

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

In the Matter of:

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

Independence Bank
East Greenwich, Rhode Island

(Insured State Nonmember Bank)

Docket Nos.:

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

**ORDER NO. 4: GRANTING REQUESTS FOR HEARING
AND DENYING DEMANDS FOR JURY TRIAL**

In a Notice filed on February 10, 2023, the Federal Deposit Insurance Corporation (“FDIC”) advised Robert Catanzaro, Danielle Desrosiers, and John Ponte (collectively “Respondents”) that it intended to seek to remove and/or prohibit Respondents from participating in any manner in the conduct of the affairs of any federally insured depository institution or any other institution, credit union, agency or entity referred to in 12 U.S.C. § 1818(e) and assessed a civil money penalty against each Respondent to take effect unless Respondents formally objected by filing a timely request for a hearing under 12 U.S.C. § 1818(i)(2)(H).¹

On March 1, 2023, Respondent Desrosiers timely filed a Request for a Hearing Without Waiver of Right to Jury Trial (“RD RFH”). In addition to requesting a hearing, Respondent Desrosiers’s submission “demands a jury trial on all claims and matters relating to the Notice for which she is entitled to a jury trial.” RD RFH at 1.

¹ The February 10, 2023 Notice also seeks an order of restitution against Respondent Ponte.

In submissions on March 2, 2023, Respondents Catanzaro and Ponte likewise timely requested hearings on the charges against them.² Respondent Ponte’s submissions on this date also demanded a trial by jury,³ while Respondent Catanzaro made his own demand for “a jury trial with respect to all claims and matters relative to” the instant proceedings in a filing on March 6, 2023 (“RC Demand”).⁴ RC Demand at 1.

On March 15, 2023, Enforcement Counsel for the FDIC (“Enforcement Counsel”) filed a Motion to Strike and Response to Respondents’ Demands for a Jury Trial (“EC Response”).⁵ Enforcement Counsel asserts in this Response that the right to a jury trial in enforcement proceedings before the Office of Financial Institution Adjudication (“OFIA”) is not available under 12 U.S.C. § 1818, 12 C.F.R. Part 308, the United States Constitution, or other applicable law. *See* EC Response at 3-4. The undersigned agrees.

² *See* Respondent John C. Ponte’s Objection to Notice of Charges for an Order of Restitution & Request for Hearing and Demand for Trial By Jury; Respondent John C. Ponte’s Objection to Notice of Assessment of Civil Money Penalties & Request for Hearing and Demand for Trial by Jury; Request of Respondent Robert S. Catanzaro for Hearing.

³ Respondent Ponte expanded on this demand in a March 15, 2023 Motion to Sever Notice of Charges for an Order of Restitution & Notice of Assessment of Civil Money Penalties, which is being addressed in a separate order issued forthwith by this Tribunal.

⁴ Respondent Ponte filed an Answer to the charges against him on March 3, 2023. In separate filings on March 1, 2023 and March 2, 2023, respectively, Respondents Desrosiers and Catanzaro filed unopposed motions for extensions of time to file their answers, which were then granted by this Tribunal in its Order Nos. 2 and 3. The Orders extended the time for these Respondents to answer the charges against them until March 20, 2023. On March 20, 2023, Respondent Catanzaro and Respondent Desrosiers filed their Answers. Respondent Desrosiers also filed an “Emergency Motion to Preclude FDIC from Publishing Notice [of Charges] in Unredacted form until Ruling on Desrosiers’ Motion to Strike or Seal or Redact” along with a “Motion to Strike, Seal, or Redact Certain Allegations in the FDIC’s Notice of Charges,” which will be addressed in a separate order.

⁵ Motions to strike “are a drastic remedy that courts disfavor,” *Moore v. United States*, 318 F. Supp. 3d 188, 190 (D.D.C. 2018), and the parties should be mindful whether such a motion is truly necessary to the efficient disposition of these proceedings before seeking such relief in the future. Although it may be the case, as Enforcement Counsel contends, that “courts are permitted to strike jury demands where the right to a jury trial does not exist,” EC Response at 3, the undersigned sees no particular benefit that inheres in formally striking Respondents’ demands from the record here, nor does Enforcement Counsel articulate one. Respondents have demanded a jury trial, and the undersigned finds below that they are not entitled to one; nothing more is needed.

Demand for Jury Trial

All three Respondents, therefore, have demanded a trial by jury. As a procedural matter, Enforcement Counsel is correct that neither the Uniform Rules of Practice and Procedure that govern these administrative enforcement proceedings nor the underlying statutory scheme set forth in 12 U.S.C. § 1818 provide for the empanelment of juries in connection with a hearing before this Tribunal, and the undersigned has no authority to grant such relief. As such, Respondents' demands for a jury trial seek an impossible outcome and must be denied.

The recent decisions in *Jarkesy v. SEC*, 34 F. 4th 446 (5th Cir. 2022) and *Burgess v. FDIC*, No. 7:22-cv-100, 2022 WL 17173893 (N.D. Tex. Nov. 6, 2022) to which Respondents briefly advert do nothing to change matters. To begin with, these decisions are not binding on this Tribunal in this action and the undersigned accords them no controlling weight.⁶ Rather, the undersigned follows the holdings of those of OFIA's constituent agencies to have considered the matter, including the FDIC,⁷ as well as relevant Supreme Court precedent,⁸ to conclude that there is no Seventh Amendment right to a jury trial available to Respondents in these proceedings.

⁶ Where the Supreme Court and the FDIC Board of Directors ("FDIC Board") have not squarely addressed an issue, the undersigned gives deference to the decisions of the other OFIA agencies—the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the National Credit Union Administration, and previously the Office of Thrift Supervision—as well as the law of the D.C. Circuit and the circuit in which the home office of the depository institution in question is located as the twin fora to which a respondent is entitled to appeal any final decision of the FDIC Board. *See* 12 U.S.C. § 1818(h)(2). The depository institution here, Independence Bank, is located in Rhode Island, which is in the First Circuit, while the *Jarkesy* and *Burgess* decisions arise from the Fifth Circuit. Thus, even if the FDIC Board had not spoken on the matter—which, as noted *infra*, is not the case—the holdings of those Fifth Circuit decisions would be only data points when considering the appropriate result in the instant proceedings.

⁷ *See In the Matter of Richard Donohoo and Craig Mathies*, Nos. 92-249c, -250e, -251e, & -252k, 1995 WL 618673, at *7 n.30 (July 5, 1995) (FDIC final decision) ("There is no right to a jury trial in an administrative proceeding."); *In the Matter of Fang Fang*, Nos. 17-006-E-I & -CMP-I, 2018 WL 3006183, at *3 (Jan. 30, 2018) (FRB determination on request for interlocutory appeal) (finding that the public rights exception to Seventh Amendment applies to OFIA proceedings).

⁸ *See Oil States Energy Svcs. v. Greene's Energy Grp. LLC*, 138 S. Ct. 1365, 1373 (2018); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53-55 (1989); *Atlas Roofing v. Occup. Health & Safety Comm'n*, 430 U.S. 442, 449-50 (1977); *see also Jarkesy*, 34 F.4th at 467-473 (Davis, J., dissenting).

Furthermore, as Enforcement Counsel observes (*see* EC Response at 4-7), respondents in OFIA proceedings are not entitled to a jury trial even under *Jarkesy*'s analysis. That case, which held that the Seventh Amendment right to a jury trial extended to securities fraud claims brought in Securities and Exchange Commission ("SEC") enforcement proceedings, set out a familiar two-step framework for determining whether the Seventh Amendment has been violated by administrative adjudicative proceedings: "First, a court must determine whether an action's claims arise 'at common law' under the Seventh Amendment. Second, if the action involves common-law claims, a court must determine whether the Supreme Court's public rights cases nonetheless permit Congress to assign it to agency adjudication without a jury trial."⁹

The FDIC's Section 1818 claims do not arise at common law for purposes of the Seventh Amendment. The statutory framework of 12 U.S.C. § 1818 was created to ensure the safety and soundness of the banking industry and is linked to that purpose in both the elements inherent in enforcement actions under that chapter—such as the requirement the sanctioned individual be affiliated with an insured depository institution¹⁰—and their remedies—such as the prohibition from participation in the affairs of an insured depository institution.¹¹ These regulatory purposes, and the unique conduct that renders one susceptible for sanction under these provisions, sets 12 U.S.C. § 1818 claims apart from common law tort claims for the recovery of damages.

Moreover, even if Section 1818 claims had a sufficient analogue at common law to meet *Jarkesy*'s first requirement, actions under Section 1818 are firmly and unquestionably situated as vindicating public rights to which the Seventh Amendment's right to a jury trial does not apply in administrative proceedings. Congress may provide for non-jury, agency adjudication of public

⁹ *Jarkesy*, 34 F.4th at 453 (internal citations omitted); *see Tull v. United States*, 481 U.S. 412, 417-18 (1987).

¹⁰ *See* 12 U.S.C. § 1818(e)(1)(A), (i)(2)(A).

¹¹ *See id.* § 1818(e)(3)(A).

rights claims even where those claims “are closely analogous to common-law claims.”¹² The term “public right” encompasses all “cases that ‘arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.’”¹³ Where Congress provides for the adjudication of such claims “in a non-Article III tribunal, the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.”¹⁴

Here, the FDIC is an agency tasked with effectuating a “specific and limited federal regulatory scheme”¹⁵—that is, “supervising and regulating commercial banks that are neither federally chartered nor members of the Federal Reserve System” and “detect[ing] and remedy[ing] ‘unsafe or unsound’ banking practices in its supervised banks.”¹⁶ The claims before this Tribunal, relating as they do to the safety and soundness of an institution-affiliated party’s actions, are “so closely integrated into [that] public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.”¹⁷ Accordingly, this action concerns the adjudication of public rights, for which the Seventh Amendment does not guarantee a jury trial.¹⁸ Even if the undersigned accepted *Jarkesy*’s reasoning that SEC securities fraud claims are sufficiently analogous to common law fraud claims as to render them not public rights,

¹² *Granfinanciera*, 492 U.S. at 52.

¹³ *Id.* at 51 n.8 (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)).

¹⁴ *Oil States Energy Servs.*, 138 S. Ct. at 1379 (internal quotation marks and citation omitted).

¹⁵ *CFTC v. Schor*, 478 U.S. 833, 855 (1986); see also *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 589, (1985) (holding that Congress may “authorize an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program without providing an Article III adjudication”).

¹⁶ *Frontier State Bank Oklahoma City, Okla. v. FDIC*, 702 F.3d 588, 591-92 (10th Cir. 2012); see also *Michael v. FDIC*, 687 F.3d 337, 348-49 (7th Cir. 2012); 12 U.S.C. § 1818(b).

¹⁷ *Thomas*, 473 U.S. at 593-94.

¹⁸ Compare *Stern v. Marshall*, 564 U.S. 462, 493 (2011) (no public rights exception where the party’s “claimed right to relief does not flow from a federal statutory scheme . . . [and] is not completely dependent upon adjudication of a claim created by federal law”) with *Schor*, 478 U.S. at 855 (public rights exception where non-Article III jurisdiction over a claim “mak[es] effective a specific and limited federal regulatory scheme” as to which the agency possesses “obvious expertise”).

which she does not,¹⁹ the same reasoning would not compel the same conclusion as to claims under Sections 1818(e) and 1818(i).²⁰

Finally, the *Burgess* decision is unavailing for Respondents. In *Burgess*, a district court judge determined that an analysis of the right to a jury trial in FDIC enforcement proceedings “should mirror that in *Jarkesy*” and that the plaintiff in that case was likely to prevail on his Seventh Amendment claim.²¹ In addition to being non-binding on this Tribunal, however, that holding represents an outlier among all courts that have considered the Seventh Amendment’s application to 12 U.S.C. § 1818 enforcement actions—including the Fifth Circuit itself.²² The holding in *Burgess* is also currently being appealed, and there are numerous grounds for potential reversal should the Fifth Circuit conclude, as the undersigned does, that it was wrongly decided.²³

¹⁹ See *Jarkesy*, 34 F.4th at 467-473 (Davis, J., dissenting) (noting the manifold ways in which the *Jarkesy* majority’s “public rights” analysis does not comport with Supreme Court precedent or the decisions of other federal courts of appeal, which “routinely hold that an enforcement action by the Government for violations of a federal statute or regulation is a ‘public right’ that Congress may assign to an agency for adjudication without offending the Seventh Amendment”) (citing cases).

²⁰ As Enforcement Counsel notes, the holding in *Jarkesy* also “turned on several features of the SEC’s unique enforcement scheme that are not shared by the FDIC’s enforcement system.” EC Response at 5. Most notably, *Jarkesy* concluded that requiring a jury trial for SEC securities fraud claims “would not ‘dismantle the statutory scheme’ because the statute provides that SEC enforcement actions can be brought in district courts as well as before the SEC.” *Id.* (quoting *Jarkesy*, 34 F. 4th at 455); see also *Jarkesy*, 34 F.4th at 455-56 (“If Congress has not prevented the SEC from bringing claims in Article III courts with juries as often as it sees fit to do so, and if the SEC has in fact brought many such actions to jury trial over the years, then it is difficult to see how jury trials could ‘dismantle the statutory scheme.’ Congress could have purported to assign such proceedings *solely* to administrative tribunals, but it did not.”) (emphasis in original). Here, by contrast, the FDIC “is required by statute to conduct administrative hearings,” as Section 1818 “mandates an administrative hearing in enforcement proceedings, directs the FDIC to render its decision after that administrative hearing, and provides for review of the FDIC’s decision in the courts of appeal.” EC Response at 6; see 12 U.S.C. § 1818(h). Unlike the SEC’s enabling statute, there is no possibility inherent in the statutory scheme for the FDIC to bring its enforcement claims under Section 1818 in a forum in which trial by jury is available.

²¹ *Burgess*, 2022 WL 17173893, at *10.

²² See, e.g., *Akin v. OTS*, 950 F.2d 1180, 1186 (5th Cir. 1992); *Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995); *Simpson v. OTS*, 29 F.3d 1418, 1423-24 (9th Cir. 1994).

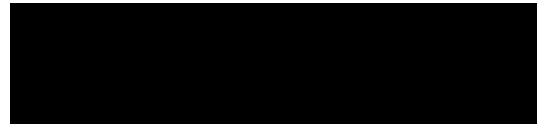
²³ See Opening Brief of Appellants/Cross-Appellees, *Burgess v. Whang et al.*, No. 22-11172, 2023 WL 1776782, at **39-49 (5th Cir. Jan. 30, 2023).

Requests for Hearing

Good cause having been shown, each Respondent’s request for hearing pursuant to 12 U.S.C. § 1818(i)(2)(H) is hereby granted and all matters concerning the civil money penalty assessment will be considered in the same proceeding as regarding the proposed removal/prohibition order and the demand for restitution against Respondent Ponte. The parties are hereby ordered to meet and confer and propose three mutually agreeable dates for a telephonic scheduling conference to take place in late April. Counsel shall inform the undersigned’s Senior Attorney, Jason Cohen, of the three dates by April 7, 2023.²⁴ The parties should also discuss discovery planning and a proposed protective order.

SO ORDERED.

Issued: March 21, 2023



Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication

²⁴ Mr. Cohen can be reached at jcohen@fdic.gov.

CERTIFICATE OF SERVICE

On March 21, 2023, I served a copy of the foregoing **Order** upon the following individuals via email:

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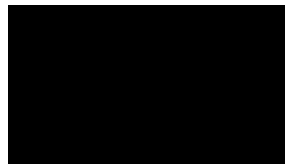
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