSD-1 (Kohlenberg Declaration) ¶¶ 38-39.

[71] RPF ¶ 47; *see id.* ¶¶ 45 ("Per the SBA Forms 159 prepared by IB, PI was paid the standard or allowed 2% broker or referral fees for SBA loans closed and funded by IB."), 287 (disputing that "he charged fees exceeding 2% of the loan amount and failed to report referral fees on the IB prepared SBA Forms 159").

[72] The undersigned notes that four of these five preapproval letters were sent to the borrowers by Respondent Ponte himself via email and bear Respondent Ponte's name as their author. *See* EC-MSD-38P & -28P (SBA Loan A cover email and preapproval letter) (3.75% fee and additional business analysis fee of $1,295); EC-MSD-71P & -31P (SBA Loan B cover email and preapproval letter) (4% fee and $1,595 business analysis fee); EC-MSD-85P & -32P (SBA Loan C cover email and preapproval letter) (3.75% fee and $1,395 business analysis fee); EC-MSD-124P & -33P (SBA Loan D cover email and preapproval letter) (3.75% fee and $1,395 business analysis fee).

letters to Ponte Investments by the exemplar borrowers outside of the closing process, other than that such transactions "speak for themselves."[73]

With respect to the Overall Business Analysis fee, Ponte agrees that such a fee was charged "from time to time," but denies that it "was charged to most borrowers" as Enforcement Counsel claims;[74] the frequency of this fee is therefore a disputed fact that may be explored further at hearing, including through the testimony of Ms. Kohlenberg. Respondent Ponte does not dispute that business analysis fees were collected directly from borrowers, but disputes that this collection was made "generally shortly after the borrower had been pre-approved from an SBA Loan at the Bank" [75]—to the extent that the timing of the payment of such fees is material, this dispute may be addressed at hearing as well.[76] And Respondent Ponte rejects that the business analysis fee "caused the broker or referral fee to exceed 2% of the SBA Loan amount," on the grounds that the business analysis fee "was not a broker or referral fee"[77] and "was separate from any SBA loan."[78]

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[73] *See*, *e.g.*, RPF ¶¶ 106-108 (preapproval letter for SBA Loan B reflecting 4% fee and separate $1,595 business analysis fee "speaks for itself"), 109, 134 (transactions in which Ponte Investments ostensibly collected $1,595 and $2,625 from Borrower B outside the loan closing process "speak for themselves").

[74] *Id.* ¶ 49. Enforcement Counsel's assertion that the Overall Business Analysis fee was charged "to most borrowers" is based on the Kohlenberg Declaration. *See* EC SOF ¶ 49; EC-MSD-1 (Kohlenberg Declaration) ¶¶ 40, 41(b).

[75] RPF ¶ 52.

[76] The preapproval letters cited by Enforcement Counsel contain an itemization of the services included in the Overall Business Analysis fee, stating that the fee covers "third party venders [sic] used" and listing items such as "UCC Lien Search and Clearance," "Affiliate/Owner Background Report," and "Affiliate/Owner Credit Report." *See*, *e.g.*, EC-MSD-28P (SBA Loan A preapproval letter) at 4. It is perhaps worth noting that the Loan Referral Agreements between the Bank and Ponte Investments limit the amount that can be charged the borrowers for out-of-pocket costs "such as background checks, credit checks, and UCC filings," with the 2018 Agreements stating that such charges must be reasonable and customary and the 2015 and 2017 Agreements stating that Ponte Investments may only charge "actual costs" with "no markup with regard thereto." EC-MSD-14 (Loan Referral Agreements) at 28 (December 2017 Agreement), 33 (June 2015 Agreement); *see also id.* at 2 (November 2018 Agreement), 21 (June 2018 Agreement).

[77] RPF ¶ 50.

[78] Ponte Opp. at 16 n.11; *see also* EC-MSD-29P (December 8, 2016 email chain including email from Respondent Ponte to CEO Catanzaro, President Catanzaro and others) (stating that apparent excess fee charged to SBA Loan applicant "was not tied to the sba loan"); EC SOF ¶ 56.

Respondent Ponte does not dispute that business analysis fees were not reported on SBA Form 159s, but says that these forms were prepared by IB "[i]n all instances" and that IB "never inquired of PI what other fees, if any, may have been charged by PI."[79] Respondent Ponte also states that the Bank was "aware that in some cases PI was charging other fees."[80] He asserts that "[a]t no time" did Ponte Investments seek to conceal the fees it charged.[81] Respondent Ponte further avers that Ponte Investments sought legal opinions in 2018 and 2019 regarding the propriety of its SBA loan-related fees, and that it was ultimately told in October 2019 that it was "permitted to charge referral fees, packaging fees and/or business analysis fees (initial loan analysis), or any combination thereof."[82]

SBA Form 159

SBA regulations require any party that receives compensation from SBA Loan applicants or lenders for services provided in connection with the SBA Loan Program, including referral agents such as Ponte Investments, to execute and provide to the SBA an agreement known as SBA

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[79] RPF ¶ 51.

[80] *Id.* ¶ 50; *see also id.* ¶ 58 ("Ponte accepts that from time to time Respondent Catanzaro was advised and was fully aware that PI was charging another fee to borrowers; however, it was not just Respondent Catanzaro who was aware of the same, but also others within the SBA Loan Program.").

[81] *Id.* ¶ 58.

[82] Ponte Opp. at 16; *see* RP-OPP-3C (Legal Opinions Regarding Fees Charged). This exhibit consists of two documents, a January 2018 email chain between an attorney named Martin Teckler and Danielle Desrosiers, who at that time was Director of Operations of Ponte Investments' SBA Loan Program, and an October 2019 letter to Ms. Desrosiers from an attorney named Nick Jellum. In the email chain, Ms. Desrosiers represents that Ponte Investments charges borrowers "a 2% referral fee and a 2% packaging fee," both of which are "debited from the loan proceeds," on top of "an up-front fee of $1,995" for business analysis. RP-OPP-3C at 2 (email chain including January 6, 2018 email from D. Desrosiers to M. Teckler). In the letter, Mr. Jellum reflects his understanding that Ponte Investments "intends to be paid Referral Fees only from lenders," while charging packaging fees to borrowers that would "be paid out of the borrower's SBA loan proceeds." *Id.* at 4-5 (October 16, 2019 letter from N. Jellum to D. Desrosiers). Consistent with note 60 *supra* regarding packaging services, it would be very helpful if Enforcement Counsel could establish at hearing, as it deems material, the extent to which these documents represent Ponte Investments' fee practices at those times, considering that the representations conflict to some degree with the bulk of the record evidence currently before this Tribunal—namely, that Ponte Investments collected referral fees, and not packaging fees, from borrowers, only 2% of which, maximum, was paid out of the loan proceeds.

Form 159 (or SBA Form 159(7a)), which "governs the compensation charged for services rendered or to be rendered to the Applicant or lender."[83] 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. As discussed above, through this form, a referral agent must disclose any and all fees charged to an SBA Loan applicant, and make the following certification:

> By signing this form, the undersigned Agent agrees that it has not and will not directly or indirectly charge or receive any payment in connection with the application for or making of the SBA loan except for services actually performed on behalf of Applicant and identified in this form. . . and that ***the compensation described in this form is the only compensation that has been charged to or received from the Applicant*** or that will be charged to the Applicant for services covered by this form. . . . False certifications can result in criminal prosecution under 18 U.S.C. § 1001 and other penalties provided by law.[84]

The particular SBA Form 159 cited here purports to disclose all of the fees charged by Ponte Investments related to one of the exemplar loans, namely SBA Loan B. The form reflects a $3,000 payment from the applicant to Ponte Investments for "Broker or Referral services," which equates to 2% of the loan being funded.[85] To all appearances, it is signed by Respondent Ponte and dated January 17, 2018.[86] Enforcement Counsel also proffers two other SBA Form 159s that bear Respondent Ponte's apparent signature, SBA Loan A (dated June 23, 2017) and SBA Loan D (dated September 19, 2017).[87] In each case, the form solely discloses a fee of 2% for a loan for

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[83] 13 C.F.R. § 103.5.

[84] EC-MSD-72P (Signed Closing Binder for SBA Loan B) at 36 (emphasis added); *see also* MSD at 16.

[85] *See* EC SOF ¶¶ 128, 131.

[86] *See* EC-MSD-72P (Signed Closing Binder for SBA Loan B) at 37; EC SOF ¶ 131.

[87] *See* EC-MSD-62P (Signed Closing Binder for SBA Loan A) at 34; EC-MSD-125P (Signed Closing Binder for SBA Loan D) at 42.

which Enforcement Counsel has adduced evidence, referenced above, that Ponte Investments charged, and received payment from the borrower, fees in excess of 2%.[88]

Respondent Ponte, it seems, rejects the authenticity of the proffered forms utterly, categorically denying that he ever signed "any IB prepared SBA Form 159 during the relevant time period (2017-2019)."[89] According to Respondent Ponte, "beginning in 2017, IB began forwarding the IB prepared SBA Form 159 to others, which did not include Ponte," such that "for all intents and purposes, during 2017, 2018, and 2019, Ponte was removed altogether from the IB prepared SBA Form 159 process."[90] Respondent Ponte further "submits that a simple handwriting analysis on a form-by-form basis will actually confirm this fact."[91]

The undersigned "is not obliged to credit the non-moving party's factual assertions when they are not supported on the record,"[92] and she will not do so here. Enforcement Counsel has offered strong documentary evidence that Respondent Ponte signed at least some SBA Form 159s in 2017 and 2018; at the very least, it is now incumbent on Respondent Ponte to support his blanket protestations to the contrary in any way whatsoever. Until and unless he does so, the undersigned does not treat Respondent Ponte's signatures on these forms as a fact in genuine dispute.

The Bridge Loan Scheme

The other claims against Respondent Ponte concern what Enforcement Counsel terms the Bridge Loan Scheme, in which Ponte Investments or its sister company Hydrangea Capital—of

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[88] *See supra* at 16-17.

[89] Ponte Opp. at 17; *see also id.* at 16-17 ("[T]here is no evidence advanced by the FDIC to suggest that Ponte signed any IB prepared SBA Forms 159 during the relevant time period (2017-2019)."); RPF ¶¶ 97 ("Ponte rejects that he signed, on behalf of PI, the IB prepared SBA Form 159 relative to SBA Loan A."), 131 (same for SBA Loan B), 208 (same for SBA Loan D), 290 ("Ponte rejects that he signed IB prepared SBA Forms 159.").

[90] Ponte Opp. at 17.

[91] *Id.* at 17 n.12.

[92] *Blanton*, 2017 WL 4510840, at *6.

which Respondent Ponte was also the sole owner—extended some form of interim financing to prospective borrowers whose SBA loan applications Ponte Investments had referred to the Bank, which financing was then repaid directly from the proceeds of the SBA Loans once funded.[93] Enforcement Counsel contends that the issuance and repayment of these Bridge Loans from SBA Loan proceeds were both *per se* violations of SBA regulations, discussed further *infra*, and that Respondent Ponte worked with CEO Catanzaro to "conceal[] or cause[] Ponte Investments to conceal" those loans and the source of their repayment "in documentation submitted to the Bank" as a result.[94] As support for this latter claim, Enforcement Counsel proffers a September 2016 email exchange in which CEO Catanzaro ostensibly became aware that Respondent Ponte's company was disclosing the existence of such Bridge Loans and how they were being repaid via the Bank and asked him to cease that disclosure, which he did.[95] Enforcement Counsel asserts that, in furtherance of this, "Respondent Ponte altered or, as the managing member of Ponte Investments, caused to be altered certain SBA Loan borrowers' information that was submitted to the Bank, including information documenting Bridge Loans."[96] All in all, and relying on the

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[93] *See* EC SOF ¶¶ 27-33; MSD at 2.

[94] EC SOF ¶ 42; *see also* MSD at 9-15.

[95] *See* EC SOF ¶¶ 35-41; EC-MSD-27P (email chain including September 29, 2016 emails between Respondent Ponte and CEO Catanzaro). Enforcement Counsel points in particular to the following passage as evidence that CEO Catanzaro was instructing Respondent Ponte to conceal the existence of Bridge Loans from the Bank and the SBA: "[W]e can't pay off Hydrangea. The UCC must be cancelled. [The Bank's credit memo] must be modified. [The amount allocated to working capital] increased. Hydrangea must deal with the borrower." EC SOF ¶ 65 (quoting EC-MSD-27P (email chain including September 29, 2016 email from CEO Catanzaro to President Catanzaro, T. Bain, R. Faris, & W. Brailliard, forwarded to J. Ponte and D. Desrosiers)) (bracketing in EC SOF). The undersigned does not find what is being communicated in this email and the rest of the exchange between Respondent Ponte and CEO Catanzaro to be so unambiguous as to admit to only Enforcement Counsel's proffered interpretation, and she notes that CEO Catanzaro himself has stated that Enforcement Counsel's interpretation is not what was meant by his email. *See* RCF ¶¶ 35-41; Catanzaro Opp. at 5 ("Not only is that characterization inconsistent with the actual language of the email it is also inaccurate in light of Catanzaro's sworn testimony to the FDIC."); EC-MSD-162P (August 9, 2022 Deposition of Robert S. Catanzaro) at 107:4-111:9. Enforcement Counsel may further explore this issue at hearing to the extent it chooses to do so.

[96] EC SOF ¶ 254. With respect to this claim, Enforcement Counsel asserts that there are two documents submitted to the Bank by Ponte Investments in connection with two different SBA Loans that "appear[] to be altered using correction fluid" to remove mention of Bridge Loans associated with those loans. *Id.* ¶ 153; *see id.* ¶¶ 151-152, 226-

Kohlenberg Declaration, Enforcement Counsel identifies 201 SBA Loan borrowers who had associated Bridge Loans that were not disclosed in the Bank's files, and states that "the vast majority" of these loans were repaid from the borrowers' SBA Loan proceeds.[97]

Respondent Ponte does not dispute that Ponte Investments and Hydrangea Capital extended Bridge Loans to at least some SBA Loan applicants "in appropriate circumstances," although he denies Enforcement Counsel's contention that he directed his employees to do so whenever possible.[98] Respondent Ponte also does not dispute that at least some Bridge Loans were repaid using SBA Loan proceeds, although he denies that it happened in "the vast majority" of cases.[99] And Respondent Ponte does not dispute that Ponte Investments "stopped documenting extensions of interim credit" because the Bank directed it to do so, but denies that there was any intent to conceal and states that the Bridge Loans were in fact reflected in "prospective borrower bank statements" and "pipeline reports" generated by the Bank.[100] Moreover, Respondent Ponte "rejects that he altered or caused to be altered certain SBA borrower information that was submitted to

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230; EC-MSD-89P (untitled spreadsheet that Enforcement Counsel represents to be a business debt schedule for the borrower denoted Borrower C); EC-MSD-140P (spreadsheet entitled "Business Debt Summary" that Enforcement Counsel represents is associated with the Bridge Loan denoted Bridge Loan D). The presence or absence of correction fluid on these documents is not apparent from the .pdf exhibits submitted to this Tribunal, and given Respondent Ponte's denial (see below) and the lack of any additional evidence that he altered these files or caused them to be altered, the undersigned finds that this is a material fact in genuine dispute that can and should be revisited at the upcoming hearing.

[97] EC SOF ¶ 252; *see id.* ¶ 251.

[98] RPF ¶ 27; *see also id.* ¶¶ 28 ("From time to time both PI and [Hydrangea Capital ("HC")] . . . extended interim financing to qualified prospective SBA borrowers."), 30 ("Ponte accepts that Bridge Loans were extended by PI.").

[99] *Id.* ¶ 252. Respondent Ponte appears to draw a distinction between having Bridge Loans "repaid directly from SBA proceeds," which he contends happened "in certain instances" until sometime in 2016, and having the borrowers themselves repay the Bridge Loans from their own pocket after the SBA Loans had been funded, which he states was the practice thereafter. *Id.* ¶ 33 (stating that after 2016, "any repayment received from [sic] PI and/or HC was made directly from the borrower, and not SBA Loan proceeds"). Enforcement Counsel may decide whether this distinction is material, and address it at the hearing, or not, as appropriate.

[100] *Id.* ¶ 42; *see also id.* ¶ 256 (stating that "PI initially documented Bridge Loans only to be advised by IB that disclosure was not required. Regardless, the Bridge Loans were documented on IB's internal pipeline reports, which were generated and managed by IB."); Ponte Opp. at 16 (asserting that the Bank never told Ponte Investments "that it could not extend interim financing, or that the same had to be disclosed").

IB."[101] He further states that the fact that his companies were offering Bridge Loans to prospective borrowers "was common knowledge" at the Bank, and that Bank personnel "was well aware of the Bridge Loan at issue" in the September 2016 email.[102] Respondent Ponte accepts that approximately two hundred SBA Loan borrowers referred to the Bank during the Relevant Times whose loans were closed and funded had associated Bridge Loans extended by his companies, although he states that the number is 211 rather than the 201 calculated by Ms. Kohlenberg.[103]

As with Ponte Investments' fee practices, Enforcement Counsel uses the exemplar loans as object examples of SBA Loans referred by Ponte Investments and funded by the Bank in which "[e]ach of the four borrowers had an associated Bridge Loan that was repaid from SBA Loan proceeds and not documented in the Bank's files."[104] The undersigned finds that it is unnecessary to recount the particulars of the exemplar loans as they relate to the Bridge Loan Scheme in detail at this stage, given her ultimate conclusion that there are disputed material facts such that summary disposition on Enforcement Counsel's Bridge Loan-related claims would be premature. Suffice to say that there is no genuine dispute that Ponte Investments or Hydrangea Capital extended some form of interim financing to the borrowers of each of the exemplar loans; that Enforcement Counsel has presented evidence that the documentation provided to the Bank in connection with these borrowers' SBA loan applications did not include the Bridge Loan agreements or otherwise directly disclose the existence of the associated Bridge Loans; and that there is likewise evidence,

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[101] RPF ¶ 254; *see also id.* ¶¶ 152-153, 227-228.

[102] *Id.* ¶¶ 35, 41; *see also* Ponte Opp. at 21 ("[A]s early as 2016, IB was aware of PI offering interim financing to SBA loan applicants. PI was never directed by any individual to not do so or otherwise 'stop'").

[103] *See* RPF ¶ 43; *see also* RP-OPP-8C (purporting to be a chart of the "current status of SBA borrowing businesses which were extended bridge loans"). Reviewing the Kohlenberg Declaration, she states that she "identified 212 Bridge Loans extended to Bank borrowers associated with 201 SBA Loans," which may be an explanation for this discrepancy. EC-MSD-1P (Kohlenberg Declaration) ¶ 13.

[104] EC SOF ¶ 62.

which is undisputed, that in each instance, the borrower paid off the Bridge Loans in full via check or wire transfer almost immediately after their SBA Loan was approved and funded.[105]

Respondent Ponte's Influence at the Bank

The Parties offer conflicting accounts of Respondent Ponte's influence at the Bank and his role in directing the conduct of the Bank's affairs, inquiries that are relevant to the threshold question of whether Respondent Ponte is an IAP of the Bank subject to the FDIC's jurisdiction.[106] Broadly, Enforcement Counsel asserts, with supporting citations to the record, that Respondent Ponte exerted influence at the Bank "by virtue of the volume of loans referred by Ponte Investments" and due to "his close personal friendship with [CEO] Catanzaro."[107] Enforcement Counsel also contends that Respondent Ponte would lobby Bank underwriters and CEO Catanzaro to make favorable decisions on SBA Loans that Ponte Investments had referred to the Bank;[108] that "Respondent Ponte would suggest and be consulted on changes to the policies and procedures related to the Bank's SBA lending program";[109] and that Respondent Ponte sought to, and did, influence "which Bank employees would work on loans referred by Ponte Investments."[110] Pursuant to this last point, Enforcement Counsel relates an episode in 2017 in which Respondent Ponte threatened to pull his business from the Bank unless CEO Catanzaro's son, then-Bank

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[105] *See id.* ¶¶ 70, 73, 91-92 (SBA Loan A), 112-124 (SBA Loan B), 147-154, 170-173, 180-184 (SBA Loan C), 214-217, 225-230, 243-244 (SBA Loan D).

[106] *See* EC SOF ¶¶ 291-305; RPF ¶¶ 291-305; *see also* Order No. 32: Denying Respondent Ponte's Motion for Summary Disposition on the IAP Issue (June 10, 2024) at 9-11, 20-21; Part V *infra*.

[107] EC SOF ¶¶ 291, 293.

[108] *See id.* ¶¶ 295-296.

[109] *Id.* ¶ 300; *see also* EC-MSD-178P (email chain including December 29, 2017 from CEO Catanzaro to Respondent Ponte seeking input on potential changes to internal Bank procedure re SBA Loans and stating that "I also think your suggested reorganization is workable and preserves the core unit. Will discuss further tomorrow at lunch.").

[110] EC SOF ¶ 297; *see also* EC-MSD-171P (email chain including August 22, 2017 email from Respondent Ponte to CEO Catanzaro, President Catanzaro, and D. Desrosiers) ("I do not want anyone other then [sic] Ben and Jen underwriting my loans, if not I will pull them from the bank.").

President Robert A. Catanzaro, was "removed from his position" reviewing Ponte Investments-referred loans after several such loans had been criticized or declined by him.[111] Following this, it is undisputed that the Bank's Board of Directors then "approved a reorganization of the Bank's lending department" in which "President Catanzaro no longer reviewed any SBA Loans referred by Ponte Investments."[112]

Once again, Respondent Ponte disputes virtually all of Enforcement Counsel's assertions, albeit in a relatively conclusory manner. Respondent Ponte contends overall that at no time did he "have any influence over IB or otherwise participate in the conduct of the affairs of IB, including having no approval or other authority at IB."[113] He disclaims any involvement "in [the Bank's] underwriting and/or approval process"[114] and "rejects that he had any input or authority relative to SBA policies, procedures, rules, and/or guidelines at the Bank," as those "were promulgated by IB's senior management and its independent Board of Directors."[115] Respondent Ponte denies lobbying Bank underwriters to approve loans referred by Ponte Investments or lobbying CEO Catanzaro to overturn the denial of such loans, although he states without elaboration that "[f]rom time to time" both he and his company "did advocate on behalf of SBA applicants in appropriate circumstances."[116] Moreover, notwithstanding the August 2017 email proffered by Enforcement Counsel in which Respondent Ponte tells CEO Catanzaro and others that "I do not want anyone

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[111] EC-MSD-171P (email chain including June 7, 2017 email from Respondent Ponte to CEO Catanzaro); *see* EC SOF ¶¶ 298; Order No. 32: Denying Respondent Ponte's Motion for Summary Disposition on the IAP Issue at 10-11.

[112] EC SOF ¶ 299.

[113] RPF ¶ 7.

[114] *Id.* ¶ 292.

[115] *Id.* ¶ 300.

[116] *Id.* ¶¶ 295-296.

other then [sic] Ben and Jen underwriting my loans, if not I will pull them from the bank,"[117] Respondent Ponte denies ever lobbying CEO Catanzaro "to affect which IB employees worked on PI referred loans."[118] Respondent Ponte also claims that his criticism of President Catanzaro was not because he declined loans referred by Ponte Investments, but because he was "untimely and unknowledgeable relative to underwriting and approval of SBA loan applications."[119]

Evaluating this in the light most favorable to Respondent Ponte as the non-moving party and accepting Respondent Ponte's evidence as true, the undersigned finds that disputed questions of material fact remain regarding the extent of Respondent Ponte's involvement and influence in the Bank's affairs that are appropriately resolved at hearing. There is no doubt on the present record that Respondent Ponte brought a significant amount of business to the Bank and communicated regularly with CEO Catanzaro on matters pertaining to loans referred by his company; as relevant to the IAP issue (*see* Part V below), the question as Enforcement Counsel has framed it is whether "Respondent Ponte's influence and *de facto* position of authority allowed him to materially influence decisions on a core Bank function, lending, thus placing him in a position where he could harm the Bank."[120] Should either Party wish to pursue this line of inquiry to further resolve it in one direction or the other, testimonial evidence from Bank directors or employees regarding the events referenced in Enforcement Counsel's narrative, and regarding the extent of Respondent Ponte's *de facto* authority at the Bank generally, would be of some benefit.

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[117] EC-MSD-170P (email chain including August 22, 2017 email from Respondent Ponte to CEO Catanzaro, President Catanzaro, and D. Desrosiers); *see* EC SOF ¶ 297.

[118] RPF ¶ 297.

[119] *Id.* ¶ 298.

[120] MSD at 38.

Respondent Ponte's Personal Gain

Enforcement Counsel asserts that Respondent Ponte received at least $2.37 million in interest and fees on Bridge Loans offered to SBA Loan borrowers during the Relevant Times, at least $6.99 million "in fees paid directly to the Bank" on SBA Loans referred by Ponte Investments, and at least $4.51 million "in fees charged outside of closing"—what Enforcement Counsel characterizes as "impermissible" fees—on such loans.[121] Respondent Ponte disputes these assertions without explanation, and it is thus unclear whether he is disputing that he received that money personally (as opposed to Ponte Investments) or challenging the basis for the specific dollar amounts that Enforcement Counsel claims or both or neither.[122] Because Enforcement Counsel's calculations are based on the Kohlenberg Declaration, Respondent Ponte will have the opportunity to test them through cross-examination and they are treated as disputed until then, but Enforcement Counsel has certainly established that Respondent Ponte, as the sole owner of Ponte Investments, personally received at least some measure of pecuniary benefit from both the charging of fees (whether impermissible or not) and the extension of Bridge Loans to prospective borrowers whose SBA Loan applications were referred to, and closed and funded by, the Bank.

Effect of the Alleged Conduct on the Bank

In addition to benefiting him personally, Enforcement Counsel contends that Respondent Ponte's alleged misconduct caused harm or potential harm to the Bank in multiple ways. To begin with, it asserts that the arrangement of payment of Bridge Loans from SBA Loan proceeds, and the failure to disclose the same in the Bank's files, both increased the risk of default on SBA Loans—because already high-risk "[b]orrowers with Bridge Loans were generally not able to

[121] EC SOF ¶¶ 281-282.
[122] *See* RPF ¶¶ 281-282.

generate as much revenue . . . as comparable borrowers without Bridge Loans"—and had the effect of shifting that default risk from Ponte Investments to the Bank and SBA.[123] Enforcement Counsel claims that "[t]he riskier nature of SBA Loans with undisclosed Bridge Loans is evidenced by contrasting their default rate (44%) to SBA Loans referred by Ponte Investments without Bridge Loans (15%)."[124] And Enforcement Counsel states that this heightened default rate caused the Bank to charge off $1.55 million in defaulted SBA Loans with Bridge Loans, corresponding to the unguaranteed portion of those loan balances that the Bank had kept on its balance sheet rather than sold to the secondary market.[125]

Further, Enforcement Counsel asserts 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 (and could still cause) the SBA to seek repayment of its guarantee from the Bank, which would require the Bank to repurchase the defaulted loans from the secondary market and absorb the entire loss on those loans.[126] Enforcement Counsel also maintains that as a result of the "mounting losses" brought about by the Bridge Loan Scheme, the SBA "took multiple and increasingly severe actions against the Bank, ultimately resulting in the termination of the Bank's ability to make SBA-guaranteed loans in November 2019."[127] This inability to participate in the SBA Loan Program, Enforcement Counsel says, "significantly impacted the Bank's profitability."[128]

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[123] EC SOF ¶ 269; *see id.* ¶¶ 268, 270.
[124] *Id.* ¶ 267.
[125] *See id.* ¶¶ 261-262.
[126] *See id.* ¶¶ 271-274, 279-280.
[127] *Id.* ¶ 275.
[128] *Id.* ¶ 277.

Most, if not all, of the above assertions are premised in large part on the Kohlenberg Declaration and the opinions and conclusions of Enforcement Counsel's two experts, which Respondent Ponte will have the opportunity to test on cross-examination.[129] Beyond this, however, Enforcement Counsel also provides evidence that each of the so-called exemplar loans ultimately defaulted, with the Bank charging off the unguaranteed portion of those loans held on its balance sheet and thereby sustaining a loss.[130]

In response, Respondent Ponte asserts that "any losses allegedly sustained by IB resulted from its own action or inaction having nothing to do with Ponte or PI," including the Bank's loss of its SBA lending authority.[131] Respondent Ponte further contends that the charge-offs in question were voluntary rather than being caused by his alleged misconduct, stating that "rather than undertaking any collection efforts relative to defaulted SBA borrowers, IB simply chose to 'charge off' loans and 'put in' for a purchase of the SBA guaranty."[132] And as to the exemplar loans, Respondent Ponte states that three of the four borrowers in question continue to operate their businesses, "which is indicative of IB's non-existent collection practices."[133] He also contends that the prospect of the SBA rescinding its guarantee on the Bank's SBA Loans is purely speculative,

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[129] *See generally id.* notes 258 through 278 (citing throughout to EC-MSD-1 (Kohlenberg Declaration), EC-MSD-18 (Barry Report), and EC-MSD-22 (Zelaya Report)).

[130] *See id.* ¶¶ 103 ($19,194.80 charge off for SBA Loan A), 138 ($22,356.51 charge off for SBA Loan B), 195 ($38,791 charge off for loans taken out by Borrower C), 250 ($35,824.97 charge off for 1st and 2nd SBA Loan D).

[131] Ponte Opp. at 12; *see id.* at 22 ("IB lost its authority to make SBA loans insofar as it was routinely cited by the SBA for deficiencies associated with its underwriting, collateralization, servicing, and collections. All of this conduct is directly attributable to the action and/or inaction of IB, and none of the activities or functions were anything in which either PI or Ponte were involved.").

[132] *Id.* at 23; *see* RPF ¶¶ 262 ("Rather than properly service and collect upon defaulted obligations, IB instead chose to simply charge off the same."), 264 ("[A]ny loss results directly from IB's non-compliant and/or non-existent collection practices.").

[133] RPF ¶ 250; *see also id.* ¶¶ 103, 138.

and that "there can be no probability of future loss to IB insofar as IB has already 'sold' or conveyed its SBA loan servicing portfolio to a third-party financial institution."[134]

The undersigned finds that Enforcement Counsel has presented evidence that the Bank sustained at least some loss on SBA Loans referred by Ponte Investments with associated Bridge Loans that were closed and funded by the Bank. The undersigned further finds that the role played by the actions of Respondent Ponte, individually and through his company, in causing this loss and in the SBA's decision to terminate the Bank's SBA lending authority are questions of law and fact to be explored further at hearing and in post-hearing briefing.

IV. Relevant SBA Regulations

The SBA regulations at issue here are complex, and it is worthwhile setting them out in some detail as a predicate matter. As Enforcement Counsel notes, "[b]asic standards for conducting business with the SBA are found in 13 C.F.R. Part 103," while the SBA Loan Program—that is, the Small Loan Advantage 7(a) program that is the subject of these proceedings—is generally governed by 13 C.F.R. Part 120.[135] The SBA Program Requirements that all lenders are required to comply with[136] include these regulations and the SBA SOPs, which provide guidance as well as "interpretations and further explanation" of the regulatory framework.[137]

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[134] Ponte Opp. at 12; *see also id.* ("[I]n no instance of which Ponte is aware did the SBA deny any guaranty purchase submitted by IB, nor has any previously purchased guaranty been returned or reversed.").

[135] MSD at 9.

[136] *See* 13 C.F.R. § 120.180 ("SBA Lenders and Intermediaries must comply and maintain familiarity with Loan Program Requirements for the 7(a) Loan Program . . . , as applicable, and as such requirements are revised from time to time."). There should be no dispute that "Intermediaries" as used here and defined in 13 C.F.R. § 120.10 is a term that has no relevance to the instant proceedings.

[137] MSD at 9. The relevant SOP here is SOP 50 10, entitled "Lender and Development Company Loan Programs," and its iterations are found at https://www.sba.gov/document/sop-50-10-lender-development-company-loan-programs. *See* MSD at 9 n.15. During the Relevant Times, the operative versions were 50 10 5(I) (effective January 1, 2017 through December 31, 2017), 50 10 5(J) (effective January 1, 2018 through March 31, 2019), and 50 10 5(K) (effective April 1, 2019 through September 30, 2020). *See id.* For ease of reference, this Order will cite to version 5(J) as having been effective for the predominant portion of the Relevant Times, but the undersigned will note any relevant substantive differences between the versions.

Broadly speaking, Enforcement Counsel asserts that Respondent Ponte's alleged misconduct violated three categories of SBA Program Requirements: ethical regulations, lending regulations, and fee regulations. Without yet addressing whether the conduct itself constitutes a violation of any regulation within these categories, the undersigned will describe the requirements set forth in each, as well as to whom they apply and whether any immediate determination can be made, based on the present record, as to the extent of Respondent Ponte's inclusion within their ambit, either individually or through Ponte Investments.

Ethical Regulations

Enforcement Counsel first contends that Respondent Ponte violated the SBA's ethical requirements at 13 C.F.R. § 120.140, which provision begins as follows:

> Lenders, Intermediaries, and [Certified Development Companies ("CDCs")] (in this section, collectively referred to as 'Participants') must act ethically and exhibit good character. Ethical indiscretion of an Associate of a Participant . . . will be attributed to the Participant. A Participant must promptly notify SBA if it obtains information concerning the unethical behavior of an Associate.[138]

The regulation then goes on to provide "examples of such unethical behavior," some of which are discussed further in Subpart A, Chapter 1, Section II of the relevant SOP.[139]

According to Enforcement Counsel, this regulation "imposes several specific requirements on a Lender and its Associates,"[140] but this is not precisely true. It appears more accurate to say that the ethical requirements imposed on a Lender—here, the Bank—are violated not only by the Lender's own behavior, but by the unethical behavior of its Associates. This is a small distinction,

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[138] 13 C.F.R. § 120.140.

[139] *Id.*; *see* SOP 50 10 5(J), Subpart A, Chapter 1, Paragraph II.E.3 (Ethical Requirements Placed on a Lender) at 14-15. As above, it should be undisputed that neither Respondent Ponte nor Ponte Investments is an "Intermediary" or a "CDC" within the meaning of this provision.

[140] MSD at 11.

but perhaps an important one—under the plain text of the regulation, a Lender's Associate cannot itself violate Section 120.140 by acting unethically, but it can bring about a violation because its unethical behavior "will be attributed to" the Lender.

For Enforcement Counsel's purposes, however, bringing about a violation is sufficient. The misconduct element of 12 U.S.C. § 1818(e), under which the FDIC brings this action for an order of prohibition, is satisfied, among other ways, by an IAP's "direct[] or indirect[]" violation of a regulation.[141] As Enforcement Counsel notes, the term "violation" under this statute is purposefully broad, encompassing "any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation."[142] Thus, assuming for the moment that Respondent Ponte is an IAP within the FDIC's jurisdiction, he can be said to have committed actionable misconduct under 12 U.S.C. § 1818(e) if his actions caused or brought about a violation of 13 C.F.R. § 120.140 by the Bank—put another way, even if Respondent Ponte had no duty under this regulation to "act ethically and exhibit good character," he has still committed a "violation" within the meaning of 12 U.S.C. § 1818(e) if, through the unethical actions of Ponte Investments as an Associate of the Bank, he has played a role in causing the Bank to violate 13 C.F.R. § 120.140 itself.

The natural question, then, is whether Ponte Investments is an Associate of the Bank under this regulation. Enforcement Counsel says yes, and the undersigned agrees. "***Associate***" in this context is defined, in pertinent part, as "[a]n officer, director, [or] key employee" of the Lender, "or *an agent involved in the loan process*."[143] An "***Agent***," by the same token, is "an authorized

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[141] 12 U.S.C. § 1818(e)(1)(A); *see also* Part VI *infra*.

[142] 12 U.S.C. § 1813(v); *see* MSD at 9.

[143] 13 C.F.R. § 120.10 (emphasis added).

representative, including an attorney, consultant, packager, lender service provider, or any other person representing an Applicant or Participant by conducting business with the SBA."[144] And the term "***conduct business with the SBA***," among other things, includes "[p]reparing or submitting on behalf of an applicant an application for financial assistance of any kind," "[a]cting as a Lender Service Provider," and "[s]uch other activity as SBA reasonably shall determine."[145]

As a "Referral Agent in the business of identifying and assisting potentially eligible borrowers and obtaining applications for the [SBA Loan] Program to be provided to the Bank,"[146] the undersigned finds that Ponte Investments was "an agent involved in the loan process" and therefore an Associate of the Bank for purposes of SBA regulations.[147] Enforcement Counsel argues that "[t]he packaging and underwriting services performed by Ponte Investments clearly make it a Lender Service Provider" as well,[148] but the undersigned finds it unnecessary to decide that at this juncture. For one thing, the extent to which Ponte Investments provided packaging services is unclear from the record;[149] it is also not clear that being a packager would in fact make Ponte Investments a Lender Service Provider, given the lack of obvious overlap in the respective

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[144] *Id.* § 103.1(a).

[145] *Id.* § 103.1(b).

[146] EC-MSD-14 (Loan Referral Agreements) at 1 (November 2018 Agreement); *see also*, *e.g.*, Ponte Opp. at 2 (stating that Ponte Investments was a "referral agent" that "originated potential loan applications for the SBA Loan Program" by referring prospective SBA borrowers to the Bank).

[147] *See* MSD at 10 (relying on the Zelaya Report for the proposition that "[a]n Agent is involved in the loan process when, amongst other things, they are a 'Referral Agent' for a Lender"); *see also*, *e.g.*, 13 C.F.R. § 103.1(f) (defining "Referral Agent" as "a person or entity who identifies and refers an Applicant to a lender or a lender to an Applicant. The Referral Agent may be employed and compensated by either an Applicant or a lender."); EC-MSD-14 (Loan Referral Agreements) at 1-14 (November 2018 Agreement) (referring to Ponte Investments throughout as a "Referral Agent" of the Bank).

[148] MSD at 11.

[149] *See* notes 60 and 82 *supra*. It is worth noting again that each of the SBA Form 159s proffered by Enforcement Counsel state that the Bank had provided, and charged fees for, "loan packaging services" to the applicant while Ponte Investments had provided "Broker or Referral services." *See* EC-MSD-62P (Signed Closing Binder for SBA Loan A) at 30, 33; EC-MSD-72P (Signed Closing Binder for SBA Loan B) at 30, 36; EC-MSD-99P (Signed Closing Binder for SBA Loan C) at 35, 41; EC-MSD-112P (Signed Closing Binder for additional SBA Loan C) at 35, 41; EC-MSD-125P (Signed Closing Binder for SBA Loan D) at 35, 41; *see also* Part IV *infra* at 40-43.

definitions of the terms and the fact that "Packager" and "Lender Service Provider" are listed separately as entities that qualify as "Agents" under SBA regulations.[150] Moreover, Agents that are Lender Service Providers must execute and provide to the SBA a formal agreement between themselves and the Lender regarding their status[151]—if that is the function of the Loan Referral Agreements between Ponte Investments and the Bank, Enforcement Counsel has not identified them as such, nor do those documents refer to Ponte Investments as a Lender Service Provider within their text.[152] Regardless, Ponte Investments is an Associate by virtue of its status as Referral Agent, whether or not it is also a Lender Service Provider under the applicable regulations.[153]

Enforcement Counsel contends that Respondent Ponte himself meets the definition of "Associate" in 13 C.F.R. Part 120, both "as the sole owner and managing member of Ponte Investments[] and as a result of his direct role in performing services for the Bank."[154] This, too, the undersigned finds unnecessary to decide. Given the broad definition of "violation" in 12 U.S.C. § 1813(v) referenced above, all that is required for Respondent Ponte to be liable for a violation of the SBA's ethical regulations for purposes of an order of prohibition is for him to have caused,

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[150] *See* 13 C.F.R. § 103.1(a) (defining "Agent" to include "packager" or "lender service provider"); *see also id.* §§ 103.1(d) (defining "Lender Service Provider" as "an Agent who carries out lender functions in originating, disbursing, servicing, or liquidating a specific SBA business loan or loan portfolio for compensation from the lender"), 103.1(e) (defining "Packager" as "an Agent who is employed and compensated by an Applicant or lender to prepare the Applicant's application for financial assistance from SBA").

[151] *See* SOP 50 10 5(J), Subpart B, Chapter 3, Paragraph IX.A, at 164-165; 13 C.F.R. § 103.5(c).

[152] *See generally* EC-MSD-14 (Loan Referral Agreements).

[153] Respondent Ponte contends briefly that neither he nor Ponte Investments is an Associate of the Bank, but offers no substantive reason why. *See* Ponte Opp. at 19 ("Neither IB nor the SBA ever deemed PI to be an associate of IB. Likewise, Ponte is not one."). On the question of Ponte Investments being a Lender Service Provider, by contrast, Respondent Ponte at least gives a colorable factual basis for his position. *See id.* at 19-20 ("At no time did either the SBA or IB ever provide notice to PI of any possible designation as an LSP. In fact, the SBA's own written reports conflict as to whether PI was ever designated an LSP of IB. . . . IB never entered into an LSP agreement with PI which was presented to the SBA for review."). Thus, even if the undersigned were more inclined to resolve the Lender Service Provider question at this stage, the record is such that there exists a genuine dispute of material fact on the issue, resolving all justifiable inferences in Respondent Ponte's favor as the non-moving party and taking his evidence as true.

[154] MSD at 11.

brought about, participated in, or aided and abetted some ethical violation by the Bank itself.[155] And because ethical indiscretions of Ponte Investments as an Associate of the Bank are attributed *to* the Bank,[156] it is immaterial whether Respondent Ponte individually is an Associate if Enforcement Counsel can show that (1) Ponte Investments acted unethically within the meaning of these regulations; and (2) Respondent Ponte, as Ponte Investments' sole owner and managing member, had some part to play in his company's unethical actions.

Turning at last to the ethical requirements themselves, then, there are several ways in which Enforcement Counsel contends that Respondent Ponte and Ponte Investments have participated in a violation of 13 C.F.R. § 120.140.

First, Enforcement Counsel asserts that "[m]aking Bridge Loans to borrowers, referred to the Bank, with the intention that they be repaid from the proceeds of the SBA-guaranteed loan," violates the regulation's proscription against ***self-dealing***.[157]

Second, the regulation prohibits a participating Lender from having "a real or apparent ***conflict of interest*** with a small business with which it is dealing,"[158] which the relevant SOP interprets to include any situation in which the Lender or its Associates have "a direct or indirect financial or other interest in the Applicant."[159] Enforcement Counsel contends that the extension of Bridge Loans qualifies as such a "direct or indirect financial interest," and further that the Bridge Loan Scheme created "an undisclosed incentive" by Respondent Ponte "to have the Bridge Loans repaid at the expense of the Bank, the borrower, and the SBA."[160]

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[155] *See* 12 U.S.C. §§ 1813(v), 1818(e)(1)(A).
[156] *See* 13 C.F.R. § 120.140.
[157] MSD at 11; *see* 13 C.F.R. § 120.140(a).
[158] 13 C.F.R. § 120.140(b) (emphasis added).
[159] SOP 50 10 5(J), Subpart A, Chapter 1, Paragraph II.E.3(a), at 14.
[160] MSD at 12.

Third, Enforcement Counsel states that both the Bridge Loan Scheme and the charging of impermissible and undisclosed fees contravene the regulation's general prohibition against ***conduct reflecting a lack of business integrity or honesty***.[161]

Fourth, Enforcement Counsel argues that the Bank was required under this regulation to disclose to the SBA that loans with associated Bridge Loans being repaid from SBA Loan proceeds would ***reduce the exposure of an Associate in a position to sustain a loss***, which it did not do.[162]

Fifth and likewise, the regulation requires the Bank to disclose to the SBA if any prospective SBA loan will "***[r]epay or refinance a debt due a Participant or an Associate*** of a Participant."[163] According to Enforcement Counsel, "[t]he entire purpose of the Bridge Loan Scheme was to keep documentation of the Bridge Loans and their repayment from the proceeds of SBA Loans issued by the Bank out of the Bank's files," thus constituting "a clear violation" of this provision.[164]

Finally, the regulation prohibits "any activity which ***taints [the Lender's] objective judgment in evaluating the loan***."[165] Enforcement Counsel claims that Respondent Ponte participated in a violation of this provision by withholding "full information on the borrower's debts and the intended use of the loan proceeds" from the Bank and its underwriters.[166]

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[161] *See id.* at 12-13; 13 C.F.R. § 120.140(f).

[162] *See* MSD at 13; 13 C.F.R. § 120.140(j)(1).

[163] 13 C.F.R. § 120.140(j)(3).

[164] MSD at 13.

[165] 13 C.F.R. § 120.140(l).

[166] MSD at 14; *see also* EC SOF ¶ 268 ("Without full documentation of the Bridge Loans in the Bank's file, the Bank's underwriters did not have a complete understanding of the borrowers' financial condition, and therefore, were not able to underwrite the 201 SBA Loans in a safe and sound manner.").

Lending Regulations

In addition to the asserted ethical violations, Enforcement Counsel contends that Respondent Ponte's conduct in connection with the Bridge Loan Scheme violated certain SBA lending regulations.[167] Again, even if these regulations do not directly impose obligations upon Respondent Ponte—and, as will be seen, they do not—he is nevertheless capable of violating them for purposes of 12 U.S.C. § 1818(e) and 12 U.S.C. § 1813(v) if his conduct can be said to have brought about, caused, or aided in their violation by another.

Overall, the lending regulations cited by Enforcement Counsel prohibit borrowers from using the proceeds of their SBA Loans for certain purposes (such as paying creditors "in position to sustain a loss causing a shift to SBA of . . . a potential loss from an existing debt")[168] and require lenders to properly document any debt being refinanced by the SBA Loan and to otherwise ensure the creditworthiness of applicants so that repayment of the loan may be "reasonably assure[d]."[169] It appears to be Enforcement Counsel's position, backed by the opinion of its experts, that the extension of Bridge Loans to prospective SBA borrowers by Ponte Investments and Hydrangea Capital, the failure to disclose the Bridge Loans in appropriate documentation, and the repayment of Bridge Loans from the proceeds of SBA Loans all constitute *per se* violations of these regulations by either the borrowers or the Bank in which Respondent Ponte played a role.[170]

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[167] *See* MSD at 14-15.

[168] 13 C.F.R. § 120.201; *see* MSD at 14-15 (also citing 13 C.F.R. § 120.130(g), which states that borrowers may not use SBA Loan proceeds for "[a]ny use restricted by [§] 120.201," and 13 C.F.R. § 120.120(c), which states that only "certain outstanding debts" may be refinanced by SBA Loans).

[169] 13 C.F.R. § 120.150; *see also* MSD at 15 ("[W]hen SBA loan proceeds are to be used to refinance a debt, the lender should have specific supporting documentation in its file including a written analysis of the debt and documentation evidencing the debt.") (citing SOP 50 10 5(J), Subpart B, Chapter 2, Paragraph V.E.5 (Policies Regarding Debt Refinancing) at 126).

[170] *See* MSD at 14-15 & n.32, 37; *see also* Part VII.B *infra*.

Respondent Ponte's more general denials of misconduct under these provisions are addressed in the appropriate section below, but there is one aspect of his argument regarding the lending regulations that deserves mention here. According to Respondent Ponte, "notice to the SBA of the extension of interim financing was not required" under the SOPs in effect during the Relevant Times. Specifically, Respondent Ponte quotes the following passage of the SOP:

> After an SBA Authorization has been issued, but prior to disbursement, a Lender or an affiliate of a Lender may make interim advances (also known as bridge loans) and SBA loan proceeds may be used to reimburse the interim advances, as long as the interim advances reasonably comply with the terms of the SBA Authorization. Such advances are made at the Lender's own risk. Lender notification to SBA of such advances is not required.[171]

Respondent Ponte maintains that, because Ponte Investments "was not an affiliate of IB," this paragraph means that "interim financing did not have to be disclosed, and there was no limit on what [Ponte Investments] could ultimately charge."[172] But this is, of course, precisely backwards. The SOP here carves out a specific circumstance in which "a Lender or an affiliate of a Lender" is permitted to (1) extend interim financing such as Bridge Loans to SBA borrowers; (2) use SBA Loan proceeds to repay that interim financing; and (3) not be required to disclose the extension of such interim financing to the SBA. If Ponte Investments is not an affiliate of the Bank, as Respondent Ponte states,[173] then it is not covered by this provision. Moreover, the fact that the Lender and its affiliates *may* do those things under this provision is strongly suggestive that entities that are not the Lender or an affiliate *may not* do those things, just as a street sign stating that

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[171] SOP 50 10 5(J), Subpart B, Chapter 2, Paragraph V.E.15(c), at 130; *see* Ponte Opp. at 15. The other operative SOPs during the Relevant Times, SOP 50 10 5(I) and SOP 50 10 5(K), have the same provision, except that the last sentence of 5(I) reads, "The lender does not have to notify SBA of such advances or loans." SOP 50 10 5(I), Subpart B, Chapter 2, Paragraph V.E.13(c), at 111.

[172] Ponte Opp. at 15.

[173] *See also* 13 C.F.R. § 121.103 (discussing affiliates in the SBA context).

"Parking is permitted here on Mondays and Wednesdays" implies that parking on that street on any other day would not be allowed. It is the exception that proves the rule. In any event, because Enforcement Counsel's argument that Respondent Ponte has violated these lending regulations is, as noted, largely predicated on the opinions of its experts, then Respondent Ponte will have the chance to cross-examine those experts at hearing on the basis for their opinions before the undersigned draws any further conclusions on this issue.

Fee Regulations

Enforcement Counsel asserts that Respondent Ponte, through Ponte Investments, violated the SBA's fee regulations in two principal ways: by charging fees to SBA Loan Applicants that "exceeded the amount permitted by the SOP," and by failing to disclose those "additional fees" on the SBA Form 159s that purported to reflect all amounts so charged.[174] Because the provisions governing these issues and their application to Respondent Ponte and Ponte Investments are slightly less straightforward than they might appear at first glance, the undersigned sets them out here for the sake of clarity.

The regulations themselves are simple enough. Under 13 C.F.R. § 120.221, lenders in the SBA Loan Program are permitted to "charge an applicant reasonable fees . . . for packaging and other services."[175] Under 13 C.F.R. § 103.5, all "compensation charged for services rendered or to be rendered" by third party Agents to SBA Loan Applicants or to Lenders must be fully documented in an SBA Form 159 and disclosed to the SBA, and such compensation must also be

[174] MSD at 18; *see id.* at 16-17.
[175] 13 C.F.R. § 120.221(a).

reasonable.[176] According to Enforcement Counsel, Ponte Investments, as an Agent, charged unreasonable compensation and did not fully disclose it.

Expanding on this framework, the SBA's SOP 50 10 5 offers detailed guidance regarding what constitutes reasonable compensation, what SBA Loan Applicants may be charged for, and by whom. First, it reiterates that lenders and third parties may collect fees "for Packaging and Other Services" from Applicants,[177] and defines those terms as follows:

> "Packaging services" provided by Lender or third party include assisting the Applicant with completing one or more applications, preparing a business plan, cash flow projections, and other documents related to the application.
>
> "Other services" provided by a third party includes consulting as to what financing is needed and what type, and ***broker or referral fees***.[178]

The SOP goes on to state that "[f]ees for packaging or other services may be based on a percentage of the loan amount or may be charged on an hourly basis," providing that percentage-based fees "may not exceed 2 percent for loans" of the amounts being originated by Ponte Investments, while all hourly fees "over $2,500 must be supported, documenting the work performed and the time spent on each activity."[179]

There is nothing in the SOP to suggest that this 2% cap could be applied to fees individually rather than cumulatively—that is, that a third party would be entitled to collect a 2% packaging

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[176] *See id.* §§ 103.5(a), (b); *see also* SOP 50 10 5(J), Subpart B, Chapter 3, Paragraph VIII.B (Disclosure of Fees and Lender Expenses) at 163 ("The Applicant or the Lender, depending on who paid or will pay the Agent, must use SBA Form 159(7a) . . . to document the fees. The Applicant, the Agent, and the Lender must sign the SBA Form 159(7a). . . . Information on this form will be used to monitor fees charged by Agents and the relationship between Agents and Lenders.").

[177] SOP 50 10 5(J), Subpart B, Chapter 3, Section VI (Fees Lenders and/or Third Parties May Collect From an Applicant), Quick Reference Chart No. 6 at 158.

[178] *Id.*, Paragraph VI.A.1 at 158 (emphasis added).

[179] *Id.*, Paragraph VI.A.2 at 159.

fee *and* a 2% referral fee from an SBA Loan Applicant—but this is to some extent moot: As Enforcement Counsel notes, the SOP provides that Lenders and their Associates, such as Ponte Investments, are categorically "prohibited from charging the Applicant for 'other services,' as defined above."[180] A subsequent section makes this even clearer, stating that "Lenders are prohibited from charging the Applicant any fees not expressly authorized in Sections V and VI above. For example, ***the Lender and/or its Associate may not . . . [c]harge the borrower any . . . referral or similar fees***."[181]

The undersigned has determined that Ponte Investments, as a Referral Agent, is an "Associate" of the Bank within the meaning of 13 C.F.R. § 120.10. Given that, it appears that Ponte Investments would not have been permitted to be compensated by SBA Loan Applicants for "other services," including referral services. Yet according to Enforcement Counsel, "[t]he excess fees charged by Ponte Investments were for 'other services,'" and "[n]one of the services being charged for were packaging."[182] The factual basis for this statement is unclear, but if it is supported by the record as developed at hearing, then it is immaterial whether the fees at issue exceed the 2% cap imposed by the SOP, as charging Applicants for referral services of any amount would be impermissible under SBA regulations.[183]

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[180] *Id.*, Paragraph VI.A.1 at 159; *see* MSD at 17. The undersigned notes that there is some tension between this provision and 13 C.F.R. § 120.221(a), which appears to permit lenders to charge applicants for "other services."

[181] SOP 50 10 5(J), Subpart B, Chapter 3, Section VII.B (Prohibited Fees) at 162 (emphasis added).

[182] MSD at 17 & n.45.

[183] *See* RPF ¶ 45 ("Per the SBA Forms 159 prepared by IB, PI was paid the standard or allowed 2% broker or referral fees for SBA loans closed and funded by IB."); *see also* EC-MSD-62P (Signed Closing Binder for SBA Loan A) at 30, 33 (reflecting fee for "Broker or Referral Services" charged to Applicant by Ponte Investments); EC-MSD-72P (Signed Closing Binder for SBA Loan B) at 30, 36 (same); EC-MSD-99P (Signed Closing Binder for SBA Loan C) at 35, 41 (same); EC-MSD-112P (Signed Closing Binder for additional SBA Loan C) at 35, 41 (same); EC-MSD-125P (Signed Closing Binder for SBA Loan D) at 35, 41 (same); EC-MSD-14 (Loan Referral Agreements) at 28 (December 2017 Agreement) (providing that the Bank would charge applicants for "packaging services" and Ponte Investments would charge applicants for "other services").

There is one more restriction placed on the types of fees that may be charged by Agents.[184] Under 13 C.F.R. § 104(g), an Agent is generally prohibited from "[a]cting as both a . . . Referral Agent and a Packager for an Applicant on the same SBA business loan and receiving compensation for such an activity from both the Applicant and lender."[185] The sole "limited exception" to this prohibition, the regulation states, is if the Agent is compensated by the Applicant for its packaging services and compensated by the Lender for its referral services.[186] In other words, "[t]he only situation where an Agent can receive compensation from both the Lender and the Applicant is when the Agent is providing different services by providing packaging services to the Applicant and receiving a referral fee from the Lender."[187] This is consistent with an Associate's inability to charge referral fees to Applicants under the SOP; any such fees must be charged to the Lender, and the Applicant may only be charged for packaging services.[188] (It remains to be seen where the "Overall Business Analysis" fees charged by Ponte Investments fit within this dichotomy.)

V. The IAP Issue

It has been Respondent Ponte's position from the beginning of this proceeding that he is not an IAP of the Bank as needed for the FDIC to maintain this action against him.[189] On June 10, 2024, the undersigned denied Respondent Ponte's motion for summary disposition on this issue,

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[184] To recall, all Agents who are "involved in the loan process" are Associates for purposes of 13 C.F.R. Part 120, but not all Associates are Agents. 13 C.F.R. § 120.10; *see id.* § 103.1(a). As noted, the undersigned has found that Ponte Investments is both an Agent and an Associate under the SBA's regulations. *See* Part IV *supra* at 32-35.

[185] 13 C.F.R. § 104(g).

[186] *Id.* (stating that the Agent must also disclose "the referral activities to the Applicant . . . [and] the packaging activities to the lender").

[187] SOP 50 10 5(J), Subpart B, Chapter 3, Paragraph IX.A.1 (Agents) at 164.

[188] *See also id.*, Paragraph IX.D.3 at 166 ("The Agent may be a Loan Referral Agent for a Lender and a Packager for an Applicant, provided both the Applicant and the Lender are aware of both relationships, and the Agent does not receive a referral fee from the Applicant or a packaging fee from the Lender.").

[189] *See* 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 (noting that the IAP issue is "a central question that must be resolved during the pendency of these proceedings").

identifying numerous disputed questions of material fact that precluded judgment in Respondent Ponte's favor and stating that, as a result, the issue was "more appropriately resolved through consideration of Enforcement Counsel's merits briefing . . . and Respondent Ponte's response to the same, or at hearing as necessary."[190] The undersigned now concludes that the factual record on the IAP issue remains murky and that the Parties should further address the questions raised below through testimony at the hearing and in briefing thereafter.

The relevant statutory provision defining the scope 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. Enforcement Counsel focuses on two of those categories, arguing that Respondent Ponte is an IAP because he participated in the conduct of the Bank's affairs under Section 1813(u)(3) and was an independent contractor of the Bank who knowingly and recklessly committed misconduct causing the Bank harm under Section 1813(u)(4).[191]

Before turning to these inquiries, however, the undersigned notes *sua sponte* that under Section 1813(u)(1) of this statute, anyone who is an "agent for[] an insured depository institution" is also considered an IAP of that institution.[192] While arguments regarding Section 1813(u)(1) have not been raised or developed directly in the Parties' summary disposition motions, the Parties have made repeated representations—such as Ponte Investments' undisputed role as Referral Agent for the Bank, or Respondent Ponte's assertion that "[a]t all times PI followed IB's directives

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[190] Order No. 32: Denying Respondent Ponte's Motion for Summary Disposition on the IAP Issue (June 10, 2024) at 4. On June 20, 2024, Respondent Ponte moved for interlocutory review of this Tribunal's denial of his summary disposition motion. The undersigned referred Respondent Ponte's interlocutory review motion to the FDIC Board of Directors on June 27, 2024, where it remains pending.

[191] *See* MSD at 32-38.

[192] 12 U.S.C. § 1813(u)(1).

in the course of the SBA Loan Program"[193]—speaking to this section's potential pertinence to the question of Respondent Ponte's status as an IAP. The undersigned therefore invites the Parties to consider whether Section 1813(u)(1) does or does not apply to the factual circumstances presented here, and to be prepared to discuss this issue during post-hearing briefing.

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

Section 1813(u)(3) provides that the term IAP includes any person "who participates in the conduct of the affairs of an insured depository institution," as that is determined by the FDIC or other appropriate federal banking agency.[194] Enforcement Counsel cites to two decisions by the FDIC Board of Directors ("FDIC Board"), *In re Jameson* and *In re LeBlanc*, for the general proposition that an individual has participated in the conduct of a bank's affairs if it can be shown that they had exerted influence at the bank and had the ability to harm the bank by virtue of their role or the nature of the work that they performed.[195]

In the *Jameson* decision, the respondent had been a vice president of the bank at the time of the alleged misconduct, but then resigned and became a consultant to the bank "to perform the duties of documentation of loan files and farm loan documentation."[196] In concluding that the respondent was an IAP of the bank under 12 U.S.C. § 1818(u)(3) even in his role as consultant, the FDIC Board stated that it would "look to the nature of the work performed, the ability of a respondent to cause harm to an institution, and the relationship between the role performed by the respondent and the institution."[197] The FDIC Board then found that the respondent's "activities

[193] Ponte Opp. at 9.

[194] 12 U.S.C. § 1813(u)(3).

[195] *See* MSD at 36-37.

[196] *In the Matter of Frank E. Jameson*, No. 89-83e, 1990 WL 711218, at *3 (June 12, 1990) (FDIC final decision), *aff'd on other grounds sub. nom. Jameson v. FDIC*, 931 F.2d 290 (5th Cir. 1991).

[197] *Id.* at *5.

during his consultancy were an integral part of the Bank's loan process" and that "[h]is assessment of the adequacy of a loan file . . . was the same work he performed as an assistant vice president of the Bank."[198] It also concluded that, as the bank's consultant, the respondent "had access to loan records and other records of the bank" and could have modified, falsified, or destroyed them at any point had he wanted to do so.[199]

In *LeBlanc*, by contrast, the respondent was a businessman who had never been a bank employee and who entered into a scheme with the bank wherein the bank arranged to lend his companies $6.2 million in exchange for his purchasing $1.7 million in classified assets from the bank.[200] In furtherance of this scheme, the respondent had attended several bank board meetings and accompanied bank officials to multiple meetings with regulators.[201] Enforcement Counsel there argued that the respondent's "detailed involvement in the proposing, explaining, modifying, and seeking regulatory approval of the plan went beyond the role of a borrower and made him an IAP."[202] It also contended that the respondent's involvement in board and regulatory meetings demonstrated his "authority and controlling influence over the Bank and the uncommonly high level of trust senior Bank officials placed in Respondent's ability to represent the Bank's interests."[203] In response, the respondent maintained that he was merely "a businessman who borrowed money and bought classified loans in transactions negotiated at arm's length," stating

[198] *Id.*
[199] *Id.*
[200] *In the Matter of Jules B. LeBlanc III*, No. 94-0017k, 1995 WL 702094, at *2 (Oct. 11, 1995) (FDIC final decision).
[201] *See id.* at *3.
[202] *Id.*
[203] *Id.*

that "each of the actions alleged to have made him an IAP was taken at the Bank's request and none is inconsistent with his interests as a borrower."[204]

The FDIC Board in *LeBlanc* accepted the respondent's argument and found that he was not an IAP, stating that while it was "apparent that Respondent exercised great leverage in" the transactions at issue, such leverage "is not inconsistent with the role of a powerful borrower."[205] The FDIC Board then concluded that there was not sufficient evidence "to show that Respondent was in a position to materially influence the activities of the Bank such that he could be fairly categorized as an institution-affiliated party," and that Enforcement Counsel in that case "did not establish substantial evidence to prove that Respondent assumed a responsibility to act on behalf of or in the best interest of the Bank."[206]

Enforcement Counsel relies on the *Jameson* test as applied there and in *LeBlanc* to argue that an individual is an IAP under Section 1813(u)(3) if "the individual exerts influence and the ability to harm the bank," even if that individual "does not have a title or explicit authority."[207] Given the material factual disputes identified previously,[208] and construing the record in Respondent Ponte's favor as the non-moving party, the undersigned finds that Enforcement Counsel has not yet made a sufficient showing under this standard. It is beyond dispute that Respondent Ponte, through Ponte Investments, played a significant role in the Bank's SBA-centric business strategy, and that Respondent Ponte himself had a close relationship with CEO Catanzaro and, through that relationship, lobbied the Bank for favorable SBA Loan decisions and sought to

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[204] *Id.*
[205] *Id.* at *4.
[206] *Id.* at *5.
[207] MSD at 37.
[208] See Part III *supra* at 25-27.

influence matters of Bank personnel and policy.[209] Yet lobbying and seeking to influence the Bank as the principal of the Bank's largest referral agent is not necessarily akin to actually exercising that influence on CEO Catanzaro and the Bank's independent board of directors, and Enforcement Counsel can do more to join these dots and distinguish Respondent Ponte's actions from those that the FDIC Board found in *LeBlanc* to be consistent with the role of a powerful but unaffiliated third party, rather than an individual who is participating in the conduct of the Bank's affairs.

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.[210]

An inquiry into Respondent Ponte's state of mind, as necessary for the "knowing or reckless" component of this statute, is generally inappropriate at the summary disposition stage,

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[209] *See*, *e.g.*, EC-MSD-171P (email chain including June 7, 2017 email from Respondent Ponte to CEO Catanzaro) (stating his "intent to terminate our relationship, based on the actions of your bank president," unless President Catanzaro "is removed from his position"); EC-MSD-170P (email chain including August 22, 2017 email from Respondent Ponte to CEO Catanzaro, President Catanzaro, and D. Desrosiers) ("I do not want anyone other then [sic] Ben and Jen underwriting my loans, if not I will pull them from the bank."); EC-MSD-178P (email chain including December 29, 2017 from CEO Catanzaro to Respondent Ponte seeking input on potential changes to internal Bank procedure re SBA Loans and stating that "I also think your suggested reorganization is workable and preserves the core unit. Will discuss further tomorrow at lunch.").

[210] 12 U.S.C. § 1813(u)(4). 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), as discussed in Part VI *infra*. 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) because the contractor has, by definition, committed actionable misconduct, *see* 12 U.S.C. §§ 1818(e)(1)(A), with the requisitely culpable state of mind, *see id.* §§ 1818(e)(1)(C), and causing some sufficiently adverse effect on the institution, *see id.* §§ 1818(e)(1)(B).

involving as it does matters of credibility and intent, and it is not appropriate here.[211] Likewise, there are disputed questions of material fact, as elucidated elsewhere in this Order, that largely preclude summary disposition on whether Respondent Ponte has caused the Bank loss and whether Respondent Ponte has participated in actionable misconduct.

The initial hurdle Enforcement Counsel must clear, however, in establishing that Respondent Ponte is an IAP under Section 1813(u)(4), is his status as an "independent contractor" of the Bank. There is no dispute that Ponte Investments was an independent contractor during the Relevant Times; it is evident from the terms of the Loan Referral Agreements and by Respondent Ponte's own admission.[212] But Enforcement Counsel has not explained, beyond an off-handed reference to Respondent Ponte's status as principal of Ponte Investments, why Ponte Investments being an independent contractor of the Bank necessarily means that Respondent Ponte himself was the Bank's independent contractor as a factual or legal matter.[213] To prevail on this argument, Enforcement Counsel must establish, through presentation of evidence or citation to relevant case law, either that Ponte Investments' status as independent contractor should be imputed to Respondent Ponte as its principal, or that Respondent Ponte was in some fashion an independent contractor of the Bank in his own right. Because Enforcement Counsel has not yet made a showing to this effect, the Section 1813(u)(4) inquiry is presently at an end.

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[211] *See* Parts VII.A.3 and VII.B.3 *infra* (denying Enforcement Counsel's motion for summary disposition on culpability element); *see also*, *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").

[212] *See* Part III at 11-14 *supra*.

[213] *See* MSD at 32 ("As the principle [sic] of Ponte Investments actively working on the loan referrals, Respondent Ponte was an independent contractor of the Bank.").

VI. Elements of Section 1818(e) and 1818(b)

To merit the entry of a prohibition order against an IAP under 12 U.S.C. § 1818(e), an appropriate federal banking agency must prove the separate elements of misconduct, effect, and culpability. The misconduct element may be satisfied, among other ways, by a showing that the IAP has (1) "directly or indirectly violated any law or regulation [or] any cease-and-desist order which has become final," (2) "engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution," or (3) "committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty."[214] The effect element may be satisfied by showing either that the institution at issue thereby "has suffered or probably will suffer financial loss or other damage," that the institution's depositors' interests "have been or could be prejudiced," or that the charged party "has received financial gain or other benefit."[215] And the culpability element may be satisfied when the alleged misconduct either "involves personal dishonesty" or "demonstrates willful or continuing disregard by [an IAP] for the safety or soundness of such insured depository institution."[216]

Although the misconduct prong of Sections 1818(e) may be satisfied by an IAP's engagement or participation in an "unsafe or unsound practice" related to the depository institution with which he or she is affiliated, that phrase is nowhere defined in the FDI Act or its subsequent amendments. John Horne, Chairman of the Federal Home Loan Bank Board ("FHLBB") during the passage of the Financial Institutions Supervisory Act of 1966, submitted a memorandum to Congress that described such practices as encompassing "any action, or lack of action, which is

[214] 12 U.S.C. § 1818(e)(1)(A).
[215] *Id.* § 1818(e)(1)(B).
[216] *Id.* § 1818(e)(1)(C).

contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds."[217] This so-called Horne Standard has long guided federal banking agencies, including the FDIC, in bringing and resolving enforcement actions.[218] It has also been recognized as "the authoritative definition of an unsafe or unsound practice" by federal appellate courts.[219] The undersigned accordingly adopts the Horne Standard when evaluating charges of unsafe or unsound practices under the relevant statute.

It is a central aspect of this statutory scheme that *only one* of the potential triggering conditions is necessary for the satisfaction of each element of Sections 1818(e). That is, the "misconduct" element is fulfilled if an IAP has breached a fiduciary duty to the institution, regardless of whether the IAP has also violated any laws or engaged in unsafe or unsound practices, and vice versa. Likewise, the effect element will be satisfied if the conduct at issue has resulted in financial gain to the IAP, even if it has not caused loss to the institution or prejudiced its depositors. Each component of the "misconduct" element is an independent and sufficient basis on which to ground an enforcement action if the other elements have also been shown. The same is true of the "effect" element and the "culpability" element. The FDIC need prove only one component of each.

In addition to prohibition orders under Section 1818(e), the FDIC is authorized to seek orders of restitution pursuant to 12 U.S.C. § 1818(b) as part of its broader authority to direct that

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[217] *Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before the House Comm. on Banking and Currency*, 89th Cong., 2d Sess. 49 (1966) (statement of John H. Horne, Chairman of the FHLBB), 112 Cong. Rec. 26,474 (1966).

[218] *See*, *e.g.*, *In the Matter of Donald V. Watkins, Sr.*, Nos. 17-154e & -155k, 2019 WL 6700075, at *7 (Oct. 15, 2019) (FDIC final decision) (applying Horne Standard); *In the Matter of Patrick Adams*, No. AA-EC-11-50, 2014 WL 8735096, at **8-24 (Sept. 30, 2014) (OCC final decision) (discussing Horne Standard in detail).

[219] *Gulf Federal Sav. & Loan Ass'n of Jefferson Parish v. FHLBB*, 651 F.2d 259, 264 (5th Cir. 1981); *see also Patrick Adams*, 2014 WL 8735096, at **14-17 (surveying application of Horne Standard by various circuits).

depository institutions and their IAPs cease and desist, and take action to correct and remedy, legal violations and unsafe or unsound practices. Specifically, the statute provides that restitution orders are appropriate, assuming a violation of law or regulation or an unsafe or unsound practice can be proven and all other conditions have been met, if "(i) such depository institution or such party was unjustly enriched in connection with such violation or practice; or (ii) the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency."[220]

VII. Argument and Analysis

Enforcement Counsel contends that the undisputed facts demonstrate that Respondent Ponte's conduct with respect to the fees charged by Ponte Investments and the alleged Bridge Loan Scheme constitute violations of SBA regulations (as detailed above) as well as actionably unsafe or unsound practices, thus satisfying the misconduct element of 12 U.S.C. § 1818(e).[221] Enforcement Counsel further asserts that this conduct caused actual or probable loss to the Bank or resulted in personal benefit to Respondent Ponte, and that through this conduct Respondent Ponte exhibited personal dishonesty and continuing and willful disregard for the safety and soundness of the Bank, thus satisfying the effect and culpability elements respectively.[222] Respondent Ponte, on the other hand, maintains that Enforcement Counsel has not met any of the necessary statutory elements.[223] The undersigned concludes that the fee-related practices so far established by Enforcement Counsel constitute a violation of SBA regulations and that Respondent

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[220] 12 U.S.C. § 1818(b)(6)(A); *see also* MSD at 31.

[221] *See* MSD at 9-18 (violation of regulations), 19-21 (unsafe or unsound practices).

[222] *See id.* at 23-26 (actual or probable loss), 27 (personal benefit), 27-28 (personal dishonesty), 28-29 (willful and continuing disregard).

[223] *See* Ponte Opp. at 10-14.

Ponte personally benefited from the fees charged by Ponte Investments and from his companies' extensions of Bridge Loans to SBA Loan Applicants, and otherwise finds that disputed questions of material fact exist that preclude entry of summary disposition.

A. Impermissible Fees

It is Enforcement Counsel's position that the allegedly impermissible fees charged by Respondent Ponte, through Ponte Investments, violated various fee-related regulations, resulted in personal financial gain for Respondent Ponte, and demonstrated personal dishonesty and willful and continuing disregard.[224] The undersigned takes each of these in turn.

1. Misconduct

Enforcement Counsel contends that Respondent Ponte violated the SBA's fee regulations and applicable SOP, as discussed in Part IV *supra*, by (1) charging fees to SBA Loan Applicants that were not permitted by the SBA—specifically, greater than 2% of the loan amount in "broker or referral fees" and a separate "Overall Business Analysis" fee—and (2) failing to disclose those fees on the corresponding SBA Form 159s.[225] The undersigned has found that questions of material fact remain in dispute regarding the magnitude of the alleged fee-related misconduct, as many of Enforcement Counsel's factual assertions are predicated on findings in the Kohlenberg Declaration that Respondent Ponte should have the opportunity to contest.[226] Thus, nothing can be determined

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[224] Although Enforcement Counsel asserts in passing that Respondent Ponte "engaged in unsafe or unsound practices by . . . charging or permitting impermissible fees," *id.* at 19, all of Enforcement Counsel's argument on the unsafe or unsound issue is focused on the Bridge Loan Scheme, *see id.* at 19-21. Likewise, Enforcement Counsel briefly states at the outset of its motion that the impermissible fees "exposed the Bank to a substantial risk of loss," *id.* at 2, but does not elaborate on this in the body of the brief, which with respect to the Bank suffering loss or probable loss concerns itself with the Bridge Loan Scheme exclusively. *See id.* at 23-26. Accordingly, to the extent that Enforcement Counsel seeks summary disposition on its fee-related claims on these two grounds, it has not made a sufficient showing, and such a motion is denied.

[225] *See id.* at 16-18.

[226] *See* Part III *supra* at 14-19.

at this point as to the total amount of fees paid by SBA Loan Applicants during the Relevant Times that were received directly from the borrower rather than being paid from loan proceeds, nor can it yet be definitively said that no business analysis fees, for example, were ever disclosed on an SBA Form 159 in that period. There are also a number of uncertainties surrounding Ponte Investments' provision of packaging services, as outlined by the undersigned earlier in this Order, that may be relevant and would benefit from additional development.

What has been established beyond dispute on the present factual record, however, is this: Respondent Ponte personally emailed at least four preapproval letters to SBA Loan Applicants that reflected between 3% and 4% in fees to be paid to Ponte Investments along with a separate business analysis fee of between $1,395 and $1,995.[227] For each of these loans, Ponte Investments completed an SBA Form 159, three of which were signed by Respondent Ponte, which stated that only 2% in fees had been charged to that Applicant.[228] These facts constitute *prima facie* violations of the SBA fee regulations and the SOP,[229] and Respondent Ponte participated in those violations, whether by personally signing the documents in question or as principal of Ponte Investments pursuant to the definition of "violation" in 12 U.S.C. § 1813(v).[230]

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[227] *See* EC-MSD-38P & -28P (SBA Loan A cover email and preapproval letter) (3.75% fee and additional business analysis fee of $1,295); EC-MSD-71P & -31P (SBA Loan B cover email and preapproval letter) (4% fee and $1,595 business analysis fee); EC-MSD-85P & -32P (SBA Loan C cover email and preapproval letter) (3.75% fee and $1,395 business analysis fee); EC-MSD-124P & -33P (SBA Loan D cover email and preapproval letter) (3.75% fee and $1,395 business analysis fee). Enforcement Counsel also presented a fifth preapproval letter with a fee exceeding 2% and a separate business analysis fee, this one sent to the borrower by a Ponte Investments subordinate and copying Respondent Ponte on the communication. *See* EC-MSD-136P & -137 (2nd SBA Loan D cover preapproval email and attached invoice for business analysis fee) (3% fee and $1,995 business analysis fee).

[228] *See* EC-MSD-62P (Signed Closing Binder for SBA Loan A) at 33-34; EC-MSD-72P (Signed Closing Binder for SBA Loan B) at 36-37; EC-MSD-125P (Signed Closing Binder for SBA Loan D) at 41-42.

[229] That fees were charged in excess of 2% is alone enough to constitute a violation, but Respondent Ponte is welcome to further develop his argument, at hearing and during the post-hearing briefing, that business analysis fees in particular were "separate from any SBA loan" and are not subject to the fee cap set forth in the SOP. Ponte Opp. at 16 n.11; *see* RPF ¶ 50.

[230] The Parties should address at hearing, at minimum, those portions of the Kohlenberg Declaration that bear on the fees charged in connection with these loans and the disclosure thereof, namely Ms. Kohlenberg's conclusions

Aside from his unsupported denial of having signed the SBA Form 159s, which has already been addressed, Respondent Ponte offers little in the way of argument as to his fee-related conduct. Respondent Ponte contends that "the FDIC has produced no evidence . . . that Ponte personally charged any fees whatsoever,"[231] but this is both contradicted by the record and immaterial to whether he took "any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation" on the part of Ponte Investments.[232] Respondent Ponte also argues that the SBA Form 159s were prepared by the Bank, which "never inquired of PI what other fees, if any, may have been charged by PI,"[233] and that the Bank "often . . . simply provided only the signature page to PI for signature."[234] Respondent Ponte understood or should have understood, however, that all fees charged by Ponte Investments had to be disclosed on SBA Form 159 "whether paid from loan proceeds or received directly from the borrower,"[235] and it is no excuse to suggest that he allowed the Bank to prepare these forms without full and accurate information and then signed whatever was put in front of him, particularly when the signature page of each SBA Form 159 warned that "[f]alse certifications can result in criminal prosecution under 18 U.S.C. § 1001 and other penalties provided under law."[236]

Finally, Respondent Ponte intimates that the fees were not impermissible because Ponte Investments had sought and received two outside legal opinions regarding the propriety of its fee

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regarding (1) proof of payments made by these borrowers to Ponte Investments outside of the loan closing process that roughly correspond to the balance of the fees reflected in the preapproval letters, and (2) the lack of any invoices or SBA Form 159s in the Bank's files for the additional payments made.

[231] Ponte Opp. at 18.

[232] 12 U.S.C. § 1813(v).

[233] RPF ¶ 51; *see* Ponte Opp. at 18.

[234] Ponte Opp. at 18.

[235] EC-MSD-14 (Loan Referral Agreements) at 28 (December 2017 Agreement), 33 (June 2015 Agreement).

[236] *See*, *e.g.*, EC-MSD-62P (Signed Closing Binder for SBA Loan A) at 34.

practices.[237] This argument is unavailing. In the first document cited, a January 2018 email chain, the attorney offers only a very preliminary conclusion pending his review of the SOP;[238] if there was any future follow-up to this exchange, Respondent Ponte does not provide it. More substantive is the second document, an opinion letter from an attorney in October 2019—in other words, at the very tail end of the Relevant Times—that does not address the prospect of Ponte Investments being paid referral fees from borrowers (as it apparently was)[239] or receiving any fee payment outside of the loan process (as it apparently did),[240] and which concludes by emphasizing that all fees charged, including business analysis fees, would need to be disclosed on an SBA Form 159.[241] Moreover, any argument that Ponte Investments relied on these opinions (or, for that matter, on the Bank's allegedly tacit approval of the fees charged by Ponte Investments) speaks at most to the issue of culpability, rather than as to whether the fee practices in question violated SBA regulations. As noted, the undersigned finds that they did, and the misconduct element of Section 1818(e) as to Enforcement Counsel's fee-related claims has therefore been met.

2. Effect

Enforcement Counsel states that Respondent Ponte, "through his ownership of Ponte Investments," received financial gain as a result of his fee-related misconduct, thereby satisfying Section 1818(e)'s effect element.[242] The undersigned agrees. Although Enforcement Counsel's

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[237] *See* Ponte Opp. at 16; *see also* Part III at 19 & n. 82 *supra*.

[238] *See* RP-OPP-3C (Legal Opinions Regarding Fees Charged) at 1 (email chain including January 10, 2018 email from M. Teckler to D. Desrosiers) ("I will give you a written response asap. Basically I think you are OK but I want to review the SOP in detail.").

[239] *See id.* at 4 ("It is our understanding that Ponte intends to be paid Referral Fees only from lenders.").

[240] *See id.* at 5 ("The Packaging Fees to be paid to Ponte by the borrower may be paid out of the borrower's SBA loan proceeds, subject to the lender's approval.").

[241] *See id.* ("Please note that Ponte will be required to complete an SBA Form 159 with respect to any of the aforementioned fees for which Ponte is paid.").

[242] MSD at 27.

assertion that "Ponte Investments charged at least $4,505,815 in impermissible fees" is based on the Kohlenberg Declaration and thus cannot yet be accepted as an undisputed fact, it is nevertheless indisputably true that Respondent Ponte was the sole owner and managing member of Ponte Investments during the Relevant Times and as such benefited financially to at least some degree from the fees charged by Ponte Investments in the course of its business, including any fees that exceeded 2% of borrowers' SBA Loan amounts and any business analysis fees.[243] Because the effect element in 12 U.S.C. § 1818(e)(1)(B) merely requires that the "party has received financial gain or other benefit" from the alleged misconduct, it is unnecessary to quantify the magnitude of Respondent Ponte's financial gain from these practices in order to conclude that the effect element has been satisfied as to the fee-related claims.

3. Culpability

To establish culpability under Section 1818(e) here, Enforcement Counsel must show that Respondent Ponte's fee-related misconduct demonstrated either personal dishonesty or willful or continuing disregard of the safety and soundness of the Bank. For purposes of its summary disposition motion, Enforcement Counsel vaguely gestures in the direction of arguments that Respondent Ponte exhibited the requisitely culpable state of mind regarding the fees charged by Ponte Investments, but does not fully articulate them. At the outset of its motion, for example, Enforcement Counsel asserts that Respondent Ponte "collected the fees through a willful violation of the SBA's regulations" and that he "dishonestly concealed . . . the impermissible fees from regulators and the Bank."[244] It then states without elaboration that Respondent Ponte's "actions

[243] *See* Part III at 28 *supra*; *see also* RPF ¶¶ 8, 10.
[244] MSD at 4.

were deliberate" and that the impermissible fees "affected at least 1,449 borrowers."[245] Nowhere, however, does Enforcement Counsel apply the personal dishonesty or willful and continuing disregard standards as articulated by the Federal banking agencies (or otherwise) to the record evidence involving the fee-related practices in any evident way—indeed, the brief section on culpability later in Enforcement Counsel's motion does not mention fees at all.[246] The undersigned accordingly finds that summary disposition on this issue is not merited.

B. The Bridge Loan Scheme

As detailed above, it is undisputed that Respondent Ponte's companies, Ponte Investments and Hydrangea Capital, extended interim financing—or Bridge Loans—to SBA Loan Applicants in at least some circumstances, and that at least some of those Bridge Loans were repaid by their borrowers from the proceeds of the related SBA Loans.[247] It is also undisputed that Ponte Investments "stopped documenting extensions of interim credit" in the SBA Loan application materials submitted to the Bank.[248] Enforcement Counsel contends that each of these practices—the extension of Bridge Loans, the repayment from SBA Loan proceeds, and the failure to document either their existence or their method of repayment—violated SBA regulations and were actionably unsafe or unsound; caused loss or risk of loss to the Bank while Respondent Ponte received financial gain; and reflect Respondent Ponte's personal dishonesty and continuing or willful disregard for the Bank's safety and soundness. With the exception of the question of Respondent Ponte's personal financial gain, the undersigned concludes that these issues would

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[245] *Id.*

[246] *See id.* at 27-29.

[247] *See*, *e.g.*, EC SOF ¶¶ 27-28, 30, 33; RPF ¶¶ 27-28, 30, 33; *see also* Part III *supra* at 21-25.

[248] *See* RPF ¶¶ 42, 256.

benefit from development at hearing before this Tribunal as trier of fact, and that summary disposition is therefore premature.

1. Misconduct

Enforcement Counsel's arguments that the Bridge Loan Scheme in each of its constituent parts constituted *per se* violations by Respondent Ponte of the SBA's ethical requirements and lending regulations discussed in Part IV *supra* as well as unsafe or unsound practices lean heavily on the opinions of its experts and their interpretation of the regulations in question.[249] The proposition that "using the proceeds of SBA Loans to repay the Bridge Loans shifted the default risk of the risky extensions of credit to the SBA and the Bank" and was therefore contrary to the prudent operation of the Bank as necessary for a finding of unsafe or unsound practices, for example, is predicated entirely on opinions expressed in the Barry Report.[250] The undersigned will therefore afford Respondent Ponte the chance to cross-examine Enforcement Counsel's experts regarding the basis for their opinions before assessing whether any or all aspects of the Bridge Loan Scheme constituted actionable misconduct.[251]

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[249] *See*, *e.g.*, EC-MSD-22 (Zelaya Report) at 15-25 (offering opinions that the extension of Bridge Loans, their repayment from SBA Loan proceeds, and the lack of disclosure of each are violations of 13 C.F.R. §§ 120.120, 120.130(g), 120.140(a), 120.140(b), 120.140(e), 120.140(f), 120.140(j), and 120.201); EC-MSD-18 (Barry Report) at 16-21 (opining that the Bridge Loan Scheme was an unsafe or unsound practice), 20 ("In my expert opinion, Bridge Loans were risky extensions of credit."); *see also* MSD at 11-15, 19-21.

[250] MSD at 21 (citing EC-MSD-18 (Barry Report) at 5, 16, and 20).

[251] In so doing, it would be helpful for both Parties to consider the interaction of SOP 50 10 5(J), Subpart B, Chapter 2, Paragraph V.E.15(c), which states that using the proceeds of SBA loans to repay bridge loans without disclosing to the SBA either the fact of the bridge loans or the manner of repayment is permissible in certain circumstances, with Enforcement Counsel's experts' apparent position that the same conduct here constitutes a *per se* violation of, *inter alia*, SBA regulations against self-dealing, conflicts of interest, and conduct reflecting a lack of business integrity or honesty as well as being definitionally unsafe or unsound. *See*, *e.g.*, EC-MSD-22 (Zelaya Report) at 16 ("In my opinion, making loans to borrowers with the intention that they be repaid from the proceeds of SBA-guaranteed loans . . . constitutes self-dealing for a Lender and its Associate."); EC-MSD-18 (Barry Report) at 19, 20 ("[T]he evidence of Bridge Loans was concealed from the FDIC and the SBA, contrary to safe and sound banking practices. . . . [U]sing the proceeds of SBA Loans to repay the Bridge Loans shifted the default risk of the risky extensions of credit to the SBA and the Bank, an unsafe or unsound banking practice."); MSD at 14 ("[T]he repayment of Bridge Loans from SBA Loan Proceeds, which happened on almost all of the 201 loans, was a violation of 13 C.F.R. § 120.201."). In other words, Enforcement Counsel appears to be arguing that the very acts

Moreover, much of the asserted impropriety of the lack of disclosure of Bridge Loans in Bank files in particular tends to turn on whether information regarding the loans and their repayment was deliberately being withheld from documentation by Respondent Ponte or at his direction, a conclusion that implicates questions of state of mind and intent that are more appropriately resolved at hearing.[252] As the undersigned has found, Enforcement Counsel has not offered undisputed evidence at this stage that Respondent Ponte actively sought to conceal the existence of the Bridge Loans from the Bank or its regulators, as the 2016 email that Enforcement Counsel primarily relies on for this purpose admits to multiple interpretations, particularly when resolving inferences in the non-moving party's favor.[253]

Having said this, Respondent Ponte's argument that he and Ponte Investments are relieved of liability for the Bridge Loan Scheme because it was the Bank's responsibility to ensure compliance with SBA regulations does not get him very far.[254] The Loan Referral Agreements made it clear that Ponte Investments and its principal were required to comply with "any and all

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of extending Bridge Loans to SBA Loan borrowers, having those loans repaid from SBA Loan proceeds, and failing to disclose such to the SBA constitute actionable misconduct as a blanket matter, notwithstanding an SOP provision that states that such acts are sometimes permissible, albeit not by an Associate such as Ponte Investments. This Tribunal would benefit from a more detailed focus by Enforcement Counsel and its experts on why the Bridge Loan Scheme in particular was violative of regulations and unsafe or unsound in ways that are not applicable to, or are distinguishable from, the scenario outlined in SOP 50 10 5(J), Subpart B, Chapter 2, Paragraph V.E.15(c).

[252] *See*, *e.g.*, MSD at 2 (asserting that Respondent Ponte and CEO Catanzaro "undertook a scheme to conceal, or cause[] to be concealed, information regarding the Bridge Loans and, where applicable, their repayment from SBA Loan proceeds from appearing in the Bank's records (the Bridge Loan Scheme)"), 20 ("Respondent Ponte made no efforts to ensure that the Bank had accurate financial information on debts of SBA Loan applicants. . . . Even more, Respondent Ponte actively hid such information on documents submitted to the Bank. These material omissions caused the Bank to make false statements to the SBA on the required SBA forms for each loan."); *see also* note 271 *infra*.

[253] *See* Part III *supra* at 22 & n. 95.

[254] *See*, *e.g.*, Ponte Opp. at 13 ("It was incumbent upon IB, and solely IB's responsibility, to oversee, manage, and/or direct its third-party relationships, such as PI."), 20 ("[I]t is, in fact, IB that is ultimately responsible for managing PI, as well as maintain[ing] day-to-day responsibility for its SBA activities. To the extent that IB improperly directed, managed, and/or administered its SBA Loan Program, including the performance of its referral agents such as PI, . . . that is an IB issue, and not a PI issue.").

current SBA guidelines, regulations, and/or procedures."[255] Indeed, under the June 2018 and November 2018 Agreements, Ponte Investments was obligated not only to comply but to become and "remain informed of all [SBA Loan] Program requirements," which included all regulatory requirements.[256] Thus, while the argument that Ponte Investments reasonably relied on the Bank's direction as to what was and was not permissible under the SBA Loan Program might be relevant to the question of culpability, it has no bearing on whether Respondent Ponte committed misconduct for purposes of Section 1818(e).

2. Effect

Enforcement Counsel contends that Section 1818(e)'s effect element has been met as to the Bridge Loan Scheme through (1) the Bank's charge-offs of SBA Loans with associated and undisclosed Bridge Loans; (2) the suspension of the Bank's SBA lending authority; (3) the risk that the SBA could have denied its guarantees, or sought to recover its guarantees, on loans with associated and undisclosed Bridge Loans; and (4) the personal financial benefit received by Respondent Ponte through his company's extension of the Bridge Loans in question.[257]

With respect to Enforcement Counsel's first argument, while it is true that "loan charge-offs represent a loss to the bank as a matter of law,"[258] Enforcement Counsel has not yet established the necessary causal connection between Respondent Ponte's Bridge Loan-related actions and the

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[255] EC-MSD-14 (Loan Referral Agreements) at 22 (June 2018 Agreement), 29 (December 2017 Agreement), 34 (June 2015 Agreement); *see also id.* at 3, 7 (November 2018 Agreement).

[256] *See id.* at 7 (November 2018 Agreement), 22 (June 2018 Agreement).

[257] *See* MSD at 23-27.

[258] *In the Matter of Harry C. Calcutt III*, Nos. 12-568e & 13-115k, 2020 WL 847520, at *16 (Dec. 15, 2020) (FDIC final decision), *aff'd*, *Calcutt v. FDIC*, 37 F.4th 297, 330 (6th Cir. 2022) ("The charge-off on the loan to Bedrock Holdings, which was part of the Bedrock Transaction, is an effect under [Section 1818]."), *rev'd and remanded on other grounds*, 598 U.S. 623 (2023); *accord*, *e.g.*, *In the Matter of James L. Leuthe*, Nos. 95-15e & -16k, 1998 WL 438323, at *15 (June 26, 1998) (FDIC final decision) ("The charge-off requirement has been held as a matter of law to result in loss to the Bank.").

Bank's charge-offs of SBA Loans with associated Bridge Loans.[259] Similarly, although loss of profits as a result of the suspension of its SBA lending authority could credibly be considered "other damage" under Section 1818(e),[260] there remain disputed questions of material fact as to the role the Bridge Loans played in the SBA taking this action against the Bank (and to the extent that Enforcement Counsel's position is buttressed by the opinions of its experts, cross-examination on the topic is appropriate).[261] The same is true for the argument that Ponte Investments' failure to comply with Loan Program Requirements, including SBA regulations and SOPs, exposed the Bank to a risk of loss "through the potential for SBA guarantees to be denied"[262]—this conclusion relies on the Zelaya Report and should be tested at hearing.[263]

On the other hand, as the undersigned has concluded, it appears undisputed that Respondent Ponte, as sole owner of Ponte Investments and Hydrangea Capital, received some financial gain as a result of the interest and fees charged by those companies to SBA Loan Applicants in connection with Bridge Loans, even if the precise amount of financial gain has not been established.[264] As with Ponte Investments' non-Bridge Loan-related fee practices, this is enough, assuming misconduct is also established, to satisfy the effect element of Section 1818(e).[265]

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[259] *See* Part III *supra* at 28-31; *see also* Ponte Opp. at 23 (asserting that "rather than undertaking any collection efforts relative to defaulted SBA borrowers, IB simply chose to 'charge off' loans and 'put in' for a purchase of the SBA guaranty").

[260] 12 U.S.C. § 1818(e)(1)(B)(i).

[261] *See* MSD at 24-25; Ponte Opp. at 22 (asserting that "IB lost its authority to make SBA loans insofar as it was routinely cited by the SBA for deficiencies associated with its underwriting, collateralization, servicing, and collections. All of this conduct is directly attributable to the action and/or inaction of IB, and none of the activities or functions were anything in which either PI or Ponte were involved.").

[262] MSD at 25.

[263] *Id.* at 25-26 (citing EC-MSD-22 (Zelaya Report) at 33).

[264] *See* Part III *supra* at 28.

[265] 12 U.S.C. § 1818(e)(1)(B)(iii).

3. Culpability

Enforcement Counsel maintains that Respondent Ponte's participation in the Bridge Loan Scheme exhibited personal dishonesty and a willful and continuing disregard for the safety and soundness of the Bank, any of which would demonstrate culpability for Section 1818(e) purposes. Personal dishonesty within the meaning of this statute encompasses "a disposition to lie, cheat, or defraud; untrustworthiness; lack of integrity; misrepresentation of facts and deliberate deception by pretense and stealth; or want of fairness or straightforwardness."[266] Continuing disregard is "conduct which has been voluntarily engaged in over a period of time with heedless indifference to the prospective consequences,"[267] while willful disregard is defined as "deliberate conduct that exposes the bank to abnormal risk of loss or harm contrary to prudent banking practices."[268]

Each of these statutory elements requires some "showing of scienter"—that is, evidence not merely of the misconduct, but of an intentionality or recklessness to the charged individual's state of mind.[269] Evidence that the respondent's conduct was merely negligent is not sufficient.[270] As a result, it is typically appropriate to resolve questions of culpability at the hearing stage rather than on summary disposition,[271] and the undersigned finds that any evaluation of culpability on

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[266] *In the Matter of Tonya Williams*, No. 11-553e, 2015 WL 3644010, at *10 (Apr. 21, 2015) (FDIC final decision).

[267] *In the Matter of Larry B. Faigin and John J. Lannan*, Nos. 11-252e, -254k, -269e, & -270k, 2015 WL 9855325, at *83 (December 15, 2015) (FDIC final decision) (internal quotation marks and citation omitted).

[268] *In the Matter of Michael Sapp*, Nos. 13-477e & -478k, 2019 WL 5823871, at *16 (Sept. 17, 2019) (FDIC final decision).

[269] *Faigin & Lannan*, 2015 WL 9855325, at *83.

[270] *See id.*; *see also In the Matter of Saul Ortega and David Rogers, Jr.*, Nos. AA-EC-2017-44 & -45, 2023 WL 8704355, at *45 (Nov. 20, 2023) (OCC final decision) (stating that satisfaction of this element requires Enforcement Counsel to "establish a degree of culpability well beyond mere negligence") (internal quotation marks and citation omitted).

[271] *See*, *e.g.*, *Miller*, 906 F.2d at 974 (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").

the present record would require the sort of "credibility determinations, weighing [of] evidence, and drawing inferences from facts" that this Tribunal is precluded from undertaking except in its capacity as factfinder.[272]

With respect to personal dishonesty, for instance, Enforcement Counsel's argument rests on Respondent Ponte's "failure to affirmatively disclose material information and participation in the falsification of Bank records," both of which involve an intentionality in state of mind that has not been established.[273] Likewise, with respect to willful and continuing disregard, Enforcement Counsel states only that "Respondent Ponte was directly aware of all Bridge Loans, and he was directly responsible for keeping documentation of the Bridge Loans from being submitted to the Bank,"[274] contentions which even if proven at this juncture would not be enough to demonstrate scienter as to his alleged misconduct. The undersigned therefore denies Enforcement Counsel's motion for summary disposition on the issue of culpability and the Bridge Loan Scheme.

C. Restitution

Finally, Enforcement Counsel argues very briefly that "Respondent Ponte should be ordered to pay restitution in the full amount of all impermissible fees charged," which, as noted, it calculates based on the Kohlenberg Declaration to be at least $4,505,815.[275] Orders for restitution under 12 U.S.C. § 1818(b)(6)(A) require not only misconduct in the form of a violation of law or regulation or an unsafe or unsound practice, but some determination that the party committing the

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[272] *Blanton*, 2017 WL 4510840, at *6.

[273] MSD at 28. As discussed in note 96 *supra*, Enforcement Counsel offers two Ponte Investments documents in which the disclosure of Bridge Loans has ostensibly been obscured with correction fluid prior to being given to the Bank, which would be *prima facie* evidence of personal dishonesty, but even assuming that the representations regarding correction fluid are accurate—it is not apparent from the exhibits as provided—Enforcement Counsel has not made a sufficient showing at this point that it was Respondent Ponte who altered those documents or caused them to be altered, and it is therefore a fact in genuine dispute.

[274] MSD at 28-29.

[275] *Id.* at 31.

misconduct has been unjustly enriched or has done so with "a reckless disregard for the law."[276] In light of the numerous material facts that remain in dispute or are subject to cross-examination, including the total amount of impermissible fees at issue, and the fact that neither Enforcement Counsel nor Respondent Ponte has yet briefed the questions of unjust enrichment or recklessness in any real depth, the undersigned will defer any determination of the appropriateness of an order of restitution, and the amount thereof, until after the hearing and the submission of the Parties' post-hearing briefs and respective responses.

VIII. Conclusion

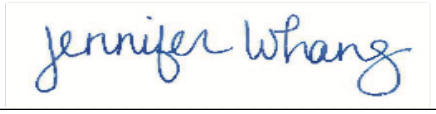
For the reasons set forth above, and in light of the disputed questions of material fact that have been identified on the present record, the undersigned hereby recommends the partial grant of Enforcement Counsel's Motion on the issues of fee-related misconduct and Respondent Ponte's personal financial gain, in the event that Respondent Ponte is determined to be an IAP of the Bank, and denies the Motion in all other respects. Within seven days of the date of this order, the Parties are to contact the undersigned's Senior Attorney Jason Cohen, at jcohen@fdic.gov, and give their positions as to whether any portion of this order should remain under seal. In the interim, the order will remain under temporary seal. Upon review of the Parties' joint submission, the undersigned will issue a public version of this order.

The undersigned will also set a date and time for a telephonic prehearing conference in September, with suggested dates being September 6, 2024 or September 19, 2024, at 1 pm Eastern time. The Parties shall confer and state in their joint submission whether they have a preference between these dates, or whether there are other dates and times for the conference that would be

[276] *See* 12 U.S.C. § 1818(b)(6)(A).

preferable to both Parties. At the conference, the Parties should be prepared to discuss the expected length of the hearing, any anticipated technical issues or necessary accommodations, and whether the Parties have reached any agreement on the topic of completing depositions for witnesses unavailable for hearing after the hearing is completed rather than taking the testimony of such witnesses virtually, as stated in Order No. 39.[277]

SO ORDERED.



Issued: August 8, 2024

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication

[277] *See* Order No. 39: Granting Enforcement Counsel's Motion for Witnesses to Testify Remotely at Hearing (July 25, 2024) at 2.

PUBLIC VERSION

CERTIFICATE OF SERVICE

On August 16, 2024*, I served a copy of the foregoing **Order** upon the following individuals via email:

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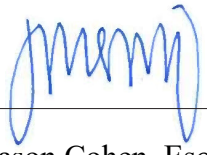

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*A confidential version of this order was issued on August 8, 2024. No redactions were necessary in issuing this public version.