UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN C. PONTE Plaintiff, vs. FEDERAL DEPOSIT INSURANCE CORPORATION, *et al*. Defendants.	Case No.: 1:24-cv-02379

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

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Defendant Federal Deposit Insurance Company's ("FDIC") administrative proceeding against Plaintiff John C. Ponte is inconsistent with the Supreme Court's recent holding in *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), creates immediate and ongoing injury to Mr. Ponte, and should be enjoined. Pursuant to LCvR 7(a) and Fed. R. Civ. P. Rule 65(b), Plaintiff Ponte respectfully submits this Memorandum of Points and Authorities in Support of his Motion for a Temporary Restraining Order on Count III of the Verified Complaint[1], seeking injunctive and declaratory relief for the denial of his jury trial rights.

For over a year John Ponte FDIC has been trapped in a Kafkaesque proceeding where even the FDIC's Administrative Law Judge ("ALJ") has not yet found jurisdiction over him. Mr. Ponte was never and is not a financial institution, nor the owner of a financial institution, and neither owned nor participated in an institution insured or regulated by FDIC. The FDIC, itself unconstitutionally constituted, has put an ALJ, who is unconstitutionally insulated from removal, in charge of Mr. Ponte's proceeding while asserting legal claims against him and denying him his Seventh Amendment right to a jury trial. As the Supreme Court recently made clear in *SEC v. Jarkesy*, such denials of constitutional rights and due process cannot be countenanced by the courts.

PERTINENT FACTS[2]

Mr. Ponte is a resident of the State of Rhode Island and has never been an employee, officer, director, or shareholder of any financial institution. VC ¶ 6. This is not in dispute even with the FDIC. *Id.* Mr. Ponte was the Manager and Member of Ponte Investments, LLC ("Ponte Investments"). *Id.* ¶ 22. Ponte Investments acted as an independent originator of potential loan

[1] Ponte seeks an immediate TRO to be converted to a preliminary injunction pursuant to Rule 65(b)(3) at the Court's and the parties' "earliest possible time."
[2] The facts are taken from the Verified Complaint ("VC") filed in this matter on August 15, 2024.

applications for a Small Business Administration ("SBA") loan program for an FDIC regulated institution. *Id.* ¶¶ 17, 22. Ponte was unaffiliated with that institution, Independence Bank ("IB"). *Id.* ¶¶ 17, 21. In May of 2020, and in connection with an investigation of IB, the FDIC issued a subpoena *duces tecum* seeking information from Ponte. *Id.* ¶ 20. Ponte further understands that IB's loan program regarding SBA loans was reviewed twice by the FDIC between 2017 and 2019 and neither Ponte nor Ponte Investments was deemed to be an institution-affiliated party ("IAP") under FDIC regulations. *Id.* ¶ 22.

On or about February 13, 2023, the FDIC issued and served a Notice of Intention to Remove From Office and Prohibit From Further Participation, Notice of Charges for an Order for Restitution, Notice of Assessment of Civil Money Penalties, Finding of Fact and Conclusions of Law, Orders to Pay, Notice of Hearing and Prayers for Relief (the "Notice"), *In re Robert S. Catanzaro, Danielle M. Desrosiers & John C. Ponte*, FDIC-22-0112e, FDIC-22-0113k, FDIC-220107e, FDIC-22-0108k, FDIC-22-0143b, FDIC-22-0109e and FDIC-22-0110k (the "Enforcement Proceeding"). *Id.* ¶ 17. The Notice alleged Mr. Ponte was an IAP. *Id.* A year and a half later, the FDIC has been unable to establish this even to its own ALJ. *Id.* ¶ 23. The Notice is attached to this Memorandum as Exhibit A.[3]

The Notice alleges that Mr. Ponte engaged in fraud of omission and commission. The Notice delineates what it calls a "Bridge Loan Scheme." Notice ¶¶ 36-61. It charges Mr. Ponte with "concealment" of the Bridge loans. *Id.* ¶¶ 62-76. It further alleges garden variety fraud. *Id.* ¶¶ 84-88. It says the impermissible fees charged were $326,000 and emerged from "knowingly or recklessly" failing to disclose certain information. *Id.* ¶¶ 107-09. The FDIC calls the allegations

[3] As stated, Plaintiff Ponte denies he is responsible for any omissions or false statements (or that he had any control of IB so as to be an IAP); the jury right is determined by the allegations, all of which sound in fraud and concealment.

the "Genesis of the Fraudulent Bridge Loan Scheme." *Id.* ¶¶ 112-338. Every single "conclusion of law" against Plaintiff Ponte relies on these allegations of fraud. *Id.* ¶¶ 385-93 ("Ponte's violations and practices described above").

Defendant Whang was assigned as the ALJ for the Enforcement Proceeding and has presided over it at all relevant times. VC ¶ 24. On or about March 2, 2023, Mr. Ponte filed his objection to the Notice and requested a jury trial. *Id.* ¶ 25. On or about the next day, Mr. Ponte filed an answer or other response to the Notice, maintaining he was not an IAP. *Id.* ¶ 26. On March 21, 2023, Defendant Whang denied the request for a jury trial. *Id.* ¶ 27. On or about March 31, 2023, the FDIC made the Notice public, gravely harming Mr. Ponte, *id.* ¶ 29, even though he is not subject to its jurisdiction. None of the allegations in the Notice or the Enforcement Proceeding are the subject of the Verified Complaint or of this Motion for TRO (except the fact that Mr. Ponte is not subject to the FDIC's jurisdiction).[4]

Throughout the Enforcement Proceeding, the Defendants FDIC and Whang have continued to issue orders against Ponte in this *ultra vires* tribunal. Mr. Ponte has been subject to 42 separate orders in the Enforcement Proceeding which remains pending. *Id.* ¶ 28. On June 10, 2024, Defendant Whang denied summary judgment to Mr. Ponte. *Id.* ¶ 36. Mr. Ponte sought review of this order directly by the Board of Directors of the FDIC, but no action has yet been taken. *Id.* The fact that this improper action against Mr. Ponte has proceeded for more than a year and a half with no finding of jurisdiction (that he was an IAP) against him is exacerbated by repeated orders that he is not entitled to a jury trial even after *Jarkesy*. *Id.* ¶¶ 36-37 and Exhibits 1-3 of the VC. ALJ Whang even denied the FDIC's motion to have 60 days to assess *Jarkesy*. *Id.* ¶ 38.

The FDIC has, for the moment, forgone civil penalties against Ponte but now seeks millions

[4] As noted, Mr. Ponte rejects those allegations in the strongest terms, but they are not the subject of the action here which is constitutional in nature.

of dollars that it deems "restitution," as well as a bar from lawful employment in the banking industry. VC ¶¶ 40-41; *See* Exhibit 4.

THE FDIC'S STRUCTURE, PROCEEDINGS, AND POWERS[5]

The FDIC is authorized only to examine or investigate banks and bankers, and it enforces a number of federal banking laws and regulations. It is empowered to do this under the Federal Deposit Insurance Act of 1950, as amended (the "FDI Act"). The FDI Act allows the FDIC to issue a "notice of charges" against an enforcement target, 12 U.S.C. § 1818(b)(l), to issue "cease-and-desist orders", 12 U.S.C. §§ 1818(b)-(d), to conduct hearings, 12 U.S.C. § 1818(h), to force banks to "correct conditions" resulting from violations of laws, 12 U.S.C. § 1818(b)(6), and to levy significant "civil money penalt[ies]" for violations of applicable laws or regulations, 12 U.S.C. § 1818(i)(2). The most severe sanctions the FDIC can impose are "removal and prohibition" orders. 12 U.S.C. § 1818(e). A removal order operates to remove its subject from the bank-related offices specified by the FDIC. 12 U.S.C. §§ 1818(e)(1)(C), (e)(4). Section 8(e), 12 U.S.C. § 1818(e), of the FDI Act provides that, if the FDIC determines that a bank or its officer has "violated … any law or regulation", engaged "in any unsafe or unsound practice", or otherwise breached a "fiduciary duty," it may serve "a written notice of the agency's intention to remove such party from office or to prohibit any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution." 12 U.S.C. §§ 1818(e)(1)(A)(i)-(iii); *see also*, 12 U.S.C. §§ 1818 (e)(1)(A)-(C), 12 U.S.C. § 1818(e)(5) (defining the "institution-affiliated part[ies]" against whom enforcement proceedings may be instituted).

[5] Plaintiff moves for the TRO and Preliminary Injunction only on the denial of jury right under the Seventh Amendment. However, the other constitutional infirmities are structural and provide added weight to the balance of harms and likelihood of success on the merits.

In the context of the Enforcement Proceeding, the parties, here Ponte and the FDIC, litigate in a "hearing" before an ALJ. 12 C.F.R. §§ 308.5(a) and 308.35. After the hearing concludes, the ALJ prepares a "recommended decision" for presentation to the FDIC's Board of Directors, which will include both "recommended findings of fact" and "recommended conclusions of law". 12 C.F.R. §§ 305(b)(8) and 308.38. Parties may then file "exceptions" to the ALJ's recommended decision with the FDIC's "Administrative Officer". 12 C.F.R. § 308.39. The Administrative Officer refers the matter "to the Board of Directors for final decision". 12 C.F.R. § 308.40(a). At that point, the Board of Directors may either (i) "render a final decision", or (ii) "order[] that the action or any aspect thereof be remanded to the ALJ for further proceedings." 12 C.F.R. § 308.40(c)(2). If the FDIC "find[s] that any of the grounds specified in [the] notice have been established" based on its review of "the record made at [the] hearing", then the FDIC may issue orders of removal and/or prohibition. 12 U.S.C. § 1818(e)(4). ALJ's are not empowered to convene juries.

Federal law currently provides that the Board will have five members. 12 U.S.C. § 1812(a)(1). Three of those Board members are appointed by the President to fixed, six-year terms. 12 U.S.C. § 1812(c)(1). Those three appointed members of the FDIC are tenure-protected and may only be removed by the President for cause. *See Wiener v. United States*, 357 U.S. 349, 352-56 (1958); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 487 (2010). Under current law, the President cannot remove a majority of the Board at will because three of its five members enjoy "for cause" protection. The FDIC participates in a unique "ALJ-sharing" arrangement. Section 916 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") required a specified group of "Federal banking agencies" including the FDIC to "jointly ... establish their own pool of administrative law judges" and "develop a set of uniform

rules and procedures for administrative judges" applicable to adjudications before those ALJs. Pub. L. No. 101-73, 103 Stat. 183, 486 (emphasis added). These agencies "created" a new entity called the "Office of Financial Institution Adjudication" ("OFIA"). There are currently two ALJs within OFIA: Whang and C. Scott Maravilla. Whang was appointed as an OFIA ALJ in or about 2019. Pursuant to the FDIC regulations, ALJs shall have "all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay." 12 C.F.R. § 308.5(a). The ALJs utilized by the FDIC have authority to issue subpoenas, rule on the admissibility of evidence, regulate hearings, rule on a variety of procedural and substantive motions, and "do all other things necessary and appropriate to discharge the duties of an ALJ." 12 C.F.R. § 308.5(b)(2), (3), (5), (7) and (11).

FDIC ALJs have "double for-cause" removal protections. If the President wanted to remove an ALJ used by the FDIC, the President would need to show cause to fire the ALJ, a majority of the Merit Service Protection Board ("MSPB"), at least one appointee to the Board, a majority of the directors of the Board of Governors of the Federal Reserve System ("FRB"), and a majority of directors of the National Credit Union Administration. All of the directors of the FRB are tenure-protected and may only be removed for cause. 12 U.S.C. § 242. Similarly, the members of the MSPB can only be removed by the President for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d).

PROCEEDINGS AND IRREPARABLE HARMS TO PONTE

On or about March 27, 2020, the FDIC issued an Order of Investigation (the "Order") regarding a regulated financial institution, IB, and certain purported institution-affiliated parties of IB. VC ¶ 60. On multiple occasions beginning in or about May, 2020, the FDIC issued to and served upon Ponte three separate sets of subpoenas *duces tecum* in connection with its ongoing investigation. *Id.* The FDIC referred the Enforcement Proceeding to OFIA, and it was assigned

to Whang. *Id.* ¶ 61. The initial order in the Enforcement Proceeding was issued contemporaneously with the referral. *Id.* The Enforcement Proceeding remains pending. *Id.* At every turn, except when Enforcement Counsel requested a stay to assess the legal landscape after *Jarkesy*, the ALJ has ruled in favor of FDIC's position. *Id.* The very fact of the proceeding and related allegations has ruined Mr. Ponte's business and reputation, denied him a jury, and, if the case proceeds to hearing, further injures him by a non-jury hearing before the ALJ. *Id.* ¶¶ 64, 66-68. An administrative adjudicatory hearing in the Enforcement Proceeding has been scheduled for October 15-25, 2024, in Providence, Rhode Island. *Id.* ¶ 61. By the end of this month, Ponte will have to meet and exchange witnesses and exhibits with the FDIC counsel. There is a "pretrial" hearing on or about September 17, 2024, all in preparation for the October 2024 hearing. The continuing proceedings before the FDIC Defendants, also unsanctioned by law, is further future harm. *Id.* ¶ 61; *see also id.* ¶¶ 64, 66-68.

PRIOR PROCEEDINGS

There are two prior proceedings in federal court against the FDIC by Ponte on its illegal assertion of power over him. He first filed an action in the United States District Court for the District of Rhode Island in or about January, 2023, later amended, seeking injunctive and declaratory relief, including requesting a declaration that he was not subject to the FDIC's jurisdiction as he is not an IAP. *See Ponte v. FDIC*, No. 1:23-cv-00018-MSM-LDA (Dkt. 1). That suit was dismissed by the District Court without prejudice. *See Ponte v. FDIC*, 673 F. Supp.3d 145 (D.R.I. 2023). The court there found that 12 U.S.C. § 1818(i)(1) divested it of jurisdiction over the jurisdictional and legal claims. *Id.* at 150-51 (and distinguishing *Burgess v. FDIC*, 639 F. Supp.3d 732 (N.D. Tex. 2022) as Ponte had not made "exogenous" constitutional claims). VC ¶ 33.

Just weeks later, the Supreme Court decided *Axon Enter. Inc. v. FTC* and *SEC v. Cochran*,

598 U.S. 175 (2023) ("*Axon*/*Cochran*"). Thereafter, Ponte filed a new complaint on April 24, 2023, again in the United States District Court for the District of Rhode Island and requested injunctive relief against the FDIC. *See Ponte v. FDIC*, No. 1:23-cv-00165-MSM-LDA (Dkt. 1). Like the petitioners in *Axon*/*Cochran*, Ponte asserted a "'here-and-now injury'" from being "hauled before an agency that [he] alleges is unconstitutionally structured." *Axon/Cochran*, 598 U.S. at 210 (Gorsuch, J., concurring in judgment) (first quotation quoting *Seila Law LLC v. CFPB*, 591 U.S. 197, 212 (2020)); VC ¶ 34. Nonetheless, the Rhode Island District Court reviewed the constitutional claims made by Ponte and determined that the language of § 1818(i)(1) precluded district court subject matter jurisdiction even after *Axon*/*Cochran*. *Ponte v. FDIC*, No. 23-cv-00165, 2023 WL 6441976, at *2 (D.R.I Oct. 3, 2023). This dismissal was also without prejudice. This time the court did not distinguish or even mention *Burgess*.

These are the key facts necessary for this Court to determine the instant motion.

ARGUMENT

The first question placed starkly before this Court is whether it has subject matter jurisdiction over this action given the language of Section 1818(i)(1). It does. *See Burgess v. FDIC*, 639 F. Supp.3d 732, 742-50 (N.D. Tex. 2022), *appeal docketed*, No. 22-11172 (5th Cir. Dec. 5, 2022) (finding no explicit bar to district court subject matter jurisdiction for structural constitutional claim concerning Seventh Amendment jury right). If that is so, the TRO should issue as Ponte is likely to succeed on the merits, the harms to Plaintiff Ponte are immediate and immeasurable, and the harm to the FDIC is negligible. Moreover, no public interest is served when an agency fails to follow the law or the Constitution.

The standards for granting a TRO are well known in this district. While it is an extraordinary form of relief, it is analyzed by the same factors as govern a grant of preliminary injunction. The movant must make a clear showing of entitlement to the relief by establishing 1)

he is "likely to succeed on the merits" of the claim; 2) in the absence of such relief he will "suffer irreparable harm[;]" 3) "the balance of equities tips in his favor[;]" and 4) that the "injunction is in the public interest." *Chef Time 1520 v. Small Business Admin.*, 646 F. Supp.3d 101, 109 (D.D.C. 2022) (quoting *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014)) (internal quotation marks omitted) (granting an injunction in part); *Banks v Booth*, 459 F. Supp.3d 143, 149 (D.D.C. 2020) (quoting same part of *Aamer*) (granting TRO in part); *Clevinger v. Advocacy Holdings, Inc.* Nos. 23-1159 and 23-1176, 2023 WL 4535467, at *2-3 (D.D.C. June 30, 2023) (extending a TRO prohibiting solicitation of customers); *Costa v. Bazron*, 464 F. Supp.3d 132, 140 (D.D.C. 2020) (extending an injunction). Perhaps the single greatest of these factors is the showing of irreparable harm. *See Banks*, 459 F. Supp.3d at 158-59. In the District of Columbia, a "sliding scale" weighing these factors is permissible. *Id.* at 149.

In this case, the key analysis for the Court in this motion is likelihood of success on the merits of whether Plaintiff Ponte is entitled to a jury trial for the claims of fraud against him and whether § 1818(i)(1) divests this Court of jurisdiction over these claims, and if it does so divest this Court of jurisdiction whether that divestment is constitutional. The other factors are manifest, to Plaintiff's knowledge not in dispute, and so will be dealt with briefly.

I. IRREPARABLE HARM IS MANIFEST

Being deprived of the right to a jury trial by an administrative agency charging fraud and seeking legal remedies in its in-house tribunal is a violation of a constitutional right. *Jarkesy*, 144 S. Ct. at 2139 ("A defendant facing a fraud suit has the right to be tried by a jury of his peers before a neutral adjudicator"); *see also* U.S. Const., amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ... ."). The deprivation of a constitutional right "for even minimal periods of time, unquestionably

constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009).

II. BALANCE OF EQUITIES AND THE PUBLIC INTEREST MERGE AND FAVOR PLAINTIFF

When the government is on the other side and the movant has demonstrated irreparable harm (and success on the merits), balance of the equities and the public interest factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009); *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016). There is no public interest and great harm in depriving an individual of constitutional rights and so both factors favor Plaintiff. *See Pursuing Am.'s Greatness*, 831 F.3d at 511-12 ("enforcement of an unconstitutional law is always contrary to the public interest") (citation omitted and cleaned up); *see also League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("There is generally no public interest in the perpetuation of unlawful agency action."). It should also be noted that all the other defendants in the Notice have settled with the FDIC, and IB is no longer operating the "scheme." VC ¶ 17 n.1. The public will not be harmed by a TRO.

III. PLAINTIFF PONTE IS LIKELY TO SUCCEED ON THE MERITS.

The ALJ in this matter has repeatedly held she cannot provide a jury trial to Ponte and under the charged offenses she cannot.[6] She has also ruled that does not stop her from depriving him of property and liberty (to practice banking). There are two distinct issues. The first is whether Ponte is entitled to a jury for the claims against him. The second is whether Congress divested him of that right. The ALJ lacks any special expertise in jury trials or the Constitution. The Supreme Court held in *Axon*/*Cochran* that a party's constitutional claims, like those raising separation of powers concerns, challenging the structure of an agency or even its existence, are outside of an agency's "'competence and expertise.'" *Id.* at 188 (quoting *Free Enter. Fund*, 561 U.S. at 491

[6]Although, as discussed below, the FDIC can charge certain banking matters in federal court.

(2010)); *id.* at 185-89. Thus, the District Court is vested with jurisdiction to review such claims. *Id.* at 189. And, less than two months ago, the Supreme Court held in *SEC v. Jarkesy*, that when an agency seeks civil penalties against a defendant, the Seventh Amendment is implicated, and he is entitled to a jury trial in an Article III court. *Id.* at 2127-39. The *Jarkesy* decision is fatal to the continued proceeding against Mr. Ponte before the FDIC. The Enforcement Proceeding violates the Seventh Amendment because it deprives Ponte of his right to a jury trial. *See Jarkesy*, 144 S. Ct. at 2129. The instant matter is nearly a carbon copy of *Jarksey*, where the Supreme Court held that the petitioner was entitled to a jury trial, not merely an "agency hearing," in a case where the SEC sought civil penalties.

A. Ponte is Entitled to a Jury for the Claims Against Him.

Here, the FDIC initially sought civil penalties and "restitution" against Ponte. *See* Notice at 48. After *Jarkesy* was decided, the FDIC dropped the civil penalty demand and is proceeding on a demand for statutory restitution and to debar him from banking.[7] But as explained below, these recent machinations by the FDIC to claim that its "penalties" are now somehow matters of equity not law are unavailing. While the Notice of Foregoing Claims for Civil Money Penalties, issued when its request to stay the matter for 60 days was denied, purports to drop its request for civil money penalties it maintains a request for statutory restitution that is identical to money damages as it is simply a judgment for money against Ponte. *See* VC, Exhibit 4. Despite the label of restitution, there is no equity involved here. Like the SEC in *Jarkesy*, under 12 U.S.C. § 1818(b)(6)(A) the FDIC is not "obligated to use [statutory restitution] to compensate victims." *Jarkesy*, 144 S. Ct. at 2120. Further, restitution may be ordered if a "party was unjustly enriched

[7] On July 24, 2024, the FDIC filed its "Notice of Foregoing Claims for Civil Money Penalties" relative to Ponte in the Enforcement Proceeding. VC, Exhibit 4. The implication being that the FDIC has withdrawn any claim for civil money penalties as against Ponte.

in connection with [a] violation or practice" or "the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency." 12 U.S.C. § 1818(b)(6)(A). In *Jarkesy*, the Supreme Court was clear that cases sounding in common law fraud and seeking legal remedies, as this does, require a jury. *Jarkesy*, 144 S. Ct. at 2129. Here the FDIC alleges Ponte made a material omission on a required form and has pleaded civil money penalties and statutory restitution. Material omissions are a classic example of a common law fraud allegation. The FDIC pre-*Jarkesy* labeled and couched every one of its claims in fraud. In *Jarkesy* the Supreme Court labeled the SEC's claim there "a common law suit in all but name." Here, the FDIC named it "Fraud." *Compare Jarkesy*, 144 S. Ct. at 2136 *with* Notice ¶¶ 117-18 ("*Genesis of the Fraudulent Bridge Loan Scheme*"). The FDI Act's multi-tier penalty statute is like the SEC's multi-tier penalty statute considered in *Jarkesy*. As in *Jarkesy*, the dividing "criteria" between tiers here is "legal in nature" and warrants a jury trial. *Jarkesy*, 144 S. Ct. at 2130. Civil monetary penalties are a "prototypical common law remedy." *Id.* at 2129. And when such are sought, "the remedy is all but dispositive" and a jury is required. *Id.*

The statute under which the FDIC charges Ponte is demonstrably a claim for money damages for common law fraud, or to the extent they claim he overcharged on a contract, a contract action. FDIC counsel by unilateral action cannot change the nature of the claim.[8] There is yet another problem with relying on FDIC counsel's waiver even if the ALJ goes along with it. The FDIC and its Board are not bound by counsel or the ALJ's views. If the ALJ does not impose second tier civil money penalties nothing prevents the Board from issuing the same penalty in a final order.

[8] The FDIC has not forgone its arguments that it had a legal basis to bring the claim in the first instance, so its withdrawal is illusory.

The same is true of FDIC counsel's one line claim that it will use the monies recovered to compensate "victims." VC, Exhibit 4. As noted, the test of whether the claim sounds in common law is objective. It is resolved by the claim and the statute, not by counsel's litigation strategy. The statute is what matters and here it provides common law claims and damages and does not require that any funds go to any "victims." Under the FDI Act, the FDIC now says it seeks only statutory restitution. But that ploy fails to avoid *Jarkesy* because the statute, 12 U.S.C. § 1818(b)(6)(A), does not require FDIC to compensate victims. *See Jarkesy*, 144 S. Ct. at 2120. Even if it did this would not end the matter as to the nature of those damages which are personal to Ponte and so punitive in nature. Most importantly, the FDIC is not required to return restitution to victims. Under § 1818(b)(6)(a) the FDIC can seek statutory restitution for unjust enrichment caused by a violative act or for acting with reckless disregard of the law or regulations. No victim has been identified.

Even were the monies going to an identified victim that would not make these damages equitable. They are a remedy at law because it does not change the ownership of a *res* or other property. The FDIC's claims against Ponte, while nominally statutory, arise at common law. Congress cannot divest an individual of a jury right by renaming the action. Pursuant to the Notice, the FDIC sought a civil money penalty (and other monetary relief) against Ponte. That it now calls the money it seeks "restitution" [and in far higher amounts than identified in the Notice] does not make the FDIC's claims equitable. Restitution is also a remedy at law. It is the nature of the restitution that determines what it is. This was explained by the Supreme Court in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002). In that case the Supreme Court explained that restitution sounds in law when it is bound to a contract and resembles money damages, that is, it is a general order of money damages against the defendant. *See id.* at 210

(collecting cases). Restitution only sounds in equity if there is a fund or property that is identifiable and in equity should be transferred to the complainant. *Id.* at 213.

The basis for the "restitution" here is that fees were charged on a contract with each of the "victims" that were allegedly too high or undisclosed. There are actual contracts identified. "Genesis of the Fraudulent Bridge Loan Scheme." Notice at 17 and described in paragraphs 112-338. Not only are the contracts referenced and claims made that borrowers were overcharged, but the money sought is fungible; not maintained in a specific identifiable bank or fund that can be seized. For "restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff *particular* funds or property in the defendant's possession." *Great-Western Life*, 534 U.S. at 214 (emphasis added). The FDIC's claim here is not for particularized funds. The substance of the action controls whether the jury trial right attaches. Stated another way, "the substance of the suit, not where it is brought, who brings it, or how it is labeled" controls. *Jarkesy*, 144 S. Ct. at 2136. The substance of the FDIC's Notice is at-law and a jury is required.

Even more than in *Jarkesy*, this case "is a common law suit in all but name." *Id.* Here, as noted, it *was* named. All the badges of common law fraud identified in the securities laws as requiring a jury are also true for the FDIC. *Id.* at 2130 ("concealing material facts"). The FDIC called it "fraud" and then sought general liability against Ponte for material omissions or misstatements (fraud) and for overcharging those he had a contract with (breach of contract). VC ¶ 94 and Notice ¶¶ 43-44, 47, 89-98 and at 48. The cause of action sounds in fraud because the FDIC alleges that Ponte willfully concealed purportedly material information from IB and the SBA, *see* Notice ¶¶ 43-44, 47, even though Ponte himself did not conduct business with IB or the SBA. As the Supreme Court observed, federal securities fraud and common law fraud claims

"[b]oth target the same basic conduct: misrepresenting or concealing material facts." *Jarkesy* at 2130. So too here.

The other aspects of whether a jury trial is required that *Jarkesy* noted are easily dealt with and redound in Ponte's favor. This is not a case of a "public right" however defined. There is no "public right" at issue in this case. Ponte's right to engage in banking (which he did not do) is not one granted by the Government. "[M]atters concerning private rights may not be removed from Article III courts." *Id.* at 2132 (citing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1855); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51-52 (1989)). If the FDIC wants to prevent Mr. Ponte from engaging in lawful employment, if it wants to restrict his liberty, it must convince a jury that the facts warrant it.

Certain of the issues noted in discussing the arguments the FDIC made in *Burgess* also apply to the FDIC claims against Ponte here. This relief will not "'dismantle the statutory scheme'" as the FDIC can bring claims in federal court where juries are available. *E.g., Jarkesy v. SEC*, 34 F.4th 446, 455 (5th Cir. 2022), *aff'd and remanded sub. nom SEC v. Jarkesy*, 144 S. Ct. 2117 (2024) (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 60-63 (1989)). *See* 12 U.S.C. § 1812(c), (d) (cease and desist orders), (i) (enforcement proceedings under §§ 1818, 1831o, or 1831p-1), and (n) (enforcing subpoenas); *see, e.g.*, *Burgess*, 639 F. Supp.3d at 748 (quoting *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *aff'd and remanded sub. nom SEC v. Jarkesy*, 144 S. Ct. 2117 (2024)). Claims involving requests for civil monetary penalties and the like are heard every day by federal courts sitting in diversity and by federal courts adjudicating liability under various state and federal statutory schemes.

Finally, the idea that a jury trial would be too slow is not borne out by the facts here. The FDIC has been investigating Mr. Ponte since at least May of 2020. This matter will have hearings

and then proceed to the Board and then to an appropriate Circuit Court for any appeal. Through all that, Mr. Ponte would be deprived of a jury and, if ultimately vindicated, might have to start all over again. Addressing his constitutional claim now and fashioning an appropriate remedy would be less burdensome on the parties and the judiciary.

B. Section 1818(i)(1) of the FDI Act Does Not Divest This Court of Subject Matter Jurisdiction and Would Be Unconstitutional If It Did

The FDIC[9] and ALJ Whang's reliance on Congress' jurisdictional bar is unavailing. Congress cannot remove the jury trial right, and it did not try to do so with §1818(i)(1) of the FDI Act. Section 1818(i)(1) states in pertinent part:

> (i) Jurisdiction and enforcement; penalty
>
> (1) The appropriate Federal banking agency may in its discretion apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the depository institution is located, for the enforcement of any effective and outstanding notice or order issued under this section or under section 1831o or 1831p-1 of this title, and such courts shall have jurisdiction and power to order and require compliance herewith; *but except as otherwise provided in this section or under section 1831o or 1831p-1 of this title no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order.*

Id. (emphasis added).

This language does not explicitly or implicitly strip this Court of its jurisdiction under 28 U.S.C. § 1331 for suits arising under federal law and the Constitution. Congress did not state that it intended to bar constitutional, exogenous claims like those here. It should be noted that both the SEC and the FTC in *Axon*/*Cochran* made and prevailed on such a claim of complete jurisdiction stripping in the lower courts but were reversed by the Supreme Court. That Court found no jurisdiction stripping divestment of federal question subject matter jurisdiction in either

[9] While the FDIC has not appeared in this case Plaintiff assumes it will take the same positions it did in *Burgess* and in the pair of Rhode Island cases involving Plaintiff.

case. What the Court said there is applicable here:

> The challenges here, as in *Free Enterprise Fund*, are not to any specific substantive decision—say, to fining a company (*Thunder Basin*) or firing an employee (*Elgin*). Nor are they to the commonplace procedures agencies use to make such a decision. They are instead challenges, again as in *Free Enterprise Fund*, to the structure or very existence of an agency: They charge that an agency is wielding authority unconstitutionally in all or a broad swath of its work. Given that equivalence, it would be surprising to treat the claims here differently from the one in *Free Enterprise Fund*—which we held belonged in district court.

Axon/Cochran, 598 U.S. at 189.

Here, the denial of a jury trial right claim is precisely such a constitutional claim providing this Court jurisdiction because its consideration does not depend on any substantive decision regarding the banking laws. *See Axon/Cochran*, 598 U.S. at 193-94 (claim that is discrete and outside the merits of the enforcement action can be tried in district court).[10] As the Supreme Court noted, there is no remedy for the injury after the adjudication, which is true here as well. This matter is outside the agency's expertise and the harm of the unjust proceeding cannot be remedied. *Id*. at 195-96. The FDIC will no doubt argue that its statute is set up differently. But given the fact that on these claims there is no *meaningful review*, as described by Justice Kagan's majority opinion in *Axon/Cochran*, the Court cannot construe the language here any differently as to Congress's meaning.

It is axiomatic in all Supreme Court holdings on these matters that when "Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (citing *Johnson v. Robinson*, 415 U.S. 361, 373-74 (1974)). As pointed out by the *Burgess* court, when Congress wants to preclude review of constitutional claims it not only must be explicit but has been. "'Judicial review of all questions of law and fact,

[10] This is, of course, also explicitly true of the other structural claims in Complaint but also applies to the denial of a jury.

including interpretation and application of constitutional and statutory provisions[.]'" *Burgess*, 639 F. Supp.3d at 742 (quoting 18 U.S.C. § 1252(b)(9))). Section 1818(i)(1) does not say that or use anything remotely as explicit. As the FDIC has conceded, law does not specifically mention a "jurisdictional bar" to "structural and constitutional claims." *Burgess*, 639 F. Supp.3d at 742.

While a statute can do so implicitly all the factors here weigh against it. Whether the statute did so *implicitly* is determined by *Axon/Cochran* which explained and relied upon the *Thunder Basin* (*Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994)) analysis. *Thunder Basin* instructs that where (1) a claim cannot be meaningfully reviewed, (2) is collateral, and (3) is outside agency competence and expertise, Congress should not be presumed to have implicitly barred district court jurisdiction. 510 U.S. at 212-13. Jury trials, by the ALJ's own admission, are outside the FDIC's purview so there is no expertise. The matter of jury trials (and of the FDIC's structure) is wholly collateral to anything Ponte is charged with. As noted, there is no meaningful review as the injury has already been inflicted is continuing and cannot be remedied after the process is done. There is reputational harm if he is either found liable and has to appeal or there is no final determination in which case he cannot challenge the unconstitutional proceeding.

Even if there were two different views of the statute, the canon of constitutional avoidance also counsels not to interpret the statutory language here to strip Mr. Ponte of his Seventh Amendment jury trial rights by an improper view of Congressional intent. *Al Baluhl v. United States*, 767 F.3d 1, 15 (D.C. Cir. 2014) (the canon is one of "judicial restraint"). The Supreme Court has been clear that Congress cannot strip Americans of their jury rights. *See Jarkesy*, 144 S. Ct. at 2129. It is well settled that Congress cannot accomplish indirectly what it is constitutionally prohibited from doing directly. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) ("Constitutional rights would be of little value if they could be indirectly denied.")

(cleaned up). If this Court found that Congress intended to strip Mr. Ponte of his jury trial right with no meaningful review, after going through an unconstitutional proceeding, it would create a collision between individual rights and constitutional power.

The Seventh Amendment is a limit on Congressional power. The Amendment, though part of the "Bill of *Rights*," was in reality a structural limitation on Congressional power to create non-jury courts. *See generally* Suja A. Thomas, *A Limitation on Congress: "In Suits at Common Law*," 71 Ohio St. L.J. 1071 (2010). The historical record makes clear that *with respect to rights and remedies that existed at the time the Seventh Amendment was adopted*, Congress could not extinguish the right to trial by jury. *See* Roger W. Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 U. Pa. L. Rev. 1281, 1339 (1978) ("The seventh amendment *was* added to the Constitution to preserve the common law right as fully as possible and to ensure that any future Congresses would" indeed be rendered powerless to assign fact-finding to administrative agencies).

"The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting); *see also* 3 William Blackstone, Commentaries on the Laws of England 379-80 (R. Bell, Philadelphia ed. 1772). As the District Court for Massachusetts observed,

> [t]he American jury, that most vital expression of direct democracy extant in America today, thus functions as a practical and robust limitation on congressional power. It is as crucial and central a feature of the separation of powers … as is the Supreme Court. Indeed, within her proper fact-finding sphere, an American juror is the constitutional equal of the President, a Senator or Representative, or the Chief Justice of the United States.

Enwonwu v. Chertoff, 376 F. Supp.2d 42, 80 (D. Mass. 2005) (internal citations omitted).

If Congress were permitted to simply channel rulemaking, investigation, adjudication, and imposition of penalties into a single body staffed by career attorneys and other government servants impervious to any sort of democratic control, the supervisory function of the jury would disappear. This alone is reason enough for rejecting the view that this Court is stripped of subject matter jurisdiction.

There are two substantive limitations on Congressional powers relevant to this case. First, Article III itself vests all judicial power in the courts. *See* U.S. Const. art. III, § 1. This power "extend[s] to all Cases, in Law and Equity, arising under th[e] Constitution [and] the Laws of the United States." *Id.* § 2. Under well-settled precedent, this means that Congress *must* vest some inferior courts with the power to hear and adjudicate cases arising under federal law. *See Martin v. Hunter's Lessee*, 14 U.S. 304, 327-39 (1816) (Story, J., opinion of the Court). And Congress has no constitutional power under Article I (or otherwise) to revest constitutionally allocated judicial power outside Article III courts.

Second, the Seventh Amendment is not merely a confirmation of an individual right, but a structural constraint on Congressional power. So, much like Congress cannot evade its obligation to vest judicial power in federal courts, neither can it vitiate a right to a civil jury. That right would be a dead letter if Congress could simultaneously: a) permit administrative agencies to impose civil penalties in non-jury administrative proceedings; and b) prohibit citizens from attempting to avoid unlawful exercise of such agencies' jurisdiction. *See U.S. Term Limits*, 514 U.S. at 829.

Without a doubt, Congress retains authority to create inferior courts and to confer on them such jurisdiction as it sees fit. *Hunter's Lessee*, 14 U.S. at 331. And though the power "to establish and disestablish inferior courts, expand or trim their jurisdiction, and move jurisdiction from one

such court to another," *Enwonwu*, 376 F. Supp.2d at 80 (footnote omitted), is broad, it is not limitless. The "limit is the American jury." *Id*.

From these principles it follows that much like Congress cannot confer "criminal jurisdiction of the United States …, consistently with the constitution, … [on] state tribunals," and withdraw it from the cognizance of federal courts, neither can it confer a power to exact civil penalties on tribunals that are permitted to sit without a jury. *See N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85-87 (1983), *superseded by statute on other grounds by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-249, 98 Stat. 116 (concluding that jury trials are one of the "the essential attributes of the judicial power" and can only be exercised by an Article III court).

As Justice Story explained, Congress "might establish one or more inferior courts; [it] might parcel out the jurisdiction among such courts, from time to time, at [its] own pleasure." *Hunter's Lessee*, 14 U.S. at 331. But Congress may not assign *factual* determinations in suits at common law (or their analogues) to anything other than Article III courts. Congress is certainly free not to create a cause of action, or create a particular obligation, but not provide any enforcement mechanism. *See, e.g.*, *California v. Texas*, 593 U.S. 659, 664-65 (2021) (recounting existence of an obligation to buy health insurance coupled with absence of any enforcement mechanism for such an obligation). However, Congress is not free to assign resolution of common-law cases to administrative agencies when doing so would extinguish Americans' constitutionally protected jury trial rights.

The contrary position, taken to its logical conclusion, would mean that *no* court could *ever* vindicate a litigant's Seventh Amendment right, because even on petition for review of a final FDIC order, *see* 12 U.S.C. § 1818(h)(2), the Court of Appeals would not be able to issue a

declaratory judgment that jury-less trials before the FDIC are unconstitutional. If it is correct that the statutory language providing that "no court shall have jurisdiction to affect by injunction *or otherwise* the issuance *or enforcement*," *id.* § 1818(i)(1), of any of FDIC's orders means that the only avenue to challenge FDIC's orders is under the Administrative Procedure Act, then there will be no avenue to challenge the constitutionality of the provision. But § 1818(i)(1) cannot and does not trump a litigant's Seventh Amendment right to have his civil liability for penalties decided by a jury. Professor Steven Vladeck of Georgetown law, arguing against Congress' jurisdiction stripping power being plenary, put this starkly when analyzing a bill purporting to strip the Supreme Court of jurisdiction:

> [T]here'd be little point in having an independent judiciary with the power to strike down acts of the democratically elected branches if those branches could take that power away at any time and for any reason. Courts couldn't be much of a bulwark against tyrannies of the majority if the majority can just take away their power to check the democratically elected branches on a whim.

Steve Vladeck, *Jurisdiction-Stripping and the Supreme Court*, One First (Aug. 5, 2024), *available at* https://stevevladeck.com/p/93-jurisdiction-stripping-and-the. Accordingly, this Court must reject this jurisdictional argument.

With such constitutional limitations, powers and rights at issue, the best interpretation of §1818(i)(1) is that Congress did not intend to strip this Court of jurisdiction over constitutional claims like those of Mr. Ponte.

CONCLUSION

The balance of factors being wholly in Mr. Ponte's favor, this Court should grant a TRO staying the Administrative Proceeding before the FDIC and its ALJ for the maximum allowable time so that the parties can have time to join issue and convert the matter to a preliminary injunction while this case proceeds.

Dated: August 19, 2024

Respectfully submitted,

/s/ *John J. Vecchione*
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing document complies with the page limitation limit under LCvR 7(e) as well as other pertinent requirements set forth in LCvR 5.1, LCvR 7, and the Federal Rules of Civil Procedure.

/s/ John J. Vecchione

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Memorandum and all other filings in this matter to date have been given to a process server to be served upon the above-captioned Defendants via hand service on the U.S. Attorney for the District of Columbia at:

Civil Process Clerk
U.S. Attorney's Office for D.C.
601 D Street, NW
Washington, DC 20530

on August 19, 2024.

Pursuant to Fed. R. Civ. P. 4(i), a copy of the foregoing and all other filings in this matter to date have also been sent via certified mail, return receipt requested to the Defendants (all of whom are sued only in their official capacities) at the addresses listed on the Complaint caption and to the U.S. Attorney General at 950 Pennsylvania Avenue NW, Washington, DC 20530 on August 19, 2024. It was until Covid possible to serve the U.S. Attorney by hand but to my knowledge that office has refused to resume accepting hand service. I have also provided a copy of the motion for TRO and accompanying brief to Mr. Ponte's counsel in the FDIC administrative matter to serve by email to FDIC counsel there.

Moreover, the Complaint and its exhibits, the proposed summons, and the civil cover sheet, were filed with the Court on August 15, 2024. Upon completion of service of the Motion for TRO, Proposed Order, Declaration, and Memorandum in Support of TRO by the process server, an updated proof of service will also be filed.

/s/ John J. Vecchione