No. 26-____

IN THE

Supreme Court of the United States

FRANK WILLIAM BONAN, II, individually and as an institution-affiliated party of GRAND RIVERS COMMUNITY BANK, GRAND CHAIN, ILLINOIS (INSURED STATE NONMEMBER BANK),

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents questions under the Seventh Amendment and Article III that the court below described as "close and challenging" and that, it predicted, "[i]n time the Justices are sure to consider." Pet.App. 18a, 21a.

Following administrative proceedings conducted before an Administrative Law Judge, the Board of Directors of the Federal Deposit Insurance Corporation ("FDIC") found that Petitioner had breached fiduciary duties owed to a state-chartered, FDIC-insured bank. On that basis, it barred Petitioner from working at federally insured banks and imposed a $105,000 civil penalty.

The Seventh Circuit upheld both sanctions, concluding that while the claims before the FDIC "implicated the Seventh Amendment," Pet.App. 8a, Congress could entrust them to an administrative agency—and thereby avoid a jury trial—under the so-called "public rights exception" to Article III. In doing so, the court acknowledged that by the time Congress authorized the FDIC to bring breach-of-fiduciary-duty claims in administrative proceedings in 1966, such claims had acquired "common law soil." Pet.App. 17a. But it regarded that development as not "legally significant" and, characterizing fiduciary-duty claims as equitable at the Founding, held that they involved public rights. Pet.App. 18a.

The questions presented are:

1. Whether a statutory claim that seeks classic legal relief, thus implicating the Seventh Amendment jury-trial right, and effectively codifies a recognized common-law claim may be assigned to an administrative agency for resolution without a jury if, as the court below concluded, the common-law claim had not been explicitly recognized at the Founding.

2. Whether the "public rights exception" permits Congress to assign statutory claims seeking classic legal relief, thus implicating the Seventh Amendment jury-trial right, to an administrative agency for resolution without a jury if similar claims were considered by courts in equity in 1789.

PARTIES TO THE PROCEEDING

Petitioner, Frank William Bonan, II, was the petitioner in the court of appeals.

Respondent, Federal Deposit Insurance Corporation, was the respondent in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual. Therefore, no disclosure is required under this Court's Rule 29.6.

RELATED PROCEEDINGS

This case arises from the following proceeding:

Bonan v. FDIC, No. 24-3296 (7th Cir.) (opinion issued Aug. 12, 2026).

There are no additional proceedings in any court that are directly related to this case within the meaning of this Court's Rule 14(b)(iii).

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FRANK WILLIAM BONAN, II, individually and as an institution-affiliated party of GRAND RIVERS COMMUNITY BANK, GRAND CHAIN, ILLINOIS (INSURED STATE NONMEMBER BANK),

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet.App. 1a-34a) is reported at 187 F.4th 841 (7th Cir. 2026). The opinion and order of the Federal Deposit Insurance Corporation (Pet.App. 35a-139a) is unreported. The initial decision of the administrative law judge (Pet.App. 140a-347a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitution and statutory provisions are included at Pet.App. 348a-408a.

INTRODUCTION

The Board of Directors of the Federal Deposit Insurance Corporation ("FDIC") found Petitioner liable for breach of fiduciary duty and, as a result, imposed a $105,000 civil penalty and lifetime ban on working at any FDIC-insured institution. Petitioner sought review in the Seventh Circuit, which acknowledged that, "when it comes to first principles," the "fiduciary duties" at issue in this case appear to involve "private rights" requiring adjudication before an Article III court where the Seventh Amendment would apply. Pet.App. 18a-21a. Nevertheless, in what it described as a "close and challenging call," Pet.App. 18a, the Seventh Circuit held that this Court's decisions in *SEC v. Jarkesy*, 603 U.S. 109 (2024), and *Atlas Roofing Co., Inc. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442 (1977), required it to affirm the FDIC Board's jury-less procedures. "In time," it observed, "the Justices are sure to consider this question," but "[u]ntil they do," the court believed that it was compelled to reject Petitioner's challenge. Pet.App. 21a. This Court should accept the Seventh Circuit's invitation.

The decision below rests on two errors. First, it confined the historical inquiry to the Founding.

Jarkesy held that a claim resembling a common-law action presumptively involves private rights. 603 U.S. at 128. The court below acknowledged that *Jarkesy* did not say that only the common-law claims that had been explicitly recognized by 1789 count. Pet.App. 13a. It also recognized that by 1966, when Congress made breach of fiduciary duty a basis for sanctions, the claim "had twentieth century common law soil," but it deemed that history not "legally significant" and looked only to the Founding. Pet.App. 17a-18a. Second, it applied Article III through a Seventh Amendment lens. The line between law and equity determines whether a jury is required once a case is in an Article III court. It does not determine whether the case belongs there, because the judicial power extends to "all Cases, in Law and Equity." U.S. Const. art. III, § 2. The court below saw no reason, as a matter of first principles, why fiduciary duties could not be private rights "in Article III terms," Pet.App. 19a, yet it adhered to *Atlas Roofing* because this Court has not resolved the question "for the purposes of Seventh Amendment analysis," Pet.App. 21a. And whether the benchmark is the Founding, when the court below found breach of fiduciary duty equitable, or 1966, when it acknowledged common-law enforcement, fiduciary duties have been enforced by courts, not by the political branches. Cf. *Jarkesy*, 603 U.S. at 128.

The courts of appeals are divided over the governing test. The Third and Fourth Circuits treat a statutory claim as public unless the challenger shows it resembles a common-law claim. *Axalta Coating Sys. LLC v. FAA*, 144 F.4th 467, 473-75 (3d Cir. 2025); *Sligo Creek Ctr. v. HHS*, 177 F.4th 556, 559-60 (4th Cir. 2026), petition for cert. filed, No. 26-473. The decision below adopted that approach and narrowed it further, holding that only Founding-era common law counts.

Pet.App. 9a, 12a-13a, 17a. In contrast, the Fifth Circuit's recent decisions place the burden on the Government to show historical exclusivity, *Texas Tobacco Barn, L.L.C. v. HHS*, 180 F.4th 229, 236 (5th Cir. 2026) (quoting *Jarkesy*, 603 U.S. at 128), and recognize that claims "in equity" involve private rights, *Intuit, Inc. v. FTC*, 170 F.4th 411, 418 (5th Cir. 2026).

The questions are pressing. Six weeks before the decision below, this Court held in *Trump v. Slaughter* that agencies adjudicating claims in-house exercise executive power answerable to the President. 609 U.S. 422, 454 (2026). Under § 1818, a court may set aside the FDIC Board's findings only if unsupported by substantial evidence. 12 U.S.C. § 1818(h)(2). In schemes like this one, misclassifying a private right means that the Executive, not a court, finally decides the private right.

This case presents the questions narrowly and cleanly. Both questions are purely legal, and the court below addressed each at length. Pet.App. 12a-21a. Either answer would decide the case. The FDIC conceded that the civil penalty implicates the Seventh Amendment and did not dispute that the prohibition order does, Pet.App. 8a, and the court upheld both sanctions on the fiduciary-duty charge alone, Pet.App. 28a-33a. The petition should be granted. Alternatively, it should be held pending *Sun Valley Orchards*, No. 25-966, being argued on November 10, 2026.

STATEMENT OF THE CASE

A. Legal Background

The FDIC is a federal agency headed by a five-member Board of Directors. 12 U.S.C. § 1812(a). It insures deposits at the nation's banks, examines insured state banks that are not members of the

Federal Reserve System for safety and soundness, and enforces federal banking laws against them. *Id*. §§ 1811(a), 1817, 1818. Against an insured institution, the FDIC may issue cease-and-desist orders, assess civil money penalties, and terminate deposit insurance. *Id*. § 1818(a)-(d), (i).

The FDIC's authority also reaches individuals. Any "institution-affiliated party"—a term that includes directors, officers, employees, and certain agents of an insured bank, *id*. § 1813(u)—may be subjected to the same enforcement process and similar sanctions. The FDIC may assess civil money penalties, which escalate by tier. *Id*. § 1818(i)(2). And it may issue a prohibition order barring the individual from participating in the affairs of *any* federally insured depository institution. *Id*. § 1818(e), (e)(7).

The FDIC investigates the alleged misconduct, decides whether to bring charges, prosecutes them, and decides them. An enforcement action begins with FDIC enforcement counsel serving a notice of charges. 12 C.F.R. part 308.[1] The case is then heard by an administrative law judge, who conducts a trial-like hearing without a jury and recommends findings of fact and conclusions of law. 12 U.S.C. § 1818(e)(4), (h)(1); 12 C.F.R. §§ 308.5, 308.38. The final decision belongs to the FDIC Board. 12 C.F.R. § 308.40.

A respondent may petition a court of appeals for review. 12 U.S.C. § 1818(h)(2). That court does not try the case anew. It must accept the Board's findings if they are supported by substantial evidence and may

[1] The procedures applicable to proceedings initiated on or after April 1, 2024, are found at 12 C.F.R. part 308. Proceedings initiated before April 1, 2024, like the proceedings against Petitioner, are governed by 12 C.F.R. part 308, Appendix A.

set aside its legal conclusions only if they are arbitrary, capricious, or otherwise contrary to law. *Id.*; 5 U.S.C. § 706; Pet.App. 28a. Filing a petition for review does not stay the Board's order, 12 U.S.C. § 1818(h)(3), and the FDIC may collect an unpaid final penalty through offset, wage garnishment, or litigation in district court without that court reviewing the penalty's validity, 12 U.S.C. § 1818(i)(2)(I); 12 C.F.R. § 313.184; 31 C.F.R. part 285.

B. Factual Background

Petitioner Frank William Bonan II served as chairman of the board of Grand Rivers Community Bank, an Illinois-chartered, FDIC-insured state nonmember bank, and sat on its loan committee. Pet.App. 2a. He also held positions at Peoples National Bank ("PNB"), where he served as president for PNB's southern region and on the institution's Board of Directors and Executive Loan Committee. Pet.App. 2a.

In 2015, Evergreen Drilling, a borrower of Grand Rivers and PNB, faced financial difficulties following a downturn in the oil-drilling industry, prompting concern that it would not be able to service its debt. Pet.App. 2a-3a. Petitioner managed the Evergreen loan relationship for both banks. Pet.App. 2a-3a. Two Evergreen-related matters gave rise to this case.

The warehouse loan. Petitioner proposed that Evergreen sell its headquarters building and lease it back, using the proceeds to pay down its loans. Pet.App. 3a. Two individuals who worked for Petitioner formed 618 Holdings, LLC, to purchase the property with a $1.26 million loan from Grand Rivers. Pet.App. 3a-4a. The loan committee approved the loan three votes to none, with two abstentions, including Petitioner's. Pet.App. 4a. The proceeds paid off the

existing mortgages, and $150,000 was placed in escrow to cover Evergreen's first eighteen months of lease payments. Pet.App. 4a. In January 2016, while Evergreen's lease payments were still being paid from the escrow account, FDIC examiners classified the loan as substandard, and that April Grand Rivers placed it on non-accrual status. Pet.App. 5a. Grand Rivers later charged off $500,000, and 618 Holdings conveyed the property to the bank by deed in lieu of foreclosure. Pet.App. 5a.

The Rig 23 release. In November 2015, Grand Rivers officers mistakenly released the bank's security interest in an Evergreen drilling rig while processing the sale of a different rig. Pet.App. 5a-6a. Grand Rivers later charged off $489,268 on the related loan. Pet.App. 6a.

C. Agency Proceedings

In May 2021, the FDIC issued a notice of charges alleging that Petitioner engaged in unsafe or unsound practices and breached his fiduciary duties to Grand Rivers. Pet.App. 6a. It sought a prohibition order under 12 U.S.C. § 1818(e) and a civil money penalty under § 1818(i). Pet.App. 6a. Petitioner objected that the FDIC's in-house adjudication violated his right to a jury trial in an Article III court. Pet.App. 112a-13a.

An FDIC administrative law judge held a six-day hearing in January 2023 and recommended both sanctions. Pet.App. 6a. In December 2024, the FDIC Board issued its final decision. Pet.App. 6a-7a. It found that Petitioner's role in the warehouse loan warranted a prohibition order[2] and a $105,000 penalty and that

[2] On January 10, 2025, the Seventh Circuit stayed enforcement of the FDIC's prohibition order pending resolution of the petition

his role in the Rig 23 release also supported the penalty. Pet.App. 65a, 101a-02a.

The Board rejected Petitioner's Seventh Amendment claim. Pet.App. 112a-30a. It reasoned that fiduciary-duty actions, "to the extent they existed in 1791, were brought against trustees, not corporate officers, and even those actions were solely equitable," because "the English High Court of Chancery had exclusive jurisdiction over trusts." Pet.App. 117a (quoting *Evans v. Pearson Enters.*, 434 F.3d 839, 849 (6th Cir. 2006)). Alternatively, the Board held that the public-rights exception covers both sanctions, relying on the history of bank regulation, the Deposit Insurance Fund, and the absence of any provision in § 1818 that permits the FDIC to bring enforcement actions in federal court. Pet.App. 124a-30a.

D. The Decision Below

Petitioner sought review in the Seventh Circuit under 12 U.S.C. § 1818(h)(2). He argued that the in-house adjudication violated the Seventh Amendment, that the Board and its ALJs were unconstitutionally insulated from removal, that the proceeding denied due process, and that the sanctions were unsupported. Pet.App. 7a, 21a, 25a-26a, 28a.

Seventh Amendment. The court of appeals analyzed Petitioner's Seventh Amendment claim under the *Jarkesy* two-step framework, which asks whether the administrative action "implicates the Seventh Amendment," and, if so, "whether the 'public rights' exception

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for review. Order, *Bonan v. FDIC*, No. 24-3296 (7th Cir. Jan. 10, 2025). On September 3, 2026, the court extended that stay and also stayed its mandate pending disposition of this petition. Order, *Bonan v. FDIC*, No. 24-3296 (7th Cir. Sept. 3, 2026).

to Article III jurisdiction applies." Pet.App. 7a (quoting *Jarkesy*, 603 U.S. at 120). Under that framework, the court held that the first step was satisfied: the FDIC acknowledged that its civil penalty is "the prototypical common law remedy" and did not dispute that the prohibition order is legal in nature. Pet.App. 7a-8a. At step two, the court framed the question as whether the FDIC's claims were "akin to suits at common law at the Founding and governed by *Jarkesy*, or ... unknown to the common law and governed by *Atlas Roofing*." Pet.App. 13a. It held that the unsafe-or-unsound standard "brings no common law soil with it." Pet.App. 13a-15a. It held that breach of fiduciary duty, "a heartland equitable concept" enforced at the Founding by "courts of equity—not common law courts," likewise was not "a common law suit in all but name." Pet.App. 16a. The court acknowledged that, by 1966, fiduciary-duty claims against bank directors had "twentieth century common law soil" but treated that history as irrelevant under a Founding-era benchmark. Pet.App. 17a. It did not consider negligence as a Founding-era common-law analogue to the breach of duty the FDIC Board found here. The court therefore held that the claims involve public rights under *Atlas Roofing*. Pet.App. 18a.

The court then explained why it found Petitioner's Seventh Amendment claim "a close and challenging call." Pet.App. 18a. Because public rights are an exception "to Article III jurisdiction," and Article III extends to "all Cases, in Law and Equity," the court saw no reason, "when it comes to first principles," why "the equitable lineage of fiduciary duties cannot render them private rights in Article III terms." Pet.App. 18a-19a. It found "plenty to support" that conclusion in this Court's decisions. Pet.App. 19a-20a. But because *Jarkesy* had not "pare[d] back *Atlas*

Roofing's application" to claims resembling traditional actions in equity, the court "adhere[d] to *Atlas Roofing*." Pet.App. 20a-21a.[3]

REASONS FOR GRANTING THE PETITION

The court of appeals upheld an industry bar and $105,000 penalty, both imposed by the FDIC Board without a jury, solely on the ground that Petitioner breached a fiduciary duty he owed to a state-chartered bank. Pet.App. 1a-2a, 28a-33a. The court called Petitioner's Seventh Amendment claim "a close and challenging call," found "plenty to support the conclusion that private rights encompass traditional actions at equity, including the breach of fiduciary duty claims" at issue, and recognized that the question is one for this Court. Pet.App. 18a-21a. Review is warranted for three reasons. First, the questions presented are unsettled. The court below flagged the equity question for this Court, and the courts of appeals apply conflicting tests to decide whether a statutory claim involves private rights. Second, the decision below conflicts with this Court's public-rights precedents. It improperly confined the historical inquiry to the Founding, and it read Article III's public-rights exception through a Seventh Amendment lens, treating the line between law and equity, which governs the jury right, as though it also determined which claims Congress may withdraw from the courts. Third, the questions are important, especially after *Trump v. Slaughter*, and this case presents them

[3] Reviewing for substantial evidence, Pet.App. 28a, the court upheld both sanctions solely on the fiduciary-duty charge. It declined to decide whether the record supported the unsafe-or-unsound finding, noting that Petitioner "may have a point" that the FDIC applied the wrong standard, Pet.App. 29a-30a, and it did not reach the Rig 23 basis for the penalty, Pet.App. 33a.

cleanly and at the right time. The Court should accordingly grant the petition. Alternatively, the Court should hold the petition pending a decision in *Sun Valley Orchards*.

I. The courts of appeals are divided over the governing public-rights test, and the decision below exposes a related question this Court has not resolved.

1. The circuits apply conflicting tests. In the Third, Fourth, and Seventh Circuits, a statutory claim is in effect presumed public. *Axalta*, 144 F.4th at 475 (a statutory claim involves public rights unless it "more closely resembles the essentially common law action in *Granfinanciera*" than "the action in *Atlas Roofing*"); *Sligo Creek*, 177 F.4th at 560; Pet.App. 13a. The challenger must "show that a statutory cause of action affirmatively resembles a historical action at common law," or "into the public-rights bucket it goes." *Axalta*, 144 F.4th at 484 (Bibas, J., concurring). The Seventh Circuit made that test narrower still: it measured common-law ancestry only at the Founding, and it declined to treat a claim it characterized as equitable as involving private rights because this Court "has not made clear" that such claims do so "for the purposes of Seventh Amendment analysis." Pet.App. 12a-13a, 16a-17a, 19a-21a.

The Fifth Circuit's recent decisions start from the opposite presumption. There, the public-rights exception applies "only to matters that 'historically could have been determined exclusively by [the executive and legislative] branches.'" *Texas Tobacco,* 180 F.4th at 236 (quoting *Jarkesy*, 603 U.S. at 128). The Government's failure to demonstrate the matter's historical exclusivity "is fatal." *Id*. at 237. Moreover, claims "that are naturally 'the subject of a suit at the common law, or

in equity,' implicate private rights." *Intuit*, 170 F.4th at 415 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989)).[4]

The choice of test decides this case. Under the Seventh Circuit's approach, the fiduciary-duty charge involved public rights because, as the court characterized it, the charge lacked a Founding-era common-law analogue. Pet.App. 13a, 17a. Under *Texas Tobacco*, the burden would have been on the FDIC to show that such a claim "historically could have been determined exclusively by" the political branches. *Texas Tobacco*, 180 F.4th at 236. The FDIC could not have made that showing: the court below acknowledged that obligations of trust were enforced by "courts of equity," Pet.App. 16a, and later by courts of law as well, Pet.App. 17a, not by executive officers.

2. Whether actions rooted in equity involve private rights now turns on which constitutional provision a litigant relies. The Fifth Circuit, resolving an Article III challenge, held that claims that are "the subject of a suit at the common law, *or in equity*" involve private rights. *Intuit*, 170 F.4th at 415 (emphasis added). It observed that because Article III "expressly confers exclusive jurisdiction on federal courts over cases that sound in law and equity," any distinction between law and equity "would only become relevant" if a litigant "claimed a right to a jury trial under the Seventh Amendment." *Id.* at 417 n.5. This case presents that scenario. As a

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[4] *Ortega v. OCC*, decided before *Texas Tobacco* and *Intuit*, upheld § 1818 sanctions for the same two charges at issue here by looking not to the claim but to the regulatory history of national banks. 155 F.4th 394, 404-09 (5th Cir. 2025). A petition for rehearing *en banc* is pending in *Ortega*. In any event, this case involves a state-chartered bank and accordingly would not be controlled by the reasoning in the *Ortega* panel's decision.

matter of "first principles," the court below acknowledged that fiduciary duty's equitable lineage may make it a "private right[] in Article III terms," and it found "plenty to support the conclusion that private rights encompass traditional actions at equity, including the breach of fiduciary duty claims" at issue. Pet.App. 19a-20a. But because Petitioner asserted the Seventh Amendment jury-trial right, and because this Court "has not made clear" that statutory claims resembling traditional actions in equity "involve private rights for the purposes of Seventh Amendment analysis," the court below adhered to *Atlas Roofing*. Pet.App. 21a. *Jarkesy*, however, framed its second step as asking whether "the 'public rights' exception to Article III jurisdiction applies." 603 U.S. at 120. Whether that exception carries one meaning or two is a question only this Court can resolve. See *infra* Part II.2. Until it does, whether a claim involves private rights will depend on which constitutional provision is at issue, leaving non-Article III tribunals to decide claims that may involve private rights reserved to Article III courts.

3. The decision below also turned on an unresolved benchmark question. *Jarkesy* asks whether a statutory claim is "in the nature of an action at common law," but as the Seventh Circuit acknowledged, it "did not expressly tell us" how to treat claims whose common-law analogues were first recognized after 1789. Pet.App. 13a. Based on guidance it gleaned from *Jarkesy*, the Seventh Circuit adopted a Founding-era cutoff. Pet.App. 13a. That choice was dispositive. By 1966, when Congress made fiduciary breach a basis for sanctioning bank directors, the court acknowledged that an action for breach of fiduciary duty in the banking context had "twentieth century common law soil." Pet.App. 17a. The court disregarded that history

only because it was "not the kind of common law development" it understood "to be legally significant." Pet.App. 17a. Had the court measured the statutory claim at the time Congress created it, *Jarkesy* would have controlled. The benchmark question thus provides an independent path to reversal, and it will recur whenever Congress fashions a statutory claim by drawing on a common-law claim recognized after the Founding.

4. Only this Court can resolve these questions. The court below explained that its role was to "follow the Supreme Court's precedent, not guess its future direction," and predicted that "[i]n time the Justices are sure to consider this question." Pet.App. 21a. Other courts of appeals agree that the doctrine needs this Court's attention. *Axalta*, 144 F.4th at 482 (Bibas, J., concurring) ("[A]fter *Jarkesy*, the case law is also at war with itself."); *id.* at 485 (urging this Court to "order [the] accreted jumble ... into a rule that is coherent"). That confusion "should be … settled by this Court" here. Sup. Ct. R. 10(c).

II. The decision below misapplies this Court's public-rights precedents.

The Seventh Circuit made two errors, either of which requires reversal. It measured the FDIC's fiduciary-duty charge against the common law of 1789 alone, disregarding the history showing that courts, not the political branches, have enforced the fiduciary duties of bank directors. And it read the Article III inquiry through a Seventh Amendment lens, treating the absence of common-law pedigree as dispositive even though Article III extends the judicial power to "all Cases, in Law and Equity." The FDIC's regulatory rationales do not fill the analytical gap.

1. The Seventh Circuit wrongly confined the historical inquiry to the Founding. *Jarkesy* asks whether a statutory claim is "in the nature of an action at common law." 603 U.S. at 128. The Seventh Circuit acknowledged that *Jarkesy* "did not expressly tell us" how that test applies to a claim whose common-law analogue developed after 1789. Pet.App. 13a. So it adopted a Founding-era cutoff, Pet.App. 13a, and that choice decided the case. The Seventh Circuit acknowledged that toward the end of the nineteenth century, courts began enforcing bank directors' fiduciary duties "not solely as creatures of equity." Pet.App. 17a. This Court itself described *Briggs v. Spaulding*, 141 U.S. 132 (1891), as offering "the rule for determining the common-law liability" of national bank directors. Pet.App. 17a (quoting *Bowerman v. Hamner*, 250 U.S. 504, 511 (1919)). By 1966, when Congress made fiduciary breach a basis for sanctioning bank directors, the claim "had twentieth century common law soil." Pet.App. 17a. Yet the Seventh Circuit set all of that aside as not "legally significant." Pet.App. 17a.

Nothing in *Jarkesy* required that result. *Jarkesy*'s reference to "the traditional actions at common law tried by the courts at Westminster in 1789" describes "[a] hallmark" of private rights, 603 U.S. at 127-28, not the exclusive test.[5] And the inquiry on the other side of the line looks to the whole of history, not a single year: public rights are matters that "historically could have been determined exclusively by [the executive and legislative] branches." *Id.* at 128 (quoting *Stern v.*

[5] The Court "has not 'definitively explained' the distinction between public and private rights," and it did "not claim to do so" in *Jarkesy*. 603 U.S. at 131 (quoting *Oil States Energy Servs., LLC v. Greene's Energy Group, LLC*, 584 U.S. 325, 334 (2018)).

Marshall, 564 U.S. 462, 493 (2011)). The recognized categories, which include revenue collection, customs, immigration, relations with Indian tribes, public lands, and public benefits, share "a serious and unbroken historical pedigree" of non-judicial determination. *Id.* at 128-30; *id.* at 153 (Gorsuch, J., concurring). Because the court treated the absence of Founding-era common-law ancestry as dispositive, it never asked whether enforcement of a bank director's fiduciary duties is a matter the political branches historically could have determined on their own.[6]

Had it asked, the answer would have been clear. By the court's own account, fiduciary duties were enforced at the Founding by "courts of equity," Pet.App. 16a (citing *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 567 (1990); *CIGNA Corp. v. Amara*, 563 U.S. 421, 439 (2011)), and by the time the duty reached bank directors, in courts of law, Pet.App. 17a. Whether the benchmark is 1789 or 1966, the result is the same. A claim that historically only a court could decide is the opposite of one that the political branches could have determined exclusively.[7]

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[6] *Jarkesy* did not need to reach the historical-exclusivity inquiry: once the SEC's claims proved "a common law suit in all but name," private-rights status followed. 603 U.S. at 134.

[7] Even on the court's own Founding-era benchmark, it looked to the wrong analogue. It asked whether fiduciary duties extended to bank directors at the Founding. Pet.App. 16a-17a. But the court sustained the sanctions on a duty of care alone: to act "with the care an ordinarily prudent person in a like position would exercise under similar circumstances." Pet.App. 30a-31a. The FDIC Board determined that Petitioner's facilitation of a loan to borrowers that he "knew or should have known would be unable to repay" breached the duty of care. Pet.App. 70a. That is the standard of negligence, an action long tried at law. See *Ross v. Bernhard*, 396 U.S. 531, 542 (1970) (an action brought by the

2. The Seventh Circuit read Article III through a Seventh Amendment lens. The court's second error compounded the first. Resemblance to a suit at common law is "[a] hallmark" of private rights, *Jarkesy*, 603 U.S. at 127-28, and a claim with that resemblance "presumptively concerns private rights," *id*. at 128. But a hallmark is not a definition. Nonetheless, the Seventh Circuit treated what this Court identified as sufficient for private-rights status as necessary. It framed the inquiry as a binary choice: claims are either "akin to suits at common law at the Founding and governed by *Jarkesy*," or "unknown to the common law and governed by *Atlas Roofing*." Pet.App. 13a. Having found no Founding-era common-law analogue, it concluded that the FDIC's enforcement action "involves public rights under the reasoning of *Atlas Roofing*." Pet.App. 18a. That binary choice leaves no room for the rest of Article III. From the beginning, this Court has explained that Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or *in equity*, or admiralty." *Murray's Lessee v. Hoboken Land & Improvement Co.*,

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corporation to recover damages on the ground of negligence would be cognizable in a suit at common law); *New Jersey Steam Nav. Co. v. Merch.'s Bank of Bos.*, 47 U.S. 344, 428 (1848) (Woodbury, J., concurring) (noting that recovery for negligence was common in the courts of law); see *DePinto v. Provident Sec. Life Ins. Co.*, 323 F.2d 826, 837 (9th Cir. 1963) ("[W]e hold that where a claim of breach of fiduciary duty is predicated upon underlying conduct, such as negligence, which is actionable in a direct suit at common law, the issue of whether there has been such a breach is, subject to appropriate instructions, a jury question."); see also *AT&T, Inc. v. FCC,* 149 F.4th 491, 502 (5th Cir. 2025) (found public-rights exception did not apply where statutory claim was "closely analogous to a common law negligence action"), rev'd on other grounds, 608 U.S. 531 (2026).

18 How. 272, 284 (1856) (emphasis added); see *Jarkesy*, 603 U.S. at 132; *Granfinanciera*, 492 U.S. at 56. A test that treats every claim lacking a common-law analogue as public would let the exception "swallow the rule." *Jarkesy*, 603 U.S. at 131.

The court borrowed a Seventh Amendment distinction to answer an Article III question. *Jarkesy*'s second step asks whether "the 'public-rights' exception to Article III jurisdiction" applies. Pet.App. 7a (quoting *Jarkesy*, 603 U.S. at 120). That is a question about the scope of the judicial power, which extends to "all Cases, in Law and Equity." U.S. Const. art. III, § 2. And this Court's precedents tie the Seventh Amendment question to the Article III one. If Congress may assign a statutory claim to a non-Article III tribunal, "the Seventh Amendment poses no independent bar." *Granfinanciera*, 492 U.S. at 53-54. But if the claim falls outside the public-rights exception, "Congress may not avoid a jury trial by preventing the case from being heard before an Article III tribunal," and the court must decide it "with a jury if the Seventh Amendment applies." *Jarkesy*, 603 U.S. at 127; see *Granfinanciera*, 492 U.S. at 55. The line between law and equity thus determines whether a jury is required once a case is in an Article III court. It does not determine whether the case belongs there. The Seventh Circuit nonetheless upheld the FDIC's in-house adjudication because this Court "has not made clear that statutory causes of action resembling traditional equitable actions involve private rights *for the purposes of Seventh Amendment analysis*." Pet.App. 21a (emphasis added). That qualification has no footing in *Jarkesy* or in Article III. Indeed, the court itself acknowledged that, "when it comes to first principles," fiduciary duty's equitable lineage suggests it may be a "private right[] in Article III terms." Pet.App. 19a.

Properly analyzed, each step does its own work. At step one, the remedy controls. The FDIC imposed a civil penalty, a remedy that "could only be enforced in courts of law," *Tull v. United States*, 481 U.S. 412, 422 (1987), and acknowledged that it is "the prototypical common law remedy," Pet.App. 8a (quoting *Jarkesy*, 603 U.S. at 123). Nor did the FDIC dispute that the prohibition order is legal in nature. Pet.App. 8a. At step two, the claim falls within Article III's "Cases, in Law and Equity," whether measured, as the court below measured it, by equity at the Founding, or by the common-law enforcement that the court acknowledged by 1966. Pet.App. 16a-18a. The claim therefore belongs in an Article III court, and because the remedy is legal, the Seventh Amendment requires a jury once it is there.[8]

The Seventh Circuit recognized the conflict and resolved it by "adher[ing] to *Atlas Roofing*" until the Court "consider[s] this question." Pet.App. 20a-21a.

3. The regulatory setting cannot supply what history does not. The FDIC's charge enforced Petitioner's "duty of care to Grand Rivers," Pet.App. 30a-31a, a state-chartered bank, Pet.App. 1a. That duty is one every corporate director owes the corporation, Pet.App. 30a-31a, and does not depend on Grand Rivers's participation in deposit insurance or any

[8] Treating the historical forum of the underlying duty as decisive at step two would let Congress do what *Granfinanciera* forbids: attach a claim for civil penalties against an individual to a duty that, as the court below found, was enforced in equity at the Founding and route it to an agency. Cf. *Granfinanciera*, 492 U.S. at 61 ("Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.").

other federal program. It neither "belongs to nor exists against the Federal Government." *Granfinanciera*, 492 U.S. at 54-55. Nor does Congress's choice of an exclusive agency forum make the claim "closely intertwined" with a regulatory program. Claims that "can be brought in standalone suits" are not intertwined. *Jarkesy*, 603 U.S. at 133-34 (quoting *Granfinanciera*, 492 U.S. at 56). A claim that one director breached his duty to one bank is a standalone claim. "Congress cannot 'conjure away the Seventh Amendment by mandating that traditional legal claims be ... taken to an administrative tribunal.'" *Id.* at 135 (quoting *Granfinanciera*, 492 U.S. at 52).

III. *Trump v. Slaughter* makes the questions presented important, and this case is an ideal vehicle for resolving them.

1. After *Slaughter*, the private-rights line is the only thing separating executive adjudication from the judicial power. Six weeks before the Seventh Circuit issued the decision below, this Court held in *Trump v. Slaughter* that when an agency enforces a statute against private parties, including through in-house adjudication, it exercises executive power and must answer to the President. 609 U.S. at 454. *Humphrey's Executor v. United States* had treated agency adjudication as "quasi-judicial." 295 U.S. 602, 624, 628 (1935). *Slaughter* overruled it, explaining that only "blind feats of definition" could make executive functions "quasi-judicial." 609 U.S. at 446-50. In this Court's words: "When an agency 'executes' a congressional mandate against private parties, it exercises executive power—no ifs, ands, or quasis about it." *Id*. at 451.

Slaughter settles what kind of power an agency exercises when it adjudicates: executive power. It

does not settle which matters the Executive may adjudicate. That depends on the scope of the judicial power, which Article III defines independently. The judicial power extends to "all Cases, in Law and Equity," U.S. Const. art. III, § 2, and "matters concerning private rights may not be removed from Article III courts," *Jarkesy*, 603 U.S. at 127 (cleaned up). The Executive may adjudicate public rights. But it may "exercise no part of th[e] judicial power." *Id.* at 148 (Gorsuch, J., concurring) (quotations omitted). And as Justice Gorsuch observed, in this era of doctrinal transition, the "Court has some work to do" to "restore … judicial powers to where they belong." *Slaughter*, 609 U.S. at 477, 479 (Gorsuch, J., concurring).

For most of the last century, Congress assigned enforcement to agencies on the premise that their adjudicators would enjoy a measure of independence. *Id.* at 473 (Gorsuch, J., concurring); *id*. at 514 (Sotomayor, J., dissenting) ("Independence was centrally important to Congress in creating these agencies."). For-cause protection never satisfied Article III's guarantee of a "life-tenured, salary-protected Article III judge," *Jarkesy*, 603 U.S. at 117, but it softened the consequences when a private right was misclassified. After *Slaughter*, that tempering is gone: "The ability to judge disputes in-house remains, but now the house is white." *Slaughter*, 609 U.S. at 474 (Gorsuch, J., concurring). Every misclassification now places the final determination of a private-rights matter with the President's subordinates. Where the line falls between public and private rights therefore

matters more than ever, and the courts of appeals cannot agree on how to draw it.[9] See *supra* Part I.1.

2. Judicial review under § 1818 does not fill the gap. Agency involvement is tolerable where a court makes the ultimate determination. In *FCC v. AT&T, Inc.*, this Court upheld an enforcement scheme in which the agency's forfeiture orders did "not definitively resolve the parties' legal obligations"—the agency could not execute on them, nonpayment carried no penalty, and the Government could collect only by proving its case to a jury in a "trial *de novo*," in which "it [was] as if the Commission never found any facts at all." 608 U.S. 531, 536, 540-42 (2026). The Court viewed the agency's order as a "prerequisite[] to suit" that leaves the ultimate determination to a court and jury. *Id*. at 543, 545. In *Jarkesy*, by contrast, the SEC's

[9] *Slaughter* also bears on Petitioner's due process claim. Petitioner argued below that adjudication by the FDIC violated his right to an impartial tribunal. Pet.App. 26a-27a. The court of appeals rejected that claim because Petitioner had not shown "a specific foundation of prejudice or prejudgment." Pet.App. 26a (quoting *Schneiter v. Carr*, 148 F.4th 438, 450 (7th Cir. 2025)). That is not the test. Due process asks objectively whether the adjudicator faces a "possible temptation" to favor one side, *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), not whether actual bias has been proven, *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016). *Slaughter* sharpens that inquiry here. Petitioner argued that the FDIC Board members' fixed statutory terms violated Article II, and the FDIC declined to defend them. Pet.App. 21a-22a. After *Slaughter*, those Board members serve at the pleasure of the same Executive whose agency brought the charges. Petitioner does not seek review of the Seventh Circuit's separate holding that his removal claim fails for want of harm under *Collins v. Yellen*, 594 U.S. 220 (2021). But if the Court vacates the judgment below, the court of appeals should reconsider the impartial-tribunal claim under the correct standard and in light of *Slaughter*.

penalties were "immediately enforceable;" the agency could garnish wages and offset tax refunds; judicial enforcement afforded no jury "as to the underlying legal violation;" and on review, the agency's findings were "conclusive" if supported by the record. *Id.* at 544 (citations omitted). "[T]he ultimate determination of the facts giving rise to the obligation to pay rested not with a jury, but with the SEC alone," a result the Constitution "forbids." *Id*.

This case resembles *Jarkesy*, not *AT&T*. Under § 1818, adjudication is exclusively administrative, 12 U.S.C. § 1818(h)(1), and the Board's orders are binding by their own terms, Pet.App. 139a. Review by the courts of appeals is available, but the agency's findings can be set aside only if unsupported by substantial evidence. Pet.App. 28a. That is a far cry from the statutory scheme in *AT&T*. The FDIC Board acknowledged that "nothing in Section 1818 authorizes the FDIC to seek prohibition orders or civil money penalties in federal court," Pet.App. 129a, and the FDIC disclaimed any similarity between § 1818 and the FCC's statute to the court of appeals, FDIC C.A. Br. 42-43. Under § 1818, as in *Jarkesy*, the ultimate determination of the facts rests with the FDIC alone.

3. The questions are recurring, and few cases will present them as cleanly. Congress has delegated "legislative and judicial powers" to agencies that regulate "our financial markets," communications, energy, and "the manner of our employment." *Slaughter*, 609 U.S. at 471-72 (Gorsuch, J., concurring). Section 1818 governs enforcement by federal banking agencies against officers, directors, and other institution-affiliated parties, and it authorizes prohibition orders and civil penalties for a "breach of such party's fiduciary duty" or a breach of "any fiduciary duty."

12 U.S.C. §§ 1818(e)(1)(A)(iii), (i)(2)(B)(i)(III); Pet.App. 13a-14a, 28a. The question has already arisen in proceedings brought by another agency under the same statute. *Ortega*, 155 F.4th at 397, 409. Even so, the question will reach an appellate court only after years of agency proceedings, if at all. "[T]he bulk of agency cases settle." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 216 (2023) (Gorsuch, J., concurring in the judgment). Those who do litigate must first proceed through the agency, because "no court" has "jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order." 12 U.S.C. § 1818(i)(1). They reach an Article III court only on a petition for review of the final order.[10] *Id*. § 1818(h)(2). Here, that took more than three years.[11] Pet.App. 6a-7a. And reviewing courts will "adhere to *Atlas Roofing*" until this Court speaks. Pet.App. 21a.

4. This case is an ideal vehicle. The questions are purely legal and were addressed below. Either is dispositive of the ground on which the Seventh Circuit rested its judgment. The FDIC acknowledged that its civil penalty is "the prototypical common law remedy" and did not dispute that the prohibition order is legal in nature, so *Jarkesy*'s first step is satisfied. Pet.App. 8a. The case therefore turns entirely on step two—

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[10] The "'appellate review model' of agency adjudication" may violate the separation of powers "by placing adjudicatory authority over core private rights—a judicial rather than executive power—within the authority of Article II agencies," and it may run afoul of the Seventh Amendment "by allowing an administrative agency to adjudicate what may be core private rights without a jury." *Axon Enter*., 598 U.S. at 201-02 (Thomas, J., concurring).

[11] Petitioner sought to stay the FDIC's enforcement proceedings, but the district court dismissed for lack of subject matter jurisdiction under 12 U.S.C. § 1818(i)(1). *Bonan v. FDIC*, No. 4:23-cv-8-HEA, 2023 WL 156852 (E.D. Mo. Jan. 11, 2023).

whether the public-rights exception applies. And the Seventh Circuit upheld both sanctions solely on the fiduciary-duty charge. Pet.App. 29a-30a, 33a.

Alternative grounds do not stand in the way. The court declined to decide whether the unsafe-or-unsound finding could stand, observing that "[a]s a pure legal matter, [Petitioner] may have a point" that the charge requires a threat to the bank's financial stability. Pet.App. 29a. The FDIC Board's separate reliance on the Rig 23 release rested on fiduciary duty alone, and the Board's prohibition order was not based on that conduct. Pet.App. 93a-94a, 101a. Whatever role the unsafe-or-unsound charge may play on remand, the judgment below rests entirely on the fiduciary-duty charge, and that charge cannot stand if it involves private rights.

IV. Alternatively, the Court should hold this petition pending its decision in *Sun Valley Orchards*.

Petitioner is not alone in seeking this Court's guidance in the wake of *Jarkesy*. The Court is currently considering *Sun Valley Orchards*, which concerns whether a statutory enforcement action resembling a common-law contract claim falls within the public-rights exception. *Sun Valley Orchards, LLC v. U.S. Dep't of Lab.*, 148 F.4th 121, 128 (3d Cir. 2025), cert. granted in part sub nom. *Dep't of Lab. v. Sun Valley Orchards, LLC*, 146 S. Ct. 2614 (2026). This case presents related but distinct questions: whether a statutory claim that seeks classic legal relief and effectively codifies a recognized common-law claim may be assigned to an administrative agency for resolution without a jury if the common-law claim had not been explicitly recognized at the Founding, or whether the "public rights exception" permits that

same result if similar claims were considered by courts in equity in 1789. A decision in *Sun Valley Orchards* clarifying the public-rights framework would bear directly on the Seventh Circuit's reasoning. But a decision limited to claims with common-law analogues would leave a question presented here unresolved. The Court should therefore grant plenary review. Alternatively, it should hold this petition pending *Sun Valley Orchards* and then dispose of it as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 10, 2026

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 24-3296

FRANK WILLIAM BONAN, II, individually and as an institution-affiliated party of GRAND RIVERS COMMUNITY BANK, GRAND CHAIN, ILLINOIS (INSURED STATE NONMEMBER BANK),

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

Petition for Review of an Order of the
Federal Deposit Insurance Corporation.
Nos. FDIC-16-0254e & FDIC-16-0256k.

ARGUED SEPTEMBER 3, 2025

DECIDED AUGUST 12, 2026

Before SCUDDER, KIRSCH, and PRYOR, *Circuit Judges*.

SCUDDER, *Circuit Judge*. Frank William Bonan II was a banker in Illinois. In 2021, the Federal Deposit Insurance Corporation commenced an administrative enforcement action against him related to misconduct at Grand Rivers Community Bank. During the administrative proceedings, the FDIC's Board of Directors found that Bonan had engaged in unsafe or

unsound banking practices and breached his fiduciary duties to Grand Rivers. It then imposed an order pursuant to 12 U.S.C. § 1818(e) prohibiting Bonan from working at any FDIC-insured institution and assessed a $105,000 civil money penalty pursuant to 12 U.S.C. § 1818(i)(2)(B). In his petition for review, Bonan urges us to reverse the FDIC's decision and vacate its orders, primarily contending that the administrative adjudication violated his jury trial right under the Seventh Amendment. While Bonan's Seventh Amendment claim presents a close question, we ultimately find no violation under the law as it stands today. As for Bonan's other challenges to the FDIC's administrative enforcement action, we see no compelling ground for relief. In the end, then, we deny the petition for review.

I

A

Frank Bonan served as chairman of the Board of Directors of Grand Rivers Community Bank. He also sat on the Bank's loan committee. By all accounts, Bonan managed Grand Rivers with an iron fist, acting as the dominant and uncompromising decisionmaker. Grand Rivers is a federally insured depository institution under the Federal Deposit Insurance Act. Bonan simultaneously held meaningful roles at People's National Bank in McLeansboro, Illinois. Beyond serving as president for PNB's southern region, Bonan had positions on the institution's Board of Directors and Executive Loan Committee.

The key events underlying the FDIC's enforcement action began in 2015. At the heart of it are Evergreen Drilling and Evergreen Properties (and related borrowers), which operated an oil-drilling business

based in Carmi, Illinois. Evergreen had outstanding secured loans with both Grand Rivers and PNB, and Bonan managed the Evergreen loan relationship for both banks. The FDIC's enforcement action focused on Bonan's involvement in two matters arising from Grand Rivers's financial relationship with Evergreen.

1. The 618 Holdings Loan

In 2015, the oil-drilling industry faced a severe downturn. Evergreen, in turn, confronted financial difficulties, prompting concern from Bonan and others at PNB that the company would not be able to service its debt. In September 2015, Bonan prepared a "Plan for Evergreen" that proposed the company sell collateral and refinance its debt to pay down its loans from PNB and Grand Rivers.

One piece of Bonan's plan centered on a local commercial warehouse that served as Evergreen's headquarters. In the fall of 2015, there were two liens on the warehouse, one securing PNB's $358,000 first mortgage and another securing Grand Rivers's $638,000 second mortgage. Bonan contemplated that Evergreen would engage in a sale and leaseback transaction through which the company would sell its warehouse, use the proceeds to pay down its loans, and then continue to use the warehouse under a new lease.

While Bonan originally envisioned that his personal company would purchase the Evergreen warehouse, he ultimately found two other buyers: James Harbison and Adam Tate. In December 2015, Bonan asked them to purchase the warehouse with financing from Grand Rivers. At the time, both Harbison and Tate personally worked for Bonan and lived rent free in housing that Bonan owned. Neither

was financially stable: Harbison had negative net worth of $190,000 and earned $62,000 annually, and Tate's net worth was $20,000 with annual earnings of $27,000.

On or before December 17, 2015, Bonan directed Grand Rivers's Chief Financial Officer to prepare a loan request on behalf of Harbison and Tate. The request stated that the loan was to purchase the warehouse from Evergreen for $1.25 million and came in the name of 618 Holdings, LLC—an entity not legally formed until December 30, 2015.

On December 23, the Grand Rivers Board of Directors voted to approve the $1.25 million loan to 618 Holdings, an entity that still did not exist. The votes were three in favor, none opposed, and two abstaining. Bonan initially voted in favor but ultimately abstained. Grand Rivers's Chief Financial Officer, who voted in favor of the loan, later testified that he did so at Bonan's direction, fearing he would lose his job if he voted no and crossed Bonan.

Several aspects of the resulting transaction bear emphasis. The final loan from Grand Rivers to 618 Holdings was for $1,262,109.75 and required a monthly payment of $7,752.94 (totaling $93,035.28 per year). The amount due annually exceeded the combined incomes of Harbison and Tate ($89,000). Additionally, 618 Holdings used this loan to purchase the warehouse, which it then leased back to Evergreen. The loan proceeds paid off the debts secured by PNB's and Grand Rivers's liens on the warehouse. The deal also placed $150,000 of the remaining proceeds into an escrow account to be automatically applied for the first 18 months of Evergreen's lease payments to 618 Holdings.

What all of this means is that Grand Rivers's loan funded both the purchase of the warehouse and Evergreen's initial ability to make lease payments, which, in turn, supplied 618 Holdings with money to repay the loan. Grand Rivers's Chief Financial Officer testified that he structured the transaction this way at Bonan's instruction. Overall, the terms of purchase and the lease agreement were nearly identical to those that Bonan had negotiated when contemplating the purchase himself.

In January 2016, two FDIC examiners reviewed the 618 Holdings loan. They classified it as substandard "due to the lack of financial capacity of the debtors, the inappropriate structuring of the 618 Holdings credit in which an indirect [principal and interest] reserve account was established to make loan payments, the lack of collateral protection, and the questionable ability of Evergreen Properties to generate sufficient income to pay lease payments."

In April 2016, Grand Rivers placed the 618 Holdings loan on non-accrual status. In January 2017, Grand Rivers charged off $500,000 from the loan, effectively deeming that amount uncollectible. 618 Holdings then defaulted on the loan, entering into a deed-in-lieu of foreclosure with Grand Rivers. At the time of the FDIC's administrative proceedings, Grand Rivers still held title to the Evergreen warehouse.

2. The Release of the Rig 23 Collateral

The second event involves a series of errors related to another piece of Evergreen's collateral securing a separate loan from Grand Rivers. In November 2015, officers at Grand Rivers mistakenly released the

Bank's purchase money security interest in Rig 23, an oil-drilling rig that Evergreen owned.

The mistake occurred in conjunction with Evergreen's sale of Rig 24, a less valuable oil drilling rig in which Grand Rivers never had a security interest. When Grand Rivers discovered the erroneous release in early 2016, it took a lower priority blanket lien in Evergreen's assets, now subordinate to PNB's interest. In January 2017, Grand Rivers charged off $489,268 from its Evergreen loan originally secured by Rig 23.

B

In May 2021, the FDIC initiated an administrative enforcement action against Bonan. Based on his role in the 618 Holdings loan and the release of Rig 23, the agency alleged that Bonan had engaged in unsafe or unsound banking practices and breached his fiduciary duties to Grand Rivers. The Notice of Charges sought an order prohibiting Bonan from working at federally insured banks (12 U.S.C. § 1818(e)) as well as a civil money penalty (12 U.S.C. § 1818(i)).

In January 2023, an FDIC administrative law judge conducted a six-day hearing, at which Bonan testified and cross-examined other witnesses. In November 2023, the ALJ issued a recommended decision, concluding that Bonan engaged in professional misconduct that merited both sanctions. For his part, Bonan disagreed and filed exceptions to the recommended decision.

In December 2024, the FDIC Board issued its decision and orders. The Board found that Bonan's misconduct in pushing through the financially unsound 618 Holdings loan satisfied the requirements

for a prohibition order under § 1818(e). And, based on similar reasoning, the Board also found that Bonan's involvement in the 618 Holdings loan merited a second tier civil money penalty under § 1818(i)(2)(B) in the amount of $105,000. Finally, the Board determined that Bonan's misconduct related to the Rig 23 release, which largely involved pressuring his subordinates into making a mistake, also supported a $105,000 civil money penalty.

Bonan then petitioned for our review. See 12 U.S.C. § 1818(h)(2). He raises five challenges to the FDIC's enforcement action and orders. The first three are constitutional claims, while the fourth and fifth dispute the FDIC's decision and penalties on mainly evidentiary grounds.

II

We begin with Bonan's contention that the FDIC's in-house adjudication of its enforcement action based on §§ 1818(i) & (e) violated his Seventh Amendment right to a jury.

The Seventh Amendment provides that "[i]n Suits at common law, . . . the right of trial by jury shall be preserved." U.S. Const. amend. VII. In *SEC v. Jarkesy*, the Supreme Court established a two-step framework for applying this constitutional guarantee in the context of administrative enforcement proceedings. 603 U.S. 109 (2024). First, we ask the "threshold" question whether the administrative action "implicates the Seventh Amendment." *Id.* at 120. If the answer at the first step is yes, we "next consider whether the 'public rights' exception to Article III jurisdiction applies." *Id.* When the public rights exception applies, "Congress may assign the matter for decision to an agency without a jury, consistent with the Seventh Amendment." *Id.* at 127.

The first step is straightforward here. The Seventh Amendment, the Court has explained, extends to statutory claims if they are "legal in nature." *Id.* at 122 (cleaned up). To make this determination, we examine both "the cause of action and the remedy it provides," giving more weight to the nature of the remedy. *Id.* at 122–23; see also *Tull v. United States*, 481 U.S. 412, 421 (1987) ("[T]he relief sought is more important than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial." (cleaned up)). The FDIC acknowledges that the civil money penalty it imposed on Bonan pursuant to 12 U.S.C. § 1818(i) is "the prototypical common law remedy," *Jarkesy*, 603 U.S. at 123, and it therefore does not contest that this aspect of its administrative enforcement action implicated the Seventh Amendment. As for the FDIC's claim seeking a prohibition order pursuant to 12 U.S.C. § 1818(e), we accept Bonan's invitation to treat this aspect of the agency's enforcement action as legal in nature—a point the FDIC does not dispute. So we proceed to *Jarkesy*'s next step for both claims.

Step two of *Jarkesy*'s Seventh Amendment framework embeds a notorious thicket in the law: the public rights exception to Article III jurisdiction. At a high level, this doctrine roots itself in the principle of separation of powers. See *id.* at 127. Article III of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. "Under the basic concept of separation of powers that flows from the scheme of a tripartite government," this judicial power "cannot be shared with the other branches." *Jarkesy*, 603 U.S. at 127

(cleaned up). As a result, the Supreme Court has understood Article III's vesting of judicial power to require that "matters concerning private rights . . . not be removed from Article III courts." *Id.* At the same time, the Court has recognized "a class of cases" concerning "public rights," where "no involvement by an Article III court in the initial adjudication is necessary." *Id.* at 128.

The Supreme Court "has not definitively explained the distinction between public and private rights." *Id.* at 131 (cleaned up); see also *id.* at 130 (acknowledging that "[t]his is an area of frequently arcane distinctions and confusing precedents" (cleaned up)). In *Jarkesy*, the Court suggested that cases involving public rights fall into a set of "historic categories of adjudications." *Id.* at 130. But the Court did not overrule, and indeed relied on, a separate line of precedent applying the public rights exception to the adjudication of statutory claims. See *id.* at 132–40 (discussing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), and *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977)); see also *Axalta Coating Sys. LLC v. Fed. Aviation Admin.*, 144 F.4th 467, 473 (3d Cir. 2025) (observing that the Supreme Court "resolved the public rights question in *Jarkesy* in a notably uncomplicated way: by analogizing the [agency's] enforcement action to the action at issue in one public rights precedent . . . and distinguishing it from the enforcement action at issue in another"); *Sligo Creek Ctr. v. United States Dep't of Health & Hum. Servs.*, 177 F.4th 556, 559–60 (4th Cir. 2026) (agreeing with the Third Circuit's characterization of *Jarkesy*). Those previous decisions guide our analysis here.

In *Atlas Roofing*, the Court announced a broad rule permitting agencies to pursue in-house enforcement of federal statutory violations. See 430 U.S. at 455. The Occupational Safety and Health Review Commission imposed monetary penalties on two private employers, including Atlas Roofing, finding that they violated safety standards promulgated under the Occupational Safety and Health Act of 1970. See *id.* at 447–48. Atlas and the second company then petitioned for review in federal court, urging that the administrative adjudication of the alleged violations ran afoul of the Seventh Amendment. See *id.* at 448–49.

The Court disagreed and upheld the constitutionality of the administrative enforcement action. See *id.* at 461. "[W]hen Congress creates new statutory 'public rights,'" enforced by the government in its sovereign capacity, the Court explained, "it may assign their adjudication to an administrative agency with which a jury trial would be incompatible." *Id.* at 455. The Court concluded that the adjudication at issue involved public rights because Congress, in enacting the Occupational Safety and Health Act, created new statutory obligations, "unknown to the common law," to remedy national workplace safety concerns. *Id.* at 450, 461.

By its terms, *Atlas Roofing* recognized that Congress has broad authority to create public rights by developing new causes of action within federal statutes that seek to address national problems. See *id.* at 461 ("The Seventh Amendment is no bar to the creation of new rights or to their enforcement outside the regular courts of law."); see also *Axalta*, 144 F.4th at 483 ("[A]ny time Congress creates a cause of action enforced by the government, *Atlas Roofing* presumes

that it involves a public right.") (Bibas, J., concurring).

While *Atlas Roofing* remains good law, the Court has narrowed its application in two subsequent decisions. The first was *Granfinanciera*, in which the Court determined that a fraudulent conveyance action codified in the Bankruptcy Code involved private rights. See 492 U.S. at 55. Because "Congress simply reclassified a pre-existing, common-law cause of action that was not integrally related to the reformation of debtor-creditor relations" as one triable by a non-Article III bankruptcy judge, the Court concluded that this "purely taxonomic change" could not render the statutory cause of action one involving public rights. *Id.* at 60–61. All of this was despite the undeniable observation that the Bankruptcy Code reflects a comprehensive statutory scheme for providing debt relief and enabling financial reorganization.

The second narrowing came in *Jarkesy*, when the Court confirmed and emphasized that not all obligations in federal statutes fall within *Atlas Roofing*'s public rights ambit. The clarification came as the Court considered "whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for [statutory] securities fraud." *Jarkesy*, 603 U.S. at 120. The Court resolved the question in the affirmative, concluding that the statutory securities fraud actions at issue involved private rather than public rights. See *id.* at 134. "If a suit is in the nature of an action at common law," the Court emphasized, "then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory." *Id.* at 128.

While the statutory fraud actions at issue in *Jarkesy* were not identical to their common law counterpart, see *id.* at 126, they "target[ed] the same basic conduct as common law fraud, employ[ed] the same terms of art, and operate[d] pursuant to similar legal principles," *id.* at 134. In short, the SEC's enforcement action based on the antifraud provisions of the federal securities laws was "a common law suit in all but name." *Id.* at 136. This meant that Congress's placement of the action within a federal regulatory scheme did not transform it into one involving public rights. See *id.* at 134.

But *Jarkesy* stopped short of overruling *Atlas Roofing*. To the contrary, the Court left *Atlas Roofing* in place for statutory causes of action that cannot "trace[] their ancestry to the common law." *Id.* at 137; see also *Axalta*, 144 F.4th at 475 (observing that in *Jarkesy* "the Court distinguished, but did not overrule, its holding in *Atlas Roofing*"). After *Jarkesy*, then, *Atlas Roofing* continues to govern the public rights inquiry for agency enforcement actions based on statutory standards that "bring no common law soil with them," *Jarkesy*, 603 U.S. at 137, while *Jarkesy* applies to "traditional legal claims" embedded in statutes, *id.* (cleaned up).

When it comes to discerning whether a statutory claim brings with it "common law soil," we believe the analysis should focus on the Founding Era. We say this because, in laying the foundation for its public rights analysis, the Court in *Jarkesy* explained that "[a] hallmark that we have looked to in determining if a suit concerns private rights is whether it is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." *Id.* at 127–28 (cleaned up).

Jarkesy also explicitly relied on principles it derived from its prior decision in *Granfinanciera*. See *id.* at 134 ("*Granfinanciera* effectively decides this case."). In *Jarkesy*'s recitation of the relevant points from *Granfinanciera*, the Court highlighted that "[a] survey of English cases showed that actions to recover fraudulent transfers were often brought at law in late 18th-century England." *Id.* at 133 (cleaned up).

To be sure, *Jarkesy* did not expressly tell us how its analysis would apply to a statutory claim with an analogue to a cause of action that became part of the common law later than 1789. But our best answer based on the guidance we find in *Jarkesy* is that common law at the Founding should be our benchmark for private rights.

Putting this all together, our task under *Jarkesy*'s second step is to determine whether the statutory claims the FDIC administratively brought against Frank Bonan were akin to suits at common law at the Founding and governed by *Jarkesy*, or are instead unknown to the common law and governed by *Atlas Roofing*.

With this in mind, we consider the two statutory causes of action that the FDIC invoked in its enforcement action against Bonan. The Federal Deposit Insurance Act, as codified at 12 U.S.C. § 1818(i), permits the FDIC to impose a civil money penalty on the director of a federally insured bank who "recklessly engages in an unsafe or unsound practice in conducting the affairs of such insured depository institution" or "breaches any fiduciary duty." 12 U.S.C. §§ 1818(i)(2)(B)(i)(II)–(III). Section 1818(e) in turn allows the FDIC to issue an order prohibiting a director from working at any federally

insured depository institution based on similar misconduct. See *id.* §§ 1818(e)(1)(A)(ii)–(iii). Based on this shared core of prohibited misconduct, we conclude that neither § 1818(i) nor § 1818(e) is akin to a common law action at the Founding.

We begin with an "unsafe or unsound practice," which underlies the FDIC's imposition on Bonan of both the money penalty and the prohibition order. This standard brings no common law soil with it, as the term likely emerged from nineteenth century state banking laws. See Thomas L. Holzman, *Unsafe or Unsound Practices: Is the Current Judicial Interpretation of the Term Unsafe or Unsound?*, 19 Ann. Rev. Banking L. 425, 429 n.21 (2000). Congress first used "unsafe or unsound practices" in federal banking law in 1933, and it now serves as a basis for enforcement actions against bank directors across many provisions of federal law. See Heidi Mandanis Schooner, *Fiduciary Duties' Demanding Cousin: Bank Director Liability for Unsafe or Unsound Banking Practices*, 63 Geo. Wash. L. Rev. 175, 202 (1995). Congress has often left unsafe or unsound practices undefined in these provisions, see *id.* at 187–89, deliberately allowing the term to serve as a gap-filling prohibition on conduct not otherwise covered in the federal regulatory scheme, see *id.* at 187. To put the point another way, unsafe or unsound practices is a regulatory—rather than common law—term of art. See Lawrence G. Baxter, *Fiduciary Issues in Federal Banking Regulation*, 56 Law & Contemp. Probs. 7, 23–24 (1993) (describing the duty not to engage in unsafe and unsound conduct as "a fundamental regulatory principle distinctive to federally insured banking").

The most widespread working definition of an unsafe or unsound practice, which the administrative record shows the FDIC relied upon in its action against Bonan, underscores the unique regulatory origins of the term. This definition comes not from common law principles but from the legislative history of the Financial Institutions Supervisory Act of 1966:

> Generally speaking, an 'unsafe or unsound practice' embraces any action, or lack of action, which is 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.

Hearings on S. 3158 Before the House Comm. on Banking and Currency, 89th Cong., 2d Sess. 49–50 (1966) (memorandum of John Horne, Chairman of the Federal Home Loan Bank Board); see also, *e.g.*, *Michael v. FDIC*, 687 F.3d 337, 352 (7th Cir. 2012) (using nearly identical language to describe an unsafe or unsound banking practice in the context of § 1818(e)); *Matter of Seidman*, 37 F.3d 911, 926–27 (3d Cir. 1994) (employing this standard verbatim for an action under § 1818(b)); Schooner, *Fiduciary Duties' Demanding Cousin*, at 190 ("In seeking a general definition for unsafe or unsound banking practices, the courts have relied on either Chairman Horne's definition or one almost identical to it.").

As we see it, this definition addresses itself to actions that present risk to the solvency of regulated banks. See Baxter, *Fiduciary Issues*, at 23 ("The duty to act safely and soundly is basically a duty not to take actions that might place the solvency of the

banking institution in jeopardy."). And our research has turned up no common law cause of action at the Founding that targets the same conduct or operates under similar legal principles. Cf. *Jarkesy*, 603 U.S. at 134.

So too with the other misconduct element underlying the FDIC's enforcement action against Bonan under §§ 1818(i) & (e): breach of fiduciary duty. At a general level, fiduciary duty is a heartland equitable concept. See Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 Duke L. J. 879, 880 (1988) ("As a legal principle, [fiduciary] obligation originated in Equity."). It evolved to prevent the abuse of relationships in which one person has reposed their trust in another. See *id.* And courts of equity—not common law courts—enforced the obligations arising from these relationships. See *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 567 (1990) (observing that "action[s] by a trust beneficiary against a trustee for breach of fiduciary duty" were "within the exclusive jurisdiction of courts of equity" (citing 2 J. Story, Commentaries on Equity Jurisprudence § 960, at 266 (13th ed. 1886))); *CIGNA Corp. v. Amara*, 563 U.S. 421, 439 (2011) (explaining that "before the merger of law and equity," a trust beneficiary "could have brought only in a court of equity" a suit against a trustee who was a "fiduciary"); *Kamen v. Kemper Fin. Servs., Inc.*, 908 F.2d 1338, 1351 (7th Cir. 1990) ("[E]nforcing fiduciary duties was equitable in English practice . . . ."), *rev'd on other grounds*, 500 U.S. 90 (1991). We therefore do not see an action to enforce the breach of a fiduciary duty as "a common law suit in all but name." *Jarkesy*, 603 U.S. at 136.

Focusing on the narrower context of banking, Bonan offers us no basis to conclude that fiduciary duties even applied to bank directors at the Founding. See Patricia A. McCoy, *A Political Economy of the Business Judgment Rule in Banking: Implications for Corporate Law*, 47 Case W. Res. L. Rev. 1, 22 (1996) (placing the first reported bank director liability cases in the nineteenth century). It does appear, however, that toward the end of the nineteenth century, courts began to recognize and enforce the fiduciary duties of bank directors, and not solely as creatures of equity. See *id.* at 34–38 (discussing the emergence of common-law tort standards as the most important basis of bank director liability beginning in the 1890s); see also *Bowerman v. Hamner*, 250 U.S. 504, 511 (1919) (describing *Briggs v. Spaulding*, 141 U.S. 132 (1891), as having offered "the rule for determining the common-law liability" of directors of national banks); *Atherton v. FDIC*, 519 U.S. 213, 217 (1997) ("We recognize . . . that this Court did once articulate federal common-law corporate governance standards, applicable to federally chartered banks.").

So, by 1966, when Congress added breach of fiduciary duty to the federal banking laws as a basis for bank director sanction, see Baxter, *Fiduciary Issues*, at 26, an action for breach of fiduciary duty in the banking context had twentieth century common law soil. But this is not the kind of common law development that we understand to be legally significant based on *Jarkesy*. Our focus is on the Founding Era, and at that time, breach of fiduciary duty was an equitable action that does not appear to have extended to bank directors.

In our final analysis, then, we conclude that the FDIC's enforcement action under §§ 1818(i) & (e) involves public rights under the reasoning of *Atlas Roofing*. This means that Congress may assign the adjudication of these causes of action to an agency without violating the Seventh Amendment. See also *Ortega v. OCC*, 155 F.4th 394, 403–09 (5th Cir. 2025) (concluding that enforcement actions under § 1818 involve public rights by focusing on the history of federal bank regulation).

III

We see Bonan's Seventh Amendment claim as a close and challenging call, and it seems prudent to explain why. Here we focus on Congress's incorporation in §§ 1818(i) & (e) of a claim for breach of fiduciary duty as one basis for in-house agency adjudication.

Recall that in *Jarkesy* the Supreme Court described public rights as an exception "to Article III jurisdiction." 603 U.S. at 120. And, while acknowledging that the boundaries of the exception remain fuzzy, the Court was clear on the consequence when a case involves public rights: "no involvement by an Article III court in the initial adjudication is necessary." *Id.* at 128. Based on this description, it seems sensible to expect Article III (and the case law interpreting it) to inform, if not define, the contours of public and private rights.

This conclusion would suggest that the public rights exception is narrower—and the category of causes of action involving private rights is larger—than what the Court's analysis in *Jarkesy* seems to convey. By its terms, Article III extends the "judicial Power" to "all Cases, in Law and Equity." U.S. Const.

art. III, § 2. If the public rights exception attempts to capture those cases that do not fall within this core judicial power, and thereby do not require Article III adjudication in the first instance, see *Jarkesy*, 603 U.S. at 128, it is unclear based on the Constitution's text why rights traditionally adjudicated in courts of equity would be subject to a different public rights analysis than those at common law. Put another way, when it comes to first principles, we do not see why the equitable lineage of fiduciary duties cannot render them private rights in Article III terms.

And, indeed, the Supreme Court's case law has suggested at times that traditional cases in equity involve private rights. In *Murray's Lessee v. Hoboken Land & Improvement Co.*, the case that first recognized the public rights exception, the Supreme Court adopted a definition of private rights that tracked more closely Article III's text, emphasizing that Congress could not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit *at the common law, or in equity, or admiralty*." 59 U.S. (18 How.) 272, 284 (1856) (emphasis added).

This statement of general principle from *Murray's Lessee* has endured to the Court's most recent cases, even to *Jarkesy*. See *Jarkesy*, 603 U.S. at 132 (referencing this precise language in *Murray's Lessee*); see also *Granfinanciera*, 492 U.S. at 56 (observing in its public rights analysis that "matters from their nature subject to a suit at common law or in equity or admiralty lie at the protected core of Article III judicial power" (quoting *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 n.25 (1982) (plurality opinion by Brennan, J.) (cleaned up))). The Supreme Court has even observed, albeit in dicta, that "breach

of fiduciary duty claims . . . involve private rights which are at the core of matters normally reserved to Article III courts." *Coit Indep. Joint Venture v. Fed. Sav. and Loan Ins. Corp.*, 489 U.S. 561, 578–79 (1989) (cleaned up). All this to say, there is plenty to support the conclusion that private rights encompass traditional actions at equity, including the breach of fiduciary duty claims embedded in §§ 1818(i) & (e). See *Intuit, Inc. v. FTC*, 170 F.4th 411, 418 (5th Cir. 2026) (concluding that traditional actions at both law and equity involve private rights under Article III); but see *id.* at 417 n.5 (suggesting the distinction between law and equity may have been "relevant" if the plaintiff had "claimed a right to a jury trial under the Seventh Amendment").

But we hew closely to the Supreme Court's most recent direction on applying the public rights exception, which comes from *Jarkesy*. And *Jarkesy* clarified that *Atlas Roofing*'s capacious view of public rights does not apply to statutory causes of action borrowed from the common law. It did not pare back *Atlas Roofing*'s application from statutory claims resembling other cases at the core of Article III, like traditional actions at equity. See *Jarkesy*, 603 U.S. at 138 ("[*Atlas Roofing*] does not control here, where the statutory claim is in the nature of a common law suit." (cleaned up)); *id.* at 137–38 ("The cases that *Atlas Roofing* relied upon did not extend the public rights exception to traditional legal claims. Instead, they applied the exception to actions that were not suits at common law or in the nature of such suits." (cleaned up)); see also *Axalta*, 144 F.4th at 483 (Bibas, J., concurring) ("Together, [the Supreme Court's public rights cases] hold that (1) when Congress creates a cause of action enforced by the government as sovereign, then it involves public

rights, unless (2) it resembles a preexisting action at common law.").

As a lower federal court, our role is to follow the Supreme Court's precedent, not guess its future direction. See *Hohn v. United States*, 524 U.S. 236, 252–53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."). The Court has not made clear that statutory causes of action resembling traditional equitable actions involve private rights for the purposes of Seventh Amendment analysis. In time the Justices are sure to consider this question. Until they do, we believe the appropriate path is to adhere to *Atlas Roofing*. It is on this basis that Bonan's Seventh Amendment claim fails.

IV

We turn next to Bonan's other challenges to the FDIC's enforcement proceeding.

A

Bonan first contends that the FDIC Board and the agency's administrative law judges were unconstitutionally insulated from presidential oversight during the enforcement proceeding. Specifically, he highlights that the FDIC's Board members serve for a statutorily defined term of years, see 12 U.S.C. § 1812(b)–(c), and that its ALJs enjoy two layers of "for-cause" protection from removal, see 5 U.S.C. § 7521. Bonan urges that these statutory restrictions on the President's removal power violate Article II of the Constitution and therefore require us to vacate the Board's decision and orders.

For its part, the FDIC does not defend the constitutionality of these removal protections, instead asserting that Bonan is not entitled to relief because he has not shown the removal restrictions caused him compensable harm. We agree that under current law Bonan needs to show harm and has failed to do so, making it unnecessary for us to opine on Bonan's underlying constitutional challenge to the removal restrictions.

Five years ago, in *Collins v. Yellen*, the Supreme Court established that we need not regard "as void" the actions of an unconstitutionally insulated administrative official. 594 U.S. 220, 258 (2021). Unlike in an instance of improper appointment, the Court found "no basis for concluding" that an administrative official enjoying unconstitutional protection from the President's removal power "lacked the authority to carry out the functions of the office." *Id.* at 258. In so holding, however, the Court left open the possibility of relief if the unconstitutional restriction "inflict[ed] compensable harm" on the plaintiff. *Id.* at 259.

To date, *Collins* has come to stand for the proposition that a successful challenge to an administrative action on removal grounds does not entitle a party to relief without a showing that the unconstitutional restriction on the President's power caused compensable harm. See, *e.g.*, *CFPB v. Law Offs. of Crystal Moroney, P.C.*, 63 F.4th 174, 179 (2d Cir. 2023); *Axalta*, 144 F.4th at 479–80; *Calcutt v. FDIC*, 37 F.4th 293, 314–15 (6th Cir. 2022), *rev'd on other grounds*, 598 U.S. 623 (2023); *Bhatti v. Fed. Hous. Fin. Agency*, 15 F.4th 848, 853–54 (8th Cir. 2021); *Kaufmann v. Kijakazi*, 32 F.4th 843, 849 (9th Cir. 2022); *Leachco, Inc. v. Consumer Prod. Safety*

Comm'n, 103 F.4th 748, 756–57 (10th Cir. 2024); *Rodriguez v. Social Sec. Admin.*, 118 F.4th 1302, 1314 (11th Cir. 2024). But see *Space Expl. Techs. Corp. v. NLRB*, 151 F.4th 761, 780 (5th Cir. 2025) (limiting *Collins*'s reach to only "retrospective relief from final agency action"). We too adopt this understanding of *Collins*.

Collins itself went on to offer some guidance on when an unconstitutional removal restriction might inflict harm. "Suppose, for example, that the President had attempted to remove [an administrative official] but was prevented from doing so by a lower court decision holding that he did not have 'cause' for removal." *Collins*, 594 U.S. at 259. "Or suppose the President had made a public statement expressing displeasure with actions taken by [the official] and had asserted that he would remove [them] if the statute did not stand in the way." *Id.* at 260. We take from these examples that a party challenging a removal restriction must show, at a minimum, that the unconstitutional protection actually impacted the particular action against them. See *Leachco*, 103 F.4th at 756 ("[H]e must demonstrate that the unconstitutional removal provision actually affected the agency's decision or conduct against him."); *L. Offs. of Crystal Moroney*, 63 F.4th at 179–80 (observing that courts have disagreed in the wake of *Collins* about how a party must demonstrate compensable harm and adopting a requirement that "a party must show that the agency action would not have been taken *but for* the President's inability to remove the agency head").

Here, Bonan objects only to the restrictions on removal protecting the FDIC Board and the agency's ALJs, not the process by which such agency officials

are appointed. His challenge thus falls squarely under *Collins*, requiring him to show compensable harm. On this front, Bonan suggests that the President may have chosen to exercise his power to remove FDIC Board members or the agency's ALJs if the restrictions were not in place, pointing to the Solicitor General's position in similar litigation that the insulation of FDIC administrative law judges is unconstitutional. See Notice of Change in Position by FDIC at 1, *CBW Bank v. FDIC*, No. 24-cv-2535 (D. Kan. Feb. 24, 2025), Dkt. No. 33. But Bonan's speculation is insufficient under *Collins*. He has not demonstrated, or for that matter even attempted to show, that the removal restrictions actually affected any aspect of the agency proceeding against him. See *Kaufmann*, 32 F.4th at 850 ("Nothing in the record suggests any link whatsoever between the removal provision and Claimant's case.").

Bonan resists the application of *Collins*'s harm requirement by contending that an unconstitutional removal restriction is a form of structural error that mandates reversal. Structural error cases contain "defect[s] affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). If an error is structural, it mandates automatic reversal, and harmless error does not apply. See *Washington v. Recuenco*, 548 U.S. 212, 218 (2006). The Supreme Court has recognized structural error only in a "very limited class of cases," *Neder v. United States*, 527 U.S. 1, 8 (1999) (cleaned up), often in which the error deprives a criminal defendant of the basic protections of a criminal trial, see *id.* (collecting examples).

The reasoning of *Collins* counsels against classifying an unconstitutional removal restriction as structural error. The Supreme Court held that we need not void or undo every action of an unconstitutionally insulated agency official. See *Collins*, 594 U.S. at 259 ("We therefore see no reason to hold that the [challenged action] must be completely undone."). This is a far cry from an error that "will *always* render a trial unfair." *Neder*, 527 U.S. at 9. Although Bonan points out that *Collins* did not address a party-specific agency adjudication, its reasoning extends beyond its facts: the Court emphasized that there was no basis to conclude the agency actors "lacked the authority to carry out the functions of the office." *Collins*, 594 U.S. at 258.

Bonan has given us no reason to conclude that the FDIC's removal protections for its Board and ALJs caused them to lack the authority to oversee the enforcement proceedings. And several circuits have applied *Collins*'s harm requirement to party-specific adjudication before an agency. See, *e.g.*, *Calcutt*, 37 F.4th at 314–17 (applying *Collins*'s harm requirement to FDIC enforcement proceedings); *Axalta*, 144 F.4th at 479–80 (same for Federal Aviation Administration enforcement proceedings); *Leachco*, 103 F.4th at 755–58 (same for Consumer Product Safety Commission enforcement proceedings); *Kaufmann*, 32 F.4th at 849–50 (same for the Social Security Administration's adjudication of a request for disability benefits); *Rodriguez*, 118 F.4th at 1314 (same). In light of *Collins*, we decline to deviate from this consensus.

B

We can make quick work of Bonan's three proffered bases to conclude that the FDIC's administrative

proceedings violated his right to due process under the Fifth Amendment.

Bonan first suggests that the FDIC impermissibly served as both the prosecution and judge in the administrative enforcement action, clouding the agency's ability to evenhandedly adjudicate the claims against him. He is correct that "a fair hearing before a fair and unbiased adjudicator is a basic requirement of due process," *Schneiter v. Carr*, 148 F.4th 438, 450 (7th Cir. 2025) (cleaned up), but "the standard for proving bias is not easily satisfied," *id.* We apply a "presumption of honesty and integrity in those serving as adjudicators," including in administrative settings. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Bonan can overcome this presumption only by "laying a specific foundation of prejudice or prejudgment, such that the probability of actual bias is too high to be constitutionally tolerable." *Schneiter*, 148 F.4th at 450 (cleaned up). And the Supreme Court has expressly held that "the combination of investigative and adjudicative functions [in the same administrative agency] does not, without more, constitute a due process violation." *Withrow*, 421 U.S. at 58.

Bonan has not carried his burden of showing bias. Indeed, he mainly raises general contentions that FDIC ALJs necessarily favor the agency. But this type of categorical speculation is insufficient to rebut the presumption of honesty after *Withrow*. When he does attempt to demonstrate actual bias in his hearing, Bonan recites a litany of decisions on the part of the presiding ALJ with which he disagrees. But our case law is unequivocal: "adverse rulings alone are not evidence of bias." *Bachner v. Comm'r of Internal Revenue*, 124 F.4th 1066, 1073 (7th Cir. 2025).

Bonan next urges that his inability to take depositions prior to his hearing violated his due process rights. "But there is no constitutional right to pretrial discovery in administrative proceedings." *Kelly v. EPA*, 203 F.3d 519, 523 (7th Cir. 2000). Rather, "discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process." *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (cleaned up).

Bonan fails to demonstrate that his lack of access to pretrial depositions rendered his hearing before the FDIC fundamentally unfair. He concedes that he did in fact depose several witnesses who were unavailable at the hearing, and he does not dispute that he was able to cross-examine witnesses who testified. See *Kelly*, 203 F.3d at 523 (rejecting the plaintiffs' challenge to the lack of discovery in EPA proceedings in part because they could have cross-examined witnesses during their hearing). Without more, his general complaint that the FDIC had greater access to pretrial discovery does not rise to the level of a due process violation.

Finally, Bonan contends that the FDIC failed to properly serve him with the Notice of Charges. But the FDIC Board found that the agency served Bonan via overnight courier at his residence. Bonan did not dispute at the administrative level that this service occurred. See 12 C.F.R. § 308 app. A § 308.39(b)(1) ("Failure of a party to file exceptions to [an FDIC ALJ's findings] within the time prescribed is deemed a waiver of objection thereto."); cf. *Porosh v. Garland*, 56 F.4th 1120, 1125 (7th Cir. 2023) (observing that "[f]ailure to challenge [the] finding" of an agency adjudicator on administrative appeal "results in

waiver"). Nor does he explicitly dispute that fact before us now. We see no reason why such service was constitutionally insufficient.

C

This brings us to Bonan's final set of challenges to the FDIC's action against him. He asserts that, as a substantive matter, the administrative record does not support the imposition of the prohibition order or the $105,000 civil money penalty.

On this front our review of the agency's action is deferential. See 12 U.S.C. § 1818(h)(2) (incorporating the standards of the Administrative Procedure Act, 5 U.S.C. § 706, into judicial review of proceedings under § 1818). "We will set aside the Board's findings only if unsupported by substantial evidence on the record as a whole," *Michael*, 687 F.3d at 348, which we define as "such relevant evidence a reasonable person would deem adequate to support the ultimate conclusion," *id.* We will disturb the FDIC Board's legal conclusions only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* (quoting 5 U.S.C. § 706(2)(A)). The FDIC Board "abuses its discretion only when it imposes a sanction that is unwarranted in law or without justification in fact." *Id.* (cleaned up).

1. The Prohibition Order

To impose a prohibition order under § 1818(e)(1), permanently removing a bank officer or director from working at a federally insured depository institution, the FDIC must present substantial evidence of "misconduct, with certain adverse effects, committed with a culpable state of mind." *Landry v. FDIC*, 204 F.3d 1125, 1138 (D.C. Cir. 2000). The FDIC Board

concluded that Bonan's role in Grand Rivers's loan to 618 Holdings satisfied this statutory standard. The administrative record shows that substantial evidence supports this conclusion.

On the "misconduct" prong, the FDIC had to show that the banker has, "directly or indirectly," (i) violated "any law or regulation"; (ii) "engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution"; or (iii) "committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty." § 1818(e)(1)(A).

The FDIC Board found that Bonan had engaged in unsafe or unsound banking practices and breached his fiduciary duties of care and loyalty to Grand Rivers. Bonan insists that the record evidence fell short of supporting this finding as to unsafe or unsound practices because the FDIC failed to show that his conduct threatened the overall financial stability of Grand Rivers. See *Michael*, 687 F.3d at 352 (defining "unsafe or unsound practice" to require "abnormal risk of financial loss or damage on a banking institution").

As a pure legal matter, Bonan may have a point. See *Calcutt*, 37 F.4th at 326 (concluding that the FDIC's argument "that the statute does not require a finding of a threat to bank stability in order to find 'unsafe or unsound' practice" contradicts the analysis of several circuit cases); see also *Johnson v. OTS*, 81 F.3d 195, 204 (D.C. Cir. 1996) (observing that "the weight of case law" holds that "the unsafe or unsound practice provision refers only to practices that threaten the financial integrity of the association" (cleaned up)). But we need not resolve the precise level of risk to a bank that the FDIC must show to support the

finding of an unsafe or unsound practice because we see substantial evidence that Bonan breached his fiduciary duty of care to Grand Rivers. See *Dodge v. Comptroller of Currency*, 744 F.3d 148, 156 (D.C. Cir. 2014) (observing that it suffices under § 1818(e)(1)(A) if the court upholds the misconduct finding on only one statutory basis); see also *Michael*, 687 F.3d at 351 (examining § 1818(e)(1)(A) and reaching a similar conclusion).

Our prior decision in *Michael* supplies guidance on what it means to breach a fiduciary duty within the meaning of the Federal Deposit Insurance Act. At a foundational level, we seemed in *Michael* to draw on generic common law concepts to interpret and define the content of a fiduciary duty as a matter of federal law. See 687 F.3d at 350–51 (relying on standards from the Revised Model Business Corporation Act and the Employment Retirement Income Security Act of 1974). In cursory fashion, Bonan invites us to instead apply Illinois corporate law. We recognize the choice of law question in § 1818 admits of some debate. See *Landry*, 204 F.3d at 1138 (leaving open whether fiduciary breach under § 1818(e)(1)(A)(iii) is a matter of state or federal law); see also *Calcutt*, 37 F.4th at 356–57 (Murphy, J., dissenting) (describing positions on both sides). But, in the absence of any compelling argument on Bonan's part, we will follow the standard from *Michael*.

The FDIC Board relied on federal law to define Bonan's fiduciary duties, and substantial evidence supports the FDIC Board's conclusion that Bonan's conduct leading up to Grand Rivers's loan to 618 Holdings breached his fiduciary duty of care.

Directors and officers owe a duty of care to their bank. See *Seidman*, 37 F.3d at 933 (quoting the

Revised Model Business Corporation Act § 8.42). This duty required Bonan to act "with the care an ordinarily prudent person in a like position would exercise under similar circumstances." *Id.* (cleaned up). The record amply supports that he did not do so. As chairman of Grand Rivers, Bonan actively solicited and influenced the terms of a sizeable loan to two individuals he personally employed, James Harbison and Adam Tate, whom he should have known had no repayment capacity and posed significant credit risk.

Bonan begs to differ, telling us that he had sound business reasons for supporting the loan to 618 Holdings, including that the company's purchase of the warehouse would infuse Evergreen with cash needed to stay in business while the oil market stabilized. But substantial evidence supports the Board's conclusion that this argument is not compelling in the face of Harbison and Tate's manifest lack of creditworthiness. Put another way, Bonan cannot explain why his ostensible business reasons should altogether displace considerations of a borrower's income and ability to satisfy a loan obligation. Indeed, Bonan all but invites a complete abandonment of the diligence reasonably expected to accompany responsible lending decisions.

In the next step of its analysis, the FDIC Board found that Bonan's misconduct satisfied the "effects" prong of § 1818(e)(1) because, "by reason of the . . . breach," Grand Rivers "suffered . . . financial loss." § 1818(e)(1)(B)(i). Substantial evidence supports this finding too. Grand Rivers charged off $513,760 from the 618 Holdings loan. Further, 618 Holdings defaulted and entered into a deed-in-lieu of foreclosure with Grand Rivers. As a result, by the time of the

FDIC's administrative proceeding, Grand Rivers held the deed to the warehouse and had only received offers on the property well below the amount then due on the loan.

Bonan does not dispute these facts or financial consequences. Instead, he urges that they were not "by reason of" his conduct, a statutory standard he interprets to require that the loss be "reasonably foreseeable" to the offender. See *De La Fuente v. FDIC*, 332 F.3d 1208, 1223 (9th Cir. 2003); see also *id.* (describing this standard as one of proximate causation). But, even accepting Bonan's preferred standard, the Board found, and substantial evidence supports, that it was reasonably foreseeable that Grand Rivers would suffer financial loss from lending $1.25 million, at Bonan's behest, to two individuals whose combined income was less than the annual payments required by the loan and who had no other assets.

Finally, as to the "culpability" prong of § 1818(e)(1), the FDIC Board found that Bonan had exhibited "willful . . . disregard . . . for the safety or soundness of" Grand Rivers. 12 U.S.C. § 1818(e)(1)(C)(ii). "Willful disregard is deliberate conduct that exposes the bank to abnormal risk of loss or harm contrary to prudent banking practices." *Michael*, 687 F.3d at 352 (cleaned up). Here, too, ample evidence supports the Board's finding that Bonan's involvement in the 618 Holdings loan satisfied this standard. He initiated and indeed pushed through the loan to two eminently uncreditworthy borrowers, whose financial circumstances were no secret to him. Bonan also dictated key terms of the leaseback agreement so that Grand Rivers's loan was funding both 618 Holdings's purchase of the warehouse and Evergreen's initial ability

to make lease payments. Overall, Bonan's deliberate efforts to put Grand Rivers in this position exposed the bank to an abnormal risk of harm contrary to prudent banking practices—or at least the FDIC could have concluded as much based on substantial evidence.

2. Civil Money Penalty

We come last to the Board's conclusion that Bonan's actions satisfied the statutory requirements for a second tier civil money penalty. The misconduct elements under 12 U.S.C. § 1818(i)(2)(B) largely track those governing the FDIC's imposition of a prohibition order, including establishing liability for "breach[] of any fiduciary duty." *Id.* § 1818(i)(2)(B)(i)(III). On the effects prong, the FDIC must show that the breach "is part of a pattern of misconduct," "causes or is likely to cause more than a minimal loss to such depository institution," or "results in pecuniary gain or other benefit to such party." *Id.* §§ 1818(i)(2)(B)(ii)(I)–(III).

Our analysis of the prohibition order resolves and disposes of Bonan's challenge to this sanction. Substantial evidence again supports the Board's finding that Bonan's lead role in the 618 Holdings loan in and of itself breached his fiduciary duty to Grand Rivers and that his conduct caused more than a minimal loss to the bank. Bonan primarily directs his challenges to the Board's separate analysis that the release of Grand Rivers's security interest in Rig 23 also supported a civil money penalty. But we agree with the FDIC that Bonan's involvement in the 618 Holdings loan was sufficient to support the penalty, and we need not reach the alternative grounds. Cf. *Michael*, 687 F.3d at 348 (agreeing with the FDIC Board that the defendants' complicity "in any one of

these transactions" was "sufficient to support removal").

* * *

For these reasons, we DENY the petition for review.

APPENDIX B

FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

FDIC-16-0254e
FDIC-16-0256k

In the Matter of

FRANK WILLIAM BONAN II,
Individually and as an institution-affiliated party of

GRAND RIVERS COMMUNITY BANK
Grand Chain, Illinois
(Insured State Nonmember Bank)

DECISION AND ORDERS

I. INTRODUCTION

This matter is before the Board of Directors ("Board") of the Federal Deposit Insurance Corporation ("FDIC") following the issuance on November 20, 2023, of a Recommended Decision ("Recommended Decision" or "R.D.") by Administrative Law Judge Jennifer Whang ("ALJ"). Among other things, the ALJ found that Respondent Frank William Bonan II's ("Bonan II" or "Respondent") actions in connection with (1) a loan ("618 Holdings loan") made to 618 Holdings, LLC ("618 Holdings") for the sale and leaseback of a warehouse owned by Evergreen Properties of Illinois, LLC ("Evergreen Properties"), and (2) the release of Grand Rivers Community Bank's ("Grand Rivers" or

the "Bank") security interest in a Cabot 900 self-propelled drilling rig ("Rig 23") held as collateral for a loan to Evergreen Drilling, LLC ("Evergreen Drilling") constitute a breach of the fiduciary duties of care and loyalty that Respondent owed to the Bank, as well as engagement in unsafe or unsound banking practices. Accordingly, the ALJ recommends that the Board enter a prohibition order against Respondent under section 8(e) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1818(e), and assess a second-tier civil money penalty ("CMP") in the amount of $105,000 under section 8(i) of the FDI Act, 12 U.S.C. § 1818(i). For the reasons discussed below, although not following the ALJ's decision in all respects, the Board concludes that a prohibition order against Respondent is warranted and that a second-tier CMP of $105,000 is justified.

II. PROCEDURAL HISTORY

The FDIC commenced this action against Bonan II in May 2021 by filing a Notice of Charges ("Notice") seeking an order of prohibition and the imposition of a $105,000 second-tier CMP under 12 U.S.C. §§ 1818(e) and 1818(i). The Notice alleged that Respondent, Chairman of the Board of Grand Rivers, engaged in unsafe or unsound banking practices and breach of his fiduciary duties to Grand Rivers in connection with Grand Rivers' loan relationship with Evergreen Drilling, Evergreen Properties, and related borrowers (collectively the "Evergreen Entities" or "Evergreen"). Respondent answered the Notice on May 26, 2021, and asserted affirmative defenses.

On December 6, 2022, following briefing by Respondent and Enforcement Counsel for the FDIC ("Enforcement Counsel") (together, "the Parties"), the ALJ issued an order denying the Parties' cross-

motions for summary judgment and partial summary disposition, which identified a number of disputed questions of material fact as to each of the misconduct, effect, and culpability elements of Sections 1818(e) and 1818(i).

The ALJ held a six-day hearing from January 17-24, 2023. The hearing included testimony from more than 15 witnesses, including Respondent. A total of 310 exhibits were introduced and admitted into evidence in connection with witness testimony.

On November 20, 2023, the ALJ issued the Recommended Decision. On April 19, 2024, Respondent filed exceptions to the ALJ's Recommended Decision ("Exceptions").

III. FINDINGS OF FACT

The Board is mindful that while it "generally defers to an [ALJ's] factual findings, especially those based on the ALJ's judgments as to the credibility of the witnesses, [it] is not bound by them, and may reach different factual findings so long as there is substantial evidence in the record to support those findings." *In the Matter of Preston J. Brooks*, No. AA-EC-91-153, 1993 WL 13966512, at *14-15 (June 17, 1993) (OCC final decision); *see also Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 853 (D.C. Cir. 1970). The Board draws the following facts from the administrative record and the factual findings of the ALJ. *See* 12 C.F.R. § 308.40(c).

A. General Background

At all relevant times, Grand Rivers was a state-chartered bank doing business under the laws of the State of Illinois, with its principal place of business at Grand Chain, Illinois. Respondents Answer and

Affirmative Defenses to the FDIC's Notice filed on May 26, 2021 ("Answer") ¶ 1. At all relevant times, it was an insured state non-member bank subject to the FDI Act, 12 U.S.C. §§ 1811-1831aa, the Rules and Regulations of the FDIC, 12 C.F.R. Chapter III, and the laws of the State of Illinois. JX 1 (December 19, 2022, Joint Stipulations of Fact) ¶ 2. Respondent was, during the relevant time period, an "institution-affiliated party" ("IAP") of Grand Rivers as that term is defined in 12 U.S.C. § 1813(u) and for purposes of 12 U.S.C. §§ 1818(e)(7), 1818(i), and 1818(j). *Id*. ¶ 3.

At the time of the September 15, 2014, examination of Grand Rivers, Respondent was Chairman of the Board of Directors of Grand Rivers and a member of the Bank's committee that approved all loan requests. *See* R.D. 14; December 6, 2022 Order No. 30: Regarding Cross-Motions for Summary Judgment ("Order No. 30"), at 7; Hr'g Tr. (Botsch) at 272:23-273:3. He served as a director of the Bank and Chairman of the Board from 2010 through October 20, 2015, and again a few days later until his final resignation on April 20, 2016. Order No. 30 at 7.

During the relevant period, Respondent was also community bank President for the southern region of Peoples National Bank, N.A., McLeansboro, Illinois ("Peoples or PNB"). R.D. at 14. He served on PNB's Board of Directors and its Executive Loan Committee. *Id*.

B. Respondent's Dominant Influence

Respondent exerted a "dominant influence" at Grand Rivers and was the dominant policy and decision maker. *See* R.D. at 15-17. Respondent disputes that he exerted a "dominant influence" at Grand Rivers and states that this characterization is the result of the

testimony of two disgruntled former employees (Patrick Hunn and Don Nave). Exceptions at 66-67. However, the testimony from numerous individuals at Grand Rivers makes clear that Respondent was the primary decision maker at the Bank and, in particular, managed and directed the Evergreen relationship at the Bank. *See e.g.*, EX 391 (Gaskins Dep.) 18:10-19:8, 167:4-7; EX 393 (Winters-Ledbetter Dep.) 20:13-19; Hr'g Tr. (Hunn) at 329:14-24; 334:23-335:1.

CEO Whitney Stringer described the Respondent's leadership style as leading "by intimidation rather than respect," explaining that he could sometimes be volatile and vindictive. Hr'g Tr. (Stringer) 34:19-24. Don Nave, a loan review officer at Grand Rivers, reported that when he denied certain loans, Respondent became angry and abusive. Hr'g Tr. (Nave) 195:9-25; 196:1-14. President Keith Botsch testified that Respondent was always trying to push Botsch around to "make me do what he wanted done." Hr'g Tr. (Botsch) 270:16-20. Attorney Patrick Hunn described the Respondent as "rul[ing] with an iron fist," saying it was "his way or no way" and stated that people lost their jobs if they didn't follow his explicit directions. Hr'g Tr. (Hunn) 328:18-22.

CFO Grady Gaskins explained that people were "on edge" when Respondent was around, that he witnessed "shouting and foul language," and that he was not comfortable disagreeing with him. EX 391 (Gaskins Dep.) 19:5-8; 20:8-15. In addition to this testimony, Respondent was found to be a dominant official in the 2016 Report of Examination of Grand Rivers ("2016 Exam"), a finding that was reported in the non-confidential section because it was a concern for examiners. EX 314 at 8; *see also* Hr'g Tr. (Heftner) 502:15-17. Given the ample supporting evidence in

the record, the Board concurs with the ALJ's finding that Respondent was a dominant influence based on the testimony from numerous individuals (not only the two that Respondent references in his Exceptions), as well as the 2016 Exam.

C. The Proposed Merger Between Grand Rivers and PNB

In July 2015, then-President Keith Botsch contacted Respondent's father, Bill Bonan Sr., about the possibility of a merger with PNB. R.D. at 18; *see also* Hr'g Tr. (Botsch) 223:6-8. In response, Respondent resigned as the Chairman of the Board of Grand Rivers, and PNB halted merger discussions. R.D. at 18-19.

CEO Stringer and Botsch believed that the merger was in the best interest of Grand Rivers and that the only way to keep it moving forward was to give in to Respondent's demands—choosing his own board members and a monthly compensation of $10,000. R.D. at 18; *see also* EX 166. Under the merger agreement, the two Evergreen loans would not be assumed but rather held by Grand Rivers' holding company. R.D. at 43; *see also* EX 195 (merger agreement); Hr'g Tr. (Botsch) 225:1-22.

D. Evergreen and its Financial Difficulties

Evergreen Drilling was an oil-drilling company based in Carmi, Illinois. Gary Evans, whose daughter "Abbey" served as the Vice President of Evergreen Drilling as of September 2015, controlled the Evergreen Entities. R.D. at 20. At the time, Evergreen Drilling and Evergreen Properties had outstanding loans with Grand Rivers of approximately $1.2 million, and the Evergreen Entities in total owed PNB approximately $10.5 million (Grand Rivers'

loans and PNB's loans are together "the Evergreen Loan Relationship"). R.D. at 20. Evergreen pledged certain collateral securing its loans to the Bank and to PNB. R.D. at 20.

The Evergreen Loan Relationship was managed by Respondent at Grand Rivers, and along with loan officer Scott Collins, at PNB. R.D. at 20.

Evergreen Drilling's oil-drilling business faced financial difficulties during 2015 in the midst of an industry-wide downturn. R.D. at 21; *see also, e.g.*, EX 391 (Gaskins Dep.) 137:21-138:5. Due to these difficulties, PNB accepted for six months payments of only interest on the Evans' loans at PNB, and an increased line of credit was extended to Evergreen on the understanding that the company would reduce its debt to PNB by $1 million by August 2015 through the sale of an equivalent amount of non-critical assets. R.D. at 21. However, by August 2015, Evergreen's loans at PNB had matured and the company still had not reduced its debt. R.D. at 21. Respondent and others at PNB expressed significant concerns about Evergreen's ability to service its debt and began considering how PNB could effectuate the company's options regarding the sale of its assets and potential future increase in cash flow. R.D. at 21.

The Plan for Evergreen

In September 2015, Respondent prepared a handwritten document entitled "Plan for Evergreen," which proposed that the Evergreen Entities sell collateral and refinance their loans in order to repay approximately $5.4 million of their debt to PNB and Grand Rivers. R.D. at 22.

One of the pieces of collateral mentioned in the Plan for Evergreen was a commercial warehouse in

Carmi, Illinois, that Evergreen used as its headquarters (the "Carmi Warehouse"). R.D. at 22. The Carmi Warehouse had been pledged as collateral and was the subject of mortgage liens on loans to Evergreen Properties in favor of both Grand Rivers and PNB. R.D. at 23. At the time, the loans secured by the Carmi Warehouse totaled approximately $358,000 to PNB and $638,000 to Grand Rivers as a first and second mortgage, respectively. R.D. at 23. Among other things, the Plan for Evergreen also contemplated that Evergreen would sell one of its drilling rigs – Rig 24 – which was pledged as collateral for a loan to PNB. R.D. at 23.

Evergreen's Agreement with PNB

On September 30, 2015, PNB classified $5.9 million of its loans to Evergreen Drilling as substandard and placed them on non-accrual status. R.D. at 23. Ultimately, in the Fall of 2015, PNB and the Evergreen Entities entered into an agreement that extended the maturity dates of PNB's two Evergreen Drilling loans, bearing a total balance of over $10 million, until the end of April 2016. R.D. at 24. In return Evergreen agreed to liquidate additional assets to pay down its debt, including the proceeds from its then-pending sale of Rig 24, and to pledge new collateral to PNB as further security for the loans. R.D. at 24. One of the pieces of new collateral that Evergreen promised to pledge to PNB "free and clear of all liens or encumbrances" was its Cabot 900 drilling rig, known as Rig 23, despite the fact that Rig 23 was at the time already pledged as security to Grand Rivers. R.D. at 24.

While the record is unclear as to the extent of knowledge of the Grand Rivers Board of Directors as to details, the ALJ found, and this Board agrees,

that the Grand Rivers Board generally knew and understood the level of Evergreen's financial difficulties, and in particular Evergreen's negative credit relationship with PNB as of December 2015. R.D. at 24-25.

The Carmi Warehouse

The Plan for Evergreen set out by Respondent involved the sale of Evergreen's Carmi Warehouse in the fall of 2015 to reduce the company's debt. R.D. at 26. However, Respondent also viewed it as "critical" that Evergreen Drilling be able to continue to use the Carmi Warehouse as its headquarters. R.D. at 26. Accordingly, Respondent contemplated a sale and leaseback transaction in which someone purchased the warehouse from Evergreen, allowing Evergreen to pay down its loans with the proceeds, while the company continued to use the warehouse under the terms of a lease agreement. R.D. at 26.

Respondent's Efforts to Purchase the Carmi Warehouse

Initially, beginning in mid-September 2015, Respondent took steps to purchase and lease back the Carmi Warehouse himself using his company FWBII Holdings ("FWBII-H"). *See* R.D. at 26-27. Carrollton Bank ("Carrollton") agreed to finance Respondent's purchase. R.D. at 27- 28. At some point after December 2, 2015, however, Respondent decided that he no longer wished to purchase the Carmi Warehouse and did not consummate the purchase. R.D. at 31-33.

E. The 618 Holdings Loan

While the Carrolton loan was awaiting consummation in December 2015, Respondent was exploring an alternate route—facilitating the purchase and lease-

back of the Carmi Warehouse by a new company formed by two of his employees, Jason Harbison ("Harbison") and Adam Tate ("Tate"). R.D. at 33. Originally, Harbison and Tate had been looking to purchase a residential building, but that fell through. EX 395 (Harbison Dep.) 15:14-20 ("For whatever reason, that didn't work out. Subsequently, I think Bill ended up buying it."). In mid-December, Respondent approached them and asked them to purchase the Carmi Warehouse instead, with financing from Grand Rivers. R.D. at 34; *see also* EX 395 (Harbison Dep.) 15:21-24 ("But he said, you know, that deal is not going to work out, but this is a deal—I need you to do me a favor, this deal would help me out a lot."); EX 391 (Gaskins Dep.) 65:13-18.

James Harbison and Adam Tate

At the time Respondent asked Harbison and Tate to purchase the Carmi Warehouse, they both worked for him and lived rent free in housing he owned. R.D. at 33. Harbison provided property management services for Respondent's company, FWBII-H, such as lawn mowing and landscaping through Harbison's company Roundfire Solutions, LLC ("Roundfire Solutions"). R.D. at 33. Tate was a contract employee. R.D. at 33. Neither Harbison nor Tate had significant financial assets. R.D. at 33-34. Harbison had a negative net worth of $190,000 with an adjusted gross income of $62,000. R.D. at 34. Tate had a net worth of $20,000 and an adjusted gross income of $27,000. R.D. at 34.

Respondent Facilitates the 618 Holdings Purchase of the Carmi Warehouse

Respondent initiated the purchase of the Carmi Warehouse by Harbison and Tate, determined the

terms, and facilitated the financing through Grand Rivers. R.D. at 33-36. Respondent approached Harbison and Tate and asked them to purchase the warehouse. R.D. at 33. On or before December 17, 2015, Respondent directed CFO Gaskins to prepare a loan request on behalf of Harbison and Tate to purchase the Carmi Warehouse from Evergreen Properties for $1.25 million. R.D. at 36. The loan request was made in the name of 618 Holdings, LLC ("618 Holdings"). R.D. at 36. The terms of purchase and the lease agreement for the purchase of the Carmi Warehouse by 618 Holdings were nearly identical terms as the proposed purchase of the property by Respondent's company, FWBII-H, terms which were negotiated by the Respondent. Hr'g Tr. (Hunn) 348:18-19; EX 391 (Gaskins Dep.) 61:25; 66:1- 3. Gaskins also testified that he told examiners that he structured the loan payment reserve based on instructions from Respondent. EX 391 (Gaskins Dep.) 82:23-25.

There is no indication in the record that Respondent ever threatened Harbison and Tate, but the ALJ credited Harbison's testimony that he felt pressured to agree to the deal and that he feared consequences if he did not comply. R.D. at 35; *see also* EX 395 (Harbison Dep.) 21: 9-24 (testifying that he went along with the deal "mostly because of leverage" and that Respondent "was my sole source of income in this economic desert that is Southern Illinois."); EX 395 (Harbison Dep.) 22: 1-5 (if he had not gone along with the deal he expected Respondent would have "fired me, told me I needed to move out, whatever. There would have been a consequence in my opinion."). Other than choosing the name of the company and visiting the Carmi Warehouse once before the sale, Harbison testified that he and

Tate had no involvement with the transaction or knowledge of the transaction terms until the day of closing. R.D. at 36; *see also* EX 395 (Harbison Dep.) 19:8-20. Everything was done for them by Grand Rivers' employees at the direction of Respondent. R.D. at 36.

Board Approval of the 618 Holdings Loan

On December 18, 2015, Winters sent the Bank's directors an email to approve certain loan requests, which included the 618 Holdings $1.25 million loan, as well as a $600,000 loan request for Harbison's other company, Roundfire Solutions. R.D. at 37. Neither request showed any cash flow analysis, but instead, the Roundfire Solutions request simply stated "adequate cash flow" and the 618 Holdings request listed a net worth of $150,000—despite not yet being a legal entity. R.D. at 37-38. 618 Holdings, LLC was formed as a company on December 30, 2015. EX 300.

On December 23, 2015, the Board of Directors for Grand Rivers voted to approve the 618 Holdings loan. R.D. at 42. 618 Holdings still did not exist as a legal entity. *Id*.; *see also* EX 300. Respondent originally voted to approve, then abstained. R.D. at 42. Stringer also abstained. *Id*. Other Board members, Gaskins, Lucas Phelps ("Phelps"), and Jake Campbell ("Campbell"), all voted yes by email. R.D. at 42; *see also* EX 296.

Gaskins testified that although he didn't think Harbison and Tate had the ability to repay the loan, he voted for it because he was told to by Respondent, and that if he hadn't, he would be removed from his position by the Respondent. R.D. at 43; *see also* EX 391 (Gaskins Dep.) 76:15-25.

Campbell expressed concerns over the true value of the Carmi Warehouse, the lack of cash flow for 618 Holdings, and Evergreen's ability to make lease payments. R.D. at 43; *see also* EX 273. Nevertheless, he testified that he ultimately voted for the loan because the Evergreen loans wouldn't be included in merger with PNB but the 618 Holdings loan would. R.D. at 43; *see also* Hr'g Tr. (Campbell) 397:13-22; 399:4-6. Campbell also testified that while he knew of Harbison and Tate's negative net worth, he thought they had a better chance of "making good" on the loans than Gary Evans because of oil prices and their financial difficulties. Hr'g Tr. (Campbell) 413:1-11. However, had he known the full state of Evergreen's financial difficulties, in particular the non-accrual status of their loans at PNB, he testified that he would not have voted yes despite his merger concerns. R.D. at 43-44.

Stringer testified that she abstained because she had concerns about the borrowers and the repayment of the loan but that she did not feel comfortable voting against it because she feared being fired as a result. R.D. at 44; *see also* Hr'g Tr. (Stringer) 64:16-22; 67:3-7; 119:5-8.

Creditworthiness of Harbison and Tate

Harbison himself testified that neither he nor Tate were creditworthy. R.D. at 34, 41; *see also* EX 395 (Harbison Dep.) 20:25-21:5. He further testified that neither of the two borrowers was capable of making the $7,753 monthly payment under the terms of the loan. R.D. at 41; *see also* EX 395 (Harbison Dep.) 33:12-23. Harbison said he felt pressured to agree to the transaction, feared consequences if he did not comply, and expected someone to come in and stop it.

R.D. at 35, 42; *see also* EX 395 (Harbison Dep.) 21:16-20; 42:9-13.

Employees at Grand Rivers were aware that Harbison and Tate were not creditworthy for the 618 Holdings loan. R.D. at 34, 36, 39, 42. The Bank's attorney Patrick Hunn testified that he was surprised they were purchasing the Carmi Warehouse "due to their financial status or lack thereof." R.D. at 36; *see also* Hr'g Tr. (Hunn) 338:10-14; 338:20-339:2. CFO Gaskins stated that Harbison and Tate were "were not very strong at the time as far as credit approval" and that neither would have the financial capacity to support the loan. R.D. at 39; *see also* EX 391 (Gaskins Dep.) 74:22-23; 75:18-76:9. Senior Loan officer Williams testified that he thought Respondent did not ask him to be involved with the loan because he would not have approved it in light of Harbison and Tate's financial worth and because he knew no way that 618 Holdings was going to generate sufficient revenue to meet payments. R.D. at 39; *see also* Hr'g Tr. (Williams) 660:3-4, 658:20-660:5, 660:12-19. CEO Stringer testified that the two borrowers "didn't have the capacity and were talked into a business arrangement that they couldn't afford to pay for in order to do whatever for Evergreen Drilling." R.D. at 42; *see also* Hr'g Tr. (Stringer) 133:1-4.

During the 2016 Examination of Grand Rivers, in addition to questioning the 618 Holdings loan, examiners also questioned a $50,000 unsecured loan to Harbison. R.D. at 49. Around the same time, representatives from PNB noted their concerns over the same $50,000 loan during a loan review as part of the due diligence for the proposed merger. *Id*. at 52. They found that Harbison did not reasonably qualify

for unsecured credit on a $50,000 loan. *Id*.; *see also* Hr'g Tr. (Stringer) 83:7-11 (noting that Harbison couldn't "cash flow" for the $50,000 loan).

Respondent argued that he was misled into believing Harbison and Tate could make the loan payments because he was provided with outdated and inaccurate credit score information. R.D. at 39. However Respondent paid Harbison and Tate's respective salaries. R.D. at 33-34. Harbison had an adjusted gross income of $62,000 while Tate had an adjusted gross income of $27,000. R.D. at 34. Neither had any significant assets. R.D. at 33-34.

The ALJ determined, and this Board agrees, that Respondent knew or should have known that Harbison and Tate would not be capable of repaying a $1.25 million loan given their income and overall life situation, as well as the Respondent's knowledge of the same. R.D. at 38, 40-42. Taking note of the additional $600,000 loan request made on behalf of Harbison personally, the ALJ found that the Respondent appeared to place little importance on Harbison's financial capacity and ability to repay the bank. R.D. at 41.

Purchase and Sale and Lease Agreements

On January 7, 2016, 618 Holdings and Evergreen Properties finalized the purchase and sale and lease agreements for the Carmi Warehouse. R.D. at 44. The final loan amount was $1,262,109.75. R.D. at 45. The transaction terms and loan structure were formulated by the Respondent and Harbison and Tate had no knowledge of the terms until the day of closing. R.D. at 44-45. The only change either of them made was an inclusion of an escalation of lease payments made by Harbison. R.D. at 45.

From the proceeds Evergreen Properties made on the sale of the Carmi Warehouse, the first and second mortgage liens at PNB and Grand Rivers, respectively, were paid off. R.D. at 45. A lease reserves account was set up in the amount of $150,000, money which was placed into an escrow account to be automatically applied to the first eighteen months of lease payments made by Evergreen Properties to 618 Holdings. *Id*. Finally, $100,000 allocated for operational expenses was given to Evergreen Properties. *Id*.

The 2016 Examination of Grand Rivers

In January 2016, during the examination process, FDIC examiners Mathias Floersch and Reuben Cash looked into the 618 Holdings loan. R.D. at 49. At a February 9 meeting, when asked about the lease reserves structure, Gaskins reported that it was the Respondent's idea to establish the lease reserves, and that the source of repayment on the 618 Holdings loan would be lease payments from Evergreen. R.D. at 49; *see also* Hr'g Tr. (Floersch) 462:21-25; 463:1-2; Hr'g Tr. (Williams) 662:9-20.

The loan was then classified as substandard by the examiners. R.D. at 49-50; *see also* EX 314 at 56 (classification was "due to the lack of financial capacity of the debtors, the inappropriate structuring of the 618 Holdings credit in which an indirect [principal and interest] reserve account was established to make loan payments, the lack of collateral protection, and the questionable ability of Evergreen Properties to generate sufficient income to pay lease payments.").

The ALJ credited the joint fact and expert testimony of examiners Floersch and Cash in their

conclusion that the structure of the 618 Holdings loan increased risk to Grand Rivers. R.D. at 51. Floersch and Cash explained that the loan resulted in Grand Rivers taking on additional debt—moving debt previously held by PNB to Grand Rivers, and then also another $250,000 in escrow and operating expenses. *Id*. This additional debt, on the same collateral, reduced the ability of Grand Rivers to recoup those funds, "jeopardizing the Bank's ability to liquidate it in case of default." *Id*. The examiners also testified that the loan file for 618 Holdings lacked a basic analysis of repayment capacity, did not conform to prudent loan workout practices, and that the lease reserves served to mask the loan's true repayment ability (or lack thereof). *Id*.

After a visit from examiners, on April 7, 2016, the 618 Holdings loan was put on non-accrual status. R.D. at 52; *see also* EX 357. On April 20, Respondent resigned from his positions at Grand Rivers and the holding company. *Id*. Gaskins and Campbell also resigned. *Id*.

618 Holdings Loan Default and Impacts

In January 2017 Grand Rivers charged off $500,000 from the 618 Holdings loan.[1] R.D. at 52. 618 Holdings then defaulted on the loan, which had a balance of $668,519 after the charge-off and after Grand Rivers applied the funds from the lease reserve account. *Id*. On April 7, 2017, in order to avoid foreclosure, 618 Holdings entered into a deed-in-lieu of foreclosure with Grand Rivers. R.D. at 52; *see also* EX 353. Brent Clark, a Board Member, testified that Grand Rivers pursued a deed-in-lieu

[1] Grand Rivers further wrote down the debt in December 2018 by $13,760. EX 357.

because Harbison and Tate had "no perceivable way to earn that type of cash flow to service that type of debt." R.D. at 53; *see also* Hr'g Tr. (Clark) 737:24-738:4. Harbison testified that he opted for the deed-in-lieu because he was not able to pay the debt. R.D. at 53; *see also* EX 395 (Harbison Dep.) 44:10-18. As of November 2022, the best offer Grand Rivers reportedly received on the property was $500,000. R.D. at 53; *see also* Hr'g Tr. (Stringer) 102:24-25. As of the date of the Recommended Decision, Grand Rivers still owned the Carmi Warehouse. R.D. at 53.

F. The Release of the Rig 23 Collateral

As of the fall of 2015, Evergreen owned several self-propelled oil drilling rigs used to carry out their business. R.D. at 53. This included Rig 23 (a Cabot 900 series model) and Rig 24 (a Service King 775 model). R.D. at 53. Rig 23 was considerably more valuable than Rig 24. R.D. at 53.

In January 2013, Grand Rivers obtained a purchase money security interest ("PMSI") in Rig 23 as collateral for a $490,000 loan to Evergreen Drilling. R.D. at 54; Ex. 9 at 1; Hr'g Tr. (Stringer) 40:22-41:10; Hr'g. Tr. (Nave) 175:9-176:15. Grand Rivers filed UCC-1s expressly reflecting its PMSI in Rig 23 with the Illinois and Indiana Secretaries of State on January 8, 2013 and January 9, 2013, respectively.[2] R.D. at 55. The file number for the Illinois UCC-1 statement was 17906194. R.D. at 55.

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[2] A search of UCC financing statements ("UCC-1s") filed in a given jurisdiction will show all of the collateral that a specific entity has pledged as security in that jurisdiction, along with the nature of the security interest. R.D. at 54-55. A PMSI is distinct from a blanket lien. *See* Hr'g Tr. (Nave) 175:19-176:3 (describing blanket liens and PMSIs).

Peoples held its own security interest in Rig 23 "through a prior blanket UCC lien securing all of its loans to Evergreen Drilling." R.D. at 55.[3] This interest was subject to Grand Rivers' $490,000 PMSI, which took priority over People's lien. R.D. at 55.

In June 2013, Grand Rivers' then-CEO, James Stroud, prepared an additional loan of approximately $90,000 to Evergreen Drilling that was also secured by its PMSI in Rig 23. R.D. at 55; EX 14 at 1; Hr'g Tr. (Nave) 202:16-20; *see also* Hr'g Tr. (Nave) 180:4-185:11. In May 2014, Respondent directed Donald Nave, as loan officer on Evergreen Drilling, to consolidate the two loans. R.D. at 55. Grand Rivers' executive loan committee approved this consolidation (which advanced a further $126,000 to Evergreen Drilling "for expenses") and the consolidated loan was issued on May 8, 2014. R.D. at 55-56; EX 15 at 1. The promissory note executed by Evergreen Drilling on May 8, 2014 stated that it was secured by Commercial Security Agreement dated January 9, 2013, and referenced UCC file #17906194 (the file number for the Illinois UCC-1 statement). EX 9, EX 10, EX 11, EX 17 at 3. EX 55 at 3, 46, Hr'g Tr. (Nave) 184:9-17; Hr'g. Tr. (Clark) 708:8-710:13; Hr'g. Tr. (Stringer) 104:2-106:14.[4]

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[3] A UCC-1 blanket lien gives a creditor a security interest in all of the assets that a borrower has in the event of default, but at a lower priority. R.D. at 55. The existence of a blanket lien held by a creditor in a given jurisdiction would also be discoverable in a UCC-1 search. *Id*.

[4] At no time while Nave was employed at the Bank was the Bank told that Rig 23 was a titled motor vehicle. Nave testified that the Bank initially asked for a title, but was told Rig 23 was equipment and did not have a title. Hr'g. Tr. (Nave) 177:15-22.

As of the fall of 2015, the PMSI in Rig 23 was the sole piece of collateral on Grand Rivers' Evergreen Drilling loan. R.D. at 56.

PNB Seeks Release of Grand Rivers' Rig 23 Interest

In or around September 2015, PNB loan officer Scott Collins contacted Grand Rivers to request that it release its security interest in the Rig 23 collateral, apparently in the belief that Grand Rivers had a lien on the wrong drilling rig. R.D. at 56. Donald Nave refused to release Grand Rivers' PMSI in Rig 23 unless Grand Rivers "was paid the full amount of its lien pursuant to the UCC-1 on file with the Illinois and Indiana Secretaries of State." R.D. at 57; *see also* EX 39, EX 40; Hr'g. Tr. (Nave) 188:10-25, 189:1-13.

The Sale of Rig 24

On September 14, 2015, as part of Evergreen Drilling's plan to liquidate assets and pay down its debt to PNB, it entered into a Letter of Intent with U.S. Energy Exploration Corporation ("U.S. Energy") for the sale of Rig 24, a Service King 775 series drilling rig. R.D. at 59; *see also* EX 45; JX 1 ¶ 35.

On October 7, 2015, Gaskins sent an email to Kassie Winters, Grand Rivers Head of Loan Operations ("Winters"), asking if Grand Rivers had Rig 24 as current collateral. EX 88 at 1. Gaskins asked Winters this question because Evergreen Drilling was about to sell Rig 24 and Gaskins knew that Grand Rivers would need to release any UCC filings on Rig 24 to complete the sale. EX 391 (Gaskins Dep.) 109:17-24. Winters responded and stated that "[t]his doesn't list a rig number it says Cabot 900 series self-propelled drilling rig SN#11937." EX 88, at 1. The "this" referred to the

UCC security agreement that Grand Rivers had for its loan to Evergreen Drilling. EX 393 (Winters-Ledbetter Dep.) 113:22-114:2.

On October 9, 2015, U.S. Energy sent Evergreen Drilling a signed Sale and Purchase Agreement ("Rig Purchase Agreement") to purchase Rig 24 for $1,559,000 (ten percent of the purchase price had already been paid as a nonrefundable deposit). R.D. at 59; *see also* JX 1 ¶ 36. As part of the transaction, Evergreen Drilling represented to U.S. Energy that it owned "good and marketable title to [Rig 24], free and clear of all Encumbrances," other than "such liens or encumbrances which can and shall be removed by application of all or a portion of the purchase price at closing by escrow agent." R.D. at 59; RX 40 (signed copy of Rig Purchase Agreement) § 3.1(c). Evergreen Drilling further warranted that it would provide U.S. Energy "with proof of satisfaction of the indebtedness and/or release of security interest" for those existing liens and encumbrances prior to closing and stated that the escrow agent holding the balance of the purchase price "shall retain the purchase price funds until such proof is provided." R.D. at 59-60; RX 40 § 3.1(c).

The Rig Purchase Agreement included attachments, two of which are pertinent here – Appendix A and Exhibit C. R.D. at 60. Appendix A identifies the drilling rig being sold as a "2010 Service King – SK 775 Series," which is the model number for Rig 24. R.D. at 60; RX 40 at 18.[5] Rig 24 is not identified or described anywhere else in the Rig Purchase

[5] On September 15, 2015, Abbey Evans had sent Bonan II a copy of the September 14, 2015 Letter of Intent that included Appendix A. EX 45.

Agreement, and in particular it is not identified by rig number. R.D. at 60. Exhibit C purported to be a list of all existing liens and encumbrances on the Service King 775 being sold (*i.e.*, *on Rig 24)* that needed to be released before closing so that "good and marketable title" to the rig could be conveyed. R.D. at 60; RX 40 §§ 2.4, 3.1(c); *see also* JX 1 ¶ 37. Exhibit C lists two separate liens that needed to be released as a condition of the sale. Erroneously, one of those liens was actually Grand Rivers' PMSI *on Rig 23* (which was not being sold). RX 40 at 23.[6]

Confusion over Rig 23 and Rig 24

Grand Rivers did not have, and never had, any kind of security interest in Rig 24; the only loan that Evergreen Drilling had with Grand Rivers at this time was the May 2014 consolidated loan secured by Rig 23. R.D. at 60; *see also* JX ¶ 55 ("Rig 24 was never collateral securing Evergreen Drilling's loan with the Bank"). Nor did Grand Rivers have a blanket lien on Evergreen Drilling. R.D. at 60. Anyone could have ascertained these facts by performing a UCC-1 search in Illinois and Indiana. R.D. at 60.

Nevertheless, Exhibit C to the Rig Purchase Agreement listed a security interest held by Grand Rivers that needed to be satisfied before clear title on Rig 24 could be conveyed and the escrow agent could release the remainder of the purchase price. R.D. at 61. The *Rig 24* interest purportedly held by Grand

[6] Rig 23 was not described by rig number. It was only identified by reference to the UCC file number. *Compare* EX 127, at Exhibit C (listing security interest in favor of Bank in Illinois with a file number of 017906194) *with* EX 10 at 1 (UCC Financing Statement No. 17906194 filed in connection with the loan to Evergreen Drilling that was secured by a PMSI in Rig 23).

Rivers is listed as "filed with the Illinois Secretary of State at File No. 017906194." R.D. at 61. But this was erroneous; this filing was actually Grand River's Illinois PMSI *on Rig 23*. R.D. at 61. The record does not reveal how this error occurred. R.D. at 61.

The confusion over Rig 23 versus Rig 24 was soon compounded.

On October 9, 2015, Abbey Evans emailed Respondent, asking "We are needing a UCC-1 release from Grand Rivers and Peoples on Rig 24 to attach to the purchase agreement as Exhibit C. If at all possible, can we please get this done today." R.D. at 62; EX 122 (October 9, 2015 email chain); JX 1 ¶ 36. Respondent then forwarded Evans's email to Gaskins and Collins and instructed them to "[g]et these releases to Gary." R.D. at 62; EX 122; *see also* JX 1 ¶ 36; RX 103, at 1. Gaskins understood that Respondent was requesting a release for the rig that was being sold, Rig 24. EX 391, Gaskins Dep. 113:2-6. This was not possible with respect to Grand Rivers because Grand Rivers had no security interest in Rig 24, but rather had a PMSI on Rig 23.[7] Later that day Gaskins got back to Respondent mistakenly stating "our ucc-1 is not a blanket it is just on this specific rig [referring to Rig 24] so all I need to do is prepare the termination and I can send it out. I won't file it until payment is received. Just need the attachments to confirm its same equipment and same wording in ucc and purchase agreement. I can take care of it right now." EX 124, at 1; EX 391 (Gaskins Dep.) 114:18-25. Gaskins testified that "this specific rig" referred to

[7] Nor was Grand Rivers receiving anything for any release of Rig 24 (even assuming that it had a lien on that rig, which it did not). R.D. at 65.

Rig 24. EX 391 (Gaskins Dep.) 114:18-25. Respondent did not send him the attachments. Gaskins did not confirm that whatever termination statement Grand Rivers filed pertained to the same drilling rig that Evergreen was selling (*i.e.*, Rig 24). EX 391 (Gaskins Dep.) 115:21-116:4.

Gaskins testified that he and Winters were responsible for confirming that the "Cabot 900" (*i.e.*, Rig 23) was the rig being sold (*i.e.,* rig 24). EX 391 (Gaskins Dep.) 110:19-111:6. Respondent testified at the hearing that, as Chairman of the Board, he was not the one responsible for confirming the accuracy of UCC filings. Hr'g Tr. (Respondent) 907:9-12. However, as to the sale between Evergreen Drilling and US Energy, Respondent directed Gaskins and Winters with respect to the Bank's release of collateral. EX 391 (Gaskins Dep.) 87:4-25; EX 393 (Winters-Ledbetter Dep.) 128:20-25; 129:1-10.

What followed was a stream of further (mis)communications with respect to the release requested by Abbey Evans, the preparation of erroneous UCC termination statements, and directions from Respondent to others at Grand Rivers to release collateral that Grand Rivers did not possess. *See* R.D. at 61-77. For example, later on October 9, Gaskins forwarded Abbey Evans' email (which included the attachment listing the Rig 23 UCC filing) to Winters saying "[n]eed this security interest released/terminated." EX 126 at 1. Gaskins, however, believed that he was instructing Winters to prepare a release for Rig 24. EX 391 (Gaskins Dep.) 121:20- 122:4. On the evening of October 9, Gaskins and Winters met at the Grand Rivers office and reviewed the U.C.C. termination statements Winters had prepared for filing in Illinois and Indiana. EX

393 (Winters-Ledbetter Dep.) 157:4-12, 157:21-158:20. The evidence shows that Winters and Gaskins thought they were preparing termination statements related to Rig 24 (which was being sold) when in reality they were doing so for Rig 23 (which was not). *See, e.g.*, EX 393 (Winters-Ledbetter Dep.) 158:8-18.

On October 16, 2015, Winters emailed Respondent copies of unrecorded UCC-3 termination statements she had prepared. EX 143, at 1-2 (Illinois); *see also* EX 142, at 1-2 (Indiana). The termination statements list the UCC file numbers for the original UCC filings on Rig 23. *E.g.*, EX 143, at 2. Respondent did not open the email attachments. Hr'g Tr. (Respondent) 878:25-880:25; 881:1-882:8.

The miscommunications continued. For example, on November 13, 2015, April Reicken of Evergreen Drilling forwarded an email from Denny Boyer (of U.S. Energy) that sought the "Grand Rivers Bank UCC Release." R.D. at 68; EX 233 (chain including November 13, 2015 email). Ms. Riecken stated:

> Bill –
>
> Gary wants to know how we handle the UCC-1 from Grand Rivers. Even though there is no collateral for Rig 24 at Grand Rivers Denny still wants a recorded UCC-1, does someone at Grand Rivers have this to send to me? I don't have anyone's information there to contact regarding this.

Id. Respondent did not correct the apparent mistake being made between Rig 23 and Rig 24, but rather forwarded this email on to Kassie Winters and Gaskins saying "[g]et this bulkshit [sic] done this morning. Do you understand me." R.D. at 68; EX 233.

Both Gaskins and Winters understood this to refer to releases for Rig 24. EX 391 (Gaskins Dep.) 87:4-11; EX 393 (Winters-Ledbetter Dep.) 165:7-14.

The Release of the Rig 23 Collateral

Thus, Respondent demanded that Rig 24 be released on November 13, 2015. R.D. at 70. The problem was that there was no Grand Rivers lien on Rig 24 to be released. There was, however, a PMSI on Rig 23.

In that regard, on that same day, Winters emailed Riecken and Boyer and attached UCC forms that terminated Grand Rivers' Indiana and Illinois interests in Rig 23. R.D. at 70-71; RX 46 at 3, 4. Respondent was copied on this email. R.D. at 71. The forms terminating the Bank's Illinois and Indiana interest in Rig 23 were filed and recorded on November 13, 2015. R.D. at 73; *see* EX 234, at 1.

It is Respondent's position that he believed that the UCC termination filings either released a security interest that did not exist or one that should not have existed. Exceptions at 13; *see also* Hr'g Tr. (Respondent) 906:22-907:3.

In any event, the evidence is that as of November 13, 2015, Respondent, Winters, and Gaskins all believed that the Bank had released its security interest (if any) in Rig 24. Hr'g Tr. (Respondent) 856:8-18; EX 391 (Gaskins Dep.) 132:21-133:2; EX 393 (Winters-Ledbetter Dep.) 145:22-146:4. There is no substantial evidence that any of the three intentionally released Rig 23.

Grand Rivers Discovers the Release of Rig 23 and Charges Off the Loan

The termination of the Bank's PMSI in Rig 23 meant that its consolidated loan to Evergreen Drilling—with an outstanding balance of approximately $550,000—was no longer secured by any collateral. R.D. at 77. Mike Williams, Grand Rivers' senior loan officer, discovered that the loan was unsecured during the joint examination of the Bank in early 2016, when he "pulled an updated UCC search" for Evergreen and realized that the UCC had been released for this loan. R.D. at 77-78. Winters then attended a meeting with Respondent, Williams and other bank personnel in which Winters confessed that she had accidentally released Grand Rivers' Rig 23 interest. R.D. at 78. Grand Rivers obtained a new blanket lien for the Evergreen Drilling loan in March 2016 that was subordinate to the blanket lien already held by PNB. R.D. at 78.

Grand Rivers ultimately charged off the Evergreen Drilling loan in the amount of $489,268 in early January 2017. R.D. at 79.

Respondents Allegations Relating to Motive

Respondent alleges in his Exceptions that the Grand Rivers board had a motive to "throw[] [him] under the bus" to obtain an insurance payment with respect to the release of Rig 23. Exceptions at 15-16. Specifically, Respondent points to the following evidence: On June 16, 2016, Mike Williams sent an email to Winters asking "what collateral is left of Evergreen. I need this ASAP." RX 85, at 3. Winters responded, stating that Grand Rivers "ha[s] a blanket UCC on everything behind PNB." *Id*. at 2. Williams forwarded Winters' response to Keith Botsch,

Whitney Stringer, and Brent Clark, stating "When Kassie released (accidentally, she said) our lien on the $2 million drilling unit, instead of remaining unsecured, she/Grady filed a blanket UCC on Inventory, Equipment, and Accounts. PNB (of course) has a prior lien." *Id*. at 1-2. Stinger responded "It's possible we can file an insurance claim. I need to have a sit down with her to get the full story. Originally, she said it was her accident, but it may be that she was instructed by [Respondent] or [Gaskins] who would both be covered under the D&O policy." *Id*. at 1. Botsch responded and stated that Grand Rivers was "going to probably take a loss so I would do what we can to recover from the insurance policy if possible." *Id*.

The Board finds that there is no credible support for the proposition that the Grand Rivers' board acted with any improper motive (or what specific action was allegedly taken that would affect the Board's analysis in this matter).

Respondent's Conflicting Positions

The ALJ found that Respondent's testimony with respect to the issues involving the release of Rig 23 was not credible. R.D. at 12, 73-77. In particular, the ALJ found that Respondent was not credible with respect to whether he believed Grand Rivers held a security interest in Rig 24 at all, and when he believed it. *Id*. For example, at certain points Respondent testified that he was aware that there was no interest in Rig 24, yet still ordered his subordinates to release Rig 24. R.D. at 73. At other points, he testified that he believed Grand Rivers had a blanket lien on Evergreen Drilling that was in a junior position to PNB. R.D. at 73. The Board defers

to the ALJ's credibility determinations with respect to Respondents' testimony on this issue.

ANALYSIS

IV. SECTION 1818 VIOLATIONS

A. Standard

Unless otherwise provided by statute, the burden of proof in an administrative proceeding is on the administrative agency to establish its charges by a preponderance of the evidence. *See* 5 U.S.C. § 556(d); *Steadman v. SEC*, 450 U.S. 91, 102 (1981). Here, the FDIC bears the burden to prove that the statutory elements for the entry of a prohibition order and the assessment of a second-tier civil money penalty have been satisfied.

B. The Elements of Sections 1818(e) and 1818(i)

Prohibition Order

For the entry of a prohibition order under 12 U.S.C. § 1818(e), the FDIC must prove the separate elements of misconduct, effect, and culpability.

The misconduct element may be established by showing that Respondent (an IAP) (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 [the Bank]," or (3) "committed any act, omission, or practice which constitutes a breach of [Respondent's] fiduciary duty." 12 U.S.C. § 1818(e)(1)(A).

The effect element may be established `by showing that [the Bank] thereby "has suffered or probably will suffer financial loss or other damage," that the Bank's

depositors' interests "have been or could be prejudiced," or that Respondent "has received financial gain or other benefit." 12 U.S.C. § 1818(e)(1)(B).

With respect to the culpability element, it may be satisfied when the alleged misconduct either "involves personal dishonesty" or "demonstrates willful or continuing disregard by [Respondent] for the safety and soundness of [the Bank]." 12 U.S.C. § 1818(e)(1)(C)

Civil Money Penalty

Under 12 U.S.C. § 1818(i), the imposition of a second-tier civil money penalty also requires the satisfaction of multiple elements.

First, the FDIC must show misconduct, which can be the violation of "any law or regulation" or "final cease-and-desist order," the breach of "any fiduciary duty," or the *reckless* engagement "in an unsafe or unsound practice in conducting the affairs" of the Bank. 12 U.S.C. § 1818(i)(2)(B)(i) (emphasis added). Second, the FDIC must show some external effect: (1) that it "is part of a pattern of misconduct"; (2) that it "causes or is likely to cause more than a minimal loss to" the Bank; or (3) that it "result[ed] in pecuniary gain or other benefit" to the Respondent. 12 U.S.C. § 1818(i)(2)(B)(ii). Further, before any civil money penalty can be assessed, the FDIC must take into account the appropriateness of the amount of the penalty sought when considered in light of certain potentially mitigating factors, such as the "gravity of the violation" and the "good faith of the . . . person charged." *See* 12 U.S.C. § 1818(i)(2)(G).

In making its determinations with respect to the misconduct element of both sections 1818(e) and (i), the ALJ adopted the so-called "Horne Standard" to

evaluate what constitutes an "unsafe or unsound practice." R.D. at 8. Under this standard, such practices encompass "any action, or lack of action, which is 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." R.D. at 8; *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). The Board likewise adopts the Horne standard in evaluating the misconduct prongs of both 1818(e) and (i).

C. Respondent is Liable for the 618 Holdings Loan and a Prohibition Order is Warranted.

The Board may impose a prohibition order if a preponderance of the evidence shows that Respondent engaged in prohibited conduct (misconduct); the effect of which was to cause the Bank to suffer financial loss or damage, to prejudice or potentially prejudice the Bank's depositors, or to provide financial gain or other benefit to the Respondent (effects); and that Respondent acted with personal dishonesty or a willful or continuing disregard for the safety and soundness of the Bank (culpability). 12 U.S.C. § 1818(e)(1); *Dodge v. Comptroller of Currency*, 744 F.3d 148, 152 (D.C. Cir. 2014) (citing *Proffitt v. FDIC*, 200 F.3d 855, 862 (D.C. Cir. 2000)). This Board agrees with the ALJ that Respondent's actions satisfy each of these three elements and concludes that a prohibition order is warranted.

1. Misconduct

Misconduct under section 8(e) encompasses participation in activity deemed to be an unsafe or unsound banking practice or in breach of a party's fiduciary duty. 12 U.S.C. §1818(e)(1)(A). The ALJ determined that Respondent, with respect to the 618 Holdings loan, engaged in unsafe and unsound banking practices and breached fiduciary duties of care and loyalty owed to Grand Rivers. R.D. at 95-101. As the record clearly supports this conclusion, this Board agrees.

Unsafe or Unsound Banking Practices

The Horne Standard defines unsafe or unsound practices as "any action, or lack of action, which is 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." [8] *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); *see also In the Matter of Patrick Adams*, No. OCC AA-EC-11-50, 2014 WL

[8] Respondent argues that an "'unsafe or unsound practice' must involve more than just an isolated action... [,]" Exceptions at 43. The authority Respondent cites for this argument is a dissent in a Sixth Circuit opinion which also states that the legislative history for defining an unsafe or unsound practice to mean an "imprudent act." *Calcutt v. Fed. Deposit Ins. Corp.*, 37 F.4th 293, 354 (6th Cir. 2022), *cert. granted, opinion rev'd on other grounds*, 598 U.S. 623 (2023). In any event, this Board has adopted the Horne standard, which describes an unsafe or unsound practice as "any action."

8735096, at *8-24 (O.C.C. Sep. 30, 2014) (discussing Horne Standard in detail).

As noted in the Recommended Decision, the record in this matter overwhelmingly establishes that Respondent jeopardized the safety and soundness of Grand Rivers with regards to the 618 Holdings loan by facilitating a sizable loan through two borrowers he knew or should have known were not creditworthy, at a significant and foreseeable risk of loss to Grand Rivers. Under the adopted Horne Standard, he engaged in unsafe or unsound banking practices and therefore meets the misconduct element of 1818(e).

Respondent engaged in banking practices "contrary to generally accepted standards of prudent operation" by facilitating the purchase of the Carmi Warehouse by 618 Holdings. *See Michael v. FDIC*, 687 F.3d 337, 352 (7th Cir. 2012). The record demonstrates that he solicited Harbison and Tate, two of his employees, to purchase the Carmi Warehouse with financing from Grand Rivers through their newly formed company, 618 Holdings. R.D. at 33; Hr'g Tr. (Harbison) 15:21-24; EX 391 (Gaskins Dep.) 65:13-18. Respondent dictated the terms of the purchase and the related leaseback agreement. *See* R.D. at 33-36; *see also* Hr'g Tr. (Hunn) 348:18-19; EX 391 (Gaskins Dep.) 61:25; 66:1-3; 82:23-25. The borrowers had little involvement in the transaction or even knowledge of the terms until the day of closing. R.D. at 36; *see also* Hr'g Tr. (Harbison) 19:8-20.

The record also demonstrates that these two borrowers were very obviously not creditworthy for the $1.25 million loan. Harbison himself knew the two borrowers were not creditworthy and could not make the $7,753 monthly payments on the loan. R.D.

at 34, 41; EX 395 (Harbison Dep.) 20:25-21:5; 33:12-23. The Bank's senior loan officer, attorney, CFO, and CEO also were well aware that Harbison and Tate were not creditworthy for the loan. *See supra* section III.E. In fact, far from qualifying for a $1.25 million loan in the name of 618 Holdings and a separate $600,000 loan to Harbison's other business, examiners and representatives from PNB found that Harbison did not even qualify for a $50,000 unsecured loan. *See* R.D. at 49; Hr'g Tr. (Stringer) 83:7-11.

Respondent argued that he was under the mistaken impression that Harbison and Tate could make the loan payments because he was presented with outdated and inaccurate credit score information. R.D. at 39. Given the different impressions of several others involved in the transaction (including at least one of the borrowers) and the fact that Respondent paid Harbison and Tate's modest salaries, this assertion is not credible.

The consequences of the 618 Holdings loan posed an "abnormal risk of loss or harm" to Grand Rivers. *See Michael*, 687 F.3d at 352; *see also Seidman v. Office of Thrift Supervision*, 37 F.3d 911, 932 (3d Cir. 1994) ("imprudent act" posing an "'abnormal risk of [financial] loss or damage to an institution, its shareholders, or the agencies administering the insurance funds'" is an unsafe and unsound practice) (citation omitted). The record is clear that Respondent should have known that Harbison and Tate were not able to make payments on the loan and facilitated the transaction regardless of this knowledge, constituting engagement in an unsafe and unsound banking practice. *Gulf Fed. Sav. & Loan Ass'n v. FHLBB*, 651 F.2d 259, 264 (5th Cir. 1981) (concluding, based on the legislative history of section 1818(e), that "disregarding

a borrower's ability to repay" is an unsafe and unsound practice); *Matter of Grubb*, FDIC-88-282k & 89-111e, 1992 WL 813163, at *29 (Aug. 25, 1992) (approving loans without determining the borrower's ability to repay constitutes an unsafe and unsound practice).

Breach of Fiduciary Duty

In addition to engagement in an unsafe and unsound banking practice, this Board also finds that Respondent breached his fiduciary duties of care and loyalty.[9] Respondent, as the Chairman of the Board of Directors of Grand Rivers, owed Grand Rivers a duty of care, a duty of loyalty, and a duty of candor.[10] *See In the Matter of Seidman*, 37 F.3d 911, 933 (3d Cir. 1994). These duties generally required him to act in good faith and in the best interests of Grand Rivers. *In the Matter of Michael R. Sapp*, Nos. FDIC-13-477(e), FDIC-13-478(k), 2019 WL 5823871, at *14 (F.D.I.C. Sep. 17, 2019).

Duty of Care: Respondent owed Grand Rivers a "constant concern for the safety and soundness" of the institution. *In the Matter of Larry B. Faigin and John J. Lannin*, Nos. 11-252e, -254k, -269e, & -270k, 2015 WL 9855325, at *82 (F.D.I.C. Dec. 15, 2015). This concern required him to act as "ordinarily prudent and diligent men would" under similar circum-

[9] Although this Board separately concludes that Respondent engaged in unsafe and unsound banking practices, it is worth noting that because of their inherent danger, breaches of fiduciary duty also constitute unsafe and unsound practices. *See Hoffman v. FDIC*, 912 F.2d 1172, 1174 (9th Cir. 1990).

[10] The Recommended Decision does not address the duty of candor. Finding that the misconduct element is sufficiently met by breaches of other fiduciary duties and by engagement in unsafe and unsound banking practices, this Board finds it unnecessary to address the duty of candor.

stances. *In the Matter of Charles E. Baker, James E. Baker, and Thomas W. Keating*, 1993 WL 853609, at *7 (*quoting Briggs v. Spaulding*, 141 U.S. 132, 152 (1891)). As Chairman of the Board, Respondent's duties were heightened: "[t]he greater the authority of the director or officer, the broader the range of his duty; the more complex the transaction, the greater the duty to investigate, verify, clarify and explain." *Faigin and Lannan*, 2015 WL 9855325, at *82 (citing *Matter of* ***, 1988 WL 583064, at *9).

Respondent did not merely fail to adequately determine the ability of 618 Holdings to repay the debt and structure the lease reserve as to obscure the loan's repayment ability. Rather he facilitated a loan to borrowers he knew or should have known would be unable to repay the debt. These actions did not represent a "constant concern" for the safety and soundness of Grand Rivers. *Faigin and Lannan*, 2015 WL 9855325, at *82. Respondent breached his duty of care.

The loan files demonstrate that Respondent did not adequately determine the ability of 618 Holdings to repay the debt. These files lacked the "basic analyses of repayment capacity." EX 369R (Cash Report) ¶ 15. They were void of documentation "showing how Evergreen could achieve positive cash flow and how 618 Holdings could repay the Bank." *Id.*; *see also* RX 11R (Schwartz Report) at 6-7. The lease reserves structure was problematic because it may have concealed "the true payment ability of the debtor."[11]

[11] Respondent argued that the lease reserve structure "did not create any false impressions among the Grand Rivers board about 618 Holdings' ability to make loan payments after the 18-month lease reserve expired..." Exceptions at 39. He did not,

Hr'g Tr. (Floersch) 455:13-15. Further, the loan files did not contain a plan to resell the Carmi Warehouse if Evergreen was unable to make lease payments after the lease reserve account ran dry. EX 369R (Cash Report) ¶ 15. Respondent argues that "[t]hose responsibilities belonged to Winters as Head of Loan Operations." Exceptions at 34. But Respondent cannot escape responsibility for the loan files on a loan he orchestrated. *See* R.D. at 33-36. Further, as Chairman of the Board of Directors, he owed a heightened duty of care to "investigate, verify, clarify, and explain." *Faigin and Lannan*, 2015 WL 9855325, at *82 (citing *Matter of* ***, 1988 WL 583064, at *9).

Respondent breached his duty of care by not ensuring that 618 Holdings was capable of repaying the $1.25 million loan that he facilitated. *In the Matter of Steven D. Haynes*, Nos. 11- 370e & -371-k, 2014 WL 4640797, at *11 (July 15, 2014) (FDIC final decision) (failing "to ascertain the borrower's ability to repay prior to approving a loan" constituted breach of fiduciary duty).

The record in this case further establishes that instead of *ensuring* repayment capacity, Respondent facilitated a sizable loan through two borrowers he knew or should have known were not creditworthy, at significant and foreseeable risk of loss to Grand Rivers. *See supra* section III.E. His assertion to the contrary is not credible, but even if he had actually believed the borrowers to be capable of repaying the debt, again he owed a heightened duty of care as Chairman. *Faigin and Lannan*, 2015 WL 9855325, at *82. At bottom, he failed to prudently structure the

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however, dispute that the lease reserve structure concealed the true payment ability from examiners.

loan and ascertain repayment capacity, which is sufficient to establish a breach of fiduciary duty. The evidence in the record demonstrates that he also recklessly facilitated a loan to borrowers he knew or should have known would be unable to repay the debt.

Respondent argued that "sometimes bankers have to choose between the better of two loans or the better of two borrowers" and that he did precisely that in facilitating the 618 Holdings loan, which although imperfect, was better than the alternative (letting Evergreen go out of business). Respondent's Post Hearing Brief ("R. Br.") at 37-38. But as the ALJ pointed out, he presented these two options—the 618 Holdings loan or letting Evergreen go out of business—as a false binary. R.D. at 80-81. While the Respondent had no responsibility himself to "personally step in and save troubled loans" by purchasing the Carmi Warehouse (Exceptions at 27), the fact that he had secured financing to do that demonstrates that there was in fact a third option—facilitating a purchase and leaseback arrangement with a creditworthy borrower. Respondent argues that "only one borrower was willing to purchase the Carmi warehouse," but there is nothing in the record that suggests that this option was even explored. *See* Exceptions at 27.

Respondent raised several other arguments for why the 618 Holdings loan was a better choice than letting Evergreen hold onto the Carmi Warehouse and presumably go out of business—namely that 1) unlike the Evergreen loans, the 618 Holdings loan would be taken by PNB through the merger; 2) the 618 Holdings loan provided Evergreen $100,000 in "desperately needed" cash to be used for operations;

3) the structure of the 618 Holdings loan gave Evergreen 18 months to get back on its feet; and 4) the 618 Holdings loan improved Grand Rivers' security position in the Carmi warehouse. R.Br. at 39-41; Exceptions at 35. Had the 618 Holdings loan been replaced by a loan to a creditworthy borrower, these arguments may have been persuasive. However, all of these arguments rely on the same faulty assumption that there were only two options.

The lease reserve structure was intended to give Evergreen time to "get back on its feet," hoping that the oil industry would turn around and Evergreen could buy the property back. R.Br. at 40. If that did not happen, the plan apparently was for Harbison and Tate to sell the property to another buyer. *Id*.; *see also* Exceptions at 39 ("If Evergreen's business did not improve in 18 months, everyone at Grand Rivers expected that 618 Holdings would sell the Carmi warehouse or relet it to another company."). Respondent seemed satisfied that this was a viable option as the property was "in a fantastic location" and "had a lot of value." Hr'g Tr. (Bonan) 796:9-13. If that was accurate, it makes the case for a third option—a creditworthy borrower—seemingly more feasible, less risky, and more beneficial to Grand Rivers than the false binary presented by the Respondent.

Respondent argues that the ALJ erred in giving deference to the opinions of the FDIC examiners because their determinations were arbitrary and capricious and "completely outside the zone of reasonableness." Exceptions at 30. This argument is based on the assertion that they failed to consider all circumstances, principally by not evaluating the "alternative to the 618 Holdings loan (defaulting the Evergreen entities)" and determining which option

was better or worse for Grand Rivers. *Id*. at 31. This argument again relies on this false binary and is without merit.

Further, Respondent takes issue with Cash testifying that the 618 Holdings loan was a restructuring and essentially substituting a borrower for Evergreen by arguing that "the facts are clear that the Evergreen entities and 618 Holdings are distinct entities that are not related to each other." *Id*. at 32. This contradictory argument—that examiners acted "outside the zone of reasonableness" in their evaluation of the 618 Holdings loan by not examining a loan that was "not related" to the 618 Holdings loan—further underscores the lack of merit in this argument.

Duty of Loyalty: Respondent also owed Grand Rivers a duty of loyalty. *In the Matter of Neil M. Bush*, OTS No. AP 91-16, 1991 WL 540753, at *5 (O.T.S. Apr. 18, 1991). The duty of loyalty prohibits directors and officers of a bank to advance their own interests, *or those of others*, at the expense of the bank. *Faigin and Lannan*, 2015 WL 9855325, at *82 (citing *Matter of* ***, 1988 WL 583064, at *9). This duty "prohibits directors from engaging in transactions that involve conflicts of interest with the institution." *In the Matter of Neil M. Bush*, 1991 WL 540753, at *5.

By facilitating the 618 Holdings loan, Respondent advanced the interests of Evergreen and PNB over the interests of Grand Rivers, breaching his duty of loyalty to Grand Rivers. These impacts are consistent with Respondent's reported motivation to "help Abbey out." EX 391 (Gaskins Dep.) at 25:4-10.

PNB benefited from the transaction by clearing $358,000 of debt from Evergreen. This was signifi-

cant, as Evergreen was a troubled borrower whose loans at PNB had been classified as substandard and placed on nonaccrual. *See* R.D. at 47; JX 1 (Joint Stip.) ¶ 6. Evergreen also benefited from the transaction: paying down debt at both PNB and Grand Rivers, securing their headquarters for 18 months, and receiving $100,000 in operating expenses. *See* R.D. at 45; *see also* JX 1 (Joint Stip.) ¶ 33; EX 302 (email from Respondent to Gaskins and Hunn: "the Evans want to keep 100,000 to operate on"); Hr'g Tr. (Stringer) 74:16-19 (Evergreen did not have to make loan payments for 18 months as they were "buried in the loan").

Conversely, Grand Rivers took on greater risk by essentially trading in a $638,000 second lien position on the Carmi Warehouse for a $1.25 million mortgage loan on the same property (*i.e.* the same collateral), the appraised value of which was questionable. *See* R.D. at 47-48; EX 273 (email between Campbell to Phelps discussing loan concerns and questioning the value of the Carmi Warehouse); EX 274 (email between Botsch, Campbell, and Clark regarding the value of the property); Hr'g Tr. (Botsch) 287:4-8 (describing conversation with Campbell doubting the value of the Carmi Warehouse and suggesting Evergreen had overpaid for it); *see also* Hr'g Tr. (Stringer) 74-75. The loan relationship also shifted from Evergreen (who, although financially troubled did possess assets) to 618 Holdings (a company with no assets, guarantors with a combined negative net worth, and whose ability to make payments on the loan entirely depended on lease payments from a financially troubled tenant). *See* R.D. at 47-48; EX 273 (email between Campbell to Phelps discussing loan concerns: "[t]he 5 year lease doesn't mean anything because the lessee is in a cash flow bind.");

EX 34 (email between Respondent and Botsch describing the dire situation Gary Evans was in).

Respondent breached his duty of loyalty by advancing the interests of others—PNB and Evergreen—at the expense of Grand Rivers. *See* EX 369R (Cash Report) ¶ 16 ("In my opinion, Bonan II's actions to structure the loan to 618 Holdings and the origination of the loan to 618 Holdings at Bonan II's direction demonstrates a complete disregard of the Bank's best interest."); *Faigin and Lannan*, 2015 WL 9855325, at *82 (citing *Matter of* ***, 1988 WL 583064, at *9).

2. Effect

To show that misconduct had the required "effect" to impose a prohibition order, the evidence must establish that (1) the bank "has suffered or will probably suffer financial loss or other damage;" (2) the interests of the bank's depositors "have been or could be prejudiced;" or (3) the respondent "received financial gain or other benefit" from his misconduct. 12 U.S.C. § 1818(e)(1)(B)(i)-(iii). The ALJ found that with respect to the 618 Holdings loan, the effect element of 1818(e) was met because the bank suffered financial loss. R.D. at 102. This Board agrees.

Grand Rivers charged off a total of $513,760 from the 618 Holdings loan. *See* R.D. at 52 ($500,000 charge off in January 2017); EX 357 ($13,760 charge off in December 2018). 618 Holdings defaulted on the loan and entered into a deed-in-lieu of foreclosure with Grand Rivers. R.D. at 52. As of November 2022, the best offer Grand Rivers received on the property was reportedly $500,000. R.D. at 53; *see also* Hr'g Tr. (Stringer) 102:24-25. As of the date of the

Recommended Decision, Grand Rivers still owned the Carmi Warehouse. R.D. at 53. It is undisputed that Grand Rivers suffered financial loss.[12]

Instead, Respondent argues that he cannot be the cause of the financial loss because he did not vote to approve the loan. R. Br. at 53. Indeed, Respondent did abstain from the vote and was not one of the board members who formally voted to approve the loan. However, Respondent had a central role in the creation of the loan, and substantially influenced others to vote to approve the loan, and an individual respondent need not be the sole cause of the harm to be held liable under section 8(e). *See Landry v. FDIC*, 204 F.3d 1125, 1139 (D.C. Cir. 2000) (explaining that the fact that other IAPs may have been "more guilty" does not absolve respondent from responsibility for his actions); *Matter of Adams*, 1997 WL 805273, at *5 (recognizing that "multiple factors, and individuals, may contribute to a bank's losses," and that a respondent cannot escape liability simply because others have contributed to the bank's loss as well).

The record clearly establishes that Respondent, as the Recommended Decision describes in detail, was the "architect" of the 618 Holdings loan. R.D. at 105. He initiated the purchase of the Carmi Warehouse by Harbison and Tate, he dictated the terms of the purchase and the related leaseback, and he facili-

[12] Respondent argues that the loss suffered by Grand Rivers must have been reasonably foreseeable. *See* Exceptions at 47. While the support he cites for this proposition does not appear to actually require reasonable foreseeability for the effect element to be met, this Board nevertheless finds that the loss to Grand Rivers, stemming from a loan made to borrowers very clearly not creditworthy for the size of the loan, to be reasonably foreseeable.

tated the financing through Grand Rivers. R.D. at 33-36; *see also* supra section III.E. Additionally, while he did abstain from voting for the loan, the record establishes that he influenced the vote to approve it. *See* supra section III.E

Of the three board members who voted to approve the loan, all three expressed concerns. Gaskins did not think Harbison and Tate had the ability to repay the loan. EX 391 (Gaskins Dep.) 76:15-25. Campbell expressed concerns over the true value of the Carmi Warehouse, the lack of demonstrated cash flow for 618 Holdings, and Evergreen's ability to make lease payments. EX 273; *see also* EX 274 (email between Botsch, Campbell, and Clark regarding the value of the property). Phelps, although he lacked banking experience and was largely seen as "yes man," shared concerns over the valuation of the property. *See* Winters Tr. 59:5-6, 172:23-173:3; EX 314 (2016 ROE) at 7 (Phelps "voted affirmatively on every measure or loan presented by or under the direction of [Respondent]"); *see also* EX 273 (email from Phelps to Campbell "I questioned the Evergreen valuation too."); Hr'g Tr. (Campbell) 388:1-5 (testifying that Phelps shared his concerns). CEO Stringer abstained from voting, but said she was not comfortable voting for the loan because of her concerns about the borrowers' ability to repay the loan. Hr'g Tr. (Stringer) 64:16-22; 67:3-7; 119:5-8; *see also* EX 277 (email from Stringer where she states that she's uncomfortable voting on the loan).

Despite concerns from all three members who voted to approve the loan, the 618 Holdings loan was approved. R.D. at 42. Gaskins testified that he voted for it because he feared being fired by the Respondent if did not. EX 391 (Gaskins Dep.) 76:15-25. Stringer

testified that she abstained because was fearful that if she voted no she would be fired. Hr'g Tr. (Stringer) 64:16-22; 67:3-7; 119:5-8. These fears of reprisal expressed by the board members, combined with the dominant influence of Respondent (*see* R.D. at 15-17; *supra* section III.B.), make it clear that he influenced the vote to approve the 618 Holdings loan.

While Respondent's influence does not necessarily absolve others who participated in the approval of the 618 Holdings loan from responsibility, Respondent cannot credibly claim that he did not cause the loan because he did not vote for it. To the contrary, it is abundantly clear from the record that he initiated, facilitated, and influenced the loan's approval, and therefore was the proximate cause of Grand Rivers' financial loss. *See Hendrickson v. F.D.I.C.*, 113 F.3d 98, 103 (7th Cir. 1997) (finding the effect element met when respondent's actions facilitated the actionable conduct).

This Board finds ample evidence in the record to support a determination that the effect element of section 8(e) is met, as the Bank suffered financial loss as a result of Respondent's conduct.

3. Culpability

Finally, with respect to the culpability element of section 1818(e), the ALJ found that Respondent acted with a willful disregard for the safety and soundness of Grand Rivers with respect to the 618 Holdings loan. R.D. at 108-109. This Board agrees.

Culpability, for purposes of section 1818(e), can be shown by "personal dishonesty" or a "willful or continuing disregard" for the safety and soundness of the financial institution. 12 U.S.C. § 1818(e)(1). "Willful disregard" is "deliberate conduct that exposes 'the

bank to abnormal risk of loss or harm contrary to prudent banking practices.'" *Michael*, 687 F.3d at 352 (quoting *De La Fuente v. FDIC*, 332 F.3d 1208, 1223 (9th Cir. 2003)). It exists if the Respondent "deliberately and consciously" acted in a way that that demonstrates a lack of attention to safety and soundness or "a willingness to turn a blind eye to the institution's interests in the face of known risk." *Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995); *accord In the Matter of Donald V. Watkins, Sr.*, FDIC-17-0154e, FDIC-17-0155k, 2019 WL 6700075, at *8 (F.D.I.C. Oct. 15, 2019).

The evidence demonstrates that Respondent knew Harbison and Tate were not creditworthy for a $1.25 million loan, and yet approached them and asked them to purchase the Carmi Warehouse at that price, with financing he facilitated through Grand Rivers. Respondent set the terms of the loan and the related leaseback agreement. Respondent influenced the Board of Directors to approve the loan. Respondent, a banker with significant experience, also paid the borrowers' salaries. *See generally, supra* section III.E. Regardless of what the two borrowers' credit scores were, Respondent either knew or should have known that they would be unable to repay the loan—and yet, he facilitated the loan despite this knowledge. Respondent's argument that it was the best of two options is unpersuasive—he himself was originally going to purchase the property, and if that were an option, so was another borrower—one who was creditworthy.

Respondent argues that nobody else was willing to purchase the Carmi warehouse (*see* Exceptions at 27), but there was nothing in the evidence to suggest that this was even attempted. Instead, the record

demonstrates that if Evergreen wasn't able to make the lease payments after the lease reserve ran out, the plan was for Harbison and Tate to simply sell it to someone else. Exceptions at 39 ("If Evergreen's business did not improve in 18 months, everyone at Grand Rivers expected that 618 Holdings would sell the Carmi warehouse or relet it to another company."). That plan, if nobody else would purchase it, makes Respondent's willful disregard for the safety and soundness of Grand Rivers even more egregious.

Respondent also argues that the ALJ erred by failing to consider the exigent circumstances Respondent was in, which he argues dictated that the culpability element cannot be established. Exceptions at 49. For support, he cited an OCC case where "the Bank had been given a mandate to improve its capital ratios urgently and by any means necessary ... There were few options for the Bank's survival." *Id*.; *In the Matter of: Saul Ortega and David Rogers, Jr.*, 2022 WL 7074606, at *62. While he argues that these were "similar circumstances," there is no support for that assertion in the record. While it would certainly be detrimental for Grand Rivers for Evergreen to fail, there is insufficient evidence to support that there were "no good solutions," and no evidence that there were few options for the Bank's survival (indeed, it did survive, despite the significant loss). The ALJ did not err in finding that culpability was established.

Finally, Respondent argues that he had no incentive to intentionally harm Grand Rivers. R.Br. at 65. But *intent* to harm is not required, but rather a willful disregard for the safety and soundness of the institution, which has been established by the evidence. Respondent's initiation of the 618 Holdings

loan with two borrowers who were far from creditworthy for the size of the loan, the failure to adequately demonstrate repayment capacity in the loan files (which would have been impossible), and the formatting of the leaseback arrangement that concealed the actual payment capacity of the borrowers, were all "contrary to prudent banking practices." *Michael*, 687 F.3d at 352 (quoting *De La Fuente II*, 332 F.3d at 1223); *see also supra* Section IV.C.1.

Respondent argued that he "made a good faith inquiry into the credit worthiness of Tate and Harbison" and that he was misled into believing that they were creditworthy because he was provided inaccurate credit score information. R.Br. at 65. The mere fact that he paid their salaries makes this assertion indefensible. The borrowers had adjusted gross incomes of $27,000 and $62,000. The monthly payment of $7,752.94 per month—not even taking into account the separate $600,000 loan to Harbison's other company—would result in payments of $93,035.28 annually. This amount is more than the combined adjusted gross incomes of both borrowers. Respondent's facilitation of a loan to borrowers completely incapable of paying the debt put Grand Rivers at an "abnormal risk of loss." *Michael*, 687 F.3d at 352. Respondent turned a "blind eye to the institution's interests in the face of known risk" while advancing the interests of PNB and Evergreen. *See Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995); *accord Donald Watkins*, 2019 WL 6700075, at *8. The record establishes willful disregard.

D. Respondent is Liable for the 618 Holdings Loan and a Second Tier CMP is Warranted.

The ALJ recommended a second tier CMP of $105,000, and the Board concludes that the evidence in the record supports a CMP in that amount. A second tier CMP may be imposed against a party who (1) commits any violation of law, regulation, or certain orders or written conditions imposed by regulators; (2) recklessly engages in an unsafe or unsound practice in conducting the affairs of the institution; or (3) breaches any fiduciary duty, and whose "violation, practice, or breach . . . is part of a pattern of misconduct;" "causes or is likely to cause more than a minimal loss" to the institution; or "results in pecuniary gain or other benefit" to the party. 12 U.S.C. § 1818(i)(2)(B).

As detailed above, Respondent is subject to a second tier CMP as a result of his breaches of fiduciary duty, which resulted in more than a minimal loss to Grand Rivers. Although the breaches of fiduciary duty standing alone would be sufficient to support the recommended CMP, the Board also finds that Respondent's unsafe and unsound practices were committed recklessly.

Recklessness is established by acts committed "in disregard of, and evidencing conscious indifference to, a known or obvious risk of a substantial harm." *Cavallari v. OCC*, 57 F.3d 137, 142 (2d Cir. 1995); *see also Simpson v. Office of Thrift Supervision*, 29 F.3d 1418, 1425 (9th Cir. 1994). Respondent facilitated the 618 Holdings loan with disregard for the obviously foreseeable risk of substantial harm stemming from a sizable loan made to borrowers who were unable to repay the debt. His unsafe or unsound practices were committed recklessly.

This Board finds that Respondent engaged in breaches of fiduciary duty that caused more than a minimal loss to Grand Rivers, as well as reckless unsafe or unsound practices. The circumstances support assessment of a $105,000 CMP.

E. A CMP, But Not a Prohibition Order, is Warranted for the Release of Rig 23.

Respondent played an important role in the release of Rig 23. He was in charge of the Evergreen loan relationship. He was a party to many of the mis-communications involving the erroneous release of that Rig and failed to clear up the evident confusion about the Bank's interest in the rig being sold. And he exerted his influence to pressure Gaskins and Winters to secure the release. However, the evidence shows that all three relevant individuals at the Bank— Gaskins, Winters, and Respondent— thought that they were dealing with a release of a security interest (if any) in Rig 24, *not* Rig 23. There is no evidence that any of the individuals— including Respondent—intentionally released the wrong rig.[13] Rather, the evidence shows a series of errors stemming from the initial inclusion of the Rig 23 lien on Exhibit C to the Purchase Agreement.

These errors could have been avoided. For example, Respondent could have provided Appendix A (which listed the rig to be sold as a "2010 Service King – SK 775 Series") to Gaskins in response to Gaskins' October 9, 2015 email stating "[j]ust need the attachments to confirm its same equipment and same

[13] Notably, Respondent was a shareholder in Grand Rivers (through its holding company). *See, e.g.*, Hr'g. Tr. (Respondent) 794:16-795:7. As such, it would not have been in his interest to have Grand Rivers lose its collateral.

wording in ucc and purchase agreement." *See* R.D. 130-31; EX 124; EX 45. Or Respondent could have opened the attachments (UCC-3 terminations) to the Kassie Winters October 16, 2015, emails, determined that they involved the wrong rig (perhaps by cross-referencing them against the original UCC filing statements), and called a halt to the erroneous filings. *See* EX 143, at 1-2 (Illinois); *see also* EX 142, at 1-2 (Indiana); EX 10 (PSMI in Cabot 900). He did not. But these failures – as with his actions and inactions with respect to the Rig 23 release overall – were, while substantial, at most negligence. It was Winters and Gaskins that were responsible for making sure the UCC filings were accurate. It is reasonable that Respondent, as Chairman of the Board of Grand Rivers, delegated responsibility for details to his subordinates. It was not reasonable, however, for him to pressure these subordinates to obtain a release for Rig 24 when he was being expressly told that there was no security interest on that Rig to release. *See, e.g.*, EX 233.

To merit a Prohibition Order, Enforcement Counsel must show that Respondent "engaged in prohibited conduct (misconduct), the effect of which was to cause the Bank to suffer financial loss or damage . . . (effects) . . . [and] that such misconduct evidences personal dishonesty or a willful and continuing disregard for the safety and soundness of the Bank (culpability)." *Faigin and Lannin*, 2015 WL 9855325, at *13. As discussed below, the Board finds that Respondent's actions meet the misconduct and effects prongs of Section 1818(e), but they do not meet the culpability prong.

To merit a CMP, in relevant part Enforcement Counsel must show the breach of any fiduciary duty

or the *reckless* engagement by Respondent in an unsafe or unsound practice in conducting the affairs of the Bank. Further, Enforcement Counsel must also demonstrate the required effect of Respondent's conduct. The Board finds that both misconduct and effect have been satisfied here.

1. Misconduct

With respect to the misconduct elements of sections 1818(e) and (i), the ALJ found that "Respondent's actions – and lack of action – over the course of the events that culminated in the release of the Bank's Rig 23 security interest evinced a failure of supervision and oversight and a general indifference to the best interests of Grand Rivers that constituted a breach of his fiduciary duties of care and loyalty to that institution as well as recklessly unsafe or unsound banking practices." R.D. at 111. The Board agrees that Respondent breached his fiduciary duty of care to the Bank and that he engaged in unsafe or unsound banking practices (albeit, as discussed below, not recklessly).

As an initial matter, the Board finds that the evidence is insufficient to show that Respondent *knew* that the Bank's interest in Rig 23 was being released. Rather, the evidence shows that Respondent thought either that the Bank had some underlying, albeit mistaken, interest in Rig 24 or that US Energy was asking for a UCC release on collateral that did not exist. All the relevant communications among Respondent, Winters, and Gaskins – where they refer to a rig number – refer to Rig 24, not Rig 23. Further, the testimony of the three relevant individuals – Gaskins, Winters, and Respondent – demonstrates that they all thought they were working on releases related to Rig 24. Rig

23 did not come up. Nevertheless, Respondent acted negligently in supervising his subordinates, including by not clarifying that he was asking for the release of an interest on a Rig that he either believed was invalid or did not exist or providing relevant information about the rigs. Certainly if Bonan actually knew that the Bank had no security interest in Rig 24 at all—as appears likely from his admittedly contradictory testimony—then it was incumbent upon him to ferret out what was actually going on. The same can be said if he thought that there was some mistakenly recorded interest of the Bank in Rig 24. Thus, regardless of what he actually believed, there was sufficient evidence before him that Respondent should have acted to put a halt to the obvious confusion that was occurring. Yet he did nothing of the sort. As the ALJ points out repeatedly, Respondent had the most information of any of the relevant individuals and if he had acted with more care the confusion could have been cleared up and the Rig 23 collateral would not have been released. *See, e.g.*, R.D. at 112-14, 119-22.[14]

Breach of Fiduciary Duty

As Chairman of the Board, Respondent owed the Bank fiduciary duties of loyalty and care. A fiduciary duty is generally defined as the requirement that care be exercised in a manner that an ordinary prudent and diligent person would exercise under

[14] Respondent's argument that the FDIC "presented no evidence that [Bonan II] instructed anyone to release a security interest in Rig 23," Exceptions at 50, is therefore correct in one way (he did not explicitly say to release Rig 23). It is incorrect in another, more important way; in the face of clear confusion, Respondent did nothing to resolve the confusion and directed the very filings to be made that released the Rig 23 collateral.

similar circumstances. *Faigin & Lannin*, 2015 WL 9855325, at *81; *Id*. at *14 ("Breaches of fiduciary duties arise from knowledge of the pertinent facts and can include a deliberate failure to investigate matters that fall within the officer's responsibilities.") *In the Matter of Tonya Denise Williams*, FDIC-11-553e, 2015 WL 3644010, at *9 (F.D.I.C. Apr. 21, 2015) (bank manager had a duty to act "diligently, prudently, honestly, and carefully" in carrying out her duties (internal quotation marks omitted)); *see also In the Matter of Michael D. Landry and Alton B. Lewis*, No. 95-65e, 1999 WL 440608, at *15 (May 25, 1999) ("The fiduciary duties of institution-affiliated parties . . . for the purposes of section 8(e) of the FDI Act are established by Federal law."), *aff'd on other grounds sub. nom. Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000); R.D. at 94, n. 437. Such a duty required the Respondent at all times "to act in good faith and in the best interests of the Bank." *Sapp*, 2019 WL 5823871 at *14; R.D. at 94 n. 437. The duty requires, among other things, the "proper supervision of subordinates . . . and the constant concern for the [Bank's] safety and soundness." *Faigin and Lannin*, 2015 WL.9855325, at *81-82. Further, [b]ecause of their unique position as safekeepers of depositors' money, directors or officers of depository institutions owe a greater duty to the bank than directors of other types of entities." *Id*. at *82. Indeed, the "greater the authority of the director . . . the broader the range of his duty." *Sapp*, 2019 WL 5823871, at *14.

The ALJ found that Respondent failed to properly supervise his subordinates. R.D. at 114. The Board finds that while Respondent appropriately delegated responsibility to his subordinates to ensure the accuracy of the UCC filings, his demands on them to get the release done quickly in the face of clear

confusion and conflicting reports about what was actually being released constitutes a breach of his fiduciary duty of care.

For example, on November 15, 2015 April Reiken (of Evergreen Drilling) told Respondent that "[e]ven though there is no collateral for rig 24 at Grand Rivers Denny still wants a recorded UCC-1." EX 233. As the ALJ noted, instead of inquiring about why a UCC-1 would be required when there was "no collateral for rig 24," or what a release on non-existent collateral would look like, Respondent immediately pressured Winters and Gaskins to "[g]et this bulkshit done this morning." EX 233. Respondent should have known – based on what Ms. Reiken was telling him and his own knowledge of the rigs – that something was awry. *Compare* Hr'g Tr. (Respondent) 906:3-4 ("I knew that Grand Rivers did not have Rig 24 as collateral.") *with id*. 944:18-20 ("I believe what was being released then was a general subordinated – or subordinate not subordinated – subordinate UCC that had no value."). Yet he pressed on, and, indeed, exacerbated the likelihood of an error by putting pressure on Winters and Gaskins. This was a breach of his fiduciary duty of care.

Further, the Board agrees that Respondent "failed to discharge his fiduciary responsibility 'to investigate, verify, clarify, and explain' while participating in a transaction in which he should have understood that not all involved appeared to be operating with the same information." R.D. at 115 (citing *Faigin & Lannin*, 2015 WL 9855325, at *82). As the ALJ notes "Respondent knew that Grand Rivers was not obligated to release any collateral, yet directed his subordinates there to release the collateral anyway in order to placate a party to the transaction [U.S.

Energy] who was under the mistaken impression that the Bank had collateral in Rig 24 to release." R.D. at 116-17. There is little doubt that Gaskins and Winters did not fulfill their responsibilities to ensure that they were preparing and filing UCC releases on the correct rig. Indeed, Winters admitted that she had mistakenly released the wrong rig. EX 393 (Ledbetter-Winters Dep.) 166:23-167:20. But Respondent cannot "escape liability by pointing the finger at his subordinate, even if the subordinate or subordinates in following the instructions of [the Respondent] contributed to the losses and also engaged in the violative conduct." *Sapp*, 2019 WL 5823871, at *13; *see also* R.D. at 121-22.

Respondent's citation to *Doolittle v. Nat'l Credit Union Ass'n*, 992 F.2d 1531, 1537 (11 th Cir. 1993) is unavailing. *See* Exceptions at 55. In *Doolittle*, the president of a credit union instructed a loan department supervisor not to make certain loans. *Id*. at 1535, 1537. These instructions were ignored. *Id*. The court found that Doolittle could not "be held to have breached his fiduciary duty simply because his underlings failed to follow his orders." *Id*. at 1537. In *Doolittle*, the officer was acting to take corrective action which was ignored by his subordinate. Here, Winters did not disobey corrective orders, as none were forthcoming; nor did she materially disobey any orders.[15] *Doolittle* is inapposite.

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[15] Respondent argues that Winters disobeyed him in (1) filing a UCC-3 instead of a UCC-1, and (2) releasing the wrong rig. Exceptions at 54-55. As to the first, the Board finds this to be immaterial. And, in any event, Winters sent the UCC-3s to Respondent and he could have corrected this error (and in the process likely averted the release of Rig 23). *See* EX 142 at 1 ("Attached please find a copy of the original UCC-3 that will be

To the extent that Respondent believed that there *was* some kind of collateral with respect to Rig 24 to release, he nevertheless breached his fiduciary duty of loyalty to the Bank because the Bank was not receiving anything in relation to the sale of Rig 24 (and thus would be giving up an interest with no corresponding benefit) even though PNB was. *See* R.D. at 65, 117-18.[16] The Board does not find, however, that Respondent intended to benefit PNB over Grand Rivers. *See* R.D. at 118 (discussing the effect of Respondent's "divided loyalties").

Ultimately, Gaskins, Winters, and Bonan were all aiming at the same target – Rig 24. But the target they hit was Rig 23. Even though Gaskins and Winters share some of the blame, and even though Winters admitted to her mistake, the responsibility for the mistaken release rests significantly on

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filed online to terminate our UCC with Evergreen Drilling"); EX 143. As to the second, as described above Respondent was at the least complicit in the release of Rig 23.

[16] Respondent argues that he believed that the Bank "had some form of recorded interest in Rig 24 despite having no actual authorized interest in the rig." Exceptions at 51. The ALJ did not credit Respondent's testimony with respect to what he knew about any interest in Rig 24 and laid out his conflicting positions on the issue. *See* R.D. at 73-77; *see also, e.g.*, Hr'g Tr. (Respondent) 849:18-19 ("Q: What did you believe Grand Rivers had on Rig 24 at the time? A: Nothing, I didn't believe they had anything."); 944:18-20 ("I believe what was being released then was a general subordinated – or subordinate not subordinated – subordinate UCC that had no value."). The Board defers to the ALJ's credibility determination. It is clear that Respondent took conflicting positions on the issue. In any event, it is ultimately irrelevant exactly what Respondent believed. It is indisputable that there was confusion about what rig was being discussed at various points and Respondent II could and should have acted to clear up that confusion, but did not.

Respondent's shoulders. He breached his fiduciary duty to the Bank.

Unsafe or Unsound Banking Practices

For the same reasons, Respondent's conduct constituted unsafe and unsound banking practices. *See Sapp*, 2019 WL 5823871, at *13 ("Because of their inherent danger, breaches of fiduciary duty constitute unsafe and unsound practices."); *Watkins, Sr.*, 2019 WL 6700075, at *7 ("An unsafe and unsound banking practice is one that is 'contrary to generally accepted standards of prudent operation' whose consequences are an 'abnormal risk of loss or harm' to a bank." (quoting *Michael*, 687 F.3d at 352).

The ALJ found that Respondent's conduct was not just unsafe and unsound, but recklessly so. The Board does not agree with this aspect of the ALJ's recommended decision. For a CMP, any unsafe and unsound banking practice must be engaged in "recklessly." Conduct is reckless for the purposes of this prong of Section 1818(i) when it "is done in disregard of, and evidencing a conscious indifference to, a known or obvious risk of substantial harm." *Patrick Adams*, 2014 WL 8735096, at *49 (cleaned up); *see also Faigin & Lannin*, 2015 WL 9855325, at *19 (same). Here, Respondent was actively involved in the erroneous release of Rig 23. He was in charge of the Evergreen relationship. He was on many of the miscommunications relating to the release of the rig. And he did not follow up on the red flags that were coming up in those communications, such as conflicting reports related to whether or not the Bank had any interest to release in Rig 24 at all. As discussed above, Respondent's failure to acknowledge these red flags and act to clarify the confusion surrounding the releases at issue was negligence. *Cf.*

Hr'g Tr. (Hefner) 522:10-11 (Enforcement Counsel expert states that Respondent was negligent). But the only Rig that was ever discussed by number was Rig 24. And there is little evidence, if any, that Respondent ever was aware that the Bank would be releasing its only collateral on the Evergreen Drilling Loan – *i.e.*, Rig 23.[17] This risk was not obvious. While Respondent could – and should – have followed up on the various discrepancies (*e.g.*, UCC-1 vs. UCC-3, whether there was any Grand River's interest in Rig 24 at all) in the communications, the Board finds insufficient evidence that his inaction evidenced a "conscious indifference" to a "known or obvious risk of substantial harm." In this regard, the Board gives some weight to the fact that Respondent, as Chairman of the Board of the Bank, delegated responsibility for ensuring the accuracy of the filings to Gaskins (CFO) and Winters (Head of Loan Operations), two high-level employees of the bank. Respondent did not carefully supervise those employees, but ultimately his inaction amounts to a mistake. A mistake with dramatic consequences, but nonetheless a mistake.

In summary, with respect to the release of Rig 23, the preponderance of evidence is that Respondent

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[17] The ALJ cites *Blanton v. OCC*, 909 F.3d 1162, 1175 (D.C. Cir. 2018) to support her conclusion that Respondent was aware of the obvious risk posed by his inaction. R.D. at 124. However, in Blanton, the OCC told the bank officer on multiple occasions of the dangers of the bank's practices. *See Blanton*, 909 F.3d at 1173-74. Further bank employees told the officer that the OCC considered the practices unduly risky. *Id*. at 1174. Here, unlike in *Blanton*, there is insufficient evidence that Respondent was aware of the undue risk associated with his inaction. The exhibits and testimony do not make it clear that it was obvious that there was a risk that the wrong rig would be released.

violated his fiduciary duties to the Bank and his actions constituted unsafe and unsound banking practices. Thus, the misconduct prong is met both for the purposes of a Section 1818(e) prohibition order (for breach of fiduciary duty and the and unsound banking practices) and a Section 1818(i) CMP (for breach of fiduciary duty).

2. Effect

As to the effect elements of sections 1818(e) and (i), the Board agrees and adopts the reasoning of the ALJ. R.D. at 126-32. As the ALJ found, "the Bank's release of its Rig 23 interest left its Evergreen Drilling loan unsecured, causing the Bank to obtain a junior lien position on Evergreen's equipment (behind the blanket lien already held by PNB) in order to secure the loan and – and after Evergreen continued to experience financial woes – ultimately resulting in the loan's full balance of $489,268 being charged off in early January 2017." R.D. at 125.

Respondent argues that his conduct was not the proximate cause of any loss to the Bank because if his instructions had been properly followed there would have been no risk to the Bank. Exceptions at 60-62. Not so. This argument is largely a rehash of Respondent's arguments against the misconduct prong. As the Board has concluded, Respondent negligently supervised his subordinates and negligently failed to raise concerns when he was being asked to release what he says he believed to be a non-existent, or mistaken, interest with respect to Rig 24. If Respondent had raised issues as to the evident confusion going on, the release of Rig 23 could have been avoided. For example, if Respondent had opened the attachments to Winters' October 16, 2015, emails (on one of which she expressly states

that she would be filing a UCC-3) and made further inquiry as to what was being released, the Bank's loss could have been averted. *See* EX 142 (with cover email referencing a to-be-filed UCC-3); EX 143. While the Board does not find that Respondent knew that Rig 23 might be released, it was obvious that something was wrong with the process of getting the release on Rig 24 that US Energy asked for, and it was foreseeable that the relevant people were talking about the wrong rig. Respondent's conduct proximately caused the Bank a loss – the charge-off of the Evergreen Drilling loan.

Thus the effect prong of both Section 1818(e) and 1818(i) is met.

Respondent's Novation Argument

Respondent argues that the release of Rig 23 did not cause a loss to the Bank because the May 2014 loan consolidation was a novation. *See* Exceptions at 62-63. Respondent does not dispute that after the consolidation the Bank still held Rig 23 as collateral, but says this was as "mere collateral" not as a PMSI. Exceptions at 63. He goes on to argue that because there was a novation, this new position as collateral had to be perfected. *Id*. According to Respondent "[b]ecause there is no evidence that the security interest in Rig 23 was perfected after May 2014, the PMSI was extinguished at that time." *Id*.

The ALJ found, and this Board agrees, that the May 2014 consolidation of the Bank's Evergreen Drilling loans did not constitute a novation that extinguished Evergreen Drilling's obligations under the January 2013 loan granting the Bank a PMSI in Rig 23. *See* R.D. at 126; Order No. 30 at 67-69.

Further, the Board disagrees that there was no evidence that the Bank's PMSI survived the May 2014 consolidation. First, as the ALJ pointed out, "the paperwork for the refinanced loans expressly references the January 2013 PMSI on Rig 23 as collateral for the consolidated loan." R.D. at 126; *see also* EX 15 (May 6, 2024 Commercial Loan Application) at 1 (identifying the loan type as "Comm. Secured" and listing a "Cabot 900 series self-propelled Drilling Rig" as collateral); EX 17 (May 8, 2014 Promissory Note) at 3 (stating, in a section titled "COLLATERAL," that "this Note is secured by Commercial Security Agreement dated January 9, 2013 and securing UCC file #17906194"). Second, more than a year later Respondent evinced his understanding that the Bank still had a PMSI in Rig 23. *See* EX 226 (Respondent states that the Bank has a "PMS" on a Cabot 900 series drilling rig).

Respondent's Titled Vehicle Argument

Respondent also argues that the ALJ improperly shifted the burden of proof to Respondent on the issue of whether Rig 23 was a titled vehicle. Exceptions at 63-64. Respondent's argument runs as follows: (1) Enforcement Counsel had to prove that the release of Rig 23 caused a loss to the Bank, which required that the security interest on that Rig be perfected; (2) under Illinois and Indiana law, a security interest in a vehicle is perfected when it is filed with the Bureau of Motor Vehicles; (3) Enforcement Counsel did not provide evidence as to whether Rig 23 was a titled vehicle; and (4) the ALJ erred by finding that Respondent failed to meet his burden of proof on the issue. *Id*.

Enforcement Counsel presented evidence that the Bank had a valid PMSI on Rig 23 as shown by the

UCC filings admitted at the hearing. And, in any event, Enforcement Counsel presented evidence that Rig 23 was *not* a titled vehicle. Specifically, Bank officer Don Nave testified that the Bank had asked Evergreen for a certificate of title for Rig 23 and was "told it was equipment and it did not have a title." Hr'g Tr. (Nave) 177:18-22). Further, as the ALJ points out, a June 17 Order of Replevin proffered by Enforcement Counsel—which established People's priority interest in Evergreen Drilling's personal property—differentiated between titled vehicles and equipment, and listed Rig 23 as equipment. EX 354, at 5. Once the agency "established a prima facie case based on the preponderance of the evidence, the burden of production of evidence to the contrary shifts to the Respondent to rebut or discredit the administrative agency's evidence." *Tonya Williams*, 2015 WL 3644010, at *6.

Respondent did not rebut the agency's evidence. The Board agrees with the ALJ that Respondent has not provided credible evidence that Rig 23 was a titled vehicle. *See* R.D. at 127- 28.

The Board finds that Enforcement Counsel presented sufficient evidence to show that Rig 23 was not a titled vehicle and that Respondent offers no credible evidence to rebut that showing. It therefore rejects Respondent's argument on the title issue.[18]

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[18] Respondent also maintains that it is "extremely relevant" to this matter that as of September 7, 2022 Grand Rivers has claimed in *Grand Rivers Community Bank v. Evergreen Energy, L.L.C. et al.*, Case No. 2017-LM-28 (2nd Judicial Circuit, State of Illinois) that it still has a valid priority security interest in Rig 23. *See* Exceptions at 64; *see also* RX 275, at 2. It is not relevant. The Bank's present litigation position does not impact the fact that due to the releases filed with respect to Rig 23 the

3. Culpability

Finally, with respect to the culpability element of section 1818(e), the ALJ agreed with Enforcement Counsel that "Respondent acted with willful disregard for the Bank's safety and soundness 'when he ordered Bank employees to file UCC releases relating to Evergreen Drilling. . . to meet U.S. Energy's demand for the Bank's UCC terminations to be recorded," despite knowing that the UCC security interest that U.S. Energy wanted released did not exist and that the only UCC release that was possible would leave the Bank's $550,000 Evergreen Drilling loan completely unsecured." R.D. at 132.

Here the Board again parts ways with the ALJ's Recommended Decision. The Board finds that Respondent did not act with the requisite "personal dishonesty" or "willful or continuing disregard by [Respondent] for the safety and soundness of [the Bank]."[19]

Bank incurred loss in the form of a charge-off of the Evergreen Drilling loan. *See* R.D. at 129.

[19] The ALJ did not find that Respondent acted with "personal dishonesty," and the Board also does not find that there was personal dishonesty involved. Further, the ALJ did not decide whether Respondent's conduct constituted "continuing" disregard for the safety and soundness of the Bank. *See* R.D. at 132, n. 604. "[C]ontinuing disregard" is "conduct which has been voluntarily engaged in over a period of time with heedless indifference to the prospective consequences." *Grubb v. FDIC*, 34 F.3d 956, 962 (10th Cir. 1994) (citation and internal quotation marks omitted). While Respondent acted negligently, this does not rise to the requisite scienter of recklessness necessary to establish culpability under Section 1818(e)(C). *See Michael*, 687 F.3d at 353 ("Although inadvertence alone is not sufficient to establish culpability, recklessness suffices"). Accordingly, the Board finds the record evidence does not support a finding that

As detailed above, the Board finds that Respondent acted (and failed to act) negligently in violation of his fiduciary duty of care to the Bank. However, negligence does not alone equate to "willful . . . disregard." *See, e.g., Kim v. OTS*, 40 F.3d 1050, 1054 (9th Cir. 1994) ("[T]he OTS must show a degree of culpability well beyond mere negligence, *i.e.*, there must be a showing of scienter."). To constitute willful disregard, an IAP, through their unsafe or unsound misconduct, must "deliberately and consciously take part in an action that evidences utter lack of attention to an institution's safety or soundness" or demonstrate "a willingness to turn a blind eye to the institution's interests in the face of a known risk." *See* R.D. at 133; *Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995); *see also De La Fuente*, 332 F.3d at 1223 (noting that "some scienter" is necessary to establish culpability and stating that "'[w]illful disregard' means 'deliberate conduct which exposed the bank to abnormal risk of loss or harm contrary to prudent banking practices" (citation omitted)); *Faigin & Lannin*, 2015 WL 9855325, at *18 ("Courts have held that 'willful or continuing disregard' signifies, at least, 'a mental state . . . akin to recklessness'" (quoting *Kim*, 40 F.3d at 1054)); *Gully v. Nat'l Credit Union Admin. Bd.*, 341 F.3d 155, 164 (2d Cir. 2003) ("Courts have concluded that 'willful . . . disregard' requires a heightened showing of scienter"). Examples of such conduct include turning a "blind eye" to a bank's interest "in the face of known risk," *Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995), engaging in a check-kiting scheme, *see Van Dyke v. Bd. of Governors of Federal Reserve System*, 876 F.2d

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Respondent acted with a continuing disregard for the safety and soundness of the bank.

1377, 1379 (8th Cir. 1989), and insider abuse, *In the of Matter of Donald E. Hedrick and John K. Snyder*, Nos. OCC-AA-EC-92-176 & 93-94, 1996 WL 772762, at *7 (O.C.C. Sep. 11, 1996).

The Board agrees with the ALJ that "[a]ll the dots were there to connect." R.D. at 133. There is a preponderance of evidence that Respondent knew that there was no security interest in Rig 24 for the Bank to release (or at least that any such recorded interest was in error). *Cf*. Exceptions at 65 ("All [Respondent] ever knew was that Grand Rivers was never supposed to have any form of security interest on Rig 24. . . . [He] believed that Grand Rivers must have mistakenly recorded some kind of interest that related to Rig 24.") There is also clear evidence that he had information in his possession that he could have (and should have) communicated to Winters and/or Gaskins, yet did not act to clarify the situation and avert the loss of collateral on Rig 23. *See, e.g.*, R.D. at 130-31. Indeed, he exacerbated the situation by badgering his subordinates to obtain a release that would satisfy U.S. Energy. But the Board concludes that Bonan's actions constituted negligence and not willful disregard. There is evidence that Bonan was being given conflicting information with respect to whether there was a lien on Rig 24. *See* EX 124, at 1 (October 9, 2015 email from Gaskins to Respondent) ("Our ucc-1 is not a blanket it is just on this specific rig"); EX 391 (Gaskins Dep.) 114:5-25. Further, he did not turn a blind eye to the Bank's interests; he put two high level employees in charge of ensuring the accuracy of the filings. They did not do so. *See, e.g.,* EX 391 (Gaskins Dep.) 110:8-111:6,

115:12- 116:22, 131:21-23; EX 393 (Ledbetter-Winters Dep.) 166:23-167:20.[20]

The Board concludes that the culpability prong of Section 1818(e) is not met with respect to the release of Rig 23. Accordingly, a prohibition order based on that release is not warranted.[21]

F. The Amount of the CMP is Justified.

Before assessing a CMP, the Board is required to consider the appropriateness of the amount being assessed by looking to five mitigating factors: (1) the size of the Respondent's financial resources; (2) the good faith of Respondent; (3) the gravity of the violation; (4) the history of previous violations; and (5) such other matters as justice may require. 12 U.S.C. § 1818(i)(2)(G). In addition, the Interagency Policy Regarding Assessment of CMPs by the Federal Financial Institutions Regulatory Agencies provides thirteen factors for interpreting these statutory factors. Civil Money Penalties Interagency Statement, 63 Fed. Reg. 30226-02, 1998 WL 280287 (adopting Interagency Policy Regarding Assessment of CMPs

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[20] This is not to say that an IAP can escape responsibility for his or her actions by delegating responsibility to underlings. An IAP cannot. However, it is surely relevant in determining the culpability of Respondent that he tasked Winters and Gaskins with making sure that the release was accurate.

[21] Note that throughout its review, the Board considered that the ALJ found that Bonan's testimony with respect to Rig 23 was not credible. R.D. at 12, 73-77. Bonan testified inconsistently on whether he believed the Bank had any type of lien on Rig 24. As noted earlier, the Board defers to the ALJ's finding. However, the Board's decisions do not rest solely (or even primarily) on Bonan's testimony. It is the record as a whole that the Board considered, rather than reliance on any particular testimony of Bonan.

by the Federal Financial Institutions Regulatory Agencies (June 3, 1998)).

Having considered the statutory and regulatory factors, the record in this case, and Respondent's Exceptions, subject to the Board's findings as to Rig 23 the Board adopts and affirms the reasoning and conclusion of the ALJ that the amount of the CMP in this case, $105,000, is an appropriate civil money penalty in this case. R.D. at 135-39. The Board has also considered its own conclusion that Respondent did not act culpably with respect to the release of Rig 23 (and did not intend to release Rig 23) and determined that this does not suffice under the relevant factors to reduce the $105,000 civil penalty. The ability to pay, the gravity of the misconduct that the Board has found, and the lack of good faith outlined by the ALJ as to Respondent's testimony more than suffice to justify the requested CMP amount.

V. THIS ACTION IS NOT TIME-BARRED

Bonan argues that the FDIC's enforcement proceeding is time-barred. Exceptions at 69. Specifically, Bonan relies on 28 U.S.C. § 2462, which requires that any action by the FDIC be commenced within five years of the date when the claim first accrued. The FDIC filed its Notice on May 5, 2021.[22] Bonan argues that because the actions upon which the Notice is

[22] The Notice of Charges is dated May 5, 2021 and this is the date that Respondent uses in his Exceptions. Exceptions at 69. However, the ALJ cites May 7, 2021 as the relevant date. *See, e.g.*, R.D. at 4. It is not necessary to solve this discrepancy as the difference of two days is not determinative of the statute of limitations issue.

based occurred more than five years prior to that date, the action is untimely. *Id*.

However, Respondent acknowledged to the ALJ that the parties entered into a series of agreements to toll the statute of limitations as to Enforcement Counsel's prospective claims, which, if valid, would result in the action being timely. *See* Respondent Frank William Bonan II's Motion for Summary Judgment and Memorandum in Support, dated August 15, 2022, at 27.

Bonan points out that these tolling agreements were never entered into evidence at his hearing. Exceptions at 69. They are, however, in the administrative record. *See* July 21, 2023 Declaration of David A. Beck ("Beck Decl.") (attaching tolling agreements); *see also* 12 C.F.R. § 308.40(c) (Board decision based on review of the entire record of the proceeding). The final such tolling agreement expired on May 12, 2021. *Id*., attaching FDIC EX 400. The ALJ relied on these tolling agreements to find that the statute of limitations did not bar this action. *See* Order No. 30, Regarding Cross-Motions for Summary Judgment at 53-56. The Board finds that the tolling agreements operated to extend the statute of limitations and this action is not time-barred.

Bonan appears to argue in a footnote, Exceptions at 69 n. 9, that the time limit in § 2462 is jurisdictional and it is therefore improper to rely on the tolling agreements.[23] The ALJ rejected this

[23] The Respondent's footnote is unclear and can be read as directed only to equitable tolling (which the ALJ did not rely on in making her decision). In any event, § 2462 is not jurisdictional and would not prohibit equitable tolling either.

argument. Order No. 30, Regarding Cross-Motions for Summary Judgment at 53-56. Agreeing with the ALJ's reasoning, the Board also rejects it. Section 2462 is not jurisdictional and the tolling agreements apply to render this action timely. *See SEC v. Fowler*, 6 F.4th 255, 258, 260-62 (2d Cir. 2021) (examining § 2462 and holding that it is not jurisdictional and subject to tolling by parties); *see also Boechler v. Commisioner of Internal Revenue*, 596 U.S. 199, 203 (2022) (a procedural requirement is jurisdictional only if Congress clearly states that it is). The only case cited by Respondent in support of his argument – *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016) – expressly did not decide if § 2462 is jurisdictional. *Id*. at 1360, n.1 ("we need not decide for purposes of this appeal whether § 2462's time bar is jurisdictional . . .").

Further, the relevant loans were charged off no earlier than December 31, 2016. *See* Order No. 30, Regarding Cross-Motions for Summary Judgment, at 56; Hr'g. Tr. (Stringer) 99:8-100:13; Hr'g. Tr. (Clarke) 736:2-737:10; EX 348; EX 350; EX 355; EX 356. As such, the effect prongs of Sections 1818(e) and (i) were not fulfilled until that date. Therefore, the claims did not accrue until that date and the May 5, 2021 Notice was timely filed regardless of whether the tolling agreements apply. *See, e.g.*, *Proffitt v. FDIC*, 200 F.3d 855, 862-63 (D.C. Cir. 2000) (1818(e) claim accrued, and limitations period began to run, when bank actually suffered loss).

VI. THERE IS NO DUE PROCESS VIOLATION

Respondent argues that his due process rights have been violated for three reasons: 1) the FDIC is both prosecuting and adjudicating this enforcement action; 2) the FDIC's administrative discovery rules do not

permit depositions; and 3) the FDIC allegedly did not properly serve the Notice of Charges. Exceptions at 69-74.

A. Administrative Agencies May Prosecute and Adjudicate.

Respondent's Fifth Amendment right to due process was not violated by the FDIC having both investigatory and adjudicatory functions. The Supreme Court's seminal case addressing due process and the combination of functions is *Withrow v. Larkin*, 421 U.S. 35 (1975). In *Withrow*, the Supreme Court held that the "combination of investigative and adjudicative functions [in a single body] does not, without more, constitute a due process violation." *Id.* at 58. Rather there must be "special facts and circumstances" before the "risk of unfairness is intolerably high." *Id*. No such special facts or circumstances exist here.

Respondent argues that the "Fifth Amendment prohibits the FDIC from acting as both prosecutor and judge" because "the risk of bias is too great." Exceptions at 71-72. Respondent's claim fails. As an initial matter, adjudicators are afforded a "presumption of honesty and integrity." *Withrow*, 421 U.S. at 47. To overcome this presumption, it is Respondent's burden to show a "conflict of interest or some other specific reason for disqualification." *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). Respondent has failed to rebut this presumption here. He acknowledges that "the members of the FDIC adjudicating this action are not the same people investigating and prosecuting" and that "it is possible" that the FDIC adjudicators "could separate their devotion to the agency to which they are employed." Exceptions at 71-72. Nevertheless, he

claims that "the FDIC personnel adjudicating this matter could find any criticism" he raised as "a negative reflection on the adjudicators' roles, leadership, and the FDIC as a whole" thereby resulting in an unacceptable risk of bias. *Id.* at 72.

This single speculative claim of potential bias is woefully insufficient to impugn the fairness of the Board members and rebut the presumption that they are "'men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Withrow*, 421 U.S. at 55 (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941). "[T]he combination of investigative and adjudicative functions into a single administrator does not, in itself, demonstrate such bias." *Hess v. Bd. of Trustees of S. Illinois Univ.*, 839 F.3d 668, 675 (7th Cir. 2016).

Even assuming, *arguendo*, there is some inherent "level of 'institutional bias,'" "such an interest does not render all agencies incapable of adjudicating disputes within their own proceedings given the strong public interest in effective, efficient, and expert decisionmaking in the administrative setting." *Doolin Sec. Sav. Bank, F.S.B. v. FDIC*, 53 F.3d 1395, 1407 (4th Cir. 1995); *see also McLaughlin v. Union Oil Co. of California*, 869 F.2d 1039, 1047 (7th Cir. 1989) ("Bias cannot be inferred from a mere pattern of rulings by a judicial officer, but requires evidence that the officer had it 'in' for the party for reasons unrelated to the officer's views of the law"); *United States v. Sykes*, 7 F.3d 1331, 1339 (7th Cir. 1993) (conclusions, and opinions, or rumors are not sufficient); *Gleason v. Welborn*, 42 F.3d 1107, 1112 (7th Cir. 1994) (a decision adverse to a party—even one adverse on all the issues raised—is not evidence

of bias where that decision is supported by the law and facts). Respondent has failed to carry his burden of showing that his right to due process was violated merely because the FDIC has prosecutorial and adjudicatory functions.

The Respondent argues that *Withrow* no longer applies, but instead relies on the more recent *Williams v. Pennsylvania*. 579 U.S. 1 (2016). That reliance is misplaced. In *Williams*, the Court found an "impermissible risk of actual bias" when a judge had "significant, personal involvement as a prosecutor" in the defendant's case. *Id*. at 8. Specifically, the Court found that there was a due process violation where the judge previously had been a prosecutor in defendant's case and authorized seeking the death penalty against the defendant. *Id.* at 8-10. The Court determined that "an unconstitutional potential for bias exists when *the same person* serves as both accuser and adjudicator in a case." *Id*. at 8 (emphasis added).

Williams is distinguishable. In Respondent's case, different individuals at the same agency are prosecuting and adjudicating. Notably, the Court in *Williams* relied heavily on *In re Murchison*, 349 U.S. 133, 138 (1955), which involved an individual acting in the role of both a grand jury and judge raising similar concerns. However, in *Withrow*, the Court explained that "*Murchison* has not been understood to stand for the broad rule that the members of an administrative agency may not investigate facts, institute proceedings, and then make the necessary adjudications." 421 U.S. at 54. The situation at hand is not analogous to *Williams* and *Murchison*; rather, *Withrow* is the applicable law.

The same agency adjudicating and prosecuting Respondent's case does not, without the "special facts and circumstances" required by *Withrow*, amount to a due process violation. *Withrow* 421 U.S. at 58; *see also Hess*, 839 F.3d at 675; *Serafinn v. Loc. 722, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 597 F.3d 908, 919 (7th Cir. 2010) ("mere commingling of prosecutorial and adjudicatory functions are insufficient to show bias"); *Bakalis v. Golembeski*, 35 F.3d 318, 326 (7th Cir. 1994) ("[p]artiality will not be presumed simply because the same tribunal investigates and adjudicates")).

B. Respondent's Claim of Insufficient Pretrial Discovery Does Not Present a Due Process Violation.

Respondent's administrative proceeding is governed by the Administrative Procedure Act ("APA"). 5 U.S.C. § 551 *et seq.* The APA does not provide for pretrial discovery in the administrative process. *Kelly v. EPA*, 203 F.3d 519, 523 (7th Cir. 2000). Further, there is no constitutional right to pretrial discovery in administrative proceedings. *Id.*; *see also Silverman v. Commodity Futures Trading Comm'n*, 549 F.2d 28, 33 (7th Cir. 1977) ("There is no basic constitutional right to pretrial discovery in administrative proceedings."); *Starr v. Comm'r*, 226 F.2d 721, 722 (7th Cir. 1955) ("it has never been held that the Constitution of the United States requires that discovery procedure be adopted by any court"). However, if a particular situation would result in a denial of due process, discovery must be granted. *Mister Disc. Stockbrokers, Inc. v. S.E.C.*, 768 F.2d 875, 878 (7th Cir. 1985) (quoting *McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979)).

Respondent argues that "parties to FDIC proceedings are prevented from taking depositions" and claims that this deprivation violated his due process rights under the Fifth Amendment. Exceptions at 72. However, this is not entirely correct. Depositions are permitted "upon a showing of good cause." 12 C.F.R. § 308.107(e)(1)(i). Indeed, Respondent availed himself of this pretrial discovery when he deposed witnesses who were unavailable for trial. *See* Exceptions at 72.

While pre-trial depositions are not automatically granted, the FDIC's Uniform Rules *do* provide for examination and cross-examination of witnesses at the hearing. *See* 12 C.F.R. § 308.35. Respondent availed himself of this opportunity, cross-examining witnesses presented by FDIC Enforcement and presenting and examining his own witnesses. *See generally* Hr'g Tr.

More specifically, Respondent argues that he was unable to depose key witnesses in the case, namely Tate, Stringer, and Botsch. *See* Exceptions at 73. Notably, Tate was not a witness in this case. *See generally* Hr'g Tr. However, both Stringer and Botsch testified at the hearing, and Respondent's counsel did cross-examine them. *See* Hr'g Tr (Stringer) at 112; Hr'g Tr (Botsch) at 290. While Respondent was not provided an opportunity to depose these witnesses *before* trial, he was provided an opportunity to examine them at the hearing.

Accordingly, Respondent's argument that he has a due process right to examine the witnesses against him, and that the lack of that opportunity violated his constitutional right to a "fundamentally fair proceeding" is unavailing. Exceptions at 73. He was afforded the right he complains of lacking. Respond-

ent was able to depose unavailable witnesses before trial and cross-examine witnesses at the hearing. He was not in fact deprived of the opportunity to examine the witnesses against him, and his inability to depose them in advance of trial did not result in a denial of due process. *Kelly*, 203 F.3d at 523 (no constitutional right to pretrial discovery).

C. Notice was Properly Served.

Finally, Respondent argues that the FDIC did not adequately serve Respondent with the Notice of Charges (Notice). Exceptions at 73. As an initial matter, service of process may be waived by giving the court "a reasonable expectation" that a respondent "will defend the suit on the merits." *See Mobile Anesthesiologists Chicago, LLC v. Anesthesia Assocs. of Houston Metroplex, P.A.*, 623 F.3d 440, 443 (7th Cir. 2010) ("[t]o waive or forfeit a personal jurisdiction defense, a defendant must give a plaintiff a reasonable expectation that it will defend the suit on the merits"); *see also United States v. Ligas*, 549 F.3d 497, 501 (7th Cir. 2008) ("a defendant who properly raises a jurisdictional defense can nevertheless waive the defense by his subsequent conduct"). In this case, there can be no doubt that Respondent actively participated in all aspects of trial and defended the suit on the merits. Accordingly, the Board finds that Respondent waived his ability to challenge service of process.

Even assuming, *arguendo*, that Respondent did not waive this argument, we find that FDIC properly effectuated service**.** Service here is governed by 12 C.F.R. § 308.11(c)(2), which provides that service may be effectuated by (i) personal service; (ii) delivery to the person's residence or workplace; (iii) delivery to a registered agent; (iv) registered or certified mail; or

(v) "any other method reasonably calculated to give actual notice." 12 C.F.R. § 308.11(c)(2).

The FDIC initially attempted to serve respondent electronically by way of his attorney, but his attorney refused service by e-mail. Exceptions at 74. Although Respondent received actual notice from his attorney, he argued that this was insufficient because his attorney refused service by e-mail, so there was no "date of service" informing when his response to the Notice would be due. *Id*. Nevertheless, he filed an Answer to the Notice of Charges on May 26. Respondent's Answer and Affirmative Defenses, at 40.

Additionally, it is undisputed that the FDIC also served him via overnight courier at his residence. FDIC's Opposition to Bonan II's Motion for Summary Disposition at 26 ("Opp. to SJ"). Under most circumstances, service by overnight courier would be "reasonably calculated to give actual notice," which is sufficient to meet service of process requirements. *See* 12 C.F.R. § 308.11(c)(2)(v); *see also In the Matter of Ricardo Carrasco*, 1998 WL 34083429 (Oct. 8, 1998) (notice sufficient even though Respondent did not actually receive notice, as the methods of service were "in most situations reasonably calculated to give actual notice"); *In the Matter of Ghaith R. Pharaon, Agha Hasan Abedi, Swaleh Naqvi, & Kemal Shoaib,* 1992 WL 12012684 (Feb. 14, 1992) (notice provided to Respondent by his secretary constituted a "method reasonably calculated to give actual notice").

Respondent does not dispute this service in his Exceptions. Nor does he claim unusual circumstances that would render service by overnight courier insufficient, nor claim that he did not receive actual notice. Instead, he argues that 1) service is not

always sufficient merely because of actual notice; and 2) the due date for his response "was forced to be completed with unnecessary urgency" because the date of service was not clear. Exceptions at 74.

As for Respondent's first argument, he does not argue that he was not provided service through a courier. His Exceptions do not provide any reference at all to this, but instead focus on the fact that his attorney refused service by e-mail. It appears, then, that service was properly executed under the "any other method reasonably calculated to give actual notice" option of 12 C.F.R. § 308.11(c)(2)(v). As for Respondent's second argument, this Board agrees with FDIC Enforcement that while that may "make an otherwise untimely Answer timely," it does not rise to the level of a due process violation. *See* Opp. to SJ at 26.

Respondent was served with the Notice of Charges, had actual notice of the proceeding, responded to the charges, and otherwise fully participated in the proceedings. This Board finds that Respondent's actions overcome his improper service claim and additionally, that service was properly effectuated.

VII. THE SEVENTH AMENDMENT DOES NOT ENTITLE RESPONDENT TO A JURY TRIAL

Respondent argues that he is entitled to a jury trial under the Seventh Amendment. *See* Exceptions at 74-77. He is incorrect. Respondent is not entitled to a jury trial under the Seventh Amendment for either the imposition of a prohibition order or a CMP. A prohibition order is equitable in nature, and in any event the public rights exception to the Seventh Amendment right to trial by jury applies. Likewise,

the public rights exception applies to an administrative proceeding by the FDIC for a CMP. The Supreme Court's recent decision in *SEC v. Jarkes*y ("*Jarkesy*") reinforces these conclusions. *See SEC v. Jarkesy*, 144 S. Ct. 2117 (2024).

To determine whether Respondent's Seventh Amendment right to a jury has been violated, the Board applies a two-part analysis: (1) does the action implicate the Seventh Amendment, and (2) if so, does the "public rights" exception apply? *See Jarkesy*, 144 S. Ct. At 2127.

A. A Prohibition Order is an Equitable Remedy that Does Not Implicate the Seventh Amendment.

This proceeding for prohibition under § 1818(e) does not implicate the Seventh Amendment, as debarment from the banking industry is an equitable remedy rather than a legal one. The purpose of prohibition is remedial rather than punitive. It serves to protect the banking industry from the misconduct of insiders and, thereby, to maintain public confidence in the banking system.

The Seventh Amendment provides that the jury trial right is "preserved" for "suits at common law," and the Supreme Court has explained on numerous occasions that this language distinguishes between legal and equitable actions and requires a jury trial only for actions that were legal in 1791. Indeed, *Jarkesy* reiterates the point:

> [T]he Framers used the term "common law" in the Amendment "in contradistinction to equity, and admiralty, and maritime jurisprudence." . . . The Amendment therefore "embrace[s] all suits which are not of equity

> or admiralty jurisdiction, whatever may be the peculiar form which they may assume."

144 S. Ct. at 2128 (quoting *Parsons v. Bedford*, 3 Pet. 433, 436 (1830)); *see also, e.g.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989) (no jury necessary for claim that is not "legal in nature"); *Atlas Roofing Co., Inc. v. OSHA*, 430 U.S. 442, 449 (1977) ("The phrase 'Suits at common law' has been construed to refer to cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not."). In making the determination of whether a claim is "legal in nature" or equitable, "courts [must] consider the cause of action and the remedy it provides[,]" and "the remedy [is] the 'more important' consideration." *Jarkesy*, 144 S. Ct. at 2129.

Prohibiting Respondent from further service in the banking industry – essentially an injunction – is an equitable remedy and falls within the domain of courts of equity rather than law.

Several courts have held that a prohibition order serves a remedial purpose. In *United States v. Stoller*, 906 F. Supp. 39 (D. Mass. 1995), *aff'd*, 78 F.3d 710 (1st Cir. 1996), for example, the court recognized that "section 1818(e) was intended to serve the legitimate remedial purpose of protecting insured institutions from the dangers of misconduct by bank insiders," and noted that the possibility of reinstatement mitigated any punitive aspect of a removal and prohibition sanction. *Id*. at 41-42. The First Circuit affirmed, holding that the absence of a criminal component to the misconduct giving rise to removal and prohibition favored the conclusion that § 1818(e) was remedial, not punitive. 78 F.3d at 721. The Fifth

and Tenth Circuits reached the same conclusion. *United States v. Rusk*, 96 F.3d 777, 779 (5th Cir. 1996) ("[D]ebarment orders do not serve a punitive purpose but rather the remedial goal of protecting the banking industry."); *United States v. Hudson*, 14 F.3d 536, 542 (10th Cir. 1994) ("[T]he OCC's use of debarment as a means of protecting the integrity of the banking system and the interests of the depositors is a legitimate remedial purpose that need not necessarily be defined as also serving as deterrence or retribution."); *see also Bae v. Shalala*, 44 F.3d 489, 496 (7th Cir. 1995) (debarment under Generic Drug Enforcement Act remedial, not punitive). This Board has also so held. *In the Matter of John J. Schmalzer*, FDIC-00-007e, 2004 WL 2930775, at *4 (FDIC Oct. 21, 2004) ("Orders of removal and prohibition under section 8(e) of the Act are remedial and are *issued not to punish, but rather to protect the public . . . .*"); *In the Matter of Richard M. Wright*, FDIC-95-79e, 2000 WL 1742018, at *3 (FDIC Oct. 2, 2000) (same); *In the Matter of Douglas A. Winter*, FDIC-89-29e, 1997 WL 602923, at *4 (FDIC Aug. 20, 1997) (same); I*n the Matter of Allan Hutensky*, FDIC-92-300e, 1997 WL 557612, at *2 (FDIC July 8, 1997) ("Section 8(e) of the FDI Act is a remedial, not a punitive statute.").

And even if the effect of prohibition orders is also, in part, to deter or punish misconduct, *see Proffitt v. FDIC*, 200 F.3d 855, 860-61 (D.C. Cir. 2000) (finding prohibition to be punitive but also noting that it has a "dual effect of protecting the public from a dishonest banker"), this does not alter the Board's conclusion. Remedies can be equitable even if punishment or deterrence is among their rationales or effects. *See, e.g.*, *S.E.C. v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006) (SEC's equitable disgorgement remedy has

"the effect of deterring subsequent fraud"); *EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1253 (11th Cir. 1997) (EEOC's injunctive remedies "deter[] the employer from future discrimination"); *F.T.C. v. Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011) (SEC's disgorgement remedies are equitable even if their "primary purpose . . . is to deter violations of the laws by depriving violators of their ill-gotten gains"); *U.S. v. Stoller*, 78 F.3d 710, 724 (1st Cir. 1996) (finding, in a double jeopardy analysis, that a debarment order imposed by the FDIC was "predominately remedial in nature"*); Navarro v. Procter & Gamble Co.,* 529 F. Supp. 3d 742, 754 (S.D. Ohio 2021) ("[T]he availability of injunctive relief . . . presumably deters and punishes infringement, but that does not change its character as equitable relief.") (citations omitted); *Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP*, 325 F. Supp. 2d 841, 851 (M.D. Tenn. 2004) (equitable remedies do not require jury trial even if "deterrence" is among their purposes), *injunction terminated on other grounds*, 423 F.3d 539 (6th Cir. 2005). Just as legal relief "incidental to or intertwined with equitable relief" is equitable for purposes of the Seventh Amendment, *see, e.g.*, *Tull v. U.S.*, 481 U.S. 412, 424 (1987), a deterrence or punishment element to a remedy that is incidental to the remedy's primary equitable purpose does not make the entire remedy legal. *Jarkesy* is not to the contrary, as the Supreme Court observed that "*monetary* remedies" may be legal rather than equitable if they are "designed to punish or deter the wrongdoer," and did not address nonmonetary remedies at all. *Jarkesy*, 144 S. Ct. at 2129. *Jarkesy* did not alter the long-settled rule that purely

equitable remedies, whatever their purpose or effect, do not require a trial by jury.

Thus, the remedy—the "most important" consideration—points to the lack of a right to a jury trial. This conclusion is buttressed when one looks at the "cause of action." The imposition of a prohibition order here is based on breach of fiduciary duty and unsafe or unsound business practices. These bases for prohibition fall outside the Seventh Amendment because they do not correspond to causes of action tried before a jury in 1791.

Courts have often recognized that actions for breach of fiduciary duty do not implicate the Seventh Amendment because actions for breach of fiduciary duty, to the extent they existed in 1791, were brought against trustees, not corporate officers, and even those actions were solely equitable and did not include damages. "[I]n colonial times, the English High Court of Chancery had exclusive jurisdiction over trusts." *Evans v. Pearson Enter.*, 434 F.3d 839, 849 (6th Cir. 2006). For that reason, the Supreme Court noted in *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry,* 494 U.S. 558 (1990), that a modern action that is comparable to an equitable action by a trust beneficiary would not require a jury trial. *Id*. at 568-69. Similarly, in *Osborn v. Griffin*, 865 F.3d 417 (6th Cir. 2017), the Sixth Circuit found that "a jury trial was not required for Plaintiffs' fiduciary duty claims," even though the remedies sought were monetary. *Id*. at 461. Even if there were a valid analogy to actions at law—and there is not—the novelty of the cause of action would permit administrative resolution. *See Granfinanciera*, 492 U.S. at 53 ("In certain situations . . . Congress may fashion causes of action that are closely analogous to

common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable.").

Not only was there no action for breach of fiduciary duty at common law, there was no duty to enforce. Historically, corporate officers, and bank officers in particular, could not be sued for unduly risky practices, as their obligations were to maximize wealth for their shareholders. As one commentator has explained:

> [Throughout] much of the nineteenth century, bank fiduciary duties were considered purely a matter of state common law. Consequently, they mostly developed in parallel with corporate fiduciary duties, with a high deference to board autonomy and an increasing emphasis on maximizing shareholder profits. . . . [D]uring this period, bank directors were given very broad latitude to pursue shareholders' interests, with a robust business judgment rule and effectively no judicial enforcement against excessive risk-taking by bank managers and directors. Reflecting the mores of the era, bank depositors were generally denied standing to sue for a breach of fiduciary duty, as it was assumed that their relationship with the bank was a contractual one and did not extend to the bank's officers and directors. Shareholder wealth maximization was seen as the primary goal of bank directors, even at the expense of depositors.

David Min, *Federalizing Bank Governance*, 51 Loy. U. Chi. L.J. 833, 849-50 (2019). Another commentator similarly observes:

> Nineteenth-century bank director liability law proceeded from the premise that shareholders invest capital in a bank with the implicit expectation of maximized profits. This premise gave rise to three allied propositions. First, it was assumed that shareholders either constituted the board or delegated authority to the board to make profit-maximizing decisions. Second, courts assumed that shareholders expected directors to take the necessary risks to achieve such profits. Finally, because shareholders stood to gain from any profits, courts concluded that shareholders bore the corresponding risk of loss.
>
> This conception of shareholders' interests militated in favor of broad board discretion, largely free from judicial supervision. When shareholder and director interests clashed, nineteenth-century courts almost always subordinated shareholder claims to board autonomy. The upshot was that courts from that era rewarded, rather than penalized, risk. **Nineteenth-century courts, for example, refused to hold directors of state-chartered institutions liable for overconcentrations of credit to single borrowers. Early decisions also showed lenience toward numerous practices treated harshly today, including worthless junior liens, loose appraisal practices, disregard of internal loan proce-**

> **dures, and additional loans to delinquent borrowers. Taken together, the nineteenth-century cases displayed an appetite for bank risk that is virtually shocking by modern mores.**
>
> The ethos of potential profit maximization at any risk level was also evident in the numerous nineteenth century cases that denied injured depositors the standing necessary to sue bank directors for negligent mismanagement. The depositor standing cases proceeded from the premise that the sole contractual relationship depositors had was with their banks and not with the banks' boards of directors. The necessary consequence, in the eyes of many courts, was that depositors lacked privity of contract with, and thus standing to sue, bank directors. The depositor standing doctrine neatly aligned with the view that the duty of care only served the interests of shareholders.

Patricia A. McCoy, *A Political Economy of the Business Judgment Rule in Banking: Implications for Corporate Law*, 47 Case W. Res. L. Rev. 1, 23-26 (1996) (emphasis added); see also *id*. at 29 ("During most of the nineteenth century, potential profit maximization, not loss avoidance, was the prevailing norm. The vast majority of courts during that period refused to interfere with lending decisions, even when such decisions were reckless and likely to result in losses. Some courts went so far as to permit conflicts of interest where a possible profit was to be had."). Thus, shareholders had no remedy at law against corporate managers for their abuses, and while the derivative suit was ultimately created as an

equitable action against such managers, that later development simply underscores the absence of common-law accountability for corporate insiders. *Ross v. Bernhard*, 396 U.S. 531, 534 (1970).

It was not until the late nineteenth century, after the Supreme Court held that the National Bank Act imposed a duty of care on directors and officers, *see Briggs v. Spaulding*, 141 U.S. 132 (1891), that courts began to read a duty of care into the common law outside the Act. *Wheeler v. Aiken County Loan & Sav. Bank,* 75 F. 781, 785 (C.C.D.S.C. 1896); *Holmes v. McDonald*, 226 Ill. 169, 175-76 (1907); *Earle v. Humphrey*, 121 Mich. 518, 525 (1899). Those comparatively recent developments simply underscore the absence of eighteenth-century roots for the FDIC's enforcement actions. S*ee Moitoso v. FMR LLC*, 410 F. Supp. 3d 320, 330 (D. Mass. 2019) (post-founding common-law developments do not control for Seventh Amendment purposes: "the 18th-century common law of England is paramount in the Seventh Amendment analysis" (citations omitted)); *In re Aircrash Disaster*, 909 F. Supp. 1083, 1111 (N.D. Ill. 1995) (post-1791 developments in the common law are "not the pertinent inquiry" for Seventh Amendment purposes).

Thus, as neither bank depositors nor shareholders nor anyone else historically had a right of action against bank insiders for recklessness in the management of banks, the FDIC's actions for unsafe and unsound practices and breach of fiduciary duty to the bank "bring no common law soil with them." *Jarkesy*, 144 S. Ct. 2137. They are new actions, and such analogues as did exist in 1791 were brought in courts of equity rather than law.

To the extent Respondent attempts to create an analogy to other types of actions where a jury might be required, there is no reasonable comparison between breach of fiduciary duty and unsafe and unsound practices, on the § 1818(e) side, and any common-law action brought before juries in the eighteenth century. *See* Exceptions at 75 (analogizing the FDIC's allegations to fraud and to professional malpractice).

First, Respondent claims that because one of the "prongs" of a § 1818(e) action – the culpability prong– can be satisfied by showing "personal dishonesty," an action under § 1818(e) *as a whole* amounts to a traditional fraud claim. Not so. Claims brought under § 1818(e) are not analogous to fraud claims either in elements or remedy. A determination of "personal dishonesty" does not equate to a civil fraud claim; personal dishonesty is a broader concept. *See Van Dyke v. Board of Gov. of the Federal Reserve Sys.*, 876 F.2d 1377, 1379 (8th Cir. 1989) (noting that Federal Reserve Board finding that personal dishonesty must be evaluated on a case-by-case basis and need not amount to civil fraud was a permissible construction of statute at issue in that case); *see also Michael v. FDIC*, 687 F.3d 337, 351 (7th Cir. 2012) (noting that personal dishonesty can include "a lack of straightforwardness and a lack of integrity"). An action for a prohibition order is not modeled on common law fraud—it does not, for instance, involve reasonable reliance, a showing of materiality, or damages—nor does it provide a type of remedy available only in law courts. Further, "personal dishonesty" relates to only one of the three prongs under § 1818(e) – the "culpability" prong. The remaining prongs of § 1818(e) – "misconduct" and "effect" – have nothing to do with the substance or

framework of a fraud claims. A §1818(e) claim, which consists of three prongs each of which can be satisfied by a number of different showings, is not somehow transformed into a fraud claim because one of those potential showings is "personal dishonesty." A finding of "personal dishonesty" is a sufficient but not a necessary finding even on the culpability prong. *See Haynes v. FDIC*, 664 Fed. Appx. 635, 637-38 (9 th Cir. 2016) (FDIC Board "not required to find personal dishonesty . . . [t]he statute lists willful of continuing disregard as an alternative to personal dishonesty"). And the remedy for any misconduct involving "personal dishonesty" – the most important factor in determining whether a claim is legal or equitable – remains equitable. Debarment from the banking industry is, as described above, an equitable remedy unknown to the common law as it existed in the eighteenth century.

Second, as to Respondent's single sentence stating that "unsafe and unsound banking practices" equates to a traditional legal cause of action for professional malpractice, the Board finds that Respondent has failed to adequately support such an argument. The single case cited by Respondent, *Resnick v. Schwartz*, No. 17C04944. 2018 WL 4191525, at *9 (N.D. Ill. Sep. 3, 2018), stands merely for the proposition that professional malpractice is a "legal" cause of action. It does not address the issue of whether an unsafe and unsound banking practices claim is an analogue of professional malpractice. Respondent does not otherwise offer any support for his bare assertion. And, in any event, regardless of how the cause of action is characterized a prohibition order is a non-monetary equitable *remedy* not a legal one. *See, e.g.*, *Tull*, 481 U.S. at 421 (characterizing the relief sought

is more important than finding a "precisely analogous common-law cause of action").

B. The Public Rights Exception Applies to Both the Prohibition Order and the Civil Money Penalty.

Even assuming solely for the sake of argument that administrative proceedings for prohibition orders were legal in nature and implicated the Seventh Amendment, the public rights exception applies to allow them to be heard in an administrative proceeding before an ALJ. The same goes for proceedings to assess a CMP.

The Supreme Court has explained that the public rights exception "has been held to permit Congress to assign certain matters to agencies for adjudication even though such proceedings would not afford the right to a jury trial." *Jarkesy*, 144 S. Ct. at 2127. And as the Court explicitly acknowledged, under the exception, "the Government may extract civil penalties in administrative tribunals in some contexts." Id. at 2134 n. 2.

While the Supreme Court in *Jarkesy* declined to apply the "public rights" exception to the SEC's securities fraud action, it did affirm that the exception remains good law, 144 S. Ct. at 2132, and declined to overturn prior decisions setting forth the parameters of the exception, specifically *Stern v. Marshall*, 564 U.S. 462 (2011), and *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). Actions for prohibition under § 1818(e) and CMP under § 1818(i) fall within the public rights exception as explained in *Stern* and *Granfinanciera*, and further detailed in *Jarkesy*.

Normally, if a suit is in the nature of an action at common law, then it "presumptively concerns private rights, and adjudication by an Article III court is mandatory." *Jarkesy*. 144 S. Ct. at 2132. However, the Court's "precedent has also recognized a class of cases concerning . . . 'public rights,'" that the Court described as "matters [that] 'historically could have been determined exclusively by [the executive and legislative] branches,' even when they were 'presented in such a form that the judicial power [wa]s capable of acting on them." *Id*. .

The *Jarkesy* Court provided examples of the "historic categories of adjudications [that] fall within the exception." *Id*. The *Jarkesy* Court cited as examples of public rights cases those involving the revenue collection power, *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1956); immigration enforcement, *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 335 (1909); tariffs, *Ex parte Bakelite Corp.*, 279 U.S. 438, 446 (1929); Native American tribe relations, *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011), public lands issues, *Crowell v. Benson*, 285 U.S. 22, 51 (1932), and patent rights, *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 334 (2018); *United States v. Duell*, 172 U.S. 576, 582-83 (1899). The Court also cited *Crowell* for the proposition that matters involving "pensions" and "payments to veterans" may be decided before an administrative tribunal, and the *Crowell* Court extended that holding to, *inter alia*, "public health" and "the facilities of the post office."

The FDIC's action enforcing banking laws fits into the types of action enumerated in *Jarkesy* as within the public rights exception. "Banking is one of the

longest regulated and most closely supervised of public callings." *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947); *see also Blue Ridge Bank v. Veribanc, Inc.*, 675 F. Supp. 1007, 1011 (W.D. Va. 1987) ("Partly because of the important role banks play in our economy, and because they have such an important effect on the public welfare, the banking industry is highly regulated at state and national levels."). Effective banking regulation ensures the continued stability of the financial system and federal regulations permeate every aspect of banking. Just as the federal government has an interest in ensuring the effective operation of the laws governing taxation, immigration, and international trade, it has a compelling interest in preventing banking misconduct, and Congress has leeway to provide for the adjudication of those matters in an administrative forum. *See Stern v. Marshall,* 564 U.S. 462, 490-91 (2011) (exception applies to "cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority. . . .[W]hat makes a right 'public' rather than private is that the right is integrally related to particular Federal Government action").

This is reinforced by the history of enforcement at the FDIC. Section 1818 enforcement claims more closely resemble the "matters [that] historically could have been determined exclusively by [the executive and legislative] branches" identified in *Jarkesy* than do the securities fraud claims at issue in that case. Prior to 2010 SEC securities fraud claims historically had been brought only in Article III courts. On the other hand, § 1818 enforcement claims historically

have been brought exclusively in executive branch administrative proceedings.

Further, unsafe and unsound conduct and other acts that imperil an insured institution threaten public funds. Unlike the SEC in *Jarkesy*, the FDIC's enforcement regime helps to protect the Deposit Insurance Fund. Diminished health of the Deposit Insurance Fund could require use of public funds in the Treasury and FDIC enforcement actions reduce the risk of that happening. *See Spawn v. Western Bank-Westheimer*, 989 F.2d 830, 837 (5th Cir. 1993) ("[A]lthough the FDIC relies on premiums from insured banks to pay the cost of deposit insurance, *see* 12 U.S.C. § 1817, the FDIC also relies on borrowing from the United States Treasury to meet its obligations, *see* 12 U.S.C. § 1824."). In *Jarkesy*, there was no similar implication for public funds. For these reasons, multiple courts of appeals have recognized that conduct affecting insured depository institutions affects public rights. In *Simpson v. OTS*, 29 F.3d 1418 (9th Cir. 1994), the court found the public rights exception applicable to a restitution order pursuant to § 1818(b)'s cease and desist authority because "Congress created the administrative forum to effectuate and protect the public interest," specifically by "safeguard[ing] the thrift industry, the depositors, and the federal insurance fund." *Id.* at 1423. The misconduct at issue "threatened [the bank's solvency" and "undermin[ed] the interests and confidence of Cascade's depositors. . . . By instituting the cease-and-desist proceedings, the OTS served a public purpose of the sort Congress envisioned in providing for administrative adjudication." *Id.* Likewise, in *Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995), the court found that "Congress enacted FIRREA in order to safeguard the thrift industry and the FDIC," and

the enforcement proceeding "stemmed from Cavallari's disregard of an order issued by the OCC pursuant to its regulatory authority under FIRREA." *Id.* at 145. Thus, the proceeding "implicate[d] public rights." *Id.*; *see also Akin v. OTS*, 950 F.2d 1180, 1184, 1186 (5th Cir. 1992) (public rights exception applies to enforcement proceeding addressing "unsafe or unsound banking practices stemm[ing] from reckless disregard of an institutional officer's duties"; the proceeding was "a proper administrative forum for adjudicating public rights").

The *Jarkesy* decision also reiterated the holding of *Granfinanciera*, where the Court explained that "[i]f a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court." 492 U.S. at 54-55. In considering this, the *Jarkesy* Court stated that when "Congress ha[s] already authorized jury trials for certain [relevant] matters [this] demonstrate[s] that jury trials were not generally 'incompatible' with the overal [statutory] regime." *Jarkesy*, 144 S. Ct. at 2135. But here, unlike with the SEC's authority to bring an enforcement proceeding in an Article III court, the FDIC's governing statute does *not* provide for a right to bring an Article III proceeding. *See* 12 U.S.C. § 1818(h)(1) (hearing on enforcement actions "shall be conducted in accordance with the provisions of chapter 5 of title 5," and 90 days after the matter is submitted, the "appropriate Federal banking agency" shall render a decision). This demonstrates that section 1818 administrative proceedings are "closely intertwined" with the federal banking regulatory regime.

Finally, the remaining considerations identified in *Granfinanciera* – a decision upheld and specifically relied upon by the *Jarkesy* court – support application of the public rights exception. *Granfinanciera* directed courts to consider whether Congress "created a new cause of action . . . because traditional rights and remedies were inadequate to cope with a manifest public problem," whether "requiring jury trials would go far to dismantle the statutory scheme" because the proceeding has been "placed in an administrative forum with which the jury would be incompatible," and whether "providing jury trials" would "impede swift resolution of the proceedings." 492 U.S. at 60, 61, 63 (citations omitted).

As discussed above, a proceeding for a prohibition order is a new cause of action, with a remedy "unknown to the common law." Similarly, Congress created a new cause of action, with remedies therefor, "unknown to the common law" when it authorized CMP in 1978, long after the FDIC was given its other enforcement powers. Pub. L. No. 95-630, 92 Stat. 3641 (1978). And, as discussed above, unsafe and unsound banking practices and breaches of fiduciary duty to banks are causes of action not rooted in the common law soil as it existed in 1791.

Requiring jury trials would also "go far to dismantle the statutory scheme" because – in contrast to the SEC enforcement regime considered in *Jarkesy* – nothing in Section 1818 authorizes the FDIC to seek prohibition orders or civil money penalties in federal court. The FDIC statutory scheme calls for these remedies to be adjudicated in administrative proceedings, and depriving the FDIC of that option would leave it with no recourse at all to prevent unsafe or unsound banking practices or other

banking misconduct. This would surely dismantle the statutory scheme meant to protect the banking system and the public.

With respect to whether requiring a jury trial would impede swift resolution of the proceedings, this also supports the public rights exception. Because the FDIC's statute does not provide for the FDIC to bring enforcement actions in federal court, requiring a jury could well put a halt to any such proceedings. This would go far beyond impeding a swift resolution; it would prevent adjudication at all.

The public rights exception applies to the FDIC's enforcement proceeding in this matter. No jury trial is required and there has been no violation of the Seventh Amendment.

VIII. THERE IS NO VIOLATION OF THE "TAKE CARE" CLAUSE OF THE CONSTITUTION

Respondent argues that the entire proceeding should be dismissed because the FDIC Board members' tenure protections, along with the "for cause" removal restrictions for ALJs, are both unconstitutional. Exceptions, at 77. He argues that both violate the "Take Care" clause of the Constitution, requiring that the President "shall take Care that the Laws be faithfully executed," because the President cannot remove either the Board members or the ALJ at will. *Id*.; U.S. Const. art. II, § 3. "Neither alleged infirmity" succeeds. *See Calcutt v. Fed. Deposit Ins. Corp.*, 37 F.4th 293, 310 (6th Cir. 2022), *cert. granted, opinion rev'd on other grounds*, 598 U.S. 623 (2023).

A. Respondent Does Not Allege Harm.

Fatal to his claims, Respondent does not allege that any harm came from the alleged constitutional violations. An unconstitutional removal restriction would need to result in "compensable harm" to provide Respondent with a remedy. *See Collins v. Yellen*, 594 U.S. 220, 259–60 (2021); *see also Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 211 (2020) ("In the specific context of the President's removal power, we have found it sufficient that the challenger "sustain[s] injury" from an executive act that allegedly exceeds the official's authority"); *Calcutt v. Fed. Deposit Ins. Corp.*, 37 F.4th 293, 314 (6th Cir. 2022), *cert. granted, opinion rev'd on other grounds*, 598 U.S. 623 (2023) ("*Collins* instructs that relief from agency proceedings is predicated on a showing of harm, a requirement that forecloses Calcutt from receiving the relief he seeks").

On this basis alone, the Board finds that Respondent's argument is without merit. Respondent has not shown or even alleged that the "President had attempted to remove [a Board member or the ALJ] but was prevented from doing so by a lower court decision holding that he did not have "cause" for removal." *Collins*, 594 U.S. at 259–60. He has not alleged that the "President had made a public statement expressing displeasure with actions taken" by a Board member or the ALJ and would remove him or her but for the removal restriction. *Id*. He has not alleged that any of the Board members or the ALJ were biased against him. And he has not otherwise argued that the Recommended Decision of the ALJ or the final decision of the Board might be different but for the allegedly unconstitutional removal restrictions.

In other words, Respondent has not alleged any injury that would make the removal restrictions, if they are indeed unconstitutional, actionable. *See Collins*, 594 U.S. at 259–60; *Seila L. LLC,* 591 U.S. at 211; *Calcutt*, 37 F.4th at 314; *see also Kaufmann v. Kijakazi*, 32 F.4th 843, 849 (9th Cir. 2022) (party "challenging an agency's past actions must instead show how the unconstitutional removal provision *actually harmed* the party"); *Bhatti v. Fed. Hous. Fin. Agency*, 15 F.4th 848, 854 (8th Cir. 2021) (remanding to district court to determine if "compensable harm" existed to entitle shareholders to relief). Respondent's claims for relief on these grounds are therefore without merit.

B. The Removal Restrictions for FDIC Administrative Law Judges Are Not Unconstitutional.

This Board further finds that in addition to Respondent's failure to allege injury stemming from the alleged unconstitutional removal provisions, the "for cause" removal restrictions for FDIC ALJs are *not* unconstitutional.

FDIC ALJs may only be removed for "good cause established and determined by the Merit Systems Protection Board" (MSPB). 5 U.S.C. § 7521(a). MSPB members are then removable by the President only for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). Respondent argues that these "two layers of for-cause removal" impede the ability of the president to ensure that the laws are faithfully executed. Exceptions, at 78.

Respondent principally relies on *Free Enterprise Fund* to assert that the Constitution prohibits the two layers of for-cause removal for ALJs. However

the Supreme Court in *Free Enterprise Fund* expressly stated that the holding "does not address that subset of independent agency employees who serve as administrative law judges." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 507 n. 10 (2010). The Court declined to extend the holding because many ALJs "perform adjudicative rather than enforcement or policymaking functions" or "possess purely recommendatory powers." *Id.*; *see also Calcutt*, 37 F.4th at 319 ("the Court took care to omit ALJs from the scope of its holding").

Justice Kavanaugh, when sitting on the D.C. Circuit during the *Free Enterprise Fund* proceedings, explained that the for-cause protections for ALJs are distinguishable from other removal restrictions, in part because many "ALJs perform adjudicatory functions that are subject to review by agency officials . . . and that arguably would not be considered 'central to the functioning of the executive Branch' for purposes of the Article II removal precedents." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 699 n.8 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (quoting *Morrison v. Olson*, 487 U.S. 654, 691–92 (1988)).

After Respondent's hearing, the FDIC ALJ issued a Recommended Decision. The FDIC Board then reviewed the Recommended Decision, along with all of the evidence and arguments made in the case, and issued this final decision. *See* 12 C.F.R. § 308.5(b)(7) (an ALJ's powers include ruling "upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Board of Directors has the power to ... decide any other motion that results in a final determination of the merits of the proceeding"). As Respondent points out, the "FDIC

Board is not bound to follow the ALJ's recommended interpretation." *See* Exceptions at 26. The FDIC ALJs perform adjudicative functions, possessing "purely recommendatory powers." *See Free Enter. Fund*, 561 U.S. at 507 n. 10. This removes the for-cause protections for FDIC ALJs from the holding in *Free Enterprise Fund*. *Id.*

Respondent also cites the Fifth Circuit's ruling in *Jarkesy v. Sec. & Exch. Comm'n*, which held, in part, that the statutory removal restrictions for SEC ALJs were invalid. 34 F.4th 446, 463 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023), and *cert. denied*, 143 S. Ct. 2690 (2023), and *aff'd and remanded,* 144 S. Ct. 2117 (2024).

Respondent's reliance is misplaced for three reasons. First, *Jarksey's* Fifth Circuit opinion is not controlling in the Seventh Circuit. Second, the Court invalidated the statutory removal restrictions in part because SEC ALJs "perform substantial executive functions." *Jarkesy*, 34 F.4th at 463. SEC ALJs differ from FDIC ALJs in that the SEC "can decide against reviewing an ALJ's decision," making the ALJ's decision final. *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. 237, 239 (2018) (citing 17 C.F.R. § 201.360(d)(2); 15 U.S.C. § 78d–1(c). Pp. 2051–2055.). This is an important distinction—in contrast FDIC ALJs *only* perform adjudicatory functions and their decisions are never final, which fits the exception recognized in *Free Enterprise Fund*. Finally, the Fifth Circuit did not invalidate the administrative proceedings based on the finding that the removal provisions for SEC ALJs were invalid. *Jarkesy*, 34 F.4th at 463 n. 17 ("we do not decide whether vacating would be the appropriate remedy based on this error alone").

The "for clause" removal restrictions for FDIC ALJs are not unconstitutional, and Respondent's claims that the "Take Care" clause was violated are without merit.

IX. CONCLUSION

For the foregoing reasons, the Board finds that a prohibition order is warranted in this case as well as the assessment of a second tier CMP of $105,000.

FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

FDIC-16-0254e
FDIC-16-0256k

In the Matter of

FRANK WILLIAM BONAN II,
Individually and as an institution-affiliated party of

GRAND RIVERS COMMUNITY BANK
Grand Chain, Illinois
(Insured State Nonmember Bank)

ORDER TO PROHIBIT FROM
FURTHER PARTICIPATION AND
TO PAY CIVIL MONEY PENALTY

ORDER TO PROHIBIT

The Board of Directors ("Board") of the Federal Deposit Insurance Corporation ("FDIC"), having considered the entire record of this proceeding and finding that Respondent Frank William Bonan II, formerly the Chairman of the Board of Grand Rivers Community Bank ("Bank"), Grand Chain, Illinois, engaged in unsafe or unsound banking practices and breaches of his fiduciary duties resulting in loss to the Bank, and that his actions involved willful and continuing disregard for the safety and soundness of the Bank, hereby ORDERS and DECREES that:

1. Frank William Bonan II shall not participate in any manner in any conduct of the affairs of

any insured depository institution, or any other institution, credit union, bank or agency enumerated in section 8(e)(7)(A) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D).

2. As described in 12 U.S.C. § 1818(e)(6)(B), Frank William Bonan II shall not solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent or authorization with respect to any voting rights in any insured depository institution, or any other institution, credit union, bank or agency enumerated in section 8(e)(7)(A) of the FDI Act, 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D).

3. As described in 12 U.S.C. § 1818(e)(6)(C), Frank William Bonan II shall adhere to all voting agreements previously approved by the appropriate Federal banking agency with respect to any insured depository institution, or any other institution, credit union, bank or agency enumerated in section 8(e)(7)(A) of the FDI Act, 12 U.S.C. § 1818(e)(7)(A), except as otherwise permitted, in writing, by the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is

defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D).

4. As described in 12 U.S.C. § 1818(e)(6)(D), Frank William Bonan II shall not vote for a director, or serve or act as an institution-affiliated party, as that term is defined in section 3(u) of the FDI Act, 12 U.S.C. § 1813(u), of any insured depository institution, or any other institution, credit union, bank or agency enumerated in section 8(e)(7)(A) of the FDI Act, 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D).

5. This ORDER shall be effective thirty (30) days from the date of its issuance.

6. The provisions of this ORDER will remain effective and in force except in the event that, and until such time as, any provision of this ORDER shall have been modified, terminated, suspended, or set aside by the FDIC.

SO ORDERED.

IT IS FURTHER ORDERED that copies of this Decision and Order shall be served on Counsel for Frank William Bonan II, FDIC Enforcement Counsel, and the Administrative Law Judge.

Dated at Washington, D.C., this 17th day of December 2024.

/s/ Debra Decker
Debra A. Decker
Executive Secretary

ORDER TO PAY CIVIL MONEY PENALTY

The Board, having considered the entire record in this proceeding, and taking into account the appropriateness of the penalty with respect to the size of the financial resources and good faith of Respondent, the gravity of the violations, and such other matters as justice may require, hereby ORDERS and DECREES that:

1. A civil money penalty is assessed against Frank William Bonan II in the amount of $105,000 pursuant to 12 U.S.C. § 1818(i).
2. This ORDER shall be effective and the penalty shall be final and payable sixty (60) days from the date of its issuance.

The provisions of this ORDER will remain effective and in force except to the extent that, and until such time as, any provision of this ORDER shall have been modified, terminated, suspended, or set aside by the FDIC.

SO ORDERED.

IT IS FURTHER ORDERED that copies of this Decision and Order shall be served on Counsel for Frank William Bonan II, FDIC Enforcement Counsel, and the Administrative Law Judge.

Dated at Washington, D.C. this 17th day of December 2024.

/s/ Debra Decker

Debra A. Decker
Executive Secretary

APPENDIX C

FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

Docket Nos.:
FDIC-16-0254e
FDIC-16-0256k

In the Matter of:

FRANK WILLIAM BONAN II,
individually and as an institution-affiliated party of
Grand Rivers Community Bank Grand Chain, Illinois
(Insured State Nonmember Bank)

RECOMMENDED DECISION

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication
(November 20, 2023)

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The Federal Deposit Insurance Corporation ("FDIC") commenced this action against Respondent Frank William Bonan II ("Bonan II" or "Respondent") on May 7, 2021, filing a Notice of Charges ("Notice") seeking an order of prohibition and the imposition of a $105,000 second-tier civil money penalty pursuant to 12 U.S.C. §§ 1818(e) and 1818(i). The Notice alleges that Respondent, in his capacity as Chairman of the Board of Grand Rivers Community Bank, Grand Chain, Illinois ("the Bank" or "Grand Rivers"), engaged in actionable misconduct, including unsafe or unsound banking practices and the breach of his fiduciary duties to the Bank, in connection with the Bank's loan relationship with Evergreen Drilling, LLC ("Evergreen Drilling"), Evergreen Properties of Illinois, LLC ("Evergreen Properties"), and related borrowers (collectively "the Evergreen Entities" or "Evergreen").[1] The allegations center around (1) a loan made to 618 Holdings, LLC ("618 Holdings"), a company formed by two of Respondent's employees at his instigation, to finance the sale and leaseback of a warehouse owned by Evergreen Properties ("the 618 Holdings loan"); and (2) the release of the Bank's security interest in a Cabot 900 self-propelled drilling rig ("Rig 23" or "the Cabot 900") held as collateral for a loan to Evergreen Drilling ("the Rig 23 collateral"), leaving that loan unsecured.[2]

On December 6, 2022, following briefing by Respondent and Enforcement Counsel for the FDIC ("Enforcement Counsel") (collectively "the Parties"), the undersigned issued an Order denying the Parties'

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[1] *See* Notice ¶ 10.

[2] *See id.* ¶¶ 49-82 (618 Holdings), 83-115 (Rig 23).

cross-motions for summary disposition and partial summary disposition ("MSD Order") and identifying a number of disputed questions of material fact as to each of the misconduct, effect, and culpability elements of Sections 1818(e) and 1818(i) to be resolved in a hearing before this Tribunal in its fact-finding capacity.

A six-day hearing was held from January 17-24, 2023 to resolve as necessary the questions of material fact that remained in genuine dispute and to address the disposition of all other issues. During the course of the hearing, this Tribunal heard testimony from ten fact witnesses, including Respondent, and five expert witnesses or hybrid fact-expert witnesses.[3] A total of 310 exhibits were introduced and admitted into evidence in connection with witness testimony. Now, on the strength of the full record of this case, including the weight of the evidence, established or admitted facts, inherent probabilities, the undersigned's credibility determinations based on the testimony of witnesses, and reasonable inferences drawn from the record as a whole, and after considering the Parties' post-hearing briefs ("EC Br." and "R Br.") and response briefs ("EC Reply" and "R Reply") and associated submissions containing their proposed

[3] Three additional witnesses—Kassie Winters Ledbetter, Grady Gaskins, and Jason Harbison—were granted leave to attend depositions in December 2022 in lieu of testifying at the hearing itself, due to extenuating personal circumstances that rendered them unavailable during the hearing dates. *See* 12 C.F.R. § 308.27; *see also* Order No. 28: Denying Motion to Quash Deposition Subpoenas of Kassie Winters Ledbetter and Grady Gaskins (November 29, 2022); Order No. 31: Denying Motion to Quash Deposition Subpoena of Jason Harbison (December 7, 2022).

findings and conclusions ("EPF" and "RPF"), the undersigned makes the following findings of fact, conclusions of law, and recommended orders.

I. Jurisdiction

At all times pertinent to this proceeding, the Bank was an insured state nonmember bank, subject to the Federal Deposit Insurance ("FDI") Act, 12 U.S.C. §§ 1811-1831aa, and Respondent was an institution-affiliated party ("IAP") as that term is defined in 12 U.S.C. § 1818(u).[4] The FDIC is therefore the appropriate federal banking agency with jurisdiction over the Bank and its IAPs for purposes of 12 U.S.C. § 1813(q), and it is authorized to initiate and maintain this prohibition and civil money penalty action against Respondent before this Tribunal, the Office of Financial Institution Adjudication ("OFIA").

II. Applicable Standard

The burden of proof in an administrative proceeding, unless otherwise provided by statute, is on the administrative agency to establish its charges by a preponderance of the evidence.[5] Under the preponderance-of-the-evidence standard, the party with the burden of proof must adduce evidence making it more likely than not that the facts it seeks to prove are true.[6] Here, the FDIC has the burden to

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[4] *See* JX 1 (December 19, 2022 Joint Stipulations of Fact ("Joint Stip.")) ¶¶ 2-3.

[5] *See* 5 U.S.C. § 556(d); *Steadman v. SEC*, 450 U.S. 91, 102 (1981).

[6] *See In the Matter of Michael Sapp*, Nos. 13-477e & 13-478k, 2019 WL 5823871, at *8, 14 (Sept. 17, 2019) (FDIC final decision) (applying preponderance standard in FDIC enforcement action); *Concrete Pipe & Prods. of Calif. v. Constr.*

prove that the statutory elements for the entry of a prohibition order and the assessment of a second-tier civil money penalty have been satisfied. This Tribunal is then tasked with making "a comparative judgment" to determine whether the agency has presented "the greater weight of the evidence" as to the satisfaction of the statutory elements.[7]

III. Elements of Sections 1818(e) and 1818(i)

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."[8] 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

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Laborers Pension Tr., 508 U.S. 602, 622 (1993) ("The burden of showing something by a preponderance of the evidence . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.") (internal quotation marks and citation omitted).

[7] *Almerfedi v. Obama*, 654 F.3d 1, 5 (D.C. Cir. 2011) (internal quotation marks and citations omitted).

[8] 12 U.S.C. § 1818(e)(1)(A).

received financial gain or other benefit."[9] 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."[10]

The imposition of a second-tier civil money penalty under 12 U.S.C. § 1818(i) also requires the satisfaction of multiple elements.[11] First, the agency must show misconduct, which can take the form of a violation of "any law or regulation" or final cease-and-desist order,[12] the breach of "any fiduciary duty," or the *reckless* engagement "in an unsafe or unsound practice in conducting the affairs" of the institution in question.[13] Second, the agency must show some external consequence or characteristic of the IAP's alleged misconduct, likewise generally termed "effect" in past decisions issued by the FDIC Board of Directors ("FDIC Board"): (1) that it "is part of a pattern of misconduct"; (2) that it "causes or is likely to cause more than a minimal loss to such depository

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[9] *Id.* § 1818(e)(1)(B).

[10] *Id.* § 1818(e)(1)(C).

[11] The assessment of a first-tier civil money penalty, by contrast, requires satisfaction of the misconduct element described here, but not the corresponding effect element. *See id.* § 1818(i)(2)(A).

[12] The misconduct elements of both Sections 1818(e) and 1818(i) can also be satisfied by the violation of a condition imposed in writing by a federal banking agency or any written agreement between such an agency and the depository institution in question. *See id.* §§ 1818(e)(1)(A)(i), (i)(2)(A). The FDIC does not allege such violations in this case.

[13] *Id.* § 1818(i)(2)(B)(i).

institution"; or (3) that it "results in pecuniary gain or other benefit to such party."[14] Before any civil money penalty can be assessed upon satisfaction of these elements, the agency must take into account the appropriateness of the amount of penalty sought when considered in light of certain potentially mitigating factors, including the "good faith of the . . . person charged," "the gravity of the violation," and "such other matters as justice may require."[15]

Although the misconduct prongs of both Sections 1818(e) and (i) 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 contrary to generally accepted

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[14] *Id.* § 1818(i)(2)(B)(ii). *See In the Matter of John Richard Lamm*, Nos. 12-052e, 12-053k, & 15-274b, 2018 WL 2297269, at *4 (Mar. 20, 2018) (FDIC final decision) (referring to this as the statute's "effects" prong); *accord In the Matter of Douglas V. Conover*, Nos. 13-214e & -217k, 2016 WL 10822038, at *27 (Dec. 14, 2016) (FDIC final decision).

[15] 12 U.S.C. § 1818(i)(2)(G); *see also In re Sealed Case (Administrative Subpoena)*, 42 F.3d 1412, 1416 (D.C. Cir. 1994) ("In assessing money penalties, Congress requires [banking] agencies to consider several mitigating factors."); *accord*, *e.g.*, *In the Matter of William R. Blanton*, No. AA-EC-2015-24, 2017 WL 4510840, at *27 (July 10, 2017) (OCC final decision), *aff'd on other grounds sub nom. Blanton v. OCC*, 909 F.3d 1161 (D.C. Cir. 2018).

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."[16] This so-called Horne Standard has long guided federal banking agencies, including the FDIC, in bringing and resolving enforcement actions.[17] It has also been recognized as "the authoritative definition of an unsafe or unsound practice" by federal appellate courts.[18] The undersigned accordingly adopts the Horne Standard when evaluating charges of unsafe or unsound practices under the relevant statutes.

Furthermore, while Respondent contends that conduct may not be deemed "unsafe or unsound" for purposes of Sections 1818(e) and 1818(i) unless it poses an abnormal risk of loss or damage "that threatens the financial stability of the banking institution,"[19] that is not the controlling law. The banking agencies have repeatedly and expressly dec-

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[16] *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).

[17] *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).

[18] *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).

[19] R Br. at 33 (internal quotation marks and citation omitted); *see also* R Reply at 19.

lined to impose a requirement that risky, imprudent conduct must directly affect an institution's financial soundness or stability in order to be considered "unsafe or unsound," adhering instead to a plain reading of the Horne Standard as articulated above. In its *Smith & Kiolbasa* decision in March 2021, for example, the Board of Governors of the Federal Reserve System ("FRB"), one of OFIA's constituent agencies, observed that it "has found [actionably imprudent] practices unsafe or unsound if they could be expected to create a risk of harm or damage to a bank, without necessarily attempting to measure their impact on the bank's overall financial stability."[20] The FRB further explained that "[a] construction of 'unsafe or unsound' conduct that focuses on the nature of the act rather than any 'direct effect' of such act on the institution's financial stability is [more] consistent with the structure of [S]ection 1818."[21] The FDIC and the Office of the Comptroller of the Currency ("OCC") have held similarly.[22] The

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[20] *In the Matter of Frank E. Smith and Mark A. Kiolbasa*, No. 18-036-E-I, 2021 WL 1590337, at *21 (Mar. 24, 2021) (FRB final decision).

[21] *Id.* at *22; *accord Patrick Adams*, 2014 WL 8735096, at *16 (noting that the standard suggested here by Respondent "conflicts with the fundamental structure of the FDI Act by introducing an effects element, textually reserved as a predicate for more severe remedies, into the definition of an element of misconduct").

[22] *See*, *e.g.*, *Patrick Adams*, 2014 WL 8735096, at **3-4 (rejecting an unsafe or unsound practices standard that "requires that a practice produce specific effects that threaten an institution's financial stability"); *In the Matter of Marine Bank & Trust Co.*, No. 10-825b, 2013 WL 2456822, at *4-5 (Mar. 19, 2013) (FDIC final decision) (declining to apply more restrictive standard).

undersigned will therefore apply the Horne Standard, unadorned by any further requirement, to the question of whether Respondent's alleged misconduct constituted unsafe or unsound practices within the meaning of the statute.[23]

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) and 1818(i). That is, the "misconduct" element of Section 1818(e) is fulfilled if an IAP has breached a fiduciary duty to the institution, regardless of whether the IAP has also violated any

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[23] Respondent cites to the Sixth Circuit's *Calcutt* decision as support for his proposition that "a finding of a threat to a bank's stability is required in order for an 'unsafe or unsound' practice to be established. R Br. at 33-34 (citing *Calcutt v. FDIC*, 37 F.4th 293, 325 (6th Cir. 2022), *reversed and remanded on other grounds*, 598 U.S. 623 (2023). Where the Supreme Court and the FDIC Board have not squarely addressed an issue, however, the undersigned gives deference to the decisions of the other OFIA agencies—the OCC, the FRB, the National Credit Union Administration ("NCUA"), 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, Grand Rivers Bank, is located in Illinois, which is in the Seventh Circuit. Even if the FDIC Board had not spoken on the matter, then (which, as stated, is not the case), the *Calcutt* decision would only be a data point when considering the appropriate result in the instant proceedings—and the undersigned finds the extensive analysis of the issue by the Comptroller of the Currency in the *Patrick Adams* case significantly more persuasive than the relatively cursory reasoning in *Calcutt* in any event. *Compare Patrick Adams*, 2014 WL 8735096, at **14-19 *with Calcutt*, 37 F.4th at 325-26.

laws or engaged in unsafe or unsound practices, and vice versa. Likewise, a second-tier civil money penalty may be assessed (assuming misconduct can be shown) if the misconduct has resulted in pecuniary gain to the IAP, even if it has not caused loss to the institution and is not part of an actionable pattern. 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.

IV. Conclusions of Law

As noted, the FDIC seeks a prohibition order and the assessment of a $105,000 second-tier civil money penalty against Respondent in this case for allegations relating generally to the Bank's loan relationship with the Evergreen Entities, and specifically to the 618 Holdings loan and the release of the Rig 23 collateral that—as detailed below—occurred in the fall and winter of 2015.

With respect to the 618 Holdings loan, Enforcement Counsel argues that a prohibition order and civil money penalty are justified because (1) Respondent engaged in unsafe and unsound banking practices and breached his fiduciary duties to the Bank (EC Br. at 24-38), thus satisfying the statutory misconduct elements; (2) Respondent's actions caused loss to the Bank and—for purposes of 12 U.S.C. § 1818(i)—were part of a pattern of misconduct (*id.* at 39-40, 59), thus satisfying the effect elements; and (3) Respondent exhibited personal dishonesty and continuing and willful disregard for the Bank's safety and soundness (*id.* at 40-45), thus satisfying 12 U.S.C. § 1818(e)'s culpability element.

Similarly, with respect to the Bank's release of the Rig 23 collateral, Enforcement Counsel contends that (1) Respondent committed misconduct by breaching his fiduciary duties and *recklessly* engaging in unsafe or unsound banking practices (EC Br. at 45-56);[24] (2) Respondent's actions had the effect of causing loss or probable loss to the Bank and were part of a pattern of misconduct (*id.* at 56-57, 59); and (3) Respondent demonstrated the requisite culpability by acting with continuing and willful disregard for the safety and soundness of the Bank (*id.* at 57-58).[25]

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[24] Enforcement Counsel's post-hearing brief conclusorily asserts that Respondent's conduct regarding the 618 Holdings loan constituted recklessly unsafe or unsound practices as well as on the Rig 23 release, *see* EC Br. at 59, but the rest of the brief does not seek to develop that argument and the undersigned accordingly does not consider it. *Compare id.* at 28-35 (arguing that Respondent's involvement in the 618 Holdings loan was an unsafe or unsound banking practice, but not mentioning recklessness) *with id.* at 52-53 (asserting that the release of the Rig 23 collateral involved recklessly unsafe or unsound practices by Respondent).

[25] Enforcement Counsel argues in passing in its post-hearing brief that Respondent's involvement in prospective Bank loans to Evergreen Drilling president Abbey Evans and her company Bentley Operating LLC in the fall of 2015 (collectively "the Bentley Operating plan") are additional evidence of Respondent's continuing disregard for the Bank's safety and soundness and part of the pattern of misconduct that makes assessment of a civil money penalty appropriate here. *See* EC Br. at 45, 59; *see also* Notice ¶¶ 29-48 (discussing the proposed loans). Because Enforcement Counsel nowhere during the course of this proceeding has made an affirmative case that the Bentley Operating plan constitutes actionable misconduct on Respondent's part in the first instance, it follows that it cannot be considered part of a pattern of such or as evidence of

In consideration of the Parties' arguments and the factual record developed by the January 17, 2023 hearing, and for the reasons and to the extent set forth in detail in this Order, the undersigned now concludes that each of the elements of a Section 1818(e) prohibition order and a second-tier Section 1818(i) civil money penalty have been proven as to Respondent on both the issue of the 618 Holdings loan and of the Bank's release of Rig 23 as collateral. The undersigned therefore recommends the entry of an order of prohibition and the assessment of a $105,000 civil money penalty against Respondent.

V. Findings of Fact

These findings are drawn as appropriate from the Parties' pleadings and stipulations, from the proposed findings of fact submitted by Enforcement Counsel and Respondent in connection with the post-hearing briefing, from hearing testimony ("Tr."),[26] and from supporting exhibits admitted therewith ("EX," "RX," and "JX") and submitted in connection with the Parties' summary disposition briefing and oppositions thereto ("EC-PSD," "R-MSD," "EC-OPP," and "R-OPP").[27] The undersigned will additionally highlight

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continuing disregard for purposes of the statute, and the undersigned therefore does not do so.

[26] The Gaskins, Winters Ledbetter ("Winters"), and Harbison depositions in lieu of hearing testimony mentioned in note 3 *supra* are entered in the record as exhibits EX 391, EX 393, and EX 395 respectively, but citations to those depositions will be denoted simply as "Tr.", consistent with testimony at the hearing, for the sake of convenience.

[27] While the federal banking agencies "generally defer[] to an [administrative law judge ("ALJ")]'s factual findings, especially those based on the ALJ's judgments as to the credibility of the

the genuine questions of materially disputed fact identified at the summary disposition stage, where relevant, and indicate the extent to which those questions have been resolved or narrowed by evidence adduced at the hearing.

As an initial matter, the undersigned observes that Respondent's hearing testimony was largely not credible in substance or demeanor, and she therefore accords it little evidentiary weight. Respondent repeatedly testified in a manner that was contradictory, self-serving, and inconsistent with record evidence and with his own litigation position. As detailed further below, Respondent contradicted himself regarding key aspects of the 618 Holdings issue (in particular whether he believed borrowers Jason Harbison and Adam Tate were creditworthy, and whether it would have mattered to him when backing their loan) and the Rig 23 issue (in particular what he believed about whether the Bank held a security interest in the rig being sold, Rig 24, and when he believed it). At one point, Respondent disavowed the contents of a sworn report that his counsel had submitted under his signature, when it contradicted his testimony at the hearing.[28] Respondent

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witnesses, the [agency] is not bound by them, and may reach different factual findings so long as there is substantial evidence in the record to support those findings." *In the Matter of Preston J. Brooks*, No. AA-EC-91-153,1993 WL 13966512, at *14-15 (June 17, 1993) (OCC final decision); *accord Patrick Adams*, 2014 WL 8735096, at *7.

[28] *See* Bonan Tr. 917:16-19 ("Q: Mr. Bonan, if you didn't write this report, who did? A: I have no idea. Q: And you are disavowing what it said, what I just read? A: I don't know what they mean, whoever wrote this."); *see also id.* 916:12-918:10; RX 149 (Opinion Testimony of Frank William Bonan II). In a

also implausibly claimed not to recognize his own handwriting, despite having previously stipulated in this matter that the handwritten document in question was his own.[29] Further, after admitting in a prior sworn statement that he had lied to Carrollton Bank loan officer Chris Dickey regarding the reason he had backed out of his decision to purchase the Carmi warehouse, Respondent recanted during his hearing testimony and claimed (in the face of evidence to the contrary) that what he said to Dickey was true.[30] And Respondent testified that, at the time of the Rig 24 sale, he did not know the rig numbers of the rigs owned by Evergreen Drilling, despite numerous contemporaneous documents in which he referred to the rigs by their numbers with familiarity and facility.[31] Put simply, there is ample

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January 9, 2023 order, this Tribunal precluded Respondent from offering this report as expert opinion testimony or offering himself as an expert. *See* Order No. 34: Granting Enforcement Counsel's Motion in Limine at 7-10. The report is listed as a rejected exhibit in the certified index of exhibits filed commensurately with this Recommended Decision, and provided as such in the administrative record submitted pursuant to 12 C.F.R. § 308.38(a).

[29] *See* EX 56 (handwritten notes entitled "Plan for Evergreen"); *compare* Bonan Tr. 938:16 ("I don't recognize the handwriting."), 938:20-23 ("I don't remember writing this. This doesn't look like my handwriting, and I can't answer if this is exactly my plan or not.") *with* Respondent's Responses to the FDIC's Statement of Material Facts in Support of Motion for Partial Summary Disposition ("Resp. Opp. SOF") at 9 (stating that "[Bonan] admits that he prepared a handwritten document titled 'Plan for Evergreen'").

[30] *See* Bonan Tr. 914:23-916:1.

[31] *See id.* at 848:2-5 ("[A]t the time . . . I didn't know rig numbers, I knew them by Cabot 900 or Service King 775. I

reason to conclude that Respondent's testimony on these and other issues generally cannot be taken at face value, and the undersigned bears that significant caveat in mind when making her factual findings.

A. Respondent's Close Ties to Peoples National Bank

Respondent began his banking career at Peoples National Bank, N.A., McLeansboro, Illinois ("Peoples" or "PNB"), where he worked under his father, Frank William Bonan, Sr. ("Bonan Sr."), who was bank president.[32] Over the course of a number of years, Respondent advanced at Peoples, ultimately becoming the community bank president for the southern region of that bank and then serving on PNB's Board of Directors and its Executive Loan

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wasn't too versed on rig numbers because those were rig numbers that they had internally placed on them."); *see also* EX 56 (Plan for Evergreen) (mentioning Rig 19, Rig 20, Rig 21, Rig 23, and Rig 24 by number and demonstrating knowledge of which numbers correspond to which rigs by noting that Rig 21 is a Service King 675 and that Rig 23 is a "Kabat 900" [sic]); EX 38 (August 31, 2015 email from F. Bonan II to S. Collins) (correcting Collins that "Rig number 23 should be rig 24" in draft document); EX 42 (September 8, 2015 email from F. Bonan II to S. Collins) (stating that "[t]he buyer is signing contract today and wiring non refundable deposit of 10 percent on rig 24 . . . . Has potential buyer for rig 23."); EX 180 (October 27, 2015 email from F. Bonan II to C. Zimmerman, S. Collins, F. Bonan, Sr., and H. Bonan) (referencing multiple rigs by their numbers and again referring to "Rig 23" as a "Kabat 900" [sic]).

[32] *See* Bonan Tr. 773:5-775:5. Respondent's uncle Hunt Bonan was also a principal shareholder and director at PNB. *See* Clark Tr. 727:16-18; *see also* EX 346 (September 2016 Joint Visit Report of Grand Rivers Bank) at 26 (describing PNB as "a financial institution controlled by the Bonan family").

Committee.[33] Even after purchasing stock in and becoming Chairman of the Board of Directors of Grand Rivers Bank, and during the events that are the subject of these proceedings, Respondent continued in his leadership positions at PNB, where he apparently remains today.[34] Of course, notwithstanding his familial ties to Peoples and his longer tenure there, Respondent agreed at the hearing that he "[wasn't] supposed to favor one bank over the other" while serving in his dual roles.[35]

B. Grady Gaskins

Another individual who had significant ties to both banks in question was Grady Gaskins, who Respondent brought over from PNB to serve as Chief Financial Officer ("CFO") of Grand Rivers and also to manage Respondent's own personal business affairs.[36] Gaskins, who had no prior CFO experience, was a commercial loan officer under Respondent at PNB when he left that position, and he found himself playing a similar role at Grand Rivers, again under Respondent's direct supervision and direction.[37] At the same time, Gaskins was managing the day-to-day operations of Respondent's outside business, FWBII

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[33] *See* Bonan Tr. 777:7-14; Answer ¶ 4; JX 1 (Joint Stip.) ¶ 46.

[34] *See* Bonan Tr. 780:4-11, 941:15-18; Answer ¶¶ 3-4; R Br. at 55 n.13 (stating that Respondent "has worked at PNB without incident since he left Grand Rivers").

[35] Bonan Tr. 942:1-3.

[36] Gaskins Tr. 11:18-22.

[37] *See id.* at 10:11-14, 12:15-13:4; *see also id.* at 13:16-20 (noting that Gaskins did not work under Mike Williams, the senior loan officer, when performing commercial loan officer duties while CFO at Grand Rivers).

Holdings (or "FWBII-H"), which owned and managed Respondent's real estate holdings.[38] Gaskins's duties in that capacity included "collecting rent, ensuring the maintenance on real estate was kept up, [and] tracking any issues related to maintenance."[39] He also "was in charge of communicating with different banks where [Respondent's] various loans were held, whether that was supplying financial information on behalf of Mr. Bonan [or] negotiating terms for new purchases or loan renewals."[40] In April 2016, Gaskins resigned from his position as CFO after Respondent instructed him to do so.[41]

C. Respondent's Management Style and Dominance at Grand Rivers

At the summary disposition stage, Respondent disputed whether he "was in fact the dominant policy and decision maker" during his time as Chairman of Grand Rivers Bank, including the relevant period of the fall and winter of 2015, and the undersigned found that this was a genuine issue of fact to be resolved at hearing.[42] The record evidence now conclusively and uniformly establishes that Respondent exerted a "dominant influence" at the Bank in line with the observations made in the 2016 Joint Report of Examination ("ROE") conducted by the FDIC and

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[38] *See id.* at 16:12-20.

[39] *Id.* at 16:20-24.

[40] *Id.* at 17:5-9.

[41] *See id.* 15:10-19 ("[A]t that time Mr. Bonan and I had had discussions and he told me it was basically a deal where he was going to resign and asked me to resign at the same time as well.").

[42] *See* MSD Order at 8.

the State of Illinois Department of Financial and Professional Regulation ("IDFPR") and cited in the MSD Order.[43] Gaskins, for example, stated that "basically everybody in the Bank took orders from Mr. Bonan."[44] He added that "[i]n my experience with him when he gives a direction he wants it done exactly how he has told it to be done and any changes he's—he is—doesn't—that doesn't sit well with him."[45] The Bank's attorney, Patrick Hunn, likewise testified that Respondent tended "to rule with an iron fist. It was his way or no way. There was no discussing issues with him. He gave direction. You had to follow him."[46]

Furthermore, witness after witness painted a picture of Respondent as a domineering and vindictive man who "led by intimidation rather than respect."[47] Hunn recalled that "Mr. Bonan had a very volatile personality. If he didn't like what you were doing, what you were saying, he would do his best to chew you up and down. People lost their jobs if they

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[43] EX 314 (2016 ROE) at 8; *see also id.* at 7 ("The dominance of Mr. Bonan, along with weak oversight, contributed to the overall decline in the bank's financial condition since the prior examination"), 9 ("As a result of the critically deficient oversight, Mr. Bonan has been permitted to exercise his authority seemingly unchecked.").

[44] Gaskins Tr. 18-19:21; *see also* Hunn Tr. 334:25-335:1 ("[N]obody did anything without having direct instructions from Mr. Bonan."); Winters Tr. 20:18-19 ("He had pretty much final say in everything.").

[45] Gaskins Tr. 167:4-7.

[46] Hunn Tr. 329:15-17.

[47] Stringer Tr. 34:19-22 (adding that Respondent was "sometimes volatile, vindictive at times").

didn't explicitly follow his direction."[48] Both he and Bank credit analyst Don Nave described Respondent as "abusive,"[49] with Nave stating that he did not feel comfortable asking Respondent for clarification if he did not understand a request.[50] Gaskins and Kassie Winters, the Bank's Head of Loan Operations, further emphasized Respondent's "demanding and aggressive" nature in expecting his instructions to be carried out "without question" and "right away."[51] Moreover, while Respondent stated that he was going through a divorce during this period and the stress of

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[48] Hunn Tr. 329:19-22.

[49] *Id.* 344:17-19 ("Working for Mr. Bonan had gotten to be a point where it was so abusive that I started looking for other employment."); Nave Tr. 196:1, 13-14 ("I saw him get angry at a lot of employees and cuss them out."); *see also* Gaskins Tr. 19:5-22 ("I know people, I believe were on edge when Mr. Bonan would come around. I witnessed, you know, some shouting, foul language, things of that nature. . . . [I]f he came into the bank offices usually there was an issue of some sort. . . . I could hear him arrive before physically seeing him."); EC Br. at 8 n.1 (quoting from EX 24, a June 11, 2015 email from Respondent to Gaskins and Whitney Stringer that is replete with profanity and abusive overtones, as a representative example of Respondent's management style).

[50] Nave Tr. 196:8-10.

[51] *See* Gaskins Tr. 16:5-11 ("Daily I was subjected to pressures from Mr. Bonan. I would say that Mr. Bonan daily would—we would communicate on a daily basis and there was—if there was something that he needed, he needed it pretty much right away."); Winters Tr. 22:1-20 ("[Respondent was] demanding and aggressive. . . . When he wanted something, he wanted it right then and he wanted it without question. . . . He was very intimidating."); *see also* Hunn Tr. 345:12 ("Everything with Mr. Bonan was an emergency.").

that spilled over into his interactions with people,[52] only Nave testified that Respondent's behavior in this regard was in any way out of the norm[53]— and, in any event, it is Respondent's personality and leadership style during the events in question that is most relevant here even if he was not always that way.[54]

The evidence also reflects a high level of micro-management, control, and attention to detail by Respondent when furthering his personal business interests. In a five-page, single-spaced email sent late at night to Gaskins and two other subordinates at PNB and Grand Rivers in September 2015, for example, Respondent gives directions on a host of issues ranging from hiring mowers and directing the design and color scheme for office buildings to giving $1/hour raises to specified junior employees of various properties.[55] Similarly, in a June 2015 email to Gaskins and Chief Executive Officer ("CEO") Whitney Stringer, Respondent questions the calculation of the previous month's interest income by providing his own numbers and directs the two to

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[52] *See* Bonan Tr. 810:1-22 (calling "that six to eight-month time period . . . the worst time in [his] life").

[53] *See* Nave Tr. 196:1-3 ("[H]e never cussed me out up until about a few months before I left [in October 2015], and then it became a common thing.").

[54] *See* Bonan Tr. 810:5-9 (agreeing that he was "using a lot of foul language" and had "a short fuse" during this time), 811:12-14 (saying that he was not proud of his behavior).

[55] *See* EX 43 (September 14, 2015 email chain including email from F. Bonan II to G. Gaskins, D. O'Bright, and A. Sosenko) at 3 ("The person assisting Chaurdas with eldorado gets named manager and get 1.00. West city girl is named manager and gets a 1.00 increase. Herrin girl named manager and given $1.00.").

visit a new Bank branch to "[t]ime how long it takes to open an account and tell those dumb mother fuckers exactly what to do."[56] The undersigned finds that these emails and the general tenor of witness testimony regarding the level of attention paid by Respondent to matters under his subordinates' purview are broadly at odds with the hands-off approach that Respondent professes to have taken with respect to the circumstances of the release of the Rig 23 collateral, as discussed *infra*.

D. The Proposed Merger and Respondent's Fall 2015 Resignation

Respondent's dominance over the Bank's affairs is aptly demonstrated in an episode involving a proposed merger between Grand Rivers and PNB in the fall of 2015. H. Keith Botsch, who served as president of Grand Rivers at that time as well as being a member of the board of directors of both banks (and the accountant for Evergreen Drilling), testified that he had approached Bonan Sr. with the idea of a merger in June 2015 due to his concerns that Grand Rivers was growing too quickly and that "things were just kinda getting out of control."[57] He stated that his relationship with Respondent soured as a result of the merger discussion but that otherwise "the current stockholders wanted that merger to go through."[58] As a result, Botsch and other

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[56] EX 24 (June 11, 2015 email from F. Bonan II to G. Gaskins and W. Stringer).

[57] Botsch Tr. 223:21-224:18.

[58] *Id.* at 272:6-7; *see id.* at 271:16-18 ("Mr. Bonan and I had been very close at one time, but after this July 11, 2015 merger request with his dad, our relationship became zero."). Respondent, by contrast, testified that he and Botsch had

shareholders devised a proposal in October to expand the Bank's board from five to ten members, thereby increasing the number of directors who supported the merger.[59]

In response to this proposed board expansion, Respondent abruptly resigned from the boards of Grand Rivers and its holding company on October 20, 2015, maintaining that he would only return to his positions if the current boards, including Botsch, stepped down and he was permitted to choose his own board members.[60] Respondent also demanded a dispensation of $10,000 per month to serve as Chairman of the Board.[61]

Upon Respondent's resignation, PNB halted all merger discussions.[62] Both Stringer and Botsch believed that the merger was in the best interests of Grand Rivers and felt that quickly acceding to Respondent's demands was the only way to keep it moving

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stopped getting along during this period because Botsch had "tried to insert himself in my divorce." Bonan Tr. 809:25; *see also id.* at 823:21-824:3. The undersigned need not decide the truth of the matter.

[59] *See* Botsch Tr. 272:6-273:3; EPF ¶ 21.

[60] *See* EX 161 (October 20, 2015 email from F. Bonan II to K. Botsch and W. Stringer) (resignation); EX 166 (email chain including October 21, 2015 email from K. Botsch to the Grand Rivers board) (outlining "[B]ill's demands"); EPF ¶¶ 21-22.

[61] *See* EX 166 (email chain including October 21, 2015 email from W. Stringer to K. Botsch); EPF ¶ 23.

[62] *See* Stringer Tr. 53:22-54:4; *see also* Clark Tr. 731:4-7 ("Mr. Bonan was, you know, the lead of our bank; he was our Chairman. And his father is on the lead at the other bank that we were looking at merging with, so they had capacity to determine whether the merger was up or down.").

forward.[63] Botsch and the rest of the board therefore resigned, and Respondent selected himself, Stringer, Gaskins, Jake Campbell, and Lucas Phelps to serve as the Bank's sole board members.[64]

According to the 2016 Joint ROE, all members of the newly constituted board "were either personal or business associates of [Respondent] and appear[ed] to operate under his dominant influence."[65] Kassie Winters concurred, testifying that in her view, the new board "were all people who would vote yes without a whole lot of questions."[66] She explained that she "base[d] that on the fact that he had close personal relationships with those individuals, one of which didn't have a whole lot of experience in banking, Mr. Phelps. So he wouldn't really know the correct questions to ask upon a loan approval."[67] In light of the fact that both Stringer and Campbell expressed significant reservations regarding the 618 Holdings loan (see Part V(G) at pp. 25, 42-44 *infra*), the

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[63] *See* Botsch Tr. 280:17-20 ("[I]f we didn't meet Bill's . . . demands, then he would get the merger derailed. And the rest of us wanted that merger to go through so bad."); Stringer Tr. 49:2-6, 55:7-11 ("By reinstating Bill as the chairman of the Board with his requirements met, then basically he would work with his dad on getting this merger put together.").

[64] *See* Botsch Tr. 280:21-281:8; *see also* EX 173 (email chain including October 21, 2015 email from F. Bonan II to M. Williams) ("Merger is back on The entire board resigned today Appointed me as chairman Allowed me to place my own board Guess that means I won"); EPF ¶ 24.

[65] EX 314 (2016 ROE) at 7 (further asserting that Respondent's "influence impedes the directors' ability to effectively oversee the affairs of the bank and fulfill their fiduciary duties").

[66] Winters Tr. 59:5-6.

[67] *Id.* at 172:23-173:3.

undersigned disagrees that the board as a whole was necessarily inclined to rubber-stamp Respondent's preferred outcomes; nevertheless, the evidence suggests that Respondent could at least be assured that Gaskins and Phelps would be reliable allies in any board vote.

E. The Evanses and the Evergreen Entities

The Evergreen Entities (including Evergreen Drilling and Evergreen Properties) were controlled by Gary Evans, a 40-year veteran of the oil and gas business, whose daughter Abbey served as the Vice President of Evergreen Drilling as of September 2015.[68] At the time, Evergreen Drilling and Evergreen Properties had outstanding loans with the Bank of approximately $1.2 million, and the Evergreen Entities in total owed PNB approximately $10.5 million (the Bank's loans and PNB's loans are together denoted "the Evergreen Loan Relationship").[69] Evergreen had also pledged certain collateral securing its loans to the Bank and to PNB.[70]

As with PNB, Respondent's interests were intertwined with those of Evergreen on both a personal and professional level during the relevant time period. In addition to knowing Gary Evans and believing him to be honest and trustworthy, Respondent was in a romantic relationship with Abbey Evans (now Bonan) during the fall of 2015, and they later married.[71]

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[68] *See* EPF ¶ 25; Answer ¶ 10; Bonan Tr. 791:18-21.

[69] *See* EPF ¶¶ 26-27; Answer ¶¶ 11-12.

[70] *See* EPF ¶ 28; Answer ¶ 13.

[71] *See* Bonan Tr. 791:13-19, 816:22-23, 818:13-14.

On the business side, the Evergreen Loan Relationship was managed at this time by Respondent at Grand Rivers and, with loan officer Scott Collins, at PNB.[72] Gaskins testified that all work performed by he and Winters on the Evergreen loans at Grand Rivers came at Respondent's direction.[73] Don Nave likewise stated that Respondent "gave all the terms for the [Evergreen] loans, what the amount was, [ ] interest rate, payment structure, everything."[74]

Evergreen's Financial Troubles

Evergreen Drilling's oil drilling business faced financial difficulties during 2015 in the midst of an industry-wide downturn.[75] In January 2015, Gary and Abbey Evans requested that their loans at PNB be renewed and placed on an interest-only basis for six to twelve months due to concerns about the winter weather reducing the company's cash flow.[76] Respondent was reluctant to make an interest-only concession, writing that doing so would "for sure be a trouble debt restructure" and would cause the loans to be classified as "substandard."[77] Such a classification was undesirable because it triggered additional reporting requirements and risked examiners

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[72] *See* Winters Tr. 24:13-15; Stringer Tr. 34:14-18; Answer ¶ 20.

[73] *See* Gaskins Tr. 22:7-24:2.

[74] Nave Tr. 170:5-6

[75] *See* Campbell Tr. 423:1-4; Bonan Tr. 817:4-5.

[76] *See* EPF ¶¶ 33-34; EX 19 (email chain including January 28, 2015 email from K. Botsch to F. Bonan II and S. Collins).

[77] EX 19 (email chain including January 28, 2015 email from F. Bonan II to K. Botsch); *see* EPF ¶ 37.

treating the loans as problem loans.[78] Nevertheless, the loans were made interest-only for six months and an increased line of credit was given to Evergreen on the understanding that the company would reduce its debt to PNB by $1 million by August 2015 through the sale of an equivalent amount of its non-critical assets.[79]

By August 2015, Evergreen's loans at PNB had matured, and the company still had not reduced its debt.[80] Throughout that month, Respondent and others at PNB—including Bonan Sr., Botsch, and loan officer Collins—expressed significant concerns about Evergreen's ability to service its debt and began considering how PNB could effectuate the company's options regarding the sale of its assets and potential future increase in cash flow.[81] In mid-August, Respondent communicated to Botsch his belief that Evergreen's situation was "dire" given the persistently low price of oil and Gary Evans's unwillingness to liquidate equipment to pay off PNB.[82] Respondent opined that Evans "literally needs to close shop and sale [sic] everything," because "[e]very day he is open with employees he gets deeper

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[78] *See* Botsch Tr. 233:4-17; Cash Tr. 572:19-573:4; *see also* EPF ¶¶ 38-39; EX 386 (Interagency Supervisory Guidance on Troubled Debt Restructuring).

[79] *See* EPF ¶¶ 40-41.

[80] *See id.* ¶ 42.

[81] *See id.* ¶¶ 43-53.

[82] EX 34 (email chain including August 16, 2015 email from F. Bonan II to K. Botsch) (also stating that "[Gary Evans] knows he is screwed. He even said that in our last meeting."); *see* EPF ¶ 55.

and deeper in the whole [sic]."[83] The undersigned notes that there is some inconsistency between the views expressed by Respondent at this time and Respondent's hearing testimony that he had faith in Gary Evans's ability to ride out the economic downturn.[84]

The Plan for Evergreen

In September 2015, Respondent prepared a handwritten document entitled "Plan for Evergreen," which proposed that the Evergreen Entities sell collateral and refinance their loans in order to repay approximately $5.4 million of their debt to PNB and the Bank.[85] At hearing, Respondent summarized the plan: "[Evergreen's] fixed costs stayed the same. Oil dropped. And so Gary was in a position and Evergreen was in a position where they had to reduce debt. So that was, that was their only way out of this. They had to sell assets and reduce debt."[86]

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[83] EX 35 (email chain including August 18, 2015 email from F. Bonan II to K. Botsch); *see* EPF ¶ 62.

[84] *See* Bonan Tr. 791:23-25 (stating that Evans "had ridden through so many other downturns, I really believed that he would ride this downturn, just like he had done in previous years").

[85] *See* EPF ¶ 89; Answer ¶ 26; EX 56 (Plan for Evergreen). As noted *supra* at p. 13 & n. 29, Respondent claimed at the hearing that he did not recognize the handwriting on this document and did not recall writing it. *See* Bonan Tr. 938:16-23. In light of Respondent's earlier stipulation that the handwriting was his, however, *see* Resp. Opp. SOF at 9, as well as Gaskin's testimony that he recognized the document as having been written by Respondent, *see* Gaskins Tr. 33:21-23, the undersigned places no weight on the accuracy or credibility of Respondent's averred handwriting blindness and post hoc lapse of memory.

[86] Bonan Tr. 795:13-17.

Gaskins also testified as to his understanding that Respondent's primary motivations for this plan were to "move the debt from [Peoples]" and to "help Abbey out."[87]

One of the pieces of collateral mentioned in the Plan for Evergreen was a commercial warehouse in Carmi, Illinois that Evergreen used as its headquarters ("the Carmi Warehouse"), which had been pledged as collateral and was the subject of mortgage liens on loans to Evergreen Properties by both the Bank and PNB.[88] At the time, the loans secured by the Carmi Warehouse totaled approximately $638,000 to the Bank and $358,000 to PNB as a second mortgage and first mortgage, respectively.[89] Among other things, the plan also contemplated that Evergreen would sell one of its drilling rigs, Rig 24, which was pledged as collateral for a loan to PNB, and would enter into a sale-leaseback transaction for two other rigs, Rigs 19 and 20, to be financed by a loan from Grand Rivers to a company formed by Abbey Evans.[90]

Evergreen's Forbearance Agreement with PNB

On September 30, 2015, PNB classified $5.9 million of its loans to Evergreen Drilling as substandard and placed them on nonaccrual status.[91] At the same

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[87] Gaskins Tr. 25:4-10.

[88] *See* EPF ¶¶ 90-91; Answer ¶ 16.

[89] *See* Resp. Opp. SOF at 10; EX 314 (2016 ROE) at 55.

[90] *See* EPF ¶¶ 90, 92-93; *see also* n. 25 *supra* (discussing Bentley Operating).

[91] *See* Answer ¶ 24; EPF ¶ 71. Broadly speaking, nonaccrual loans are those for which a lending institution should not accrue

time, Respondent and other officials at PNB were preparing a proposed Forbearance Agreement to be executed between PNB and the Evergreen Entities, under which PNB would refrain from collecting on the principal owed by Evergreen Drilling for a given period in exchange for Evergreen's agreement to sell certain of its assets under specified time limits, including Rig 24.[92] In its final form as approved by PNB's Board in late October 2015 and executed one week later, the Forbearance Agreement (now an

Extension Agreement) extended the maturity dates of that bank's two Evergreen Drilling loans, bearing a total balance of over $10 million, until the end of April 2016.[93] In return, Evergreen agreed to liquidate additional assets to pay down its debt, including the proceeds from its then-pending sale of Rig 24, and to pledge new collateral to PNB as further security for the loans.[94] One of the pieces of new collateral that Evergreen promised to pledge to PNB "free and clear of all liens or encumbrances" was its Cabot 900 drilling rig, known as Rig 23, despite the fact that

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interest income because the loans are delinquent or there is reasonable doubt regarding their ultimate collectability. The 2016 ROE states that a substandard asset is one that "is inadequately protected by the current sound worth and paying capacity of the obligor or of the collateral pledged, if any. Assets so classified must have a well-defined weakness or weaknesses that jeopardize the liquidation of the debt. They are characterized by the distinct possibility that the institution will sustain some loss if the deficiencies are not corrected." EX 314 (2016 ROE) at 49.

[92] *See* EPF ¶¶ 67-70.

[93] *See id.* ¶¶ 81, 88; Answer ¶¶ 98, 101; *see also* EX 198 (November 3, 2015 Extension Agreement) at 1-2.

[94] *See* EPF ¶ 88; EX 198 (Extension Agreement) at 2.

Rig 23 was at that time already pledged as security to Grand Rivers.[95]

The Board's Knowledge of Evergreen's Difficulties

One material factual dispute identified at the summary disposition stage and explored at the hearing was the extent to which the Grand Rivers board knew and understood the level of Evergreen's financial difficulties, and particularly the company's negative credit relationship with PNB, when it voted to approve the 618 Holdings loan in December 2015.[96] Respondent contends that "problems with Evergreen Drilling's financial condition in August 2015 were well and widely known throughout the Southern Illinois oil industry and banking industry, including by the Bank,"[97] while Enforcement Counsel marshals testimony from board members Whitney Stringer and Jake Campbell suggesting that they would have acted differently regarding the 618 Holdings loan had they known that PNB had determined Evergreen's loans there to be impaired, placed them on non-accrual, and entered into an agreement with the company for the liquidation of assets towards the payment of its debt.[98]

It appears uncontested that Respondent did not disclose to Board members the specific existence or nature of Evergreen's Extension Agreement with

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[95] *See* EPF ¶ 88; EX 198 (Extension Agreement) at 2 & Ex. A; *see also* Part (V)(H) *infra* at pp. 58-59.

[96] *See* MSD Order at 17-18, 20; *see also* Part (V)(G) *infra* at pp. 42-44.

[97] Answer ¶ 20; *see also* R Reply at 11-13.

[98] *See* EPF ¶¶ 189-193.

PNB.[99] On balance, however, the record shows that the Bank's board members, including Stringer and Campbell, would have been reasonably apprised of Evergreen's financial straits and cash flow difficulty during the relevant period, even if they did not know the details of its arrangement at the other bank.[100] With respect to Stringer in particular, Respondent adduces evidence that Stringer was told directly by Botsch that the Evergreen loans would be going before the Watch Committee at PNB—and that, as a member of the Bank's Watch Committee herself, she would understand that this was not a good thing.[101] Moreover, Stringer also knew that the Grand Rivers' Evergreen loans were among a very limited subset of loans that PNB was refusing to assume under the

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[99] *See*, *e.g.*, Bonan Tr. 802:21-803:13.

[100] *See*, *e.g.*, Botsch Tr. 253:21-23 ("I think everybody in our community knew that Evergreen was in trouble"); Campbell Tr. 421:11-15 (agreeing that "it was general knowledge that Evergreen was having cash flow problems"); Gaskins Tr. 138:16-24 (recalling discussions at Grand Rivers board meetings regarding Evergreen's financial issues); Nave Tr. 206:20-207:11 (expressing belief that Grand Rivers board members and officers knew that Evergreen was experiencing problems); *see also* Bonan Tr. 803:3-804:16 (asserting that "the fact that Evergreen was in financial trouble . . . and that something had to be done or they were going to go under" was communicated to the Grand Rivers board "numerous times").

[101] *See* EX 156 (email chain including October 19, 2015 email from K. Botsch to W. Stringer) ("Hunt Bonan just called me about the Evergreen loan. He says it is going to the watch committee tomorrow morning and the board in the afternoon."); *see also* Bonan Tr. 802:14-17 ("[S]he knew that [PNB] was taking a very active, that it was not going well at [PNB]. For a loan to go to the Watch Committee, that means it's not going very well.").

terms of the merger being discussed in the fall of 2015;[102] this in itself should have been a red flag as to how PNB viewed the loans' collectability.[103] The undersigned therefore agrees with Respondent on this issue.

F. The Carmi Warehouse

Although the Plan for Evergreen detailed by Respondent involved the sale of the Carmi Warehouse in the fall of 2015 to reduce the company's debt, Respondent also viewed it as "critical" that Evergreen Drilling be able to continue to use that property as its headquarters, noting that an oil and gas company could not function well without a suitably large yard and corporate office.[104] Respondent accordingly pictured a sale and leaseback transaction in which someone purchased the warehouse from Evergreen, allowing Evergreen to pay down its loans with the

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[102] *See* Stringer Tr. 41:24-43:15 (proposed merger would exclude Bank's Evergreen loans); RX 125 (draft Merger Agreement dated November 27, 2015) at 66. Instead, the loans would have been put with Main Street Bancshares, the Bank's holding company. *See* EX 167 (email chain including October 21, 2015 email from F. Bonan, Sr. to F. Bonan II and K. Botsch) ("The loans we [PNB] don't want will go to Main Street or we will take them with the option to put to Main Street if they don't pay as agreed for two years after the close. PNB will service the loans at Main Street for free.").

[103] *See* Botsch Tr. 283:21-284:1 ("That was [] the loans that Peoples determined was not the best credit risk, such as Evergreen's loans would go up to Main Street to the holding company and Peoples would service those, and they were supposed to—eventually they would get moved to Peoples if they performed like they were supposed to.").

[104] Bonan Tr. 800:10-20.

proceeds, while the company occupied and used the warehouse under the terms of a lease agreement.[105]

Respondent Seeks to Purchase the Carmi Warehouse

Beginning in mid-September 2015, Respondent became increasingly determined to buy the warehouse himself, adding it to his growing real estate portfolio. At the hearing, Respondent explained why such an idea was attractive and why he felt he needed to move quickly for the benefit of Evergreen:

> Well, Gary [Evans] was under a time restriction on reducing debt. He had to sell assets. It was do or die. Everybody knew that. Keith had broached the idea with me of him and Jake Campbell purchasing the building, so that idea was in my head. And so I was strong at the time. I believed in the value of the property. And I believed in Evergreen's ability to continue to make it; even though they were having extreme hard times, I believed that they would make it, and so I was going to, I offered to purchase the building and have them lease it back.[106]

Respondent thus informed Gaskins and others of his intentions to purchase and lease back the Carmi Warehouse using his company, FWBII Holdings, providing Gaskins with the terms and structure of such a deal and directing him to "find a bank to do

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[105] *See* Gaskins Tr. 27:5-21; Bonan Tr. 798:6-17, 799:24-800:7 (stating that the idea of purchasing the warehouse and leasing it back to Evergreen had originally been Botsch's).

[106] Bonan Tr. 813:5-15.

this."[107] Under the envisioned structure, Evergreen would receive $1.25 million as proceeds from the sale of the warehouse, of which total it would give Respondent $150,000 to cover its first two years of rent.[108] Respondent would then use that $150,000 as part of his down payment on a $1 million mortgage loan to purchase the property, putting up the additional $100,000 down payment himself. [109] Respondent directed the Bank's attorney, Patrick Hunn,[110] to create a draft purchase agreement and draft lease agreement between Evergreen and FWBII-H on September 22, 2015, giving a closing date for the transaction of November 1, 2015.[111]

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[107] Gaskins Tr. 27:5-21; *see* EX 43 (September 14, 2015 email chain including email from F. Bonan II to G. Gaskins, D. O'Bright, and A. Sosenko); JX 1 (Joint Stip.) ¶ 14.

[108] *See* JX 1 (Joint Stip.) ¶ 14. After the two years in advance rent payments had elapsed, Evergreen would pay Respondent, through FWBII-H, $8,250 per month for the next sixty months, with rent payments increasing every five years thereafter. *See id.*; EX 43 (September 14, 2015 email chain including email from F. Bonan II to G. Gaskins, D. O'Bright, and A. Sosenko) at 4.

[109] *See* JX 1 (Joint Stip.) ¶ 14.

[110] As with Gaskins, Respondent frequently appropriated the time of Bank counsel Hunn to do work for FWBII Holdings. *See* Hunn Tr. 331:19-332:3.

[111] *See* JX 1 (Joint Stip.) ¶¶ 15-16; EX 47 (September 22, 2015 email from P. Hunn to G. Gaskins attaching draft Purchase and Sale Agreement); EX 48 (email chain including September 22, 2015 email from P. Hunn to G. Gaskins indicating attachment of draft Lease Agreement).

Carrollton Bank Agrees to Finance Respondent's Purchase

On October 16, 2015, Gaskins emailed Chris Dickey, a loan officer at Carrollton Bank (or "Carrollton") to request a loan on Respondent's behalf to finance the sale and leaseback of the Carmi Warehouse between FWBII-H and Evergreen Properties.[112] While discussions were ongoing, Respondent emailed Gaskins and Hunn on October 27, 2015, stating that the warehouse transaction had "moved up the list on priority" following the Bank's failure to approve certain loans for Abbey Evans, because "[t]hey just need more debt gone."[113] Hunn testified that he interpreted this email as "informing us that the priority status of that Evergreen property purchase had changed and that it is now a top priority."[114]

On November 2, 2015, Respondent followed up with Dickey regarding his loan request. Consistent with the increased urgency expressed in his email to Hunn and Gaskins, Respondent impressed upon Dickey the depth of his financial resources and his

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[112] *See* EX 139 (October 16, 2015 email from G. Gaskins to C. Dickey attaching draft Purchase and Sale Agreement and draft Lease Agreement); JX 1 (Joint Stip.) ¶¶ 17-19.

[113] EX 182 (October 27, 2015 email from F. Bonan II to G. Gaskins, P. Hunn, and D. O'Bright) (noting that "[t]his has moved up the list on priority since Keith fucked Abbeys loan"); *see also* EPF ¶¶ 98-121, 131 (describing Respondent's unsuccessful efforts to fund loans to Abbey Evans and her company Bentley Operating).

[114] Hunn Tr. 335:19-21; *see also id.* at 336:3-6 (relaying that he understood the email to relate "to that Evergreen transaction and FWBII Holdings' purchase of that property").

desire to make the warehouse purchase happen, writing:

> How is my credit request coming along for the purchase of the Evergreen property. I don't know if anyone has told you but I have had a hell of a year this year. ***My part that came to me after debt on the Clayton building sale was 2.4 million.*** This property would be a nice addition to my portfolio[.][115]

Dickey responded that he was seeking formal approval of the loan from the credit committee and that "[a]ssuming all goes as planned, I will issue a commitment letter to you to sign so we can order appraisal, title, etc." [116] Respondent then thanked Dickey for his "hard work and dedication on this glorious project" and reaffirmed that the property "really adds nicely to my portfolio."[117]

On November 5, 2015, Dickey notified Respondent that his loan request had been approved and provided him with a conditional commitment letter outlining the terms of the proposed transaction for a loan of up to $1 million.[118] In contrast to Respondent's original idea, these terms provided that the $150,000

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[115] EX 205 (email chain including November 2, 2015 email from F. Bonan II to C. Dickey) at 3 (emphasis added).

[116] *Id.* (email chain including November 4, 2015 email from C. Dickey to F. Bonan II) at 2.

[117] EX 201 (email chain including November 4, 2015 email from F. Bonan II to C. Dickey).

[118] *See* EX 205 (email chain including November 5, 2015 email from C. Dickey to F. Bonan II and attaching conditional commitment letter).

in sale proceeds from Evergreen would not go to Respondent but would be placed directly in an escrow account at Carrollton "to be debited for the initial 18 loan payments."[119] Respondent would also provide a $250,000 down payment for the transaction and offer Carrollton Bank an unlimited personal guaranty.[120]

The Deal is Finalized With Carrollton Bank

When he had not received a signed commitment letter by November 9, 2015, Dickey reached out to Respondent to ask if he had any questions or concerns about the terms of the transaction.[121] Dickey and Respondent then discussed a revised transaction structure proposed by Respondent in which the escrowed $150,000 from Evergreen would not only be used as "funds to pay the lease payments so they don't need to worry about the lease payment for cash flow purposes," but would also count as equity on the property, thus allowing Respondent to make a smaller down payment.[122] After considering this structure, Dickey told Respondent that it would only be possible if the $150,000 was "truly pledged as collateral and not used for a payment stream"—that is, not used as a lease payment reserve to be debited—adding that he understood that "this is not a

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[119] *Id.* (email chain attaching conditional commitment letter) at 5; *see* EPF ¶ 134.

[120] *See* EPF ¶ 133; Dickey Tr. 614:3-618:22.

[121] *See* EX 214 (email chain including November 9, 2015 email from C. Dickey to F. Bonan II).

[122] EX 215 (email chain including November 10, 2015 email from C. Dickey to F. Bonan II) at 1-2; *see* Dickey Tr. 620:19-22 ("Bill had requested that $150,000 be taken and put into a separate account to be used as extra collateral rather than putting as much money down.").

viable option based on what Evergreen and you had planned."[123]

Ultimately, Respondent and Dickey agreed to terms that did not include any escrow account from the loan proceeds out of which payments would automatically be made. Instead, the size of the loan was increased to $1.15 million, and the extra $150,000 would be held as collateral for 24 months and then either used to pay down the loan or released to Respondent.[124] Meanwhile, Respondent would only be required to make a $100,000 down payment.[125] Respondent stated that this structure was "perfect" because he had the resources to make the first 24 months of payments himself "without any income from Gary" and this would "force [him] to save the cash."[126] Respondent's monthly loan payment under these terms would be $8,600 per month, which he would be required to pay whether or not Evergreen made its lease payments to him.[127]

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[123] EX 215 (email chain including November 10, 2015 email from C. Dickey to F. Bonan II) at 1-2; *see* Dickey Tr. 620:22-25.

[124] *See* JX 1 (Joint Stip.) ¶ 23; EPF ¶ 137; EX 219 (email chain including November 12, 2015 email from C. Dickey to F. Bonan II) at 1-2.

[125] *See* Dickey Tr. 621:13-25.

[126] EX 219 (email chain including November 11, 2015 email from F. Bonan II to C. Dickey and November 12, 2015 email from F. Bonan II to C. Dickey) at 1, 2; *see* EPF ¶ 138; *see also* EX 215 (email chain including November 11, 2015 email from F. Bonan II to C. Dickey) at 1 (stating that "[m]aking those first 24 months in payments will not be any problem at all for me").

[127] *See* Dickey Tr. 627:6-15; Bonan Tr. 910:5-913:22; EX 215 (email chain including November 11, 2015 email from C. Dickey

Respondent returned a signed commitment letter with these handwritten revisions on November 13, 2015.[128] When offered the option of closing sooner or waiting until the beginning of 2016, Respondent stated that "I need to close around December 18th if possible."[129] Here, again, Respondent's desire to close quickly rather than waiting for a later date is consistent with his testimony that this transaction was "do or die" for Evergreen and that time was of the essence.[130]

The terms agreed to, Dickey arranged for an appraisal of the Carmi Warehouse using an appraiser suggested by Respondent.[131] On December 2, 2015,

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to F. Bonan II) at 1 (reaffirming that Respondent "would personally make payments out of pocket").

[128] *See* EX 381 (email chain including November 13, 2015 email from G. Gaskins to C. Dickey attaching "the signed commitment letter"); EX 382 (signed commitment letter with handwritten revisions). The undersigned notes that the Notice, the Answer, the Joint Stipulations of Fact, and Enforcement Counsel's proposed findings of fact all erroneously state that the signed commitment letter was returned to Dickey two days later, on November 15, 2015, but offer no support for this in the record.

[129] EX 219 (email chain including November 12, 2015 email from F. Bonan II to C. Dickey).

[130] Bonan Tr. 813:5-15 ("Gary [Evans] was under a time restriction on reducing debt. He had to sell assets. It was do or die. Everybody knew that."); *see also* EX 182 (October 27, 2015 email from F. Bonan II to G. Gaskins, P. Hunn, and D. O'Bright) ("This has moved up the list on priority. . . . they just need more debt gone").

[131] *See* EX 252 (email chain including November 12, 2015 email from F. Bonan II to C. Dickey) at 1; Bonan Tr. 815:20-21, 816:2-10 (stating that there were "only one or two commercial

Dickey informed Respondent that the warehouse had been appraised at $1,245,000, or $5,000 less than the purchase contract price.[132] Respondent agreed to pay the additional $5,000 himself at closing.[133] Respondent then reversed his earlier preference regarding the closing date, writing Dickey that "I really don't want to close this until end of December so I can start fresh on January 1."[134] When Dickey suggested closing on January 5th or 6th so that the loan payments would be due around the same time as Evergreen's rent payments, Respondent replied, "That would be perfect."[135] Thus, everything had been finalized, and the only thing left was the closing itself.

Respondent Backs Out of the Carrollton Bank Deal

Sometime after his December 2, 2015 email stating that a closing date in early January "would be perfect," Respondent decided that he no longer wished to purchase the Carmi Warehouse. When Dickey returned from vacation on January 4, 2016

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appraisers in the entire area" and that this individual "had done a large amount of work for PNB").

[132] *See* EX 253 (email chain including December 2, 2015 email from C. Dickey to F. Bonan II) at 1. Examiners' questions regarding the reliability of this appraisal amount are discussed *infra* at n. 194.

[133] *See* EX 253 (email chain including December 2, 2015 email from F. Bonan II to C. Dickey) at 1.

[134] EX 254 (email chain including December 2, 2015 email from F. Bonan II to C. Dickey) at 1.

[135] EX 256 (email chain including December 3, 2015 email from C. Dickey to F. Bonan II and December 5, 2015 email from F. Bonan II to C. Dickey) at 1.

and learned that the deal was off, he emailed Respondent to ask what had happened.[136] In response, Respondent told Dickey that "[t]he property owner and I can't get along" and "[t]hat it would be better because of that not to do the deal."[137] As noted *supra*, Respondent later acknowledged in sworn testimony that this statement to Dickey was not accurate, although—in the face of the record evidence that he believed Gary Evans was "a borrower that's honest and that you could trust" and otherwise got along quite well with the Evanses—he recanted and stood by his initial statement at the hearing.[138]

When asked while on the stand to elaborate on his reasons for not going through with the Carmi Warehouse transaction, Respondent offered the following answer:

> You know, I think at the time, you know, everything was, you know, just, there was a lot going on, and, you know, I was afraid, I was afraid, you know, Abbey and I had gone on a date or two during that time period, so I was afraid of the close appearance of it. . . . [Y]ou know, it was a downturn in the oil market, and southern Illinois is an oil market, and so I had lots of credit at PNB that I was having to help work out. We had lots of credit at Grand Rivers that had lots to

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[136] *See* EX 303 (January 4, 2016 email from C. Dickey to F. Bonan II); EPF ¶ 145.

[137] EX 304 (email chain including January 4, 2016 email from F. Bonan II to C. Dickey).

[138] Bonan Tr. 791:13-14; *see* EPF ¶ 145; Bonan Tr. 914:23-916:1.

> work out. I knew an exam was coming up at Grand Rivers Community Bank which I was getting prepared for, loan review and getting everybody ready to go. So to say that I had a little bit to do is probably an understatement.[139]

Not only does this explanation contradict what Respondent told Dickey, thus underscoring the untruthful nature of that statement, but it is not credible on its own terms. Nothing here explains why Respondent might have been motivated to back out of the Carrollton Bank deal at a point when everything was done but signing the paperwork. Indeed, to the extent that he had many other things to do and "there was a lot going on," it was surely much more work for Respondent to start from scratch in finding a solution to a problem—Evergreen's need to sell the Carmi Warehouse and pay down debt—that he supposedly viewed as time-sensitive and critical to the survival of one of his banks' biggest clients. Certainly the least labor-intensive approach would have been to proceed and put the finishing touches on his purchase of the Carmi property.

It must also be noted that withdrawing from this deal benefited Respondent at the expense of the Bank and other parties. Both Respondent and Dickey testified that had the loan gone through, Carrollton would have had first lien position on the Carmi property and would have paid off any existing liens, thus benefiting the Bank and PNB.[140] The Carrollton

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[139] Bonan Tr. 816:19-817:16.

[140] *See* Dickey Tr. 633:24-634:9; Bonan Tr. 912:17-913:2 (agreeing that the deal would have paid off the existing

deal would also have benefited Evergreen, both in paying down its debt and in offering a backstop to any difficulty making lease payments during the downturn, in the form of the $150,000 collateral.[141] On the other hand, deciding not to do the deal benefited Respondent financially, in the short and long term: he did not have to come up with a $100,000 down payment or make up the $5,000 appraisal shortfall, he no longer faced exposure on the loan balance as a whole in the form of a personal guaranty, and he was not responsible any longer for making $8,600 loan payments monthly out of his own pocket for at least two years.[142] In short, and as discussed in the following section, the evidence suggests that Respondent changed his mind about purchasing the Carmi Warehouse not because he did not get along with Gary Evans or because his hands were full with other matters, but because he had found what he believed to be a more preferable way to get Evergreen the funds it needed and reduce its debt to PNB—riskier to the Bank, perhaps, as shall be seen, but requiring less financial outlay on his own part and of no personal risk to him.

G. The 618 Holdings Loan

Respondent thus abandoned his plan, at the eleventh hour, to purchase the Carmi Warehouse himself through FWBII-H via a loan from Carrollton Bank. Instead, while the Carrollton loan was await-

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mortgages at Grand Rivers and PNB and "would have been beneficial to both banks").

[141] *See* Bonan Tr. 911:12-16 (referring to the $150,000 in collateral as "prepaid rent").

[142] *See id.* at 913:10-22.

ing consummation in December 2015, Respondent was exploring an alternate route—namely, facilitating the purchase and leaseback of the Carmi Warehouse by a new company formed in the name of Jason Harbison and Adam Tate, two of his employees with minimal assets and no previous experience in commercial real estate.

Jason Harbison and Adam Tate

At this time, Tate and Harbison worked for Respondent—Harbison provided property management services for FWBII-H such as lawn mowing and landscaping through his company Roundfire Solutions, LLC ("Roundfire Solutions"), while Tate was a contract employee—and both lived for free in housing that Respondent owned.[143] Neither Tate nor Harbison had significant financial assets: Tate had a net worth of $20,000 and an adjusted gross income of $27,000, according to a contemporaneous personal financial statement and his 2014 tax return, respectively, while Harbison had a negative net worth of $190,000 and an adjusted gross income of $62,000.[144] When asked during his testimony whether

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[143] *See* Harbison Tr. 10:14-24 (stating that "I had a guy that helped mow the grass sometimes and I had the guy that did, like, cleaned out apartments after people had moved out"), 11:13-14 (stating that "free rent was part of my compensation package"); EPF ¶ 148.

[144] *See* EPF ¶ 204. Updated personal financial statements completed by Tate and Harbison in March 2016 reflected a negative net worth for *both* individuals, with Harbison's having increased from negative $190,000 to around negative $244,000 without taking into account his liability as guarantor for the 618 Holdings loan. *See* EX 328 (March 1, 2016 personal financial statement of Jason Harbison); EX 333 (March 17, 2016 personal financial statement of Adam Tate). Harbison's updated personal

he felt he was creditworthy to qualify for a $1.25 million loan, Harbison replied, "Absolutely not."[145] The Bank's Senior Loan Officer Mike Williams, who had known Tate and Harbison all their lives, agreed, testifying that he had significant concerns about their ability to repay such a large loan based on the state of their finances.[146] And CEO Whitney Stringer stated that she "couldn't imagine [] the two of them . . . being able to ever obtain a $1.2 million loan from any other bank, let alone pay it."[147]

Respondent Directs Harbison and Tate to Purchase the Carmi Warehouse

Nevertheless, the record is clear that in mid-December 2015, Respondent approached Harbison and Tate and asked them to obtain financing from the Bank for the purchase and leaseback of the Carmi Warehouse.[148] Harbison testified that Respondent

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financial statement reported a total annual income of approximately $110,000, which examiners observed derived exclusively from a contract between FWBII-H and Roundfire Solutions. *See* EX 314 (2016 ROE) at 55-56. Examiners further noted that because "the level of operating expense for Roundfire Solutions was not provided[,] . . . the amount of income from the company available to service debt obligations of Mr. Harbison could not be calculated." *Id.* at 55.

[145] Harbison Tr. 20:25-21:5. Tate was not called as a witness by either side.

[146] *See* Williams Tr. 655:20-656:17.

[147] Stringer Tr. 62:15-17.

[148] *See* Harbison Tr. 15:21-24 ("[Respondent] said . . . I need you to do me a favor, this deal would help me out a lot. And then we were introduced to the Evergreen property, and this all happened really fast."), 22:16-19 ("Q: Did Mr. Bonan tell you to go to Grand Rivers for the loan for the 618 Holdings property? A: Yeah, I was told to go meet with Grady, so yes."); Gaskins Tr.

assured him that there would not be a problem getting financing for the transaction because of Respondent's position at the Bank.[149] Although there is no indication that Respondent ever threatened the two individuals, the undersigned credits Harbison's testimony that he felt pressured to agree to the deal and that he feared consequences if he did not comply. Moreover, Harbison's explanation of why he went along with the transaction is both credible and consistent with the testimony of other witnesses regarding Respondent's personality and vindictive nature:

> A: I'd say mostly because of leverage. I was living in an apartment owned by Bill. I was—he was my sole source of income in this economic desert that is Southern Illinois. . . . And so I thought the FDIC or somebody would stop it. *I thought there was no way that it would get approved and that would keep me from having to anger him or*

65:15; Winters Tr. 60:18-23; Bonan Tr. 822:19-23 ("I was working on Evergreen and with Gary and trying to get debt paid down. . . . [A]nd so I simply offered [the Carmi property] to Jason and Adam at the time to say do you guys want to buy this.").

[149] *See* Harbison Tr. 48:10-24 (relaying that Respondent told him that "it would be okay," which he interpreted to mean "that the loan will get approved and everything" because Respondent owned the Bank); EC-PSD-6A (Transcript of July 30, 2018 Interview of Jason Harbison by the FDIC Office of the Inspector General ("July 2018 Harbison Tr.") at 0047862 (recalling that Respondent told the two of them beforehand that this would be "a good deal for everybody" and that the Bank would not "screw [them] over" on the loan because Respondent was "in charge of the Bank").

> *disappoint him and tell him no*, and it would just, oh, we tried, sorry, you know, I tried to help every way I could but, you know, and then the loan went through. And then we—you know, and then we closed, and so maybe Bill was right.
>
> Q: What do you think Mr. Bonan would have done if you declined the transaction, if you refused to do the 618 Holdings transaction?
>
> A: I mean, fired me, told me I needed to move out, whatever. I mean there would have been a consequence in my opinion.[150]

Harbison also noted, and the undersigned likewise credits, that the fact that Respondent was his landlord and boss and that "[his] parents banked at Peoples," where Respondent had significant influence, created an unequal power dynamic between Respondent and Harbison that "made it hard for me to stand up for myself and say no."[151]

In any event, Harbison and Tate agreed to the transaction and agreed to have a company formed in their name that would be the entity on the loan and

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[150] Harbison Tr. 21:11-22:5 (emphasis added); *see also* EC-PSD-6A (July 2018 Harbison Tr.) at 0047874 (stating that Respondent is "a petty vindictive human being. I mean I've watched it just in other, in other areas. You know there are people that get fired, other people that cross him on a business deal.").

[151] Harbison Tr. 46:15:22 (also stating that "at the time when we started this relationship, when I started this relationship with Bill, we were never on level footing"); *see also id.* at 45:14-18 ("[After the transaction,] I felt like I was misled. I felt like there was leverage used against me to do—to get me to do things that I normally wouldn't have done.").

lease documents. Other than choosing the name of the company and visiting the warehouse property once before the sale, Harbison testified that he and Tate had no involvement with the transaction, no input into the deal structure, or even any knowledge of the transaction terms until the day of closing.[152] Everything was done for them by Bank employees at Respondent's direction.[153]

The 618 Holdings Loan Request

On or before December 17, 2015, Respondent directed Gaskins to prepare a loan request on behalf of Harbison and Tate to purchase the Carmi Warehouse from Evergreen Properties for $1.25 million.[154] The loan request was made in the name of 618 Holdings, a newly formed LLC. Winters then emailed Bank attorney Patrick Hunn—who had previously been involved in setting up Respondent's prospective purchase and leaseback of the Carmi Warehouse through FWBII Holdings[155]—to ask if he could prepare documents for the formation of 618 Holdings "asap."[156] She added, "[t]hey are the ones

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[152] *See id.* at 19:8-20.

[153] *See id.* at 19:13-14; EPF ¶¶ 158-164.

[154] *See* EPF ¶ 159; Resp. Opp. SOF at 16-17.

[155] *See* JX 1 (Joint Stip.) ¶¶ 15-16.

[156] EX 268 (email chain including December 18, 2015 email from K. Winters to P. Hunn); *see also* EX 265 (email chain including December 18, 2015 emails from K. Winters to P. Hunn) (asking Hunn to revise the draft purchase agreement and loan paperwork to replace FWBII Holdings as the borrower with "[a] TBD LLC"). Hunn understood that this was done at Respondent's direction. *See* Hunn Tr. 337:13-15. When Hunn spoke to Respondent and asked to be compensated for the work he was doing for Harbison and Tate, Respondent told Hunn "to

who are going to be buying evergreen now (don't ask)."[157] Hunn testified that he was surprised that Harbison and Tate would now be purchasing the warehouse rather than Respondent, "due to their financial status or lack thereof."[158]

On December 18, 2015, Winters emailed Gaskins to ask him to review and revise the loan write-up for the 618 Holdings loan as well as a proposed $400,000 loan to Harbison personally, stating: "I am not sure what [Respondent] wants it to say so I figured you may have a better idea. Also he wants these sent out today so no pressure or anything LOL."[159] After receiving revisions from Gaskins, Winters emailed Respondent and asked him to "[p]lease review the write up for Adam and Jason to purchase Evergreen. Please let me know if I need to make any changes."[160]

Later that day on December 18, 2015, Winters sent the Bank's directors a $1.25 million loan request on behalf of Harbison and Tate's yet-to-be-formed company, with Harbison and Tate serving as sole

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just do the work that [he] was instructed to do and not worry about compensation." *Id.* at 341:4-11.

[157] EX 268 (email chain including December 18, 2015 email from K. Winters to P. Hunn). The subject header of the email that Winters sent to Hunn was "Adam and Jason," making it clear who Winters was referring to.

[158] Hunn Tr. 338:12-14; *see also id.* at 338:20-339:2 (noting that "it was extremely odd" for Harbison and Tate to be "involved in the purchase of a $1.25 million property" given their lack of assets).

[159] EX 269 (December 18, 2015 email from K. Winters to G. Gaskins).

[160] EX 271 (December 18, 2015 email from K. Winters to F. Bonan II).

guarantors.[161] In the same email, Winters also provided the directors with a $600,000 loan request for Harbison's other company, Roundfire Solutions, to purchase investment properties.[162] Neither the Roundfire Solutions loan request nor the 618 Holdings loan request showed any cash flow analysis for those entities or otherwise that would justify the loans in question.[163] Instead, the Roundfire Solutions request merely stated that "[a]dequate cash flow" was a strength of the loan application, while recording that Harbison (who was listed as guarantor) had a negative net worth in the tens of thousands of dollars.[164] The 618 Holdings loan request, meanwhile, stated without support that the company—which, as a reminder, did not yet exist—had $1.4 million in assets and $1.25 million in liabilities for a net worth

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[161] *See* JX 1 (Joint Stip.) ¶ 25; EX 272 (December 18, 2015 email from K. Winters to Bank board members attaching loan request write-ups).

[162] *See* EX 272 (December 18, 2015 email from K. Winters to Bank board members attaching loan request write-ups) at 1, 2-15. This appears to be a revision of the $400,000 loan request for Harbison circulated among Winters, Gaskins, and Respondent earlier that day.

[163] *See id.* at 2-15 (Roundfire Solutions loan request, with pages entitled "Cash Flow Analysis," "Global Cash Flow Analysis," and "Financial Statement" left blank), 16-29 (same for 618 Holdings loan request).

[164] *See id.* (Roundfire Solutions loan request) at 2 (also stating that "[t]he purchase price for the investment properties is $500,000.00" and that "Jason is borrowing an additional $100,000.00 for repairs and remodel").

of $150,000.[165] It then noted that these numbers were "[p]rojections only."[166]

Both Hunn and Winters testified that Respondent wanted the 618 Holdings loan request approved quickly. Winters stated that "[t]his loan needed to close as soon as possible, from my understanding."[167] She further recalled that Respondent urged her to call the other board members and get their votes on the loan, stating that this was not the usual practice but that Respondent "wanted approval faster."[168] According to Winters, the loan was ultimately approved before the purchase agreement between 618 Holdings and Evergreen was signed, which "was not normal."[169] And Hunn stated that on the day he discovered that FWBII Holdings would no longer be purchasing the Carmi Warehouse, "there was now all of a sudden a rush to get this loan done through this new 618 Holdings."[170]

Harbison and Tate's Creditworthiness

One disputed material fact that was identified at the summary disposition stage is whether Respondent had a reasonable basis to believe that Tate and Harbison were creditworthy at the time that he was pushing for approval of the loan to 618 Holdings.[171] The record now confirms that Resp-

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[165] *See id.* (618 Holdings loan request) at 16.

[166] *Id.*

[167] Winters Tr. 70:6-7.

[168] *Id.* at 85:22-86:8.

[169] *Id.* at 99:13-100:9.

[170] Hunn Tr. 339:14-17; *see id.* at 338:4-6.

[171] *See* MSD Order at 14.

ondent knew or should have known, and better than most, that his two employees did not have anything approaching the financial wherewithal or demonstrated repayment capacity to qualify for a $1.25 million loan.

Certainly others at the Bank knew and understood that Harbison and Tate were not good credit risks for a loan of that size. In addition to Hunn, Stringer, and Williams, whose concerns are detailed above, CFO Gaskins stated that he knew that Harbison and Tate "were not very strong at the time as far as credit approval"[172] and recognized further that neither of them would "have the financial capacity if called upon to support the loan to 618 Holdings."[173] The undersigned also credits the testimony of Senior Loan Officer Williams that he believed Respondent did not ask him to be involved with the 618 Holdings loan because Respondent knew that Williams would not have approved the loan in light of "the lack of financial worth of [Tate and Harbison]."[174] As he explained further, "I knew of no way where 618 Holdings was going to generate sufficient revenue to meet payments. . . . I just had concern with this size of a loan with these, with the quality of borrowers being these two individuals."[175] If the meager state of Harbison and Tate's finances, lack of net worth, and inability to repay a $1.25 million loan was common knowledge among these people, then it is extremely implausible that Respondent, an experienced banker

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[172] Gaskins Tr. 74:22-23.

[173] *Id.* at 75:18-76:9.

[174] Williams Tr. 660:3-4; *see id.* at 658:20-660:5.

[175] *Id.* 660:12-19.

and loan officer who knew how much Harbison and Tate took home every month because he was the one who determined their salary, did not possess that knowledge as well.

Respondent contends that he was misled into believing that Harbison and Tate were good credit risks because Winters provided him with outdated and inaccurate information regarding the two individuals' credit scores.[176] He further claims that had he known the scores that credit rating bureaus had actually assigned Harbison in particular in December 2015, it would have caused issues because "[t]hose are horrible. That's a person with horrible credit."[177] Finally, Respondent suggests, although does not state outright, that if Winters had given him an accurate credit score for Harbison, he would no longer have believed that the 618 Holdings loan "was a good loan."[178]

This argument is unavailing for Respondent on multiple fronts. First, Respondent did not ask

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[176] *See* Winters 81:9-82:18, 180:5 (testifying that she "looked at the wrong document" and provided Respondent with an old credit report in which Harbison's score was 664, rather his more recent scores of 520, 533, and 560); *see also* Bonan Tr. 831:18-25; EXs 263, 264 (December 2015 credit reports for Harbison and Tate); EX 374 (June 2015 credit report for Harbison).

[177] Bonan Tr. 832:3; *see also id.* at 829:15-18 (stating that information about Harbison and Tate's credit scores was "important" because "[i]t would tell me if they pay their debts or not").

[178] *See id.* at 832:11-16 ("Q: Were you aware of these credit scores at the time you were telling other people at Grand Rivers that you thought this was a good loan? A: No, and I actually repeated those credit scores that Kassie gave me to many other people that 'They had good credit. Kassie Winters told me.'").

Winters for Tate and Harbison's credit scores until December 22, 2015, four days after the 618 Holdings loan request had been provided to the rest of the Bank board and well after Respondent had already inveigled Tate and Harbison into being part of the transaction.[179] Any suggestion by Respondent that he would have brought the process to a halt at that stage had he discovered that one of the two had poor credit simply does not hold water, given the urgency with which he viewed consummation of the transaction.

Second, Respondent knew or should have known that Harbison and Tate would not be qualified for a $1.25 million loan even with perfect credit scores, given their life situations. Even if Respondent mistakenly believed Harbison's credit score to be higher than it was, he was under no such misapprehension regarding, for example, Harbison's negative net worth or the individuals' modest salaries and lack of any significant assets or discernible cash flow that would conceivably enable them, as guarantors of the 618 Holdings loan, to make any of the necessary payments of principal and interest if required, without being dependent on Evergreen's rent.[180] While credit scores may be useful to measure, as

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[179] *See* EX 290 (email chain including December 22, 2015 email from F. Bonan II to K. Winters).

[180] This is especially true because the terms of the loan as drawn up post-approval envisioned a massive balloon payment on the remainder of the loan's balance following five years of monthly payments of approximately $7,753. *See* EX 310 (January 7, 2016 Promissory Note) at 1 (stating that "Borrower will pay this loan in 60 regular payments of $7,752.94 each and one irregular last payment estimated at $1,132,163.12.").

Respondent puts it, an individual's past propensity to "pay their debts or not,"[181] they say nothing about whether that individual has the capacity to do so in the future if the payments on the debt they owe are particularly large relative to their means.

Finally, Respondent's suggestion that knowledge of Harbison's true credit score would have made a difference in whether he supported the 618 Holdings loan is, to put it charitably, directly at odds with the core of his litigation position and other testimony in this matter—namely, that 618 Holdings was a better credit risk than Evergreen and that Harbison and Tate's inability to personally make loan payments was ultimately irrelevant due to the structure of the transaction.[182] Respondent cannot claim that it would have mattered to him that Harbison had "horrible credit" while also professing that 618 Holdings was in "[b]etter shape than Evergreen [was] in" because Evergreen's negative net worth was larger than that of Harbison and Tate.[183] And, indeed, the fact that Respondent was not only seeking approval for the $1.25 million 618 Holdings loan request in December 2015 but also a separate $600,000 loan to be personally guaranteed by Harbison succinctly underscores how little importance Respondent appeared to place

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[181] Bonan Tr. 829:18.

[182] *See* Parts VI(A)(1) at pp. 80-94 *infra*.

[183] Bonan Tr. 920:11; *see id.* at 925:20-23 ("[A]t the time I think Evergreen had a net worth of about a negative million dollars. So the negative net worth that Adam Tate had and that Jason Harbison had were so much better than what Evergreen had.").

on Harbison's personal financial capacity and ability to repay the Bank.[184]

It is important to emphasize, again, that even Harbison did not think that he and Tate were qualified for the 618 Holdings loan.[185] Harbison testified, moreover, that neither he nor Tate would have been personally capable of making the $7,753 monthly payments that the terms of the loan required, had they needed to do so.[186] And Harbison stated that he agreed to the transaction only with the expectation that someone would step in and stop it: "Yeah, that someone would loan Adam Tate and I that amount of money at that point in our lives and it [would] just be okay. I was so sure that it wasn't going to happen that when it did, I guess Bill knows more than I do, you know. I was wrong."[187] The

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[184] The $600,000 loan to Roundfire Solutions was approved by the Board in late December 2015, although Stringer indicated that the loan was never funded following concerns expressed by examiners. *See* EX 266 (package including December 22, 2015 and December 23, 2015 emails from J. Campbell, L. Phelps, and G. Gaskins voting yes on loans including Roundfire Solutions loan); Stringer Tr. 81:6-12 (noting that examiners "did not want us to fund the Roundfire Solutions loan"), 83:7-11 (stating that the Roundfire Solutions loan "hadn't funded").

[185] *See* Harbison Tr. 20:25-21:5.

[186] *See id.* 33:12-23. Respondent testified that Harbison was lying about not being able to afford the monthly payment, although he offered no credible evidence or support for his assertion and the undersigned gives it no weight. *See* Bonan Tr. 925:20-926:12 ("Q: Well, if I represent to you if Mr. Harbison said he couldn't, you would have no reason to doubt what he said, would you? A: I don't believe him.").

[187] Harbison Tr. 42:9-13; *see also id.* at 21:16-20 ("I thought the FDIC or somebody would stop it. I thought there was no way

undersigned therefore finds that Respondent could not have reasonably believed at the time that Tate and Harbison were capable of repaying a $1.25 million loan, given the significant evidence to the contrary that, in the words of CEO Stringer, "these individuals didn't have the capacity [and] were talked into a business arrangement that they couldn't afford to pay for in order to do whatever for Evergreen Drilling."[188]

The Board Approves the Loan

On December 23, 2015, the Bank's Board of Directors approved the 618 Holdings loan, even though 618 Holdings still did not yet exist as a legal entity.[189] Respondent initially voted to approve the loan, but then informed Winters that he would abstain from the vote because Harbison and Tate were his employees.[190] Of the other four board members, CFO Gaskins, Lucas Phelps, and Jake Campbell voted yes by email, while CEO Stringer did not vote.[191]

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it would get approved and that would keep me from having to anger him or disappoint him.").

[188] Stringer Tr. 133:1-4.

[189] *See* JX 1 (Joint Stip.) ¶ 30.

[190] *See id.* ¶ 27. Regardless of Respondent's abstention, the record reflects his dominant influence on the ultimate vote tally. *See*, *e.g.*, Winters Tr. 72:22-73:2 ("Bill was the one helping to push through this loan.").

[191] *See* EX 266 (package including December 22, 2015 and December 23, 2015 emails from J. Campbell, L. Phelps, and G. Gaskins voting yes on loans including 618 Holdings loan). Stringer stated that "at that time we very seldom had meetings to discuss the loans. They were mainly sent out via email for approval." Stringer Tr. 60:6-7.

Gaskins testified that although he did not believe that Harbison and Tate had the ability to repay the loan, he voted to approve it because he was told to do so by Respondent: "It was a plan and order passed down to me from Mr. Bonan to—. . . It was a plan Mr. Bonan relayed to me and it was my responsibility to present the request and to vote in favor of the request."[192] Gaskins added, and the undersigned credits, that he believed he "would have been removed" from the Bank's board by Respondent if he had not voted yes.[193]

Before voting to approve the 618 Holdings loan, Campbell expressed a number of reservations regarding, among other things, the true value of the Carmi property,[194] the lack of demonstrated cash flow

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[192] Gaskins Tr. 76:15-20.

[193] *Id.* at 76:21-77:2.

[194] *See* EX 273 (email chain including December 19, 2015 email from J. Campbell to L. Phelps) ("The purchase of Evergreens yard has the appraisal listed at $1,250,000. I don't think it is worth $300,000, especially with the current oil, coal, and ag depression that this area is in. The 5 year lease doesn't mean anything because the lessee is in a cash flow bind."). The undersigned notes that Phelps, Botsch, and bank examiners all raised similar questions regarding the adequacy of the appraised value of the Carmi Warehouse. *See id.* (email chain including December 19, 2015 email from L. Phelps to J. Campbell) ("Yes I agree. I questioned the Evergreen valuation too."); Botsch Tr. 288:2-8 ("[W]e discussed the fact that 618 Holdings was, the building they are buying, I said it was probably worth $350,000. Evergreen overpaid for it. They also bought that from a client of mine, so I knew the building very well. It was not going to bring $1.25 million."); EX 346 (September 2016 Joint Visit Report of Grand Rivers Bank) at 26 (identifying several concerns with the appraisal and suggesting that "impairment may be significantly understated" on the 618

for 618 Holdings,[195] and Evergreen's ability to make its lease payments on the warehouse given the downturn in the oil industry.[196] Campbell testified that he ultimately voted yes on the loan because the Evergreen loans would not have been included in the merger with PNB but the 618 Holdings loan would.[197] Nevertheless, Campbell stated that if he had known that the Evergreen Drilling loan was at nonaccrual status at PNB and had been classified as substandard at the time of his approval of the 618 Holdings loan, he would have voted no "[n]otwithstanding [his] merger concerns."[198]

The sole director not to vote to approve the loan was CEO Stringer, who discussed her concerns about it with Campbell and Senior Loan Officer Williams.[199]

Holdings loan relationship as a result); EPF ¶ 251 (summarizing these concerns).

[195] *See* EX 284 (email chain including December 22, 2015 email from J. Campbell to F. Bonan II, W. Stringer, L. Phelps, and G. Gaskins) at 2 ("Will this throw up problems for the FDIC since there is nothing in the paperwork showing sufficient, or any cash flow to pay for this?").

[196] *See id.* ("What are the details of the 5 year lease? That lease is only as good as the company leasing it and the oil business as a whole is not looking good at all.").

[197] *See* Campbell Tr. 397:13-22, 399:4-6 (agreeing that "the merger ultimately drove [his] vote for the loan").

[198] *Id.* at 401:12-19.

[199] *See* EX 277 (email chain including December 22, 2015 email from W. Stringer to J. Campbell) at 1 (responding to a question about whether she has voted on the loans yet by writing, "No, and I'm not comfortable with it."); Williams Tr. 657:24-25 (stating that he and Stringer "were both very concerned about the credit, about going forward with 618 Holdings").

Asked why she didn't express those concerns more widely to the other board members, Stringer testified that "they would have all reported back to Bill and I likely would have been fired."[200] Stringer also stated that she abstained from the vote rather than voting no, because a no vote would have prompted Respondent to fire her "as there had been discussion between Mr. Bonan and another employee about firing me on previous accounts."[201] The undersigned finds it credible that Stringer reasonably feared reprisal and believed she would have been fired if she had voted against the 618 Holdings loan, given similar testimony from Gaskins, Harbison, and Hunn over the course of the hearing.[202]

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[200] Stringer Tr. 129:3-6.

[201] *Id.* at 64:16-22; *see also id.* at 67:3-7 ("I had concerns about the borrowers and the repayment of the loan, and I had a fiduciary responsibility to do what was right for the Bank. So I didn't respond. I felt like if I responded with a no, even though I didn't think the loan was worthy of a yes vote, I thought I'd be fired.").

[202] *See* Gaskins Tr. 76:21-77:2; Harbison Tr. 21:11-22:5; Hunn Tr. 329:18-330:16. In addition to stating that he had personally suffered negative consequences for not explicitly following Respondent's directions, Hunn noted that his predecessor as Bank general counsel, Alanna Sosenko, had been fired because she disagreed with Respondent on a legal issue. *See* Hunn Tr. at 330:9-16 ("Mr. Bonan didn't like the fact that we were giving opinions as opposed to just taking directions, and Ms. Sosenko would challenge certain directives that were given and Mr. Bonan didn't like that and so it got to the point where he fired her.").

The Purchase and Leaseback of the Carmi Warehouse

On January 7, 2016, the purchase and sale agreement and lease agreement for the Carmi Warehouse were executed between Evergreen Properties and 618 Holdings.[203] Harbison and Tate were not involved in negotiating the terms of the purchase and had no input in its structure, nor did Respondent tell them anything about the details of the transaction after they agreed.[204] Harbison testified, in fact, that the first time he saw the transaction terms and structure was "at the closing table."[205] The only change made by Harbison at that time was to steadily escalate Evergreen's lease payments following the initial eighteen-month period, in order to incentivize the company "to purchase the property back from us."[206] This was done out of a concern that otherwise Tate and Harbison "would not make money on the deal."[207]

Overall, the transaction was structured as follows:

- The 618 Holdings loan was funded in the amount of $1,262,109.75.[208]

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[203] *See* EX 308 (Purchase and Sale Agreement); EX 309 (Lease Agreement).

[204] *See* Harbison Tr. 16:24-17:1 ("Q: So did Mr. Bonan discuss the terms of the transaction with you? A: No."); *see also id.* at 19:5-15, 22:12, 27:11-13.

[205] *Id.* at 17:1-2.

[206] *Id.* at 17:3-5.

[207] EC-PSD-6 (June 27, 2022 Declaration of Jason Harbison ("Harbison Decl.")) ¶ 7(d).

[208] As the Parties note, this amount was "$12,109.75 more than the Board had authorized," a discrepancy that is not explained in the record. JX 1 (Joint Stip.) ¶ 32.

- From these proceeds, PNB received approximately $358,000 and the Bank received approximately $638,000, sufficient to pay off the first and second mortgage liens, respectively, that Evergreen Properties owed them on the Carmi Warehouse.
- $150,000 of the remaining loan proceeds was placed in an escrow account at the Bank to be automatically applied to the first eighteen months of lease payments made by Evergreen Properties to 618 Holdings, which would then use those payments to itself make monthly loan payments of $7,753 to the Bank.[209]
- $100,000 was given to Evergreen Properties to be used for operational expenses.[210]

It was Harbison's understanding that Evergreen intended to purchase the property back from 618 Holdings when the price of oil returned to normal.[211] He noted that if he had not changed the agreement at closing to add the escalating lease schedule, "[t]here's no reason for them to buy the property back," and he and Tate would have had no incentive to enter into the transaction.[212] Following closing, Tate and

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[209] The lease agreement provides that Evergreen's rent for the first eighteen months would be $8,250 monthly, rather than $7,753, another discrepancy that the record does not explain. *See* EX 309 (Lease Agreement) at 1, 4.

[210] *See* JX 1 (Joint Stip.) ¶ 33; *see also* EX 302 (January 3, 2016 email from F. Bonan II to G. Gaskins and P. Hunn) ("Work on closing evans deal Friday. I want Scott [Collins] to know that the Evans want to keep 100,000 to operate on. So you and he can figure out how much each bank is getting.").

[211] *See* Harbison Tr. 17:11-16.

[212] *Id.* at 34:7-21. The undersigned notes that even as amended, Tate and Harbison would not have seen any benefit

Harbison continued to have no interaction with Evergreen or involvement with the loan payment process itself, as Bank personnel handled everything:

> Kassie at the bank continued to make payments to the bank whenever payments were due and we really kind of just forgot about it. . . . We didn't do anything with the loan, as far as like we didn't collect rent from Evergreen, we didn't make the payments to the bank. The bank did all that. . . . We never touched a rent check, deposited a rent check. I never wrote a payment check for the loan, none of that.[213]

The record reflects that, other than the eighteen-month lease payment reserve, the ability of 618 Holdings to pay its monthly loan payment of $7,753 was entirely dependent on Evergreen Properties making its lease payments.[214] Evergreen Properties, in turn, depended upon income from Evergreen Drilling's operations in order to make its lease payments to 618 Holdings.[215] Ultimately, then, the repayment of the 618 Holdings debt to the Bank hinged on Evergreen Drilling's financial health after the eighteen-month lease reserve was exhausted,

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from the deal for 18 months at the earliest, raising further questions about whether they would have chosen to enter into the transaction of their own volition absent leverage or pressure from Respondent.

[213] *Id.* at 41:7-22; *see also id.* at 42:14-21.

[214] *See* EPF ¶ 201.

[215] *See id.*

rather than on any capacity of 618 Holdings or its guarantors to pay the debt themselves.[216]

To summarize the state of affairs following the funding of the 618 Holdings loan and the execution of the purchase and leaseback transaction of the Carmi Warehouse:

PNB cleared away $358,000 of debt from Evergreen Properties, a troubled borrower having significant cash flow issues whose financial health was dependent on the continued operations of Evergreen Drilling, an entity in the midst of an industrywide downturn whose loans PNB had previously classified as substandard and placed on nonaccrual status.[217]

The Evergreen Entities made progress on their agreement to pay down PNB debt in exchange for an extension on Evergreen Drilling's loans with that bank while reducing their debt load with both PNB and Grand Rivers. Evergreen Properties (and the Evanses) received $100,000 in operating expenses and an 18-month period of prepaid lease payments to ride out the downturn while continuing to use the Carmi Warehouse as the headquarters for Evergreen Drilling.

Respondent achieved success on his primary motivations at that time—in the words of Gaskins, to

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[216] *See* EX 314 (2016 ROE) at 55 ("[T]he loan proceeds used to fund the lease payment reserve account are currently making loan payments."); *see also* Bonan Tr. 922:10-19 (agreeing "that the primary repayment source for this loan aside from the prepaid lease payment was going to be . . . Evergreen Drilling and their ability to pay lease payments back to 618 Holdings after the prepaid lease account was exhausted").

[217] *See* JX 1 (Joint Stip.) ¶ 6.

"move the debt from [PNB]" and to "help Abbey out,"[218] or more charitably to help Evergreen sell assets and reduce its debt to both banks consistent with the plan devised by Respondent in the fall of 2015. Respondent managed this without taking on personal financial risk and debt by purchasing the Carmi Warehouse himself, as he had previously planned.

Grand Rivers traded in its $638,000 second lien position on the Carmi Warehouse for a $1.25 million mortgage loan backed by the same property, the appraised value of which multiple Bank directors had seriously questioned.[219] The Bank also exchanged its existing loan relationship with Evergreen Properties as borrower and Gary Evans as guarantor for newly-formed 618 Holdings, a company with no assets and guarantors with negative net worth whose ability to make payments on the loan depended entirely on lease payments from a financially troubled tenant. On the other hand, because that tenant's situation was so "dire" (according to Respondent)[220] that PNB

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[218] Gaskins Tr. 25:4-10.

[219] *See* EX 273 (email chain including December 19, 2015 email from J. Campbell to L. Phelps) at 1 ("The purchase of Evergreens yard has the appraisal listed at $1,250,000. I don't think it is worth $300,000, especially with the current oil, coal, and ag depression that this area is in."); *id.* (email chain including December 19, 2015 email from L. Phelps to J. Campbell) ("Yes I agree. I questioned the Evergreen valuation too."); *see also* EX 346 (September 2016 Joint Visit Report of Grand Rivers Bank) at 26 (identifying several concerns with the appraisal and suggesting that "impairment may be significantly understated" on the 618 Holdings loan relationship as a result).

[220] EX 34 (email chain including August 16, 2015 email from F. Bonan II to K. Botsch).

was refusing to assume its loans in any proposed merger of the two banks, Grand Rivers theoretically benefited in that the 618 Holdings loan, unlike the Evergreen Properties loan, could go to PNB if and when the proposed merger ever were to take place.[221]

Jason Harbison and Adam Tate, through their new company, assumed $1.25 million in debt that they had no discernible way of repaying, and for which they would be personally liable if Evergreen Properties was unable to make lease payments at any point following the exhaustion of the 18-month lease reserve account. Harbison and Tate only stood to benefit from this transaction if, at the end of the eighteen months, (1) Evergreen regained its cash flow and continued to lease the Carmi property from them under the escalated payment schedule suggested by Harbison; (2) Evergreen regained its cash flow and decided to purchase the property back from them at an amount that allowed them to make a profit; or (3) Evergreen failed but Harbison and Tate were able to find a separate tenant for the property at a profitable

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[221] *See* Wallace Tr. 768:14-769:1 ("[T]he sale of the property to 618 Holdings would have given Grand Rivers a saleable asset which it wouldn't have had prior to the sale. . . . It was no longer an Evergreen loan, so it may have been something that Peoples was willing to purchase in connection with the merger and/or acquisition of Grand Rivers."). Putting aside why PNB would necessarily have viewed a loan with inadequate guarantors and whose repayment was entirely dependent on Evergreen as any better than one of the existing loans to Evergreen, it was never clearly explained on the record why the Evergreen loans staying with the Bank's holding company after the merger and being serviced there by PNB would have a negative consequence for the Bank, whose interests would now be presumably aligned with PNB as part of the newly merged entity.

lease schedule or a separate purchaser at a profitable price. In any other scenario—if oil prices did not rebound after eighteen months, for example, and no company was willing to purchase or lease the warehouse for a sufficient amount, 618 Holdings would be unable to repay the loan and the Bank would be left holding the bag.

The 2016 Examination and its Aftermath

FDIC examiners Mathias Floersch and Reuben Cash raised questions about the 618 Holdings loan and a separate $50,000 unsecured loan to Harbison during the examination of the Bank by the FDIC and IDFPR beginning in January 2016.[222] On February 9, 2016, Floersch, Cash, and other examiners participated in a discussion with Gaskins, Stringer, and Williams about these two loans.[223] In that discussion, Gaskins and the others repeatedly named Respondent as the one who had originated the 618 Holdings loan and conceived of the idea to establish the $150,000 lease reserve account from which payments would be made for Evergreen's rent for the first

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[222] *See* EPF ¶ 208; Floersch Tr. 443:10-14 (stating that Floersch and another examiner "decided it would be good to look at some of the unsecured credits" and chose the $50,000 Harbison loan and from there the 618 Holdings loan to examine).

[223] *See* EPF ¶ 209; EX 368R (Revised Declaration of Mathias Floersch) ("Floersch Report") ¶ 4. The undersigned observes that according to contemporaneous notes of the meeting by Examiner Cash, the Roundfire Solutions loan adverted to *supra* was also a subject of discussion. *See* EX 320 (2/9/16 meeting notes) at 3 (referencing "the Roundfire Solutions credit" and stating that Floersch highlighted problems with that loan: "Harbeson [sic] has no net worth, the structure of Roundfire makes no sense. This is at a minimum, substandard.").

eighteen months of the loan's term.[224] Gaskins also acknowledged that Evergreen Drilling's operations would be "the source of repayment" for the 618 Holdings loan, stating further that he was not aware of any other loans that funded lease payments in reserve in this manner.[225]

Following the February 9, 2016 meeting, Examiner Floersch classified the outstanding balance of the 618 Holdings loan—at that time, $1,262,000—as substandard.[226] Floersch stated in the 2016 ROE that this classification was "due to the lack of financial capacity of the debtors, the inappropriate structuring of the 618 Holdings credit in which an indirect [principal and interest] reserve account was establish[ed] to make loan payments, the lack of collateral protection, and the questionable ability of Evergreen Properties to generate sufficient income to pay lease payments."[227] Floersch therefore recommended that

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[224] *See* EX 320 (2/9/16 meeting notes); EPF ¶ 209; EX 368R (Floersch Report) ¶ 4.

[225] *See* EX 320 (2/9/16 meeting notes) at 1, 2. Williams likewise stated at the meeting and in his testimony that he had never "seen commercial loans where the loan proceeds have indirectly funded a principal and interest reserve account." Williams Tr. 662:9-20; *see* EPF ¶ 215; EX 320 (2/9/16 meeting notes) at 2.

[226] *See* EPF ¶ 211; EX 314 (2016 ROE) at 56.

[227] EX 314 (2016 ROE) at 56; *see* EPF ¶ 211; EX 325 (email chain including February 18, 2016 email from W. Stringer to F. Bonan II) (stating that examiners "[s]aid we financed 1st 18 months of lease payments, a structure that they have not seen before. 2 borrowers that cannot support the debt if lease payments aren't made, and the ability for the lease payments is questionable. Questioned collateral value. Borrowers did not

the Bank place the loan on nonaccrual status until full repayment of principal and interest could be reasonably assured.[228]

Throughout these proceedings, Respondent has asserted that the 618 Holdings loan was structured as it was in order to give Evergreen, one of the Bank's larger loan relationships, time to get back on its feet while it weathered the oil industry's financial downturn.[229] Respondent points specifically to the lease payment reserve account as an appropriate way to "guarantee[] that the loan would be repaid on time for at least 18 months."[230] According to Respondent, the purchase and leaseback of the Carmi Warehouse "was designed to provide Evergreen Drilling and its associated companies the opportunity to become more financially stable, while at the same time protecting the Bank by having 18 months of loan payments in escrow."[231] Respondent thus represents that, as a result of the transaction structure, the Bank was

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have a down payment and didn't bring anything to the table on this deal.").

[228] *See* EPF ¶ 211; EX 314 (2016 ROE) at 56.

[229] *See*, *e.g.*, R Br. at 40 ("The goal was to put Evergreen in a position where they could ride out the storm at least until the 2016 elections, which is when Grand Rivers believed the oil market would rebound."), 44 ("The 618 Holdings loan was made precisely because Evergreen was struggling and about to go out of business. The loan was structured so that Evergreen could remain in its headquarters and stay in business.").

[230] R Br. at 26.

[231] Answer ¶ 75 (asserting that "if Evergreen Drilling and its associated companies did not become more financially stable within 18 months, 618 Holdings could sell the Carmi property to pay off the loan from the Bank").

protected "regardless of Tate and Harbison's personal ability to pay the loan."[232]

As described further in Part VI(A)(1) at pp. 86-94 *infra*, however, the undersigned credits the hybrid fact and expert testimony (and related reports) of Examiners Cash and Floersch that, far from protecting the Bank, the structure of the 618 Holdings loan—and how that structure was implemented—in fact foreseeably increased risk to the Bank in multiple ways.[233] For example, to the extent that the 618 Holdings loan was intended "to allow Evergreen to begin to generate cash through operations or allow 618 Holdings to sell the Carmi Warehouse without a loss to the Bank," the loan file lacked "basic analyses of repayment capacity," including cash flow analysis and other necessary information for both Evergreen and 618 Holdings, and otherwise did not conform to the requirements of prudent loan workout practices or the criteria for restructured troubled debt.[234] Moreover, the examiners

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[232] R-BIO at 9; *see also*, *e.g.*, R Br. at 41 ("The very structure of the loan was designed to *protect* the financial stability of Grand Rivers.") (emphasis in original).

[233] *See* EX 368R (Floersch Report) ¶¶ 6-11; EX 369R (July 5, 2022 Hybrid/Expert Witness Statement of Reuben Cash) ("Cash Report") ¶¶ 9-16.

[234] EX 369R (Cash Report) ¶ 15 (noting that "there was no documentation showing how Evergreen could achieve positive cash flow and 618 Holdings could repay the Bank (such as pro forma financial statements forecasting how Evergreen proposed to achieve positive cash flow within 18 months" or "a plan forecasting how the Bank's commercial real estate collateral, the Carmi Warehouse, could be sold after 18 months without a loss to the Bank"); *see also id.* ¶¶ 13-14; EX 314 (2016 ROE) at 54, 55 (stating that "[c]urrent income information [for Evergreen

explained that loan payments being made through the lease payment reserve account masked the loan's quality by keeping it artificially current for the first eighteen months of its term, making it difficult "to assess the true repayment ability of [618 Holdings]."[235] And Floersch and Cash emphasized that the Bank taking on additional debt as a result of this transaction—not only the $358,000 previously held by PNB, but a further $250,000 between the escrow and operating expenses—effectively "marginalized the Bank's collateral position," reducing "the realizable value sufficient to discharge the debt" and jeopardizing the Bank's ability to liquidate it in case of default.[236]

On April 7, 2016, the Bank placed the 618 Holdings loan on nonaccrual status and made a loan

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Drilling] was not located in the loan files" and that the lack of financial information for Evergreen Properties left examiners "unable to determine if the company has the financial capacity to pay the lease payments to 618 Holdings").

[235] Cash Tr. 597:24-598:9; *see* EX 368R (Floersch Report) ¶ 6 (stating that the escrow account served to "skew or distort for 18 months any possible warning signs of potential credit losses involving the Bank's loan to 618 Holdings that would otherwise appear in the Bank's delinquent loan report"); Floersch Tr. 455:17-456:3 ("[W]ith the payments being made by the reserve account, you lose the ability to monitor the current nature of it . . . . There was no evidence, be it a current financial statement or income statement on Evergreen Properties, to let us . . . know that the payments could continue to be made once the [reserve account] was exhausted.").

[236] EX 368R (Floersch Report) ¶ 8; *see* Cash Tr. 582:25-583:3 (stating that "the margin of collateral was unusually high and that's the direct result of the borrowers and the purchasers of the commercial real estate not bringing cash or equity to the transaction").

impairment allocation that it later adjusted following a September 2016 visit by FDIC and IDFPR examiners.[237] On April 20, 2016, Respondent resigned from his positions at the Bank and the holding company, and Gaskins and Campbell followed suit.[238] Following these resignations, the Grand Rivers board consisted of Stringer, Williams, and Brent Clark.[239]

One last note regarding this time period: On April 15, 2016, representatives of PNB visited the Bank to conduct a loan review as due diligence in connection with the proposed merger.[240] Among other things, the PNB team concluded as a result of this review that Harbison—who Respondent seemingly believed was creditworthy enough as a guarantor for the Bank to lend him seven figures to purchase the Carmi Warehouse—did not "reasonably qualify for unsecured credit" even on a $50,000 loan.[241]

Current Status of the Property and the Loan

In January 2017, the Bank applied the remaining funds in the lease payment reserve account to the outstanding balance of the 618 Holdings loan and charged off $500,000 from that loan amount.[242]

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[237] *See* JX 1 (Joint Stip.) ¶ 34.

[238] *See* EX 314 (2016 ROE) at 80.

[239] *See id.*

[240] *See* EPF ¶ 245; Stringer Tr. 91:18-25.

[241] EX 337 (materials including April 15, 2016 memorandum entitled "Loan Summaries" from T. Visintine and K. Gansauer to F. Bonan Sr.) at 7.

[242] *See* EX 352 (2017 Joint Report of Examination of Grand Rivers Community Bank) ("2017 ROE") at 71; JX 1 (Joint Stip.) ¶ 34; *see also* EX 347 (October 25, 2016 letter from Grand Rivers to FDIC) at 44 (noting that "it is the bank's intent to move the

Following the charge-off, 618 Holdings defaulted on the loan—which remained in nonaccrual and had a balance of $668,519[243]—"and acquiesced to the use of a deed-in-lieu to avoid foreclosure, conveying the Carmi Warehouse to the Bank." [244] Brent Clark testified that the Bank board believed a deed-in-lieu was appropriate because "the guarantors had no assets that we were aware of, a negative net worth, and no perceivable way to earn that type of cash flow to service that type of debt."[245]

According to Mike Williams, the warehouse was ultimately leased to "an oil and gas servicing company based out of Erie, Pennsylvania" called Reliant Oil Service, and the lease payments were $1,500 to $2,000 per month. [246] At the time that Williams left the Bank in December 2018, the highest offer it had received when trying to sell the property

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balance of the escrow account to the loan balance to lessen the bank's nonaccruals").

[243] *See* EX 351 (January 2017 loan review by ProBank Austin) ("ProBank Austin Loan Review") at 21-22.

[244] JX 1 (Joint Stip.) ¶ 34 (stating that the Bank then wrote down the value of the property by an additional $13,760). In a deed-in-lieu, "[t]he Bank gets possession and control of whatever the said property is." Clark Tr. 737:18-19.

[245] Clark Tr. 737:24-738:4; *see also* Williams Tr. 677:10-25 (explaining that the Bank "saw no recovery from [Harbison and Tate] either short term or, you know, in the next five years," and felt the best option was to "[e]ither liquidate [the warehouse] or try to get somebody to lease the property, get some cash flow coming back"); Harbison Tr. 44:10-18 (choosing to do the deed-in-lieu because he "wasn't in the financial position to pay the note or to get it refinanced").

[246] Williams Tr. 678:7-25.

was $300,000 from Reliant (an offer that the Bank rejected).[247]

Likewise, when Stringer left the Bank in November 2022, the best offer it had received for the property was $500,000, which the Bank rejected because it would had to have taken "further charge-downs which it couldn't afford at the time."[248] Clark related that the Bank still owns the Carmi Warehouse as an Other Real Estate Owned (OREO) property.[249]

H. The Release of the Rig 23 Collateral

Evergreen owned several self-propelled oil drilling rigs used to carry out their business as of the fall of 2015, including most notably a Cabot 900 series model referred to as Rig 23 and a Service King 775 model known as Rig 24. The record reflects that Rig 23 was significantly more valuable than Rig 24, with an internal PNB email chain in August 2015 valuing the former at $5.8 million compared to $1.9 million for the latter.[250] In October 2015, Respondent emailed

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[247] *See id.* at 679:3-13. In its January 2017 loan review of the 618 Holdings and Harbison loans, compliance firm ProBank Austin stated that the Bank believed that the Carmi property "is now worth only $750,000 but has no validation of this value in the collateral file." EX 351 (ProBank Austin Loan Review) at 21. ProBank Austin agreed that the 618 Holdings loan was substandard and recommended that a new appraisal be ordered. *See id.* at 22.

[248] Stringer Tr. 102:20-103:5.

[249] Clark Tr. 745:11-12; *see* Stringer Tr. 103:5 (noting that the property is "currently being leased").

[250] *See* EX 30 (email chain including August 13, 2015 email from C. Zimmerman to F. Bonan Sr.) (reflecting the value of Rig

others at PNB stating that Rig 23 was now worth $2.6 million "in this market."[251] He further noted that Evergreen, having sold Rig 24 (about which more below), was "actively trying to [sell]" Rig 23, which he anticipated would happen by the end of the year.[252]

The Bank Acquires a PMSI in Rig 23

The evidence shows that in January 2013, the Bank obtained a purchase money security interest ("PMSI") in Rig 23 as collateral for a $490,000 loan to Evergreen Drilling.[253] Bank officer Don Nave testified

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23 as $5.8 million and Rig 24 as $1.9 million); Bonan Tr. 870:15-25.

[251] EX 180 (October 27, 2015 email from F. Bonan II to C. Zimmerman, S. Collins, F. Bonan Sr., and H. Bonan).

[252] *Id.*; *see also* EX 45 (September 15, 2015 email from A. Evans to F. Bonan II, S. Collins, and K. Botsch) ("[W]e still have a buyer making arrangements to come see Rig 23. We have it priced at $2.6 million.").

[253] *See* EPF ¶¶ 262-265. As discussed further in Part VI(B)(2) *infra*, one disputed question of fact identified at the summary disposition stage was whether Rig 23 was a titled vehicle subject to the motor vehicle codes of Illinois and Indiana such that the Bank's security interest in the rig had not been properly perfected. *See* MSD Order at 25 26, 64-67. The undersigned agrees with Enforcement Counsel that Respondent "provided no credible evidence that the Cabot 900 was a titled vehicle" at the hearing, while the evidence offered by Enforcement Counsel suggests that "the Bank had asked for a certificate of title for the Cabot 900 and was told it was equipment and did not have a title." EC Reply at 21, 22; *see* Nave Tr. 177:18-22 (also stating that he never got "any information at any time while . . . at Grand Rivers that indicated that the Cabot 900 was a titled vehicle"). Accordingly, the undersigned finds that because Respondent, both at the summary disposition stage and at hearing, "failed to produce Rig 23's certificate of title and [] provided no evidence that Rig 23 was ever registered as a

that a PMSI gives the Bank "first lien priority of that rig as collateral ahead of anyone else."[254] To secure a piece of equipment with a PMSI, "[t]he note, collateral security agreement, and [Uniform Commercial Code ("UCC")] filing should all have the statement 'Purchase Money Security Interest,' along with the specific details of the collateral."[255] Thus, a search of UCC financing statements (or "UCC-1s") filed in a given jurisdiction will show all of the collateral that a specific entity has pledged as security in that jurisdiction, along with the nature of the security interest.[256] In this instance, the Bank filed UCC-1s expressly reflecting its PMSI in Rig 23 with the Illinois and Indiana Secretaries of State on January 8, 2013 and January 9, 2013, respectively.[257] It is relevant to these proceedings that the file number for the Illinois UCC-1 statement is 17906194.[258]

In contrast to a PMSI, a UCC-1 blanket lien gives the creditor a security interest in all of the assets that a borrower has in the event of default, but at a lower priority. As Nave explained,

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vehicle in Indiana, which was the applicable jurisdiction," EC Reply at 21, he has failed to meet his burden of proof on the issue.

[254] Nave Tr. 180:21-22; *see also* Winters Tr. 144:8-22.

[255] Nave Tr. 176:9-11.

[256] *See id.* at 176:16-177:14; *see also* EX 55 (email chain including September 30, 2015 email from S. Collins to C. Zimmerman) (results of UCC-1 searches for the Evergreen Entities in Illinois and Indiana).

[257] *See* EX 8 (Indiana UCC-1 financing statement); EX 10 (Illinois UCC-1 financing statement).

[258] *See* EX 10 (Illinois UCC-1 financing statement).

> It's not uncommon to have blanket liens filed on equipment. And blanket liens act like a net. They try to collect security interest on all equipment that's owned and purchased in the future. With a [PMSI], what you're doing is stating that this loan is for this one specific piece of equipment and it will take a priority over blanket liens as a [PMSI] for that one piece of equipment.[259]

The existence of a blanket lien held by a creditor in a given jurisdiction would also be discoverable in a UCC-1 search.[260] Here, PNB held its own security interest in Rig 23 "through a prior blanket UCC lien securing all of its loans to Evergreen Drilling," but this interest was "subject to the Bank's $490,000 PMSI," which took priority over PNB's lien.[261]

In June 2013, the Bank's then-CEO, James Stroud, prepared an additional $89,000 loan to Evergreen Drilling that was also secured by its PMSI in Rig 23.[262] In May 2014, Respondent directed Nave, as loan officer on the Evergreen Drilling credits, to consolidate the two loans.[263] The Bank's executive loan committee approved this consolidation, which advanced a further $126,000 to Evergreen Drilling

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[259] Nave Tr. 175:20-176:3; *see also* Winters Tr. 144:14-145:4.

[260] *See* Winters Tr. 144:9-13; *see also* EX 55 (email chain including September 30, 2015 email from S. Collins to C. Zimmerman) at 43, 45 (UCC-1 blanket liens held by PNB in Indiana and Illinois on assets of Evergreen Drilling).

[261] Notice ¶ 15; Answer at 6.

[262] *See* EPF ¶¶ 264-266.

[263] *See* EC-OPP-13 (August 29, 2022 Declaration of Donald Nave ("Nave Decl.")) ¶ 7; EPF ¶ 269.

"for expenses" per the terms of the loan request, and the consolidated loan was issued on May 8, 2014.[264] The loan request and promissory note for the new $640,500 loan reflected that it was secured by a "Cabot 900 series self propelled Drilling Rig," specifically identifying the file number of the Bank's Illinois UCC-1 statement for Rig 23.[265] Despite Respondent's contention that the May 2014 consolidation acted to extinguish the Bank's PMSI in Rig 23, then,[266] the undersigned finds that the PMSI was alive and well—and the sole piece of collateral on the Bank's Evergreen Drilling loan—as of the fall of 2015.

PNB Seeks Release of the Bank's Rig 23 Interest

In or around September 2015, PNB loan officer Scott Collins, who worked closely with Respondent at that bank on the Evergreen loan relationship, contacted the Bank to request that it release its security interest in the Rig 23 collateral. According to Mike Williams, then the Bank's Senior Loan Officer,

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[264] EX 15 (May 6, 2014 Commercial Loan Application) at 1; *see* EPF ¶ 268.

[265] *See* EX 15 (May 6, 2014 Commercial Loan Application) at 1 ("Collateral #1: Cabot 900 series self propelled Drilling Rig"); EX 17 (May 8, 2014 Promissory Note) at 3 ("Borrower acknowledges this note is secured by Commercial Security Agreement dated January 9, 2013 and securing UCC file #17906194."); *see also* R-MSD-D (exhibit showing both documents).

[266] *See* R Br. at 52-53; *see also* Part VI(B)(2) *infra* at p. 126 & n. 573; MSD Order at 67-69 (rejecting Respondent's argument that the refinancing of the Bank's Evergreen Drilling loans in May 2014 acted as a novation that terminated its PMSI in Rig 23).

Collins claimed without evidence that "the Bank had a lien on the wrong rig."[267] Williams then referred the matter to Don Nave, as the individual who had "put the loan together [and] perfected the lien,"[268] When Collins spoke with Nave, he "repeated[ly] demand[ed] that [the Bank] release the PMSI in the Cabot 900 without payment," but refused to explain why he believed the Bank's security interest was invalid.[269] On September 1, 2015, Nave provided Collins with evidence of the PMSI by email.[270] Nave then refused to release the Bank's PMSI in Rig 23 unless the Bank "was paid the full amount of its lien pursuant to the UCC-1 on file with the Illinois and Indiana Secretaries of State."[271]

On September 30, 2015, Collins requested and received from PNB personnel the emailed results of UCC-1 searches on the Evergreen Entities in Illinois and Indiana.[272] These UCC-1 results revealed that the Bank had a PMSI in a Cabot 900 series drilling

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[267] Williams Tr. 679:24-25.

[268] *Id.* at 680:25-681:1; *see also* Nave Tr. 188:12-13 ("Scott [Collins] called me and told me that we were not in a first lien position [on Rig 23] and I contended that we were.").

[269] EC-OPP-13 (Nave Decl.) ¶ 16; *see also id.* ¶¶ 10, 15 ("At no time did Collins ever give me an explanation why he thought GRCB's PMSI in Evergreen Drilling's Cabot 900 was invalid."); Nave Tr. 188:15-20 ("I asked for his reasoning and he never gave it to me.").

[270] *See* EPF ¶ 271; EXs 39, 40 (September 1, 2015 emails from D. Nave to S. Collins attaching copies of the relevant promissory notes and commercial security agreement).

[271] EC-OPP-13 (Nave Decl.) ¶ 16.

[272] *See* EX 55 (September 30, 2015 email chain attaching UCC-1 search results).

rig—that is, Rig 23—on file in those states, and prominently featured the file number for the Bank's Illinois UCC-1 filing in the first attachment to the email.[273] The search also showed that "the Bank did not have a blanket UCC relating to the Evergreen Companies in either Illinois or Indiana," nor did it have any kind of security interest in any other Evergreen rig.[274]

On October 1, 2015, Nave was terminated from his position at the Bank.[275] When asked about the circumstances related to his firing, Nave recalled an instance around thirty days earlier, or in early September, in which Respondent called him and angrily "cussed [him] out."[276] Nave suggested in his August 2022 declaration that he "knew [his] employment was at risk" when he refused PNB's request to release the Bank's PMSI in Rig 23,[277] although he does not specifically draw a connection between that refusal and his subsequent termination. Nevertheless, it is true that the timing of Nave's recollection of Respondent's angry and profanity-

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[273] *See id.* at 1 (first email attachment is "UCC Search – Evergreen Drilling IL.pdf"), 3 (Bank's Illinois UCC-1 filing #17906194 for a "Purchase Money Security Interest in a Cabot 900 Series Self Propelled Drilling Rig"), 46 (same for Indiana); *see also* Nave Tr. 192:2-194:21.

[274] EPF ¶ 272; *see* EX 55 (September 30, 2015 email chain attaching UCC-1 search results) at 2, 4, 10, 23, 29, 37, 42 (no other Grand Rivers UCC filings in connection with Evergreen Entities).

[275] *See* EC-OPP-13 (Nave Decl.) ¶ 18.

[276] Nave Tr. 196:15-197:1 (stating that "I did not expect to be talked to like that, did not deserve that").

[277] EC-OPP-13 (Nave Decl.) ¶ 17.

filled phone call does align with the point at which Nave testified that he told Collins that he would not be releasing the Bank's security interest in the rig without adequate compensation. Nave also testified that before leaving the Bank, he "went straight to Grady's office" and "told him, 'Whatever you do, do not release that UCC [for the Bank's PMSI in Rig 23] unless you get a check.'"[278] Nave stated that he told Gaskins this "because he would be the one it would fall on to do that" once Nave was gone.[279]

Evergreen Pledges Rig 23 to PNB "Free and Clear"

There is a curious incident that, although ill-sketched out on the record, nonetheless deserves to be mentioned here. On November 3, 2015, as part of the agreement negotiated for the extended maturity dates of PNB's two Evergreen Drilling loans (*supra* at pp. 23-24), Evergreen promised to pledge to PNB "additional collateral to secure said loans" that would be "free and clear of all liens and encumbrances," as set forth in Exhibit A of that document.[280] It is undisputed that among the collateral listed in Exhibit A to be pledged to PNB was Rig 23, a Cabot 900 series drilling rig.[281] One problem: Evergreen had

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[278] Nave Tr. 197:11-16; *see* EC-OPP-13 (Nave Decl.) ¶ 19.

[279] Nave Tr. 197:21-24; *see id.* at 197:18-20 (stating that he wanted to warn Gaskins about the release of Rig 23 "[b]ecause the Bank would have lost its collateral. It would have had no, nothing to fall back on and probably would have taken a loss.").

[280] EX 198 (Extension Agreement) at 1, 2.

[281] *See id.* (Extension Agreement, Ex. A) at 13 (line item for "Rig 23," a "[r]efurb 2013 Cabot 900"); *see also* JX 1 (Joint Stip.) ¶ 48 ("In return for PNB's extension of the maturity dates on the two Evergreen Drilling loans, . . . Evergreen Drilling

no power to pledge "free and clear" title to Rig 23 to PNB in this manner at that time, because—despite Collins's efforts—the Bank still had a PMSI on Rig 23 that took precedence over any other claims or liens. Respondent's counsel suggests that Rig 23's inclusion on this list was a "mistake," but does not offer any basis for this supposition, and the Parties do not develop the matter further.[282] Lacking a fuller record, the undersigned notes only that if it *was* a mistake, then it was a mistake that operated to advance the interests of Evergreen and PNB at the expense of the Bank—much like Collins's unsupported assertion two months earlier that the Bank's PMSI was defective and should be released, and much like the ostensibly inadvertent release of the Bank's interest in Rig 23 ten days later in connection with Evergreen's sale of Rig 24, to which this order now turns.

The Sale of Rig 24

On September 14, 2015, as part of its plan to liquidate assets and pay down its debt to PNB, Evergreen Drilling entered into a Letter of Intent

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promised to pledge new collateral set out on Exhibit A free and clear of all liens and encumbrances. Rig 23 was one of the pieces of Evergreen Drilling equipment listed and described on Exhibit A.").

[282] *See* Botsch Tr. 311:24-312:10 ("Q: There should have been no reason Rig 23 was mentioned on this agreement? A: No. Because it was not free and clear. . . . Q: Mistakes happen in banking, correct? A: Yes, mistakes happen in everything."). In his testimony, Respondent claimed that Exhibit A was merely a list of Evergreen's assets rather than collateral that it was pledging to PNB as part of the Extension Agreement, *see* Bonan Tr. 892:5-19, but standing alone this claim is contradicted both by the document's plain text and by Respondent's own counsel.

with U.S. Energy Exploration Corporation ("U.S. Energy") for the sale of its Service King 775 series drilling rig known as Rig 24.[283] The next day, Abbey Evans emailed Respondent and others at PNB with the signed Letter of Intent, noting that a nonrefundable deposit for 10 percent of the purchase price—approximately $156,000—had been wired into the Evergreen Drilling account that morning.[284]

On October 9, 2015, U.S. Energy sent Evergreen Drilling a signed Sale and Purchase Agreement ("Rig Purchase Agreement") to purchase Rig 24 for $1,559,000.[285] As part of the transaction, Evergreen Drilling represented to U.S. Energy that it owned "good and marketable title to [Rig 24], free and clear of all Encumbrances," other than "such liens or encumbrances which can and shall be removed by application of all or a portion of the purchase price at closing by escrow agent."[286] Evergreen Drilling then warranted that it would provide U.S. Energy "with proof of satisfaction of the indebtedness and/or release of security interest" for those existing liens and encumbrances prior to closing, and stated that the escrow agent holding the balance of the purchase price "shall retain the purchase price funds until such proof is provided."[287]

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[283] *See* JX 1 (Joint Stip.) ¶ 35.

[284] *See* EX 45 (September 15, 2015 email from A. Evans to F. Bonan II, S. Collins, and K. Botsch).

[285] *See* EX 122 (October 9, 2015 email chain including email from D. Boyer to G. Evans).

[286] RX 40 (signed copy of Rig Purchase Agreement) § 3.1(c).

[287] *Id.*; *see also id.* § 2.4 (providing that "Escrow Agent shall hold all funds received from Buyer on account of this Agreement

A complete copy of the Rig Purchase Agreement includes two attachments, Appendix A and Exhibit C, that are central to the events at issue here.[288] Appendix A identifies the drilling rig being sold as a "2010 Service King – SK 775 Series," which is the model number for Rig 24.[289] Nowhere else in the document is Rig 24 described or identified.[290] Exhibit C, by contrast, purported to be the list of all existing liens and encumbrances on Rig 24 that needed to be released before closing so that "good and marketable title" to the rig could be conveyed.[291]

The Bank did not have, and at no prior point had ever had, any kind of security interest in Rig 24, whether as a PMSI or as part of a blanket lien on Evergreen Drilling assets—the only loan that Evergreen Drilling had with the Bank at this time was the consolidated loan issued in May 2014 and secured only by Rig 23.[292] Moreover, anyone

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until such time as Company [has] fully satisfied its obligations herein including, but not limited to, Company's obligation set forth in paragraph 3.1(c) below to provide Buyer with satisfactory proof of the satisfaction or release of all liens and encumbrances covering the Assets").

[288] *See id.* at 18-19 (Appendix A), 23 (Exhibit C).

[289] *See id.* at 18.

[290] *See id.* at 5 (providing that "the Company shall sell, assign, transfer and deliver to Buyer, and Buyer shall purchase and acquire from the Company the drilling rig, together with all the drilling machinery and equipment listed on Appendix A, hereto (the 'Rig').").

[291] *See id.* §§ 2.4, 3.1(c) (identifying Exhibit C as setting forth liens and encumbrances to be released); *see also id.* at 23 (Exhibit C).

[292] *See* EX 88 (October 7, 2015 email chain between G. Gaskins and K. Winters) (Gaskins: "Can you check to see if we

performing a UCC-1 search in Illinois and Indiana on liens held related to Evergreen assets, as Collins had done for PNB at the end of September 2015,[293] would have known that the Bank did not have any blanket liens on Evergreen Drilling (or any Evergreen Entities) or any liens on Rig 24 specifically.

Despite these facts, Exhibit C to the Rig Purchase Agreement listed one security interest held by PNB and one security interest held by Grand Rivers that needed to be satisfied before free and clear title on Rig 24 could be conveyed and the escrow agent could release the remainder of the purchase price. The interest held by PNB was recorded as having been "filed with the Indiana Secretary of State at Filing No. 2011000556370";[294] this is duly reflected in the UCC-1 search performed by PNB on September 30, 2015.[295] The Rig 24 interest putatively held by Grand Rivers, by contrast, is listed as "filed with the Illinois Secretary of State at File No. 017906194"[296]—and this, of course, is the Bank's Illinois PMSI in Rig 23.

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have Rig 24 as current collateral?" Winters: "This doesn't list a rig number it says Cabot 900 series self-propelled drilling rig . . . . They only have the one loan with us and it has a balance of 557,024.05").

[293] Gaskins testified that Scott Collins handled the Rig 24 transaction on behalf of PNB. *See* Gaskins Tr. 87:16-18.

[294] RX 40 (signed copy of Rig Purchase Agreement) at 23 (Exhibit C).

[295] *See* EX 55 (September 30, 2015 email chain attaching results of UCC-1 search) at 45; *see also* EPF ¶ 286 (noting that this entry on Exhibit C "described PNB's blanket UCC-1 securing all of Evergreen Drilling's equipment").

[296] RX 40 (signed copy of Rig Purchase Agreement) at 23 (Exhibit C).

The Banks Take Steps to Identify and Release Their Collateral

The record does not explain why the Bank's Rig 23 security interest would be identified as a lien and encumbrance in documents pertaining to Rig 24. Nor was testimony elicited that shed any light on who drafted Exhibit C and included this erroneous information—although presumably it must have been someone at PNB or Evergreen, as the two entities involved in this transaction that were best in position to compile a list of Rig 24's liens and encumbrances. To the extent that the explanation is simple error, perhaps the most likely culprit is someone working from a UCC-1 search (whether the one performed by PNB or otherwise) who saw that Grand Rivers had a PMSI in an Evergreen drilling rig but neglected to double-check which one.[297] We will never know.

In any event, the confusion was compounded from the first: immediately following the transmission of the signed Sale and Purchase Agreement on October 9, 2015, Abbey Evans emailed Respondent, asking, "We are needing a UCC-1 release from Grand Rivers and Peoples on Rig 24 to attach to the purchase agreement as Exhibit C. If at all possible, can we please get this done today?"[298] Respondent then

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[297] *Compare* EX 55 (September 30, 2015 email chain attaching UCC-1 search results) at 3, 41 (reflecting that Grand Rivers holds a "Purchase Money Security Interest in a Cabot 900 Series Self Propelled Drilling Rig") *with* RX 40 (signed copy of Rig Purchase Agreement) at 18 (stating that drilling rig being sold is a "2010 Service King – SK 775 Series").

[298] EX 122 (October 9, 2015 email chain including email from A. Evans to F. Bonan II).

forwarded Evans's email to Gaskins and Collins and instructed them to "[g]et these releases to Gary."[299] But while the copy of the Rig Purchase Agreement provided to PNB and Grand Rivers on that date included Exhibit C, it did not likewise include Appendix A—in other words, someone reading that copy who was unfamiliar with the transaction would see the file numbers of the UCC-1s that supposedly needed to be released by each bank, but not the model or rig number of the rig being sold.[300]

The resulting potential for crossed wires is evident from Gaskins's response to Respondent at 5:16 that evening, fifteen minutes after Bonan had directed him to release the security interest reflected in Exhibit C. Gaskins told Respondent, pertinently, that "[o]ur UCC-1 is not a blanket it is just on this specific rig," stating that he could prepare the termination but that he first "need[ed] the attachments to confirm its same equipment and same wording in ucc and purchase agreement. I can take care of it right now."[301] Respondent then replied, "[s]he said she just

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[299] *Id.* (October 9, 2015 email chain including email from F. Bonan II to G. Gaskins and S. Collins).

[300] *See* Winters Tr. 159:5-8 ("I wasn't sure what Rig 24 was at any point. I just knew what the UCC number that they had listed in the purchase agreement, was the UCC I had in file."); *see also* EPF ¶¶ 283-284; EX 129 (email chain including October 10, 2015 email from C. Zimmerman to F. Bonan II) ("I will need to get a specific list with the appendix A and release the specific collateral associated with the rig since we don't want to release the blanket we don't have the Appendix [and] once we get it we can get the release together").

[301] EX 124 (October 9, 2015 email chain including email from G. Gaskins to F. Bonan II).

emailed you."[302] Gaskins testified that he never followed up and confirmed this information.[303]

Instead, Gaskins reached out to Winters within the hour, forwarding Exhibit C and stating that he needed "this security interest released/terminated."[304] He then added later that evening, "***Not sure we had this as collateral but he wants it released if we do.*** They are selling it. I'll find out more do we just file a ucc release?"[305] As shall be seen from the record evidence, it is clear that Winters and Gaskins were acting under Respondent's supervision and direction at every step, as they sought to secure the release of collateral that the Bank did not, in fact, possess.

Meanwhile, PNB was making its own preparations. On October 14, 2015, PNB officer Clytie Zimmerman emailed Scott Collins and Respondent at his PNB email address, attaching an unrecorded UCC Financing Statement Amendment for Indiana that would, when filed, remove Rig 24 from the scope of PNB's blanket lien on Evergreen Drilling assets.[306] By this point, PNB had received Appendix A from Evergreen, which would be filed with this

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[302] *Id.* It is a reasonable assumption that the "she" in question is Abbey Evans, although no testimony was elicited on this score.

[303] *See* Gaskins Tr. 116:17-22.

[304] EX 126 (email chain including October 9, 2015 email from G. Gaskins to K. Winters).

[305] EX 128 (email chain including October 9, 2015 email from G. Gaskins to K. Winters) (emphasis added).

[306] *See* EX 134 (October 14, 2015 email from C. Zimmerman to S. Collins and F. Bonan II attaching UCC Financing Statement Amendment and Appendix A); *see also* EPF ¶¶ 298-299.

amendment as a way to specify that the collateral being released was a Service King 775 drilling rig.[307] Zimmerman stated that once the balance of the Rig 24 purchase price was released from escrow and applied to Evergreen Drilling's loan at PNB, the bank could file this release.[308]

On the morning of October 16, 2015, Respondent emailed Gaskins, directing him to "[g]ive me a call" and indicating that it "has to do with abbeys release."[309] Less than an hour later, Winters sent two emails attaching unfiled UCC-3 termination statements for the Bank's interest in Rig 23. One email, to Respondent, Abbey Evans, and April Reicken of Evergreen Drilling, attached a statement which, when filed, would terminate the Bank's Illinois PMSI (file number 17906194) that was listed in Exhibit C.[310] The other, sent only to Respondent at his PNB email address, contained an unfiled termination statement for the Rig 23 PMSI held by

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[307] *See* JX 1 (Joint Stip.) ¶ 39; EPF ¶ 295; *see also* EX 134 (October 14, 2015 email from C. Zimmerman to S. Collins and F. Bonan II) at 2 (referencing "Attached Appendix A" as the collateral to be deleted), 4 (Appendix A).

[308] *See* EX 134 (October 14, 2015 email from C. Zimmerman to S. Collins and F. Bonan II) at 1.

[309] EX 141 (October 16, 2015 email from F. Bonan II to G. Gaskins); *see* Gaskins Tr. 94:17-18 (stating that Respondent "is referring to the release of collateral from Grand Rivers Community Bank").

[310] *See* EX 143 (October 16, 2015 email from K. Winters to F. Bonan II, A. Evans, and A. Riecken attaching unrecorded Illinois UCC-3 termination statement).

the Bank in Indiana.[311] When asked why she sent a termination statement for Indiana when only Illinois was required under the terms of the Rig Purchase Agreement, Winters explained:

> Based on the previous email that Grady had sent me on the 9th, when I pulled the file, there were two UCCs filed referencing the collateral for Evergreen Drilling's loan. One was filed in the State of Illinois, one was filed in the State of Indiana. . . . [Respondent] wanted the security interest released and terminated. If I didn't terminate the one in Indiana as well as the one they requested in Illinois, they would not have that piece of equipment free and clear.[312]

Notably, Respondent did not question why Winters was providing termination statements for Illinois and Indiana when the Rig Purchase Agreement required only the Bank's release of a security interest in Illinois. This testimony also evinces a consistent belief by Winters, who lacked contrary information and has stated that she was not familiar with the rig number nomenclature used by Evergreen, that the UCC-1 filing listed in Exhibit C that she was being asked to release was associated with Rig 24.

Just after noon on that same day, Abbey Evans emailed Denny Boyer of U.S. Energy, attaching the unrecorded Indiana UCC Financing Statement

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[311] *See* EX 142 (October 16, 2015 email from K. Winters to F. Bonan II attaching unrecorded Indiana UCC-3 termination statement).

[312] Winters Tr. 118:18-119:6.

Amendment from PNB and both of the unrecorded Illinois and Indiana UCC-3 termination statements that Winters had earlier provided.[313] Evans told Boyer that "all the required documents per the escrow and purchase agreement" were attached and stated that "[t]he only thing holding us up is a one line email stating your approval of releasing the funds from escrow."[314]

It is worth noting here that although Section 3.1(c) of the Rig Purchase Agreement contemplated that any liens and encumbrances on Rig 24 would "be removed by application of all or a portion of the purchase price at closing,"[315] in fact the Bank was not receiving any compensation for the putative release of its Rig 24 security interest. Instead, the amount being held in escrow as proceeds of the Rig 24 sale, approximately $1.4 million, would be going in full to PNB to be applied to Evergreen debt at that bank, with the exception of $160,000 of the proceeds that would be received by Evergreen Drilling.[316] Referring to his statement to Respondent on October 9, 2015 that he would wait to file the Bank's UCC-3 termination statement "until payment is received,"

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[313] *See* EX 140 (email chain including October 16, 2015 email from A. Evans to D. Boyer, F. Bonan II, S. Collins, et al.). Winters testified that the Bank's Indiana termination statement had only been sent to Respondent and that she did not know how Abbey Evans received it. *See* Winters Tr. 122:17-123:5.

[314] EX 140 (email chain including October 16, 2015 email from A. Evans to D. Boyer, F. Bonan II, S. Collins, et al.).

[315] RX 40 (Rig Purchase Agreement) § 3.1(c).

[316] *See* JX 1 (Joint Stip.) ¶ 46 (noting that the $160,000 to Evergreen Drilling would "cover the costs of moving Rig 23 from Texas to the Carmi Warehouse and preparing it for sale").

Grady Gaskins testified that it was initially his understanding that Grand Rivers would receive some money in connection with the Rig 24 transaction, but that this understanding changed when he spoke to Scott Collins and learned "that Peoples National Bank would receive the funds from the sale."[317] Even if the Bank did have a security interest in Rig 24 that needed to be released before the rig could be freely conveyed to U.S. Energy, then, there was seemingly no incentive for the Bank to release that interest if it was not receiving anything in return.

When asked about this at hearing, Respondent remarkably claimed that Grand Rivers was not being compensated for the security interest it was being directed to release in connection with the Rig 24 transaction because it had no security interest to release:

> Q: And you were more concerned about Peoples getting the 1.262 million dollars—
>
> A: Because I knew Grand Rivers Bank had no interest in Rig 24. Q: Grand Rivers weren't getting anything? A: That's right.
>
> Q: It was all Peoples?
>
> A: They had no interest in Rig 24.[318]

The logical lacunae between this statement and Respondent's repeated demands and pressure exerted on Gaskins and Winters "for Rig 24 to be released," as

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[317] Gaskins Tr. 90:2-14; *see* EX 124 (October 9, 2015 email chain including email from G. Gaskins to F. Bonan II).

[318] Bonan Tr. 908:8-14.

he acknowledged that he had done in testimony just moments before, are explored further *infra*.[319]

The Rig 24 Transaction is (Mostly) Consummated

Having received unrecorded terminations of what purported to be Rig 24 security interests from PNB and Grand Rivers, Denny Boyer authorized the wire transfer of $1,262,790—all but $140,000 of the escrowed amount—to PNB on October 16, 2016.[320] In exchange, U.S. Energy transport trucks picked up Rig 24 and its drilling machinery and equipment from the Carmi Warehouse.[321] However, despite Respondent's assurances to Boyer that the UCC termination statements would be recorded when U.S. Energy's wire transfer was received by PNB, neither the Bank nor PNB took further steps to record those terminations at that time.[322]

On November 11, 2015, April Riecken of Evergreen Drilling emailed Boyer, copying Respondent and others, to inform him that all components of Rig 24 had left the Carmi Warehouse and to request that the remaining $140,000 be released from escrow as a

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[319] *Id.* at 906:15.

[320] *See* EPF ¶¶ 309-310.

[321] *See id.* ¶¶ 306-307.

[322] *See* EX 239 (email chain including November 16, 2015 email from D. Boyer to A. Riecken, F. Bonan II, et al.) ("It appears the original UCC filing statements that were sent to escrow were never acted upon. . . . They were supposed to file when the initial money was released nearly a month ago. Bill Bonan assured me he would file this when the initial money was received."); EPF ¶ 308.

result.[323] Boyer replied that "Peoples Bank needs to follow through with the paper work they promised in order for any money to be released," noting that he had called Respondent multiple times "and left messages but he has never returned any of my calls."[324] In response, Riecken stated that she would contact PNB and have them "expedite your [UCC]-1 release and get that to you as soon as possible."[325] On November 12, 2015, PNB filed its UCC Financing Statement Amendment with the State of Indiana, terminating its interest in Rig 24.[326] Upon receiving proof of this, Boyer thanked Riecken and stated, "If we can get Grand Rivers Bank UCC Release we should be finished."[327]

The Rig 23 Collateral is Released

The same day that PNB finally released its Rig 24 interest, Respondent emailed Winters inquiring about "the loans and balances associated with Gary evans and evergreen drilling [sic]" that were being held by the Bank.[328] Winters responded twenty-nine

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[323] *See* EX 216 (November 11, 2015 email chain including 2:35 pm email from A. Riecken to D. Boyer, F. Bonan II, et al.).

[324] *Id.* (November 11, 2015 email chain including 3:08 pm email from D. Boyer to A. Riecken, F. Bonan II, et al.).

[325] *Id.* (November 11, 2015 email chain including 3:15 pm email from A. Riecken to D. Boyer, F. Bonan II, et al.).

[326] *See* JX 1 (Joint Stip.) ¶ 51; EX 223 (email chain including November 12, 2015 email from A. Riecken to D. Boyer, F. Bonan II, et al.).

[327] EX 223 (email chain including November 13, 2015 email from D. Boyer to A. Riecken, F. Bonan II, et al.).

[328] EX 226 (November 12, 2015 email chain including 11:23 am email from F. Bonan II to K. Winters).

minutes later—apologizing for the delay—to report that the Evergreen Entities had two loans with Grand Rivers, one to Evergreen Properties that was secured by the Carmi Warehouse (discussed in detail *supra*) and one to Evergreen Drilling that was "secured by a UCC on a drilling rig and equipment."[329] When Respondent inquired further about other collateral, Winters stated that "[u]nfortunately" this was all the Evergreen collateral that the Bank held.[330] Respondent then stated, "[w]e have a pmsi on one rig," which Winters promptly confirmed: "***Yes a Cabot 900 series drilling rig.***"[331]

Respondent was thus informed on November 12, 2015, in no uncertain terms, that the Bank did not hold any blanket lien on Evergreen assets and that the only Evergreen drilling rig that was secured as collateral with a PMSI was a Cabot 900 series, not a Service King 775. As noted previously, the record reflects that (contrary to his hearing testimony) Respondent was very familiar at this time with which Evergreen rig numbers were associated with which models—evidenced, among other things, by an October 27, 2015 email in which Respondent refers

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[329] *Id.* (November 12, 2015 email chain including 11:52 am email from K. Winters to F. Bonan II).

[330] *See id.* (November 12, 2015 email chain including 12:35 pm email from F. Bonan II to K. Winters and 1:09 pm email from K. Winters to F. Bonan II).

[331] *Id.* (November 12, 2015 email chain including 1:10 pm email from F. Bonan II to K. Winters and 1:11 pm email from K. Winters to F. Bonan II) (emphasis added); *see also id.* (7:55 pm email from F. Bonan II to K. Winters) (replying, "OK. That is what we have a PMS on.").

repeatedly to Rig 23 as being "the Kabat [sic] 900."[332] Therefore, if Respondent was not already aware that the Bank had no security interest in Rig 24—blanket or otherwise—that would need to be released for U.S. Energy to have free and clear title to that rig, there can be no doubt that he was so informed following his correspondence with Winters that day.[333]

If this were not enough, April Riecken's email to Respondent and Collins on the morning of November 13, 2015 should dispel with the notion that Respondent could reasonably have believed there was anything for the Bank to release in connection with this transaction. Forwarding Boyer's email seeking the "Grand Rivers Bank UCC Release," Riecken solicited Respondent's input as to how to complete the impossible task that Boyer had requested:

> Bill –
>
> Gary wants to know how we handle the UCC-1 from Grand Rivers. ***Even though there is no collateral for rig 24 at Grand Rivers*** Denny still wants a recorded UCC-1,

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[332] EX 180 (October 27, 2015 email from F. Bonan II to C. Zimmerman, S. Collins, F. Bonan Sr., and H. Bonan); *see also supra* at n. 31 (providing additional examples of Respondent using rig numbers, including referring to Rig 23 as a "Kabat 900" in the handwritten Plan for Evergreen and distinguishing between Rig 23 and Rig 24 on multiple occasions).

[333] *See* Bonan Tr. 896:12-16 ("Q: So Ms. Winters told you on the 12th of November that the only collateral, the only UCC the Bank had was on a Cabot 900 with a Purchase Money Security Interest. A: Yeah, I took that to mean that we did not have Rig 24 as collateral."), 906:3-5 ("I knew that Grand Rivers Bank did not have Rig 24 as collateral. I verified that with Kassie saying that the only one we had a PMSI on was Rig 23.").

> does someone at Grand Rivers have this to send to me? I don't have anyone's information there to contact regarding this.[334]

Respondent had therefore been told again, and unambiguously, that the Bank did not hold any security interest in Rig 24. He also knew, based on his colloquy with Winters the previous day, that the only Evergreen UCC-1 release that the Bank could conceivably provide to anyone was that of a "Cabot 900 series drilling rig," which he knew that Rig 24 was not. And he understood that the Bank's PMSI on the Cabot 900—Rig 23—was the only collateral the Bank held on its Evergreen Drilling loan, the $550,000 balance of which would be left unsecured should that collateral somehow be released.[335]

Nonetheless, when Respondent received Boyer's email stating that a UCC release from Grand Rivers was necessary to complete the Rig 24 transaction, he did not correct Boyer—telling him, for example, "actually, our interest is in a different rig, so Rig 24 is already all yours!"—or seek clarification from any of the parties involved. Nor did he express any curiosity as to how the Bank could file termination papers to release a security interest that he knew did not exist, or pause to consider what the possible risk of consequences might be to the Bank's genuine PMSI if

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[334] EX 233 (email chain including November 13, 2015 email from A. Riecken to F. Bonan II and S. Collins) (emphasis added).

[335] *See* EX 226 (November 12, 2015 email chain between F. Bonan II and K. Winters) (Winters telling Bonan that the current balance of the Evergreen Drilling loan was "secured by a UCC on a drilling rig and equipment," that the loan was not cross-collateralized, and that "[u]nfortunately that is all we have").

he acceded to Riecken's request to send "a recorded UCC-1."

Instead, Respondent forwarded Boyer's email to Gaskins and Winters without comment, an action that Winters—reasonably, in this Tribunal's view—understood to mean "that he wanted me to record, as quickly as possible, the Indiana and Illinois Form UCC-3 terminations that I forwarded to him in October."[336] Then, when Riecken emailed at 11:00 that morning noting that "there is no collateral for rig 24 at Grand Rivers" and asking for guidance, Respondent did not reply; rather, he forwarded that message to Gaskins and Winters less than two minutes later, commanding them to "[g]et this bulkshit [sic] done this morning. Do you understand me."[337]

Through that email, as Respondent himself has testified, he "directed for Rig 24 to be released."[338] Which raises the natural question: if Respondent knew, as he did, that the Bank had no security interest in Rig 24 that could conceivably be released, then what did he believe that he was asking Gaskins and Winters to do? Whatever it was, it is clear that Respondent wanted it done quickly—according to Gaskins, "that morning [Respondent] sent the emails he was also sending text messages and calling the

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[336] EC-OPP-14 (August 30, 2022 Declaration of Kassie Ledbetter Winters ("Winters Decl.")) ¶ 9; *see also* Winters Tr. 127:5-24; EX 231 (email chain including November 13, 2015 email from F. Bonan II to G. Gaskins and K. Winters).

[337] EX 233 (email chain including November 13, 2015 emails from A. Riecken to F. Bonan II et al. at 11:00:54 am and from F. Bonan II to G. Gaskins and K. Winters at 11:02 am).

[338] Bonan Tr. 906:15.

bank very adamant to get it done right away."[339] Winters also interpreted the communications from Respondent as an "adamant request for us to get it done immediately."[340] And Winters recalled that Respondent "was very aggressive and intimidating," stating that she was concerned—again, reasonably so, based on record evidence—that he "would become angry with me" if she did not process the termination statements.[341] Moreover, because Winters was not familiar with the rig numbers and had not, as far as the record reflects, seen Appendix A, she had no reason—unlike Respondent—to believe that the UCC-3 termination statements for a Cabot 900 series drilling rig did not relate to Rig 24.[342]

Fifteen minutes after receiving Respondent's email, Winters emailed Riecken and Boyer, attaching what she identified as "the recorded copy of the UCC termination in Indiana" and "the working copy" of "the UCC termination for IL."[343] She further stated

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[339] Gaskins Tr. 96:9-13.

[340] Winters Tr. 129:24-130:1.

[341] EC-OPP-14 (Winters Decl.) ¶ 9; *see also* Winters Tr. 22:6-8 ("When he wanted something, he wanted it right then and he wanted it without question."); Hunn Tr. 345:12 ("Everything with Mr. Bonan was an emergency."); Nave Tr. 196:8-10 ("Q: Did you feel comfortable asking questions of him if you didn't understand a request he had made? A: No.").

[342] This is particularly true because, as Winters has averred, Respondent never indicated to her that the UCC-3 termination statements that she had provided him in October 2015 were inapplicable to Boyer's request or should otherwise be corrected or changed. *See* EC-OPP-14 (Winters Decl.) ¶¶ 6, 10.

[343] RX 46 (November 13, 2015 email chain including 11:18 am email from K. Winters to A. Riecken, D. Boyer, F. Bonan II, and G. Gaskins).

that "as soon as it is received I will forward the [recorded UCC-3 Illinois termination] to you."[344] Attached to Winters' email were UCC forms terminating the Bank's Indiana and Illinois interests in Rig 23.[345]

Respondent, who was copied on Winters' email, sent a reply shortly thereafter that was directed at Riecken: "April. ***This is what you need.*** Let me know if you need anything else from me."[346] When Riecken thanked Respondent for "working so fast to get this to us," Respondent replied, "No problem. Just so you know these docs are bullshit."[347] Respondent's hearing testimony regarding this statement is worth relating in full, bearing as it does on the inherent contradiction in Respondent's stated position here:

> Q: What did you mean by that, Mr. Bonan?
>
> A: ***That Grand Rivers Bank did not have a lien on Rig 24*** and that Evergreen was selling Rig 24 so that Grand Rivers shouldn't even have been in that transaction.
>
> Q: Did you ever tell Mr. Boyer that? You were the one talking to him from Grand Rivers and Peoples?

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[344] *Id.*

[345] *See id.* at 3 (Indiana termination), 4 (working copy of Illinois termination).

[346] EX 232 (November 13, 2015 email chain including 11:20 am email from Respondent to A. Riecken et al.) (emphasis added).

[347] *Id.* (November 13, 2015 email chain including 11:27 am email from Respondent to A. Riecken et al.).

A: He was not a customer of mine. I did not know him. April was a customer, April worked for Evergreen who was a customer of mine who I was familiar with. I spoke with Denny Boyer maybe twice in my life.

Q: ***But you knew early on that Rig 24 was not collateral over at Grand Rivers.***

A: ***That's right.***

Q: Why didn't you tell Mr. Boyer that? You say hey pal—

A: ***Well, I told him that I was getting the UCC released that he requested.*** That's what I kept telling him.

Q: But there weren't any UCCs to be had at Grand Rivers. They didn't have Rig—

A: ***That's what he was telling me, that in order for the sale to be done that they had to have a release from Grand Rivers Bank on Rig 24.***

Q: And you were Chairman of the Board at Grand Rivers. A: Yes.

Q: Didn't you want to inquire and find out, get to the bottom of it was—

A: ***I knew that Grand Rivers did not have Rig 24 as collateral. I verified that with Kassie saying that the only one we had a PMSI on was Rig 23.*** Rig 23 was not being sold. I did not think this had anything to do to pertain to Grand Rivers Bank; I thought it only had pertained to PNB.

> Q: But if Grand Rivers only had a UCC on Rig 23, the Cabot 900, and Kassie records terminations—
>
> A: I'm being told by—
>
> Q: —she, she's just released the Bank's collateral. You knew that at the time.
>
> A: That's not what I knew. That's not what I understood. That's not what I directed. ***I directed for Rig 24 to be released.***[348]

At the time that Respondent was informing April that "these docs are bullshit" because the Bank never had an interest in Rig 24, he was aware that Winters had recorded a UCC-3 termination in Indiana but had as yet provided only a "working copy" of the termination statement for Illinois. In other words, Winters had provided Respondent, once more, with UCC terminations that he has testified that he knew did not relate to Rig 24, and that he had reason to know, and should have known, related to Rig 23. Someone with Respondent's knowledge and in Respondent's position exercising a modicum of care could have interceded at that point before the Illinois termination was recorded, thus possibly salvaging the situation to at least some degree. But despite recognizing that Winters was somehow filing genuine UCC-3 termination statements in connection with a fictitious Rig 24 security interest for which there should have been no genuine UCC-3 termination statements to file, Respondent again did nothing, and the forms terminating the Bank's Illinois and Indiana

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[348] Bonan Tr. 905:3-906:15 (emphases added).

interest in Rig 23 were filed and recorded on November 13, 2015.[349]

Respondent's Conflicting Positions

As the exchange quoted above demonstrates, Respondent's testimony regarding what he knew and believed over the course of the Rig 24 transaction is variable and not always internally consistent. For much of his testimony, Respondent maintained that he was aware that there was no interest in Rig 24 that could be released by the Bank but still ordered his Bank subordinates to release Rig 24, a stance that is less than coherent on its own terms. Largely on redirect examination from his counsel, Respondent then changed his story, claiming that he had believed that the Bank had a blanket lien on Evergreen Drilling that was in junior position to PNB and "that should have never been filed"—which not only does not comport with his earlier testimony but is also contradicted by what Respondent was told repeatedly at the time.[350]

A few examples of the shifting sands of Respondent's story should suffice. To begin with, Respondent emphasized at multiple points of the hearing that he knew that the Bank did not have any

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[349] *See* EX 234 (November 13, 2015 email to K. Winters attaching acknowledgment of terminations).

[350] Bonan Tr. 944:8-9; *see* EPF ¶ 334 ("Bonan II claims he believed the Bank had a blanket lien on Rig 24 based on conversations with US Energy. . . . However, Bonan II was told by both Gaskins on October 9, 2015 and by Winters on November 12, 2015 that the Bank only had a PMSI on the Cabot 900.").

lien on Rig 24 that was capable of being released.[351] At the same time, Respondent directed Gaskins from the beginning of the transaction to "get these releases to Gary,"[352] and he testified that when Winters sent him, on October 16, 2015, what she represented to be "a copy of the original UCC-3 that will be filed online to terminate our UCC with Evergreen Drilling,"[353] that Winters had attached "a release on Rig 24."[354]

> Q: So although you don't know what's being terminated, you know Ms. Winters has just sent you an unrecorded termination of a Financing Statement of collateral of Grand Rivers Community Bank pertaining to Evergreen Drilling. Is that correct?
>
> A: Yeah, I assumed it was a release on Rig 24. Q: You assumed it was a release on Rig 24?
>
> A: I never looked at this attachment until I just looked at it in front of you.[355]

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[351] *See*, *e.g.*, Bonan Tr. 849:18-19 ("Q: What did you believe Grand Rivers had on Rig 24 at the time? A: Nothing. I didn't believe they had anything."), 855:4-8 ("Q: And what did you take it to mean when [Riecken] says even though there is no collateral for Rig 24, he still wants a recorded UCC-1? What is she talking about? A: That Grand Rivers Bank did not have Rig 24 as collateral for any loan.").

[352] EX 124 (October 9, 2015 email chain including email from F. Bonan II to G. Gaskins).

[353] EX 142 (October 16, 2015 email from K. Winters to F. Bonan II entitled "Evergreen UCC Termination").

[354] Bonan Tr. 880:20-21.

[355] *Id.* at 880:12-25.

Likewise, Respondent stated that when he commanded Gaskins and Winters to "[g]et this bulkshit done" on the morning of November 13, 2015, he was telling them "to release Rig 24."[356] These two positions—that Respondent knew the Bank did not have any kind of interest in Rig 24 yet still believed that the Bank could file something releasing Rig 24—are fundamentally incompatible.

Perhaps recognizing this, Respondent also testified, primarily but not exclusively on redirect, that it was his contemporaneous understanding that the Bank had a junior blanket lien on Evergreen Drilling assets that, for whatever reason, it should not have had—and this was what was being released. Respondent explained it as follows:

> So we were being told – or I was being told that Grand Rivers Bank had a second UCC by the buyer. And so . . . I understood at the time that we had, that there was a junior or there was a second position on a UCC that Grand Rivers Bank had but that should have never been filed. And . . . there was never any, Rig 24 was never supposed to be collateral for any loan or debt at Grand Rivers Community Bank.[357]

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[356] *Id.* at 855:18-19; *see* EX 233 (email chain including November 13, 2015 email from F. Bonan II to G. Gaskins and K. Winters).

[357] Bonan Tr. 944:4-11; *see id.* at 944:18-20 ("I believed what was being released then was a general subordinated UCC – or subordinate, not subordinated – subordinate UCC that had no value.").

Thus, when Denny Boyer emailed on November 13, 2015 that the transaction would be finished "[i]f we can get Grand Rivers Bank's UCC released,"[358] it is Respondent's contention that he believed the UCC release that Boyer referred to was "[t]he junior one on Rig 24."[359]

There are several holes in this logic, and the undersigned does not find Respondent's testimony credible. For one, Respondent has acknowledged that he was told by both Gaskins and Winters before any release was filed that the Bank did not possess any kind of blanket lien related to Evergreen.[360] In addition, if there *had* been a blanket lien, then Respondent should have understood that the right approach to releasing the Bank's interest in Rig 24 would not have been a UCC-3 termination statement of the kind that Winters provided, but a UCC-1 financing statement amendment removing the rig from the collateral covered under the blanket lien, exactly as PNB was doing at the time.[361] Finally, if

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[358] EX 233 (email chain including November 13, 2015 email from D. Boyer to A. Riecken, F. Bonan II, et al.).

[359] Bonan Tr. 854:9-11.

[360] *See id.* at 872:23-873:1 (agreeing that Gaskins told him on October 9, 2015 "that the Bank, Grand Rivers, did not have a blanket lien on any rig"), 896:12-16 (agreeing that Winters told him on November 12, 2015 "that the only [Evergreen Drilling] collateral, the only UCC the Bank had was on a Cabot 900 with a Purchase Money Security Interest").

[361] *See* EX 129 (email chain including October 10, 2015 email from C. Zimmerman to F. Bonan II) ("I will need to get a specific list with the appendix A and release the specific collateral associated with the rig since we don't want to release the blanket"); EX 134 (October 14, 2015 email from C. Zimmerman

Boyer was telling Respondent that a subordinate lien existed that Respondent knew "was never approved in any of the write-ups,"[362] it is implausible that Respondent would have simply taken Boyer's word for it rather than pursuing the matter or, at the very least, opening an email attachment from Winters to examine the UCC termination statement that she was proposing to file—particularly when Respondent knew that the Bank *did* have a PMSI on a different rig that was the sole collateral for its Evergreen Drilling loan.

In their post-hearing briefing, Respondent's counsel persistently characterizes the release of the Rig 23 collateral as "a comedy of errors" or "[a] series of mistakes" by individuals other than Respondent, stemming primarily from the erroneous inclusion of the Bank's Rig 23 security interest in Exhibit C of the sale agreement for Rig 24.[363] They assert without evidence that the "opaque" reference to Rig 23 in

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to S. Collins and F. Bonan II attaching UCC Financing Statement Amendment and Appendix A).

[362] *See* Bonan Tr. 850:3-8 ("Q: You shouldn't have had, even had a backup second lien in place on Rig 24? A: That's right. Q: Why not? A: Because that was never approved in any of the write-ups. We had just simply that PMSI as our collateral which was Rig 23.").

[363] *See* R Br. at 1 ("a comedy of errors that started with the erroneous reference in the Rig 24 purchase agreement to Grand Rivers' UCC filing for Rig 23 and ended with Winters and Gaskins assuming that the UCC termination statements they prepared and filed pertained to Rig 24"); 8 ("[a] series of mistakes"), 11 (inclusion of Rig 23 filing number "was clearly a mistake by whoever prepared Exhibit C to the Agreement"); R Reply at 1 ("the comedy of errors that caused Rig 23's release"), 24 ("a one-time mistake").

Exhibit C was "[u]nbeknownst to anyone at the time," as if the filing number was a series of random digits that appeared from nowhere and just happened to correspond with the Bank's recorded PMSI.[364] And they state that "[t]he release of Grand Rivers' security interest in Rig 23 was not part of a secret plan by [Respondent], nor would any such plan make sense given that [Respondent] was a shareholder of Grand Rivers and would have had no reason to cause a Grand Rivers loan to become unsecured."[365]

Whether or not Rig 23 was referenced in Exhibit C out of error, however, and regardless of the responsibility borne by Gaskins and Winters when acting as they did with the information they had, two things are clear: First, it cannot be denied that the Bank's PMSI in Rig 23 was an inconvenience and potential impediment to Evergreen's efforts to sell that rig—its most valuable—and further pay down its debt with PNB following the sale of Rig 24.[366] Second, despite the confusion engendered by Abbey Evans's failure to provide the Bank with Appendix A or any other documentation identifying the rig being

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[364] R Br. at 9.

[365] *Id.* at 2.

[366] *See* EX 180 (October 27, 2015 email from F. Bonan II to C. Zimmerman, S. Collins, F. Bonan Sr., and H. Bonan) ("Kabat 900. Worth in this market. $2,600,000. They are aggressively trying to sale now. Feel this will happen by end of year. . . . They are actively trying to sale the Kabat 900. They have a goal by the end of the year to sale. Worst case. Dump it would be a price of 2,200,000. This would [lower] debt to almost $4,000,000."); *see also*, *e.g.*, JX 1 (Joint Stip.) ¶ 46 (noting that $160,000 of the Rig 24 proceeds would go "to Evergreen Drilling to cover the costs of moving Rig 23 from Texas to the Carmi Warehouse and preparing it for sale").

sold as a Service King 775,[367] there can be no doubt that Respondent—by his own admission, and as reflected by the record evidence—understood which rig was being sold and knew that the Bank should not have had any security interest in that rig, blanket or otherwise, that should have been necessary to release.[368] Respondent was also involved in the transaction for both the Bank and PNB, in addition to being personally close to Abbey Evans, a multi-faceted vantage point that should and would have afforded him a perspective that his subordinates did not necessarily have.[369] Thus, while the release of

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[367] *See* EX 126 (email chain including October 9, 2015 email from A. Evans to S. Collins forwarding email entitled "Signed Purchase & Sale - Exhibit C - Bill of sale Combined"); EX 127 (signed copy of Rig Purchase Agreement including Exhibit C but not Appendix A); *see also* EX 88 (October 7, 2015 email chain between G. Gaskins and K. Winters) (Gaskins: "Can you check to see if we have Rig 24 as current collateral?" Winters: "[The UCC] doesn't list a rig number it says Cabot 900 series self-propelled drilling rig. . . . They only have the one loan with us and it has a balance of 557,024.05"); Winters Tr. 159:5-8 ("I wasn't sure what Rig 24 was at any point. I just knew what the UCC number that they had listed in the purchase agreement, was the UCC I had in file.").

[368] It should also be noted that Respondent, unlike Winters or Gaskins, *did* have a copy of Appendix A at his disposal and could have provided it to his Bank subordinates for the avoidance of all doubt. *See* EX 45 (September 15, 2015 email from A. Evans to F. Bonan II, S. Collins, and K. Botsch) (attaching Letter of Intent between Evergreen Drilling and U.S. Energy as well as Appendix A).

[369] *See* Hefner Tr. 526:8-18 (opining that Respondent "was on both sides of this transaction and that there was definitely information in those emails that showed the difference between the two rigs. . . . He should have known that there was a difference and that Rig 23 that the Bank had as collateral was

the Rig 23 collateral may ultimately have been an avoidable mistake on the part of Kassie Winters (albeit one made under pressure and at Respondent's direction), the undersigned finds that reasonably prudent oversight by Respondent at any point between mid-October to mid-November 2015 would have significantly lessened the chances of that mistake occurring.[370]

The Release is Discovered and the Loan Charged Off

The termination of the Bank's PMSI in Rig 23 meant that its consolidated loan to Evergreen Drilling with an outstanding balance of approximately $550,000 was no longer secured by any collateral.[371] Winters testified that Mike Williams discovered that the loan was unsecured during the joint examination in early 2016, when he "pulled an updated UCC search" for Evergreen and "realized that the UCC had been released for this loan."[372] Winters stated that when Williams inquired, she told him that she had released it "[b]ecause [Respondent] told me to."[373] Winters then attended a meeting with Respondent, Stringer, Williams, and other bank personnel in which she confessed that she had accidentally released the Bank's Rig 23 interest.

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not the rig being sold and therefore the release should not have been made.").

[370] *See also* Part VI(B) *infra*.

[371] *See* EPF ¶ 331; Answer ¶ 115.

[372] Winters Tr. 134:10-14.

[373] *Id.* at 134:16-18.

According to Stringer and Winters, Respondent was uncharacteristically calm upon learning that Winters had caused the Evergreen Drilling loan to become unsecured.[374] Respondent then suggested that, to address the situation, the Bank could "reach out to Scott Collins at Peoples and request a new UCC-1 filing that would be a blanket behind [PNB's] existing UCC."[375] Consistent with this suggestion, the Bank ultimately obtained a new blanket lien for the Evergreen Drilling loan in March 2016 that was subordinate to the blanket lien already held by PNB.[376] Thus, seven months after Collins had

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[374] *See* Stringer Tr. 107:19-20 (stating that she "was taken back by Mr. Bonan's lack of reaction"); Winters Tr. 135:22 136:6 (recalling that Respondent's "[e]xtremely calm" reaction surprised her "[b]ecause normally when something like that happens, by direct or mistake, he didn't react well to situations where things went wrong. So he didn't seem concerned about the situation at hand."); *see also* Bonan Tr. 857:13-16 (asserting that he was calm because "we had examiners in the bank[,] [w]e had the FDIC making other accusations that were not true against me, so that was not the biggest issue that I had at the time.").

[375] Winters Tr. 136:13-15; *see also* Stringer Tr. 107:21-25 ("Q: And did Mr. Bonan give directions to anybody after hearing this information? A: To take a blanket lien on Evergreen and Gary Evans, get Gary to sign the document to make sure that [the Bank was] in second position only behind Peoples National Bank.").

[376] *See* EX 335 (email chain including March 28, 2016 email from K. Winters to A. Evans stating that "the Bank is "taking a second lien position behind Peoples National Bank on their UCC"); *see also* EXs 331, 334 (documentation of new blanket lien); EX 336 (April 12, 2016 email from K. Winters to Bank board) ("I am requesting ratification of a recent Change in Terms that was prepared for Evergreen Drilling, LLC. . . . The new security agreement reflects a Blanket UCC1 that was filed

represented to Williams and Nave without any evidence that the Bank's interest in Rig 23 was not a valid PMSI and should be in second lien position behind PNB,[377] that scenario came to pass as reality.

On June 6, 2016, following Respondent's resignation, Keith Botsch related the request of Gary Evans to Stringer, Williams, and Clark—the new Bank board—for the Evergreen Drilling loan to be put on interest-only status.[378] The Bank ultimately charged off that loan in the amount of $489,268 in early January 2017.[379]

VI. Analysis

Having made its factual findings, this Tribunal now addresses the questions of law relevant to whether, and to what extent, Enforcement Counsel has shown by a preponderance of the evidence that Respondent has engaged in actionable misconduct, triggered some applicable effect, and demonstrated a requisitely culpable state of mind sufficient for the imposition of a prohibition order under 12 U.S.C. § 1818(e) and the assessment of a $105,000 second-tier civil money penalty under 12 U.S.C. § 1818(i). The undersigned also considers the appropriateness

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on 3/25/2016. This allowed us to obtain additional collateral for this loan and take a 2nd place behind PNB's first blanket lien.").

[377] *See* Nave Tr. 188:12-13 ("Scott [Collins] called me and told me that we were not in a first lien position [on Rig 23] and I contended that we were.").

[378] *See* EX 339 (June 6, 2016 email chain principally between K. Botsch and W. Stringer, M. Williams, and B. Clark); EPF ¶ 346.

[379] *See* EPF ¶ 347; Stringer Tr. 111:14-24; Clark Tr. 736:25-737:6.

of this civil money penalty amount in light of the mitigating factors set forth in 12 U.S.C. § 1818(i)(2)(G).

A. The 618 Holdings Loan

Enforcement Counsel argues that Respondent's role in conceiving of, structuring, and effectuating the 618 Holdings loan constituted a breach of his fiduciary duties and an engagement in actionably unsafe or unsound banking practices that caused loss to the Bank and was undertaken with personal dishonesty and continuing and willful disregard for the Bank's safety and soundness.[380] For the reasons discussed below, the undersigned agrees that Enforcement Counsel has demonstrated the requisite elements of misconduct, effect, and culpability in connection with Respondent's conduct regarding the 618 Holdings loan.

1. Misconduct

Respondent makes three principal arguments as to why his actions in connection with the 618 Holdings loan did not constitute actionable misconduct, either as a breach of his fiduciary duty to the Bank or as unsafe or unsound banking practices. First, Respondent argues that engineering the loan to 618 Holdings was effectively the best of two bad options, as the alternative (he says) would have been to let Evergreen fail.[381] Second, Respondent contends that

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[380] *See* EC Br. at 24-38 (misconduct), 39-40 (effect), 40-45 (culpability).

[381] *See*, *e.g.*, R Br. at 44 (arguing that "Grand Rivers was not in a position to be picky when it came to mitigating its risk of loss on the Evergreen loans. It had to pick one of two options, neither of which was perfect."); *see also id.* at 38 (stating that

the 618 Holdings loan benefited the Bank because 618 Holdings, and Harbison and Tate, "were a better credit risk" than the Evergreen Entities.[382] Third, Respondent claims that the creditworthiness of Tate and Harbison is in some sense beside the point, because the 618 Holdings loan was prudently structured to ensure that it would be paid from the lease reserve for the first eighteen months, after which time either Evergreen would have the capacity and cash flow to make its rent payments itself (in which case 618 Holdings could simply apply those monthly payments to its loan) or 618 Holdings could sell the Carmi Warehouse, whether to Evergreen or another purchaser, and pay back its loan with the proceeds.[383] These and Respondent's other misconduct-based arguments are considered below.

"[w]hen faced with two choices, the prudent banker is going to pick the choice that is better for the Bank compared to the alternative") (internal quotation marks and citation omitted).

[382] *See*, *e.g.*, *id.* at 18 n.3 ("Although 618 Holdings was a better credit bet than Evergreen Drilling, 618 Holdings didn't have the financial resources to make a down payment on the loan."), 42 ("[A]lthough Tate and Harbison were far from the perfect borrowers, they were a better credit risk compared to Evergreen.").

[383] *See*, *e.g.*, *id.* at 40 ("The goal was to put Evergreen in a position where they could ride out the storm. . . . [D]uring the 18-month period of time, either hopefully the oil industry turns around and Evergreen gets back on its feet and everybody's happy and maybe they buy the property back," or else "if a year in nothing's turning around Harbison and Tate can always sell the property.").

Respondent Presents the Bank's Options as a False Binary

The most common refrain in Respondent's briefing and from his counsel during the hearing is the notion that the Bank was faced with a stark choice in late December 2015 between lending $1.25 million to Adam Tate and Jason Harbison or watching as Evergreen went out of business. As Respondent tells it, the 618 Holdings loan was "the only viable alternative" to "letting the Evergreen Entities default on their loans at Grand Rivers."[384] He goes on to describe the Bank's "two options" during that period:

> Option A involved letting Evergreen Drilling default and go out of business. Option B involved keeping Evergreen Drilling in business at least through the next election cycle, when everyone believed oil and gas prices would rebound and when everyone hoped that the Evergreen entities would be able to purchase the headquarters back from 618 Holdings.[385]

In truth, of course, the Bank's options at this time were not nearly so binary. Indeed, one can accept Respondent's framing yet not conclude that the aim of Option B—keeping Evergreen in business—necessitated a $1.25 million loan to a newly formed entity owned by two of Respondent's employees with

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[384] *Id.* at 27; *see also*, *e.g.*, R Reply at 16 (asserting that Enforcement Counsel expert Floersch "would not even analyze whether *the alternative to the 618 Holdings loan (defaulting the Evergreen Entities)* would have been worse for Grand Rivers") (emphasis added).

[385] R Br. at 2-3.

no real assets of their own and no independent ability to pay the money back. Even if some transaction or concession was necessary to keep Evergreen afloat during the industry downturn, there is no reason why the 618 Holdings loan specifically was "the only viable alternative." As we have seen, Respondent had obtained financing from Carrollton Bank and was on the verge of purchasing the Carmi Warehouse himself through FWBII Holdings before backing out at the final stage for reasons that he has not credibly articulated.[386] Had it occurred, this transaction—call it Option C—would have allowed Evergreen to stay in business just as well as the loan to 618 Holdings was supposed to do, and benefit PNB and the Bank in the bargain.[387] By his own admission, too, Respondent had just made $2.4 million in profit on "the Clayton building sale" in the fall of 2015—whatever else may be said *infra* regarding the relative creditworthiness of Evergreen and 618 Holdings, it seems surpassingly likely that Respondent was a better credit risk than either.[388] Yet Option C is missing from Respondent's calculus.

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[386] *See* Part V(F) *supra* at pp. 27-31.

[387] *See* Bonan Tr. 911:12-16 (referring to the $150,000 in collateral in the Carrollton Bank deal as "prepaid rent"), 912:17-913:2 (agreeing that the deal would have paid off the existing mortgages at Grand Rivers and PNB and "would have been beneficial to both banks").

[388] EX 205 (email chain including November 2, 2015 email from F. Bonan II to C. Dickey) at 3 ("I don't know if anyone has told you but I have had a hell of a year this year. My part that came to me after debt on the Clayton building sale was 2.4 million."); *see also* EX 215 (email chain including November 11, 2015 email from F. Bonan II to C. Dickey) (stating that

Setting Respondent himself aside, what about other borrowers? As Respondent's counsel highlights in their post-hearing brief, Respondent testified at the hearing that "very, very recent to [the 618 Holdings loan]," Evergreen had received an offer from a different energy company to buy the Carmi Warehouse for $1.5 or $1.6 million. [389] Given Respondent's apparent belief that the warehouse "had a lot of value" and would be easy for Tate and Harbison to sell, if necessary, in eighteen months,[390] there is no reason why the Bank could not have made some genuine attempt to find a willing and credit-worthy borrower for such a purchase—one that would be willing to lease the property back to Evergreen—in late December 2015 once Respondent decided not to proceed with the Carrollton Bank transaction.[391] Let us call this Option D.

What else? Respondent's brief also highlights the possibility of restructuring the debt of a troubled borrower to "try to help the borrower stay in

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"[m]aking those first 24 months in payments will not be any problem at all for me").

[389] Bonan Tr. 796:14-20.

[390] *Id.* at 796:9-13 ("It was a well-known piece of property in Carmi. It's on a major highway. It's in a fantastic location. I have driven by this property all my life, so I knew it very well. I was very comfortable; I really thought it had a lot of value, you know.").

[391] Respondent also knew that Botsch and Campbell—both veterans of the oil and gas industry—had shown interest in purchasing the property earlier that fall, *see id.* at 813:5-15, and yet there is no indication that Respondent considered them, or anyone other than Harbison and Tate, as prospective candidates to approach about the transaction.

business." [392] Grady Gaskins agreed during his testimony that "[w]hat you want is . . . to come up with a restructuring plan that will allow the borrower to succeed financially so that they, in turn, can go ahead and fully perform on the loan from the bank."[393] It is thus fair to say that the 618 Holdings loan essentially functioned as an informal restructure of Evergreen's troubled debt.[394] But there are more formal methods of troubled debt restructuring or prudent commercial real estate loan workouts that are the subject of guidance by federal financial regulators that the Bank could have availed itself of rather than loaning $1.25 million to 618 Holdings, and these can, collectively, be Option E.[395]

> There were at least five options for the Bank, then, rather than two:
>
> - Option A: Let Evergreen fail.
> - Option B: Finance the sale of the Carmi Warehouse to an uncreditworthy borrower that has no independent ability to generate cash flow and must rely on a built-in lease payment reserve for its monthly loan payments; the Bank trades in its $638,000

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[392] R Br. at 38 (quoting Bonan Tr. 791:4-11); *see also id.* at 37-38.

[393] Gaskins Tr. 148:10-13; *see* R Br. at 37.

[394] *See infra* at pp. 90-94.

[395] *See* EX 1 (FDIC Policy Statement on Prudent Commercial Real Estate Loan Workouts); EX 386 (Interagency Supervisory Guidance on Troubled Debt Restructuring); *see also* EX 369R (Cash Report) ¶ 15; Cash Tr. 572:19 573:4, 581:3-18, 591:12-22, 593:15-594:3.

second lien position for a $1.25 million first position.

- Option C: Respondent finalizes his paperwork and purchases the Carmi Warehouse himself, financed through Carrollton Bank; the Bank is not involved other than having its Evergreen Properties loan paid off.
- Option D: Finance the sale of the warehouse to a different, creditworthy borrower; there is no indication that Evergreen, Respondent, or the Bank ever explored this option at all.
- Option E: Formally treat the Evergreen loans as restructured troubled debt and do a workout in accordance with prudent loan practices.

According to Respondent's expert Gary Schwartz, the sale-leaseback transaction between Evergreen and 618 Holdings is "one tool a lender can use in a loan workout scenario as a means of freeing up equity and generating liquidity,"[396] and Respondent asserts that this is "precisely what [he] tried to accomplish with the 618 Holdings loan."[397] Schwartz goes on, however, to state that while "[t]his restructure was an attempt to provide a problem borrower with additional cash flow and reduce its debt through the sale-leaseback transaction," such transactions are only "***one of the many options available to a bank and the borrower in these types of workout situations***."[398] Likewise here, there is no reason why

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[396] RX 11R (Expert Report of Gary Schwartz) ("Schwartz Report") at 6.

[397] R Br. at 37.

[398] RX 11R (Schwartz Report) at 7 (emphasis added).

the Bank "had to pick one of two options, neither of which was perfect,"[399] and it was only Respondent's decision not to pursue the transaction himself and to instead present Harbison and Tate as the only lending options that placed the Bank in a false dilemma and effectively offloaded risk from himself to the Bank.[400] Respondent cannot frame the situation as a choice between keeping your valuables in a burning building (Evergreen) or moving them to the poorly constructed, tinder-filled building next door (618 Holdings) if there are places they can be moved to that are safer than both.

Harbison and Tate Were Not Creditworthy Borrowers

Another of Respondent's frequent assertions is that the 618 Holdings loan was prudent because 618 Holdings—and Tate and Harbison as individuals—were "a stronger credit bet compared to Evergreen."[401] Even notwithstanding Respondent's seemingly belated recognition that Harbison was "a person with horrible credit," however, this assertion does not withstand the barest scrutiny.[402] Most fundamentally, it is unclear how 618 Holdings could be a better credit risk than Evergreen when 618 Holdings was

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[399] R Br. at 44.

[400] Recall also that Respondent had previously expressed reluctance at making an interest-only concession to Evergreen on its loans at PNB, out of concern that doing so would "for sure be a trouble debt restructure" and would cause the loans to be classified as "substandard." EX 19 (email chain including January 28, 2015 email from F. Bonan II to K. Botsch).

[401] R Br. at 39; *see also*, *e.g.*, *id.* at 3, 5, 18 n.3, 25-26, 37, 38, 42; R Reply at 12.

[402] Bonan Tr. 832:3.

"fully reliant on Evergreen's operations to fund the lease obligations which then fund[] repayment of the Bank." [403] 618 Holdings simply did not have an independent source of cash flow other than Evergreen, and Respondent never adequately addresses this point.[404] Evergreen, by contrast, was an established business with assets, led by someone who, as Respondent put it, "had the history . . . [and] the knowledge . . . [and] had been in the oil and gas business for 40 years."[405] While Evergreen's creditworthiness and cash flow was projected to improve

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[403] Cash Tr. 598:15-16. While Respondent's counsel attempted to make hay at the hearing from the fact that FDIC examiner Floersch's write-up for the 618 Holdings loan did not compare the relative creditworthiness of 618 Holdings and Evergreen, *see* Floersch at 475:15-477:10, such a comparison is in a sense immaterial: any factors that made Evergreen a bad credit risk also made it a poor idea to premise the creditworthiness of 618 Holdings solely on the ability of Evergreen to make its lease payments. Likewise, Jake Campbell's testimony that knowledge of Evergreen's ailing business "would make Tate and Harbison an even more likely choice," Campbell Tr. 414:12 415:1, is illogical at its heart, given that the future performance of the 618 Holdings loan was intrinsically dependent on the strength of Evergreen's financial condition.

[404] Respondent contends in his reply that "the loan to 618 Holdings allowed the entity to purchase the Carmi Warehouse, giving it the capacity to generate revenue," R Reply at 5, but this argument is circular at best. Moreover, Respondent's blithe statement that "if Evergreen was not making the lease payments to 618 Holdings as agreed[,] . . . Tate and Harbison could have sought other lessees or devised other uses for the property that would have generated revenue," *id.* at 5-6, in addition to being baldly speculative, merely underscores the lack of any documentation of future cash flow analyses in the 618 Holdings loan paperwork. *See infra* at pp. 88-89, 91-92.

[405] Bonan Tr. 791:13-19.

with improved market conditions,[406] the same was not true for 618 Holdings, which had demonstrated no capacity to make the $7,753 monthly payments, either at the time of the loan or in the future, save being used as a vehicle for the Bank to pay itself via the lease reserve.

As for Harbison and Tate individually, the undersigned credits the testimony of Enforcement Counsel's hybrid fact-expert witness Mathias Floersch that he "very seldom" sees guarantors with a negative net worth, since those guarantors would not "provide much support to repayment of the debt," and that loans backed by such guarantors would usually result in a "substandard or worse classification."[407] Not even Harbison believed that he should have been given the 618 Holdings loan or that he and Tate had any personal ability to afford the monthly payments.[408] FDIC examiners and officials at PNB both questioned Harbison's ability to pay back even a $50,000 unsecured loan.[409] In short, and as previously

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[406] *See* Botsch Tr. 299:19-300:4 (affirming that Gary Evans "had ridden waves, ups and downs before" in his decades in the oil and gas industry, and agreeing that the only thing keeping Evergreen from financial success was that "they were beholden to the falling price of oil").

[407] Floersch Tr. 454:5-13.

[408] *See* Harbison Tr. 20:25-21:5, 33:12-23.

[409] *See* Floersch Tr. 444:4-8 (noting that the unsecured $50,000 loan to Harbison raised concerns on its own because "[h]e showed $190,000 negative net worth. He showed limited income. It's not typical that a borrower [like] that would be lent funds in an unsecured relationship."); EX 337 (materials including April 15, 2016 memorandum entitled "Loan Summaries" from T. Visintine and K. Gansauer to F. Bonan Sr.)

detailed at Part V(G) at pp. 38-42, then, Harbison and Tate were in no way qualified for the $1.25 million 618 Holdings loan, and Respondent knew or should have known that at the time.

The 618 Loan Structure was Imprudent and Foreseeably Risky

The final recurring theme in Respondent's briefing on the 618 Holdings issue is that the 618 Holdings loan terms (as devised and championed by Respondent) were prudently structured to accomplish the goal of helping Evergreen regain its footing while protecting Grand Rivers from additional risk that might arise from the transaction.[410] The undersigned concludes that this is wrong on multiple fronts.

It is important, first, to note that the conclusions of examiners on "matters pertaining to their special expertise," [411] including the extent to which "a particular practice poses a safety and soundness concern" or constitutes the breach of a fiduciary duty owed to a financial institution, are generally entitled to significant deference before this Tribunal.[412] One

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at 7 (finding that Harbison did not "reasonably qualify for unsecured credit" on $50,000 loan).

[410] *See*, *e.g.*, R Br. at 3 ("[Respondent] simply did what every prudent banker should—he made efforts to improve a struggling borrower's cash flow issues and ability to pay back loans to the bank."), 40 ("[T]he structure of the loan gave Evergreen 18 months to get back on its feet.").

[411] *In the Matter of Pinchus D. Raice*, No. 14-119k, 2017 WL 2118816, at *6 (Mar. 21, 2017) (FDIC final decision).

[412] *In the Matter of Steven J. Ellsworth*, Nos. AA-EC-11-41 & -42, 2016 WL 11597958, at *13-14 (Mar. 23, 2016) (OCC final decision); *see In the Matter of Bank of Louisiana*, No. 17-0086k, 2019 WL 5823884, at *7 (May 28, 2019) (FDIC final decision)

such type of conclusion is whether a bank officer has acted prudently or whether a given action is contrary to generally accepted standards of prudent banking operation.[413] Therefore, examiner opinions on the

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("Th[e] exercise of informed judgment on the part of commissioned examiners is entitled to deference, and should not be disregarded in the absence of compelling evidence that it is without rational basis.") (quoting *Sunshine State Bank v. FDIC*, 783 F.2d 1580, 1583 (11th Cir. 1986)); *cf. Brickner v. FDIC*, 747 F.2d 1198, 1202 (8th Cir. 1984) (concluding that federal banking agencies should be accorded "substantial discretion" in determining the scope of fiduciary duty under 12 U.S.C. § 1818, given the agencies' "extensive experience with the duties and responsibilities of bank officers and directors").

[413] *See infra* at Part VI(A)(1)(a) (breach of fiduciary duty), Part VI(A)(1)(b) (unsafe or unsound banking practices). In his reply brief, Respondent quotes examiner Cash as testifying on cross-examination that "saying a course of action that a prudent banker may or may not have taken is not within my scope." R Reply at 18 (quoting Cash Tr. 595:15 16). A plain reading of this testimony in context reveals that it was an overbroad statement made in response to a hypothetical question in which Respondent's counsel suggested that the only choices the Bank had were to make the 618 Holdings loan or let Evergreen go out of business and then directed examiner Cash to choose between those options. *See* Cash Tr. 594:25-595:3 ("Q: If the alternative to the 618 Holdings loan was the Evergreen Entities going out of business, do you believe a prudent banker would go forward with the 618 loan or let the Evergreen Entities go out of business?"). As noted above, those were not the only options. Examiner Cash's inartful response to this hypothetical does not negate the rest of his testimony and expert opinion detailing the ways in which the 618 Holdings loan was originated and structured imprudently based on his examiner experience, nor does it change the fact that "[t]he expression of expert judgment as to whether a given set of facts represents an unsafe or unsound practice is very much within the competence of [bank examiners]." *Patrick Adams*, 2014 WL 8735096, at *36.

prudency of the terms and structure of the 618 Holdings loan shall be entitled to deference "unless shown to be arbitrary and capricious or outside a 'zone of reasonableness.'"[414]

Respondent argues as a blanket matter that the conclusions offered by FDIC examiners in this case should be disregarded as arbitrary, capricious, and unreasonable because they assertedly "make no logical sense and indicate serious misunderstanding of the transactions at issue."[415] The undersigned finds that the examiners' conclusions are reasonable and that Respondent's objections are without merit. Further, it is unnecessary to address Respondent's characterizations of examiner testimony on a point-by-point basis—the undersigned comfortably concludes that Respondent's actions were unsafe or unsound and constituted breaches of his fiduciary duty to the Bank, for the reasons detailed in the sections below, with or without giving deference to the examiners' opinions. Suffice to say, however, that Respondent's objections are largely dressed-up legal argumentation rather than any evidence of examiner "misunderstanding."[416]

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[414] EC Reply at 6 (quoting *Sunshine State Bank*, 783 F.2d at 1584); *accord* R Reply at 15.

[415] R Reply at 16.

[416] For example, Respondent complains that examiners Cash and Floersch characterized the 618 Holdings loan as "a troubled or restructured debt" even though it "was a new loan to a new borrower" and "the facts are clear that the Evergreen entities and 618 Holdings are distinct entities that are not related to each other." R Reply at 16, 17. To the extent that Respondent is claiming that the 618 Holdings loan was not a restructuring of Evergreen's debt or did not serve the purpose of a loan workout,

The undersigned will therefore give deference to the examiners' conclusions regarding the terms and structure of the 618 Holdings loan. Specifically, examiners Floersch and Cash noted a number of ways in which they believed the loan was imprudent and was substandard at the time that it was made:

The loan file lacked any documentation of repayment ability. The loan files for 618 Holdings and the Evergreen Entities—and, the undersigned notes, the 618 Holdings loan request—did not contain current financial information for those entities or a meaningful credit analysis supporting the repayment ability of 618 Holdings,[417] something that

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he is contradicted by his own litigation position and his own expert. *See* RX 11R (Schwartz Report) at 6-7 ("Sale-leaseback scenarios are one tool a lender can use in a loan workout scenario as a means of freeing up equity and generating liquidity. . . . This restructure was an attempt to provide a problem borrower with additional cash flow and reduce its debt."); R Br. at 37 ("That's precisely what [Respondent] tried to accomplish with the 618 Holdings loan."). On the other hand, to the extent that he asserts that the 618 Holdings loan and purchase-leaseback transaction should not fall under the purview of the supervisory guidance on restructured troubled debt and prudent commercial real estate loan workouts referenced at the hearing and in Enforcement Counsel's briefs, this is quintessentially a matter on which the conclusions of bank examiners are entitled to deference. Finally, considering that the evidence is clear that Respondent exhorted Harbison and Tate to form 618 Holdings in order to alleviate the debt load on Evergreen and give that company an opportunity to withstand its financial troubles, it is disingenuous to claim that this was "a new loan to a new borrower" as if that makes a meaningful difference to whether Respondent acted prudently in directing the approval of that loan.

[417] *See* EX 368R (Floersch Report) ¶ 11; EX 369R (Cash Report) ¶ 9 ("As noted in the 2016 ROE, current income

Respondent should have ensured before bringing the 618 Holdings loan to the Bank board and advocating for its approval. Floersch opined that Respondent's origination of the 618 Holdings loan "without determining the financial ability of the Evergreen Entities [] to support and make lease payments to 618 Holdings . . . was an imprudent banking practice that jeopardized the liquidation of the debt."[418]

The loan improperly increased the Bank's margin on the collateral. As structured, the 618 Holdings loan added $250,000 in additional debt to the Bank's collateral while also transferring the balance of PNB's $358,000 mortgage on that collateral from PNB to the Bank. Floersch opined that "[a]dding more debt to the Bank's collateral reduced the realizable value sufficient to discharge the debt," thereby improperly marginalizing the Bank's collateral position.[419]

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information for Evergreen was not in the Bank's loan files. . . . Evergreen's weakened capacity to generate cash flow from operations to fund Evergreen Properties' lease payment obligations to 618 Holdings raised the distinct possibility of payment default."); EX 314 (2016 ROE) at 55 (stating that the lack of financial information for Evergreen Properties left examiners "unable to determine if the company has the financial capacity to pay the lease payments to 618 Holdings"); EX 272 (December 18, 2015 email from K. Winters to Bank board members attaching loan request writeups) at 16 (618 Holdings loan request).

[418] EX 368R (Floersch Report) ¶ 11; *see* EX 369R (Cash Report) ¶ 9 ("To appropriately assess 618 Holdings' credit risk to the Bank, the financial capacity of Evergreen, the primary repayment source for the 618 Holdings loan[,] had to also be assessed.").

[419] EX 368R (Floersch Report) ¶ 8.

The lease reserve structure hid the borrowers' inability to repay. Cash and Floersch both stated that the 18-month lease reserve being applied to the 618 Holdings loan payments improperly masked the borrower's repayment capacity and prevented examiners from having an accurate picture of the risk of delinquency or default.[420] Floersch opined that "[t]he use of a lease reserve account, as structured by [Respondent], to pay the principal and interest monthly loan payments for 618 Holdings . . . was an imprudent and improper banking practice."[421]

In response to the examiners' opinions, Respondent offered an analogy as to why the lease reserve structure was appropriate and did not skew the borrower's payment history:

> If ***any borrower***, without the bank's knowledge, opened a savings account and decided to specifically set aside the funds in the account to make automatic monthly payments on a loan, the loan would be performing as planned with no allegations that such an account improperly 'skews' the

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[420] *See id.* ¶ 6 ("[U]sing this improper structure would skew or distort for 18 months any possible warning signs of potential credit losses involving the Bank's loan to 618 Holdings that would otherwise appear in the Bank's delinquent loan report."); EX 369R (Cash Report) ¶ 10 (stating that the lease reserve structure operated to "keep the loan's payment status artificially 'current'").

[421] EX 368R (Floersch Report) ¶ 7; *see also* EX 369R (Cash Report) ¶ 10 ("[T]he Bank's loan to 618 Holdings was inappropriately structured by the use of loan proceeds from the Bank's loan to 618 Holdings to fund the $150,000 lease escrow account which was to be used to fund principal and interest payments on the loan for 18 months.").

> payment history. The lease payment reserve was money that would otherwise have gone to Evergreen Properties, yet it was specifically held back in a Grand Rivers account to guarantee that the lease payments would be made.[422]

This analogy misses the point. The examiners opined, and the undersigned agrees, that the concern with the lease reserve account is that it acts to obscure the repayment ability of the borrower, 618 Holdings, once the 18-month period of escrowed payments comes to an end. There is no question of the *borrower* putting money aside for future loan payments—the money that is paying the monthly lease payment and being funneled to pay the 618 Holdings loan originates either from Grand Rivers or from Evergreen. It is not coming in any meaningful sense from 618 Holdings' own coffers, because those coffers are and have been empty. But the regular payments from the lease reserve being applied to principal and interest for the borrower contrives to give the impression, in the Bank's loan reports, that the borrower has been paying and will be able to continue to pay after the 18-month reserve period is over, which was not at all the case.

The loan restructured troubled debt but failed to conform to prudent workout practices. The purpose of the 618 Holdings loan, by Respondent's own admission, was "to structure the transaction so that the Bank would be protected for the first 18 months of the loan, during which time either Evergreen would become financially stable or the Carmi

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[422] R Br. at 43 (emphasis added).

Property could be sold without a loss."[423] Respondent's expert himself stated that "***[t]his restructure*** was an attempt to provide a problem borrower with additional cash flow and reduce its debt."[424] Grady Gaskins likewise testified that the 618 Holdings loan amounted to "a restructuring plan that will allow [Evergreen] to succeed financially so that they, in turn, can go ahead and fully perform on the loan from the bank."[425] And Respondent has argued in his briefing that in effectuating the 618 Holdings loan, he "simply did what every prudent banker should—he made efforts to improve a struggling borrower's cash flow issues and ability to pay back loans to the bank."[426] In other words, the 618 Holdings loan was about Evergreen, and 618 Holdings was incidental.

Because the loan's purpose was to assist a troubled borrower, Cash opined that both the 618 Holdings loan and the Evergreen loans should have been treated as restructured troubled debt in accordance with prudent loan workout practices.[427] Loan workouts

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[423] EX 369R (Cash Report) ¶ 12 (quoting (rejected) RX 149 (Opinion Testimony of Frank William Bonan II) at 5-6); *see also* Cash Tr. 597:4-598:2 (stating that this statement is consistent with what he was told by Gaskins during the 2016 examination); R Br. at 40 ("The goal was to put Evergreen in a position where they could ride out the storm at least until the 2016 elections, which is when Grand Rivers believed the oil market would rebound.").

[424] RX 11R (Schwartz Report) at 6 (emphasis added).

[425] Gaskins Tr. 148:10-13; *see* Cash Tr. 580:24-581:2 (recalling that Gaskins told examiners that the 618 Holdings loan was designed to "help [Evergreen] sell assets and pay down debt").

[426] R Br. at 3.

[427] *See* Cash Tr. 572:19-573:4, 580:15-581:2, 591:12-22; *see also* EX 369R (Cash Report) ¶ 13 ("If the structure of the loan to

and troubled debt restructures are subject to specific regulatory guidance, reporting requirements, and risk management principles that have specific consequences for the bank and the borrower, which Cash opined should have been, but were not, followed here.[428] Among other things, Cash noted that, under Respondent's direction, Grand Rivers "did not have any management infrastructure to identify, control and manage the complexity of the workout involving 618 Holdings and Evergreen,"[429] as it should have done, and that there were no "basic analyses of

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618 Holdings sought by Bonan II was to give Evergreen 18 months to begin to generate cash through operations or allow 618 Holdings to sell the Carmi Warehouse without a loss to the Bank, the loans to both Evergreen and 618 Holdings should have been portrayed as [restructured troubled debt] at the time of the 2016 examination.").

[428] *See* Cash Tr. 573:1-4 (noting that "if a loan is identified as a troubled debt restructuring, there are additional reporting and actions that we would expect on behalf of bank management"); *see also* EX 369R (Cash Report) ¶¶ 13-16; EC Reply at 10-11 (noting that "a debt restructuring must improve collectability of the loan in accordance with a reasonable repayment schedule" and "loan workouts must support the ultimate collection of principal and interest") (citing EX 1 (FDIC Policy Statement on Prudent Commercial Real Estate Loan Workouts); EX 386 (Interagency Supervisory Guidance on Troubled Debt Restructuring)).

[429] EX 369R (Cash Report) ¶ 15; *see also* EX 1 (FDIC Policy Statement on Prudent Commercial Real Estate Loan Workouts) at 3 (providing that "[a]n institution's risk management practices for renewing and restructuring [commercial real estate] loans should be appropriate for the complexity and nature of its lending activity and should be consistent with safe and sound lending practices and relevant regulatory reporting requirements").

repayment capacity" as required by troubled debt restructure supervisory guidance:

> [T]here was no documentation showing how Evergreen could achieve positive cash flow and 618 Holdings could repay the Bank (such as pro forma financial statements forecasting how Evergreen proposed to achieve positive cash flow within 18 months). There was also not a plan forecasting how the Bank's commercial real estate collateral, the Carmi Warehouse, could be sold after 18 months without a loss to the Bank. In my experience as an FDIC examiner and CPA, I expect an FDIC insured bank working with a troubled commercial borrower to have these types of basic analyses of repayment capacity in the loan files.[430]

Cash also opined that "[t]o be consistent with prudent workout practices, efforts undertaken by [Respondent] to structure the loan to 618 Holdings . . . should have evidenced his consideration of how the Bank's position would be improved by advancing $250,000 of 'new money' despite the absence of a clear plan for repayment, and . . . new borrowers [] who lacked the financial capacity to repay a $1.25

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[430] EX 369R (Cash Report) ¶ 15; *see also* EX 386 (Interagency Supervisory Guidance on Troubled Debt Restructuring) at 4 ("A [troubled debt restructure] designation means the loan is impaired for accounting purposes. . . . [A] well-documented assessment of the cash flows available to service the modified loan and the extent of any collateral protection and guarantor support should be performed to form the basis for determining whether an adverse credit risk grade or classification is warranted.").

million loan."[431] He added that "[w]ithout a clear path to repayment, and with the loan files lacking current financial information, [Respondent's] structure for managing the Evergreen relationship for 18 months lacked appropriate consideration of the Bank's interests to receive repayment in full from 618 Holdings."[432] The undersigned credits these opinions in all respects.

Moreover, Respondent's assertion that the 618 Holdings loan structure was in the best interests of the Bank hinges far too much on the prospect of the Carmi Warehouse being sold at the end of the 18 months, either to Evergreen or to another entity if Evergreen's financial prospects had not improved:

> Everyone understood that during the 18-month period of time, either hopefully the oil industry turns around and Evergreen gets back on its feet and everybody's happy and maybe they buy the property back, or if a year in nothing's turning around Harbison and Tate can always sell the property.[433]

There are obvious flaws with this argument, not least that the Bank's chance of avoiding default if Evergreen had not regained its footing by the end of

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[431] EX 369R (Cash Report) ¶ 16.

[432] *Id.*; *see also* Cash Tr. 598:3-9 ("[O]ne of the principles of a prudent loan workout is being able to assess the payment performance of a borrower. And so with this payment reserve account, funding payments on behalf of the borrower, it's not possible to assess the true repayment ability of this borrower, and that's the concern.").

[433] R Br. at 40 (internal quotation marks and citation omitted).

the lease reserve period rests on sheer speculation that the uncreditworthy guarantors of the $1.25 million loan, who were uncreditworthy at the time it was made, would be able to find a different buyer for a sufficient sale price in time to make the Bank whole. This would be an imprudent plan to paper over the patent inability of the borrower to make loan payments even if there had not been reason to doubt the appraised value of the Carmi Warehouse in the fall of 2015.[434] With the benefit of hindsight, too, the idea of Harbison and Tate recouping close to $1.25 million by selling the warehouse after 18 months seems utterly fantastical, considering that the highest offer the Bank has received for the property since it came into its possession has been $500,000.[435]

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[434] *See* EX 273 (email chain including December 19, 2015 email from J. Campbell to L. Phelps) ("The purchase of Evergreens yard has the appraisal listed at $1,250,000. I don't think it is worth $300,000, especially with the current oil, coal, and ag depression that this area is in. The 5 year lease doesn't mean anything because the lessee is in a cash flow bind."); *id.* (email chain including December 19, 2015 email from L. Phelps to J. Campbell) ("Yes I agree. I questioned the Evergreen valuation too."); Botsch Tr. 288:2-8 ("I said [the warehouse] was probably worth $350,000. Evergreen overpaid for it. They also bought that from a client of mine, so I knew the building very well. It was not going to bring $1.25 million."); EX 346 (September 2016 Joint Visit Report of Grand Rivers Bank) at 26 (identifying several concerns with the appraisal and suggesting that "impairment may be significantly understated" on the 618 Holdings loan relationship as a result).

[435] *See* Stringer Tr. 102:20-103:5; *see also* Williams Tr. 679:3-13 (noting that when he left the Bank in December 2018, the Bank had not received any offers on the Carmi Warehouse higher than $300,000). In his reply, Respondent expands Harbison and Tate's prospective options for making money off the property beyond its sale, stating that the two individuals, if

It is perhaps most illustrative of the imprudency of the loan structure that anyone, no matter how poor a credit risk, would have served the same purpose as Harbison and Tate, as Respondent conceived of the transaction. That is, if the ability of 618 Holdings to repay the loan amount did not matter in Respondent's planned transaction—because the loan payments were being made through the lease reserve for the first 18 months and the warehouse could simply be leased or sold thereafter—then Harbison and Tate's presence in the transaction, and their own credit histories and repayment capacities as guarantors, was truly inessential. A bankrupt baby could have taken their place and had a company formed in its name, and Respondent's plan to aid Evergreen and reduce its debt at PNB could have proceeded apace. The baby would not even need a bank account: Respondent did not ask Harbison and Tate to put a single dollar down, compared to the minimum $100,000 in down payment that Carrollton Bank had required from a creditworthy borrower with signi-

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necessary, "could have sought other lessees or devised other uses for the property that would have generated revenue." R Reply at 5-6. But this argument falls at two hurdles: (1) if Evergreen could not make lease payments on the warehouse, then it is foreseeable that others in the oil and gas industry would also have difficulty, making it difficult for Harbison and Tate to do as Respondent now suggests; and (2) such a plan presupposes that 618 Holdings could not only generate revenue by renting or otherwise using the Carmi property, but generate *enough* revenue to pay their $7,753 monthly payments—possibly a tall order, as the next tenant after Evergreen appears to have paid only $1,500 to $2,000 per month for their lease. *See* Williams Tr. 678:7-25.

ficant assets.[436] Viewed in that light, it is starkly evident that the best interests of Grand Rivers were nowhere near the forefront of Respondent's mind when devising, directing, and effectuating the 618 Holdings loan.

a. Breach of Fiduciary Duty

As Chairman of the Grand Rivers board, Respondent owed the Bank fiduciary duties of loyalty and of care, both of which Enforcement Counsel contends have been breached by Respondent's conduct in connection with the 618 Holdings loan.[437]

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[436] *See* EX 205 (email chain including November 2, 2015 email from F. Bonan II to C. Dickey) at 3 ("I don't know if anyone has told you but I have had a hell of a year this year. My part that came to me after debt on the Clayton building sale was 2.4 million.").

[437] *See* EC Br. at 35-38. Although Respondent asserts that Illinois law should govern the claim for breach of fiduciary duty here, *see* R Br. at 34, that is not the case: the FDIC Board has held that "[t]he fiduciary duties of institution-affiliated parties . . . for the purposes of section 8(e) of the FDI Act are established by Federal law." *In the Matter of Michael D. Landry and Alton B. Lewis*, No. 95-65e, 1999 WL 440608, at *15 (May 25, 1999) (FDIC final decision), *aff'd on other grounds sub nom. Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000); *see also*, *e.g.*, *In the Matter of Neil M. Bush*, No. AP 91-16, 1991 WL 540753, at *5 (Apr. 18, 1991) (OTS final decision) ("The federal government as regulator and insurer . . . may establish a regulatory and common law of fiduciary duties that does not depend on the location of the institution."); *Brickner*, 747 F.2d at 1202 (noting that "[t]he concept of fiduciary duty may, in differing circumstances, require fiduciaries to exercise varying degrees of vigilance and care. The FDIC has special expertise in the banking area, and extensive experience with the duties and responsibilities of bank officers and directors."). Respondent cites the Supreme Court's *Atherton* decision as support for his position, *see* R Br. at 34, but that case is inapposite—as

The fiduciary duty of care obligated Respondent at all times "to act in good faith and in the best interests of the Bank."[438] Discharging this duty requires diligence, prudence, and honesty in carrying out a bank officer's responsibilities, as well as "the proper supervision of subordinates . . . and the constant concern for the [bank's] safety and soundness."[439] Further, "[b]ecause of their unique position as safe-

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Enforcement Counsel points out, *Atherton* concerned, in relevant part, whether state law should govern actions brought by the FDIC in its capacity as receiver against directors and officers of a failed institution under a separate statutory provision, 12 U.S.C. § 1821(k). *See Atherton v. FDIC*, 519 U.S. 213, 226-229 (1997); EC Reply at 14-15. The FDIC as receiver succeeds to "all rights, titles, powers, and privileges of the insured depository institution," 12 U.S.C. § 1821(d)(2)(A), and as such is a "separate and legally distinct entity" from the FDIC as insurer and regulator. *Miller v. FDIC*, 738 F.3d 836, 838 n.1 (7th Cir. 2013). *Atherton* therefore has no bearing on the question of fiduciary duty claims in Section 1818 enforcement actions. *Atherton*, 519 U.S. at 225 ("[H]ere, . . . the FDIC is acting only as receiver of a failed institution; it is not pursuing the interest of the Federal Government as a bank insurer.").

[438] *Michael Sapp*, 2019 WL 5823871, at *14; *accord Smith & Kiolbasa*, 2021 WL 1590337, at *15 ("Officers and directors of depository institutions have a strict fiduciary duty to act in the institution's best interests.") (internal quotation marks and citation omitted).

[439] *In the Matter of Larry B. Faigin and John J. Lannan*, Nos. 11-252e, -254k, -269e, & -270k, 2015 WL 9855325, at *81-82 (December 15, 2015) (FDIC final decision) (internal quotation marks and citation omitted); *see also In the Matter of Tonya Williams*, No. 11-553e, 2015 WL 3644010, at *9 (Apr. 21, 2015) (FDIC final decision) ("Bank officers have a duty to act diligently, prudently, honestly, and carefully in carrying out their responsibilities.") (internal quotation marks and citation omitted).

keepers of depositors' money, directors or officers of depository institutions owe a greater duty to the bank than directors of other types of entities."[440] And "[t]he greater the authority of the director or officer, the broader the range of his duty; the more complex the transaction, the greater the duty to investigate, verify, clarify, and explain."[441]

The undersigned concludes that Respondent breached his fiduciary duty of care in connection with the 618 Holdings loan in multiple respects. As detailed throughout this Decision, by engineering the purchase-leaseback of the Carmi Warehouse through the loan to 618 Holdings, Respondent demonstrably advanced the interests of Evergreen and PNB with scant regard for those of the Bank, in a manner that foreseeably increased the Bank's risk.[442] All record evidence supports the testimony of Grady Gaskins that Respondent's primary motivations during the fall and winter of 2015 were to "move [Evergreen's] debt from [PNB]" and to "help Abbey out,"[443] and the Bank was merely a vehicle for this scheme, left worse off than before. Respondent claims that his actions reflect "a desire to protect the bank from a large borrower who was perilously close to defaulting on its

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[440] *Faigin & Lannan*, 2015 WL 9855325, at *82.

[441] *Id.* (internal quotation marks and citation omitted).

[442] *See*, *e.g.*, Part V(G) *supra* at pp. 47-48 (summarizing the effect of the 618 Holdings loan on the Evergreen Entities, PNB, Grand Rivers, Respondent, and Harbison and Tate); *see also* EX 369R (Cash Report) ¶ 16 ("In my opinion, Bonan II's actions to structure the loan to 618 Holdings and the origination of the loan to 618 Holdings at Bonan II's direction demonstrates a complete disregard of the Bank's best interest.").

[443] Gaskins Tr. 25:4-10.

loans,"[444] but the collectability of the 618 Holdings loan was precariously balanced on the strained back of that very same borrower, while lessening the risk exposure of PNB should that "perilously close" borrower happen to default.[445] Respondent therefore did not act with the best interests of the Bank in mind or with "constant concern for the [Bank's] safety and soundness" in this regard.[446]

Beyond this, the undersigned agrees with Enforcement Counsel that Respondent also "breached his duty of care to the Bank by failing to act prudently and diligently in structuring the 618 Holdings loan."[447] Among other things, and in line with the examiners' conclusions above, Respondent failed to ensure that the loan files for Evergreen and 618 Holdings contained current financial information and appropriate analyses of repayment ability and future cash flow for both entities consistent with prudent workout practices for a transaction designed to help a troubled borrower regain its footing by increasing its liquidity and reducing its debt.[448]

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[444] R Reply at 22.

[445] *See* EC Br. at 38 (observing that, as a result of the 618 Holdings loan, "PNB was paid $358,309, eliminating its lien on the Carmi Warehouse," while the Bank itself "paid out $250,000 in new money, increased the Bank's maximum risk from $637,681 to $1,262,109.75, and loaned more money than the appraised value of the property").

[446] *Faigin & Lannan*, 2015 WL 9855325, at *82 (internal quotation marks and citation omitted).

[447] EC Br. at 37.

[448] *See* RX 11R (Schwartz Report) at 6-7; *see also* EX 369R (Cash Report) ¶ 15 (noting that the loan files lacked "basic analyses of repayment capacity," that "there was no documentation showing how Evergreen could achieve positive

Respondent also did not adequately consider how the nature of the lease reserve structure might obscure the repayment ability of 618 Holdings (and the financial health of Evergreen) and provide the Bank and its regulators with an inaccurate picture of the loan's risk of default or delinquency over the first eighteen months.[449] As a "highly unusual structure" that neither examiners nor Bank officials had ever seen in that form before,[450] the lease reserve triggered a heightened duty of care "to investigate, verify, clarify, and explain," none of which Respondent

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cash flow and 618 Holdings could repay the Bank (such as pro forma financial statements forecasting how Evergreen proposed to achieve positive cash flow within 18 months," and that there was no "plan forecasting how the Bank's commercial real estate collateral, the Carmi Warehouse, could be sold after 18 months without a loss to the Bank"); *In the Matter of Steven D. Haynes*, Nos. 11-370e & -371-k, 2014 WL 4640797, at *11 (July 15, 2014) (FDIC final decision) (finding breach of fiduciary duty when bank officer failed "to ascertain the borrower's ability to repay prior to approving a loan").

[449] *See*, *e.g.*, EX 368R (Floersch Report) ¶¶ 6-7.

[450] Cash Tr. 571:18-23 ("[T]hat was a highly unusual structure that caught my attention in seeing that that lease payment reserve account had been established to essentially fund loan payments on that other loan, the 618 Holdings loan."); *see also*, *e.g.*, EX 369R (Cash Report) ¶ 11 (stating that "[r]eserves are sometimes used to fund interest payments while a borrower is improving a property, but not loan principal reduction or recurring business operating expenses like lease payments"); Williams Tr. 662:9-20 (testifying that he had never "seen commercial loans where the loan proceeds have indirectly funded a principal and interest reserve account").

showed any interest in doing in his roles as architect of the transaction and Chairman of Grand Rivers.[451]

The undersigned further concludes that Respondent breached his fiduciary duty of care by presenting 618 Holdings to the Bank as the only lending option for the Carmi Warehouse despite being in position to know that Harbison and Tate were unqualified to be the borrowers or guarantors on such a loan.[452] As has been amply detailed, Respondent had no reason to believe that Harbison and Tate could make the $7,753 monthly payments if called upon to do so, and every reason not to believe it.[453] There were other options available, including Respondent himself using his millions in recent real

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[451] *Faigin & Lannan*, 2015 WL 9855325, at *82 (duty of care is greater for complex transactions and for bank directors with significant authority) (internal quotation marks and citation omitted).

[452] *See* EX 368R (Floersch Report) ¶ 10 (opining that Respondent's "origination of the loan to 618 Holdings, whose guarantors provided nominal support to the borrower, was an imprudent banking practice that jeopardized the liquidation of the debt"); *see also* Part VI(A)(1) *supra* at pp. 88-94.

[453] *See*, *e.g.*, Gaskins Tr. 75:18-76:9 (testifying that he knew at the time that Tate and Harbison did not "have the financial capacity if called upon to support the loan to 618 Holdings"); Williams Tr. 660:12-19 ("I knew of no way where 618 Holdings was going to generate sufficient revenue to meet payments. . . . I just had concern with this size of a loan with these, with the quality of borrowers being these two individuals."); Stringer Tr. 62:15-17 (testifying that she "couldn't imagine [] the two of them . . . being able to ever obtain a $1.2 million loan from any other bank, let alone pay it"); Harbison Tr. 42:9-13 (testifying that he did not believe "that someone would loan Adam Tate and I that amount of money at that point in our lives and it just be okay. I was so sure that it wasn't going to happen").

estate profits and putting a pen to the already-completed paperwork for his own purchase of the warehouse, but he did not do that.[454] Instead, Respondent, as Grand Rivers Chairman, caused the Bank to loan $1.25 million to two individuals who transparently lacked the means to pay it back. This, alone, is a clear breach of his duty of care.

Enforcement Counsel contends that Respondent breached his fiduciary duty of loyalty, in addition to his duty of care, "when he directed a loan that benefited Evergreen and PNB, but placed greater risk at the Bank."[455] The undersigned agrees. As the FDIC Board has held, "[t]he duty of loyalty requires directors and officers to administer the affairs of the bank with candor, personal honesty, and integrity. They are prohibited from advancing their own personal or business interests, or those of others, at the expense of the bank."[456] And, quoting the Seventh Circuit, the FRB has identified ""[s]elf-dealing, conflicts of interest, [and] even *divided loyalties*" as

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[454] *See* Part VI(A)(1) *supra* at pp. 80-84.

[455] EC Br. at 38. While Enforcement Counsel further argues that Respondent's duty of loyalty was breached by the failure to disclose material information regarding Evergreen to the Grand Rivers board prior to the approval of the 618 Holdings loan, *see id.* at 36-37, the undersigned does not find it necessary to decide that issue in light of the numerous other ways that Respondent breached his fiduciary duties.

[456] *Faigin & Lannan*, 2015 WL 9855325, at *82 (internal quotation marks, citation, and emphasis omitted).

being "inconsistent with" a banker's fiduciary responsibilities towards their institution.[457]

Here, Respondent owed fiduciary duties of loyalty to both Grand Rivers and PNB, and therefore "could not favor one bank over the other as to a common borrower."[458] It also goes without saying that Respondent could not favor the interests of Evergreen or any other borrower over the interests of Grand Rivers. In this instance, however, and as described *supra*, the evidence consistently shows that not only did Respondent have divided loyalties, but that over the course of the fall and winter of 2015—and through the 618 Holdings loan—he acted to advance the interests of Evergreen (and the Evanses) and PNB over the best interests of the Bank.[459] As a result, the undersigned concludes that Respondent breached his fiduciary duty of loyalty as well.

b. Unsafe or Unsound Practices

Having determined that the Section 1818 misconduct element has been satisfied already through Respondent's breaches of the duties of care and loyalty he owed to the Bank, the undersigned now turns to Enforcement Counsel's argument that Respondent's actions in connection with the 618 Holdings loan amounted to an engagement in unsafe

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[457] *Smith & Kiolbasa*, 2021 WL 1590337, at *15 (quoting *Michael v. FDIC*, 687 F.3d 337, 351 (7th Cir. 2012)) (emphasis added).

[458] EC Br. at 35; *see* Bonan Tr. 942:1-3 (agreeing that he "[wasn't] supposed to favor one bank over the other" while serving in his dual roles).

[459] *See* Part V(G) *supra* at pp. 47-48.

or unsound banking practices.[460] In this sense, too, does Respondent's role in the conception and approval of the 618 Holdings loan constitute statutory misconduct.

The undersigned notes, to begin with, that the FDIC Board has held that "[b]ecause of their inherent danger, breaches of fiduciary duty also constitute unsafe and unsound practices."[461] Considering that Enforcement Counsel has already proven that Respondent has breached his fiduciary duties, the inquiry can therefore arguably stop there. Nevertheless, in a sufficiency of caution, the undersigned will analyze Respondent's conduct through the lens of the Horne Standard, to determine whether it can be considered unsafe or unsound practices as a standalone matter under that rubric as well.[462]

To recall, the Horne Standard—as adopted by the FDIC and OFIA's other constituent agencies—defines the scope of unsafe or unsound banking practices for purposes of Section 1818 to encompass "any action, or lack of action, which is 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."[463] Drawing support

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[460] *See* EC Br. at 29-35.

[461] *Michael Sapp*, 2019 WL 5823871, at *13.

[462] *See* Part III *supra* at pp. 8-9 (addressing Horne Standard).

[463] *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); *see also*, *e.g.*, *Donald Watkins,* 2019 WL 6700075, at *7 (applying

from a Sixth Circuit dissent, Respondent contends that "an 'unsafe or unsound practice' must involve more than just an isolated action, as a 'practice' necessarily 'includes a connotation of repetition (of habitual acts).'"[464] Not only is this novel theory at odds with the "any action[] or lack of action" language of the Horne Standard, which has been treated as authoritative by courts and the federal banking agencies, but Respondent's plan to sell the Carmi Warehouse to reduce Evergreen's debt, his conception and execution of the structure of the 618 Holdings loan and the purchase-leaseback transaction, his securing Harbison and Tate to act as borrowers, his push for the Bank board to approve the loan, and his demonstrated lack of prudence throughout all of that are in no sense "an isolated action" in any event.

Actionably unsafe or unsound practices are those that pose "a reasonably foreseeable undue risk to the institution," which has been interpreted by the banking agencies and the D.C. Circuit to mean an "increased risk of some kind."[465] Enforcement Counsel offers numerous reasons why Respondent's actions relating to the 618 Holdings loan were unsafe and unsound, many of which mirror the conclusions that the undersigned has already made.[466] Giving appropriate deference to the conclusions of the FDIC's

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Horne Standard); *Patrick Adams*, 2014 WL 8735096, at **8-24 (discussing Horne Standard in detail).

[464] R Br. at 44 (citing *Calcutt*, 37 F.4th at 355 (Murphy, J., dissenting)).

[465] *Patrick Adams*, 2014 WL 8735096, at *5; *accord Blanton*, 909 F.3d at 1172 (internal quotation marks and citation omitted).

[466] *See* EC Br. at 30, 31-32, 33.

examiners,[467] and in line with her conclusions regarding Respondent's breach of his fiduciary duties, the undersigned now concludes that, at the very least, Respondent causing a $1.25 million loan to be made to a borrower with no assets and with guarantors who he knew or should have known were uncreditworthy; adding $250,000 in new money secured by the same collateral, the appraised value of which had been questioned, and taking on an additional $358,000 in existing debt; without any analysis of repayment ability or future cash flow or other appropriate documentation; using a structure in which the loan payments of this uncreditworthy borrower were dependent—following an initial period in which the balance of the loan was being artificially paid by the bank itself—on the operations of a struggling entity whose loans Respondent's other bank (which benefited from this transaction) had recently deemed substandard; for the purposes of advancing the interests of entities other than the bank that approved the loan; in a manner that foreseeably increased the risk exposure of that bank and left it in a worse position—that all of this is an unsafe or unsound banking practice contrary to generally accepted standards of prudent operation.

2. Effect

Having placed the 618 Holdings loan on nonaccrual status in the spring of 2016 following the examiners' classification of the loan as substandard for the reasons articulated above, the Bank then charged off

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[467] *See Patrick Adams*, 2014 WL 8735096, at *36 (noting that "[t]he expression of expert judgment as to whether a given set of facts represents an unsafe or unsound practice is very much within the competence of bank examiners]").

$500,000 from the loan's balance in January 2017.[468] At the summary disposition stage, the undersigned concluded that this charge-off constituted actionable bank loss for the purposes of Section 1818 and held that "to the extent that Respondent's conduct ultimately 'caused' the Bank to charge off the loan and incur this loss . . . the statutory effect prongs have been satisfied."[469] The undersigned further held that disputed questions of material fact existed that precluded a determination of causation at that stage, including "Respondent's role in the Bank's approval of the 618 Holdings loan" and "whether the loan itself was imprudently risky at the time it was made"—questions that have since been resolved (significant, and yes).[470]

Respondent now argues that he is not responsible for any loss borne by the Bank as a result of the

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[468] *See* Part V(G) *supra* at pp. 52-53. After 618 Holdings defaulted on the loan and acquiesced to a deed-in-lieu, Grand Rivers subsequently wrote down the value of the property by an additional $13,760. *See* JX 1 (Joint Stip.) ¶ 34.

[469] MSD Order at 60; *see also In the Matter of Harry C. Calcutt III*, Nos. 12-568e & 13-115k, 2020 WL 847520, at *16 (Dec. 15, 2020) (FDIC final decision) ("[L]oan charge-offs represent a loss to the bank as a matter of law."), *aff'd*, *Calcutt*, 37 F.4th at 330 ("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); *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.").

[470] MSD Order at 61; *see also* Parts V(G) and VI(A)(1) *supra* at pp. 34-38, 42-44 (Respondent played significant role in the loan's approval), 86-94 (loan was imprudently risky from its origination).

charge-off because (1) he did not vote in favor of the loan's approval, and (2) he played no part in "decid[ing] to call the loan before the lease reserve was exhausted."[471] To put it in the words of Section 1818(e), Respondent contends that the Bank's loss on the 618 Holdings loan did not occur "by reason of" his conduct, but rather the conduct of others.[472]

Before turning to the merits of Respondent's arguments, however, the undersigned addresses Respondent's threshold claim that "[t]he FDIC recently conceded" during its briefing of the Sixth Circuit's *Calcutt* decision before the Supreme Court, that it had previously committed "legal error in evaluating causation" in Section 1818 proceedings by not requiring proximate causation to be established between the conduct and the alleged loss.[473] This is wrong; the FDIC made no such concession. In the briefing quoted by Respondent, counsel for the FDIC was simply summarizing the holding of the court below as part of the procedural history of the case.[474]

In *Calcutt*, the Sixth Circuit held that the "by reason of" language of 12 U.S.C. § 1818(e) required a showing of proximate cause, and further concluded

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[471] R Br. at 53; *see also id.* at 4.

[472] 12 U.S.C. § 1818(e)(1)(B).

[473] R Br. at 4, 50; *see* R Reply at 19.

[474] *See* Brief for the Respondent, *Calcutt v. FDIC*, No. 22-714, 2023 WL 2815448 (Apr. 3, 2023), at *8 ("The court [of appeals] held that the phrase 'by reason of' in Section 1818(e)(1)(B) 'mandates proximate causation,' and that the Board had failed to apply a proximate-causation standard. . . . The court of appeals [then] concluded that a remand to the Board was unwarranted, notwithstanding the Board's legal error in evaluating causation.").

that the FDIC Board had not properly applied that standard in that case.[475] Rather than remanding, though, the court of appeals affirmed the FDIC Board's decision based on its own *de novo* determination that proximate cause had been established.[476] Finding that this *de novo* determination was improper, the Supreme Court then reversed, remanding with instructions that the case be sent "back to the FDIC for further consideration of petitioner's case."[477] In so doing, the Supreme Court did not express any view regarding the correctness of the Sixth Circuit's holding on proximate causation.

Respondent argues that Enforcement Counsel errs by not applying the proximate causation standard articulated in *Calcutt* to the present factual record.[478] But *Calcutt* is a Sixth Circuit case, and it is not binding in an action like this one where the financial institution in question is located in the Seventh Circuit.[479] Unless and until the FDIC Board holds that proximate cause is required in all Section 1818 enforcement actions brought by the agency, Enforcement Counsel is justified in relying on previous decisions of the federal banking agencies and relevant circuits regarding the Section 1818 effect elements, whether or not the standard of causation

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[475] *See Calcutt*, 37 F.4th at 329-330.

[476] *See id.* at 330-332.

[477] *Calcutt*, 598 U.S. at 629.

[478] *See* R Br. at 50-51; R Reply at 19-20.

[479] *See* n. 23 *supra*.

applied in those cases is precisely coextensive with *Calcutt*'s conception of proximate cause.[480]

Regardless, the undersigned finds that causation has been established here for purposes of Section 1818(e) even under the standard Respondent proposes.[481] For proximate cause to be shown, Respondent states that the misconduct in question must "be a substantial factor in producing the injury if the injury was reasonably foreseeable at the time of the

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[480] *See* Brief of Respondent FDIC, *Calcutt v. FDIC*, No. 20-4303, 2021 WL 2525744 (6th Cir. June 16, 2021) (noting that the FDIC Board "has consistently interpreted the 'by reason of' language in § 1818(e) as requiring a causal 'nexus' between the misconduct and harm, or that harm was reasonably foreseeable") (citing cases).

[481] Neither Respondent nor the Sixth Circuit in *Calcutt* appear to differentiate between 12 U.S.C. § 1818(e) and 12 U.S.C. § 1818(i) for causation purposes, even though *Calcutt*'s holding was premised on specific language in Section 1818(e)—the phrase "by reason of"—that does not appear in Section 1818(i). *See Calcutt*, 37 F.4th at 329 ("Because [Section 1818(e)] requires that a bank's loss or potential loss, or a party's benefit, occur 'by reason of' the misconduct, it mandates proximate causation."); *compare* 12 U.S.C. § 1818(e)(1)(B) (causation if an applicable effect occurs "by reason of" the party's misconduct) *with* 12 U.S.C. § 1818(i)(2)(B)(ii)(II)-(III) (causation, *inter alia*, if the party's misconduct "*causes or is likely to cause* more than a minimal loss to [the] depository institution" or "*results in* pecuniary gain or other benefit to such party") (emphases added). Thus, even if one were to accept that the phrase "by reason of" connotes a proximate causation standard, the same would not necessarily be true for the language in Section 1818(i)—and the undersigned is unaware of any authority, whether from the OFIA agencies or otherwise, indicating that Sections 1818(e) and 1818(i) should be governed by different causation standards, as *Calcutt*'s premises would suggest. The undersigned takes no position on this issue.

wrongful act"[482]—or, as Respondent also frames it, that "the risk of loss [from the misconduct] must be reasonably foreseeable."[483] As detailed *supra*, it was reasonably foreseeable that an imprudently structured $1.25 million loan to unqualified borrowers might increase the Bank's risk exposure, be classified as substandard, and ultimately require some portion of the loan balance to be charged off as a loss. Indeed, the Sixth Circuit in *Calcutt* held that the respondent there had proximately caused a $30,000 charge-off on one of the Bedrock Transaction loans at issue in that case, because he had "participated extensively in negotiating and approving the Bedrock Transaction."[484]

Here, Respondent declares that he bears no responsibility for the loss to the Bank because he "merely proposed the loan to the voting committee" and did not vote in favor of the loan's approval.[485] According

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[482] R Br. at 49 (internal quotation marks and citation omitted). Respondent also asserts that, under *Calcutt*, proximate cause "requires a finding of a threat of bank stability," R Reply at 19, but this is plainly incorrect: not only did this aspect of *Calcutt* arise under its discussion of unsafe or unsound practices (i.e., misconduct), rather than proximate causation (i.e., effect), *see Calcutt*, 37 F.4th at 326, but the undersigned has already explained that *Calcutt* is not dispositive on this issue and, in fact, is directly contradicted by binding agency precedent. *See* n.23 *supra*.

[483] R Br. at 50 (internal quotation marks and citation omitted).

[484] *Calcutt*, 37 F.4th at 330.

[485] R Br. at 53. Respondent fails to mention, of course, that he initially did vote to approve the 618 Holdings loan, only abstaining belatedly on the grounds that Tate and Harbison were his employees. *See* JX 1 (Joint Stip.) ¶ 27.

to Respondent, "[a]ny loss in connection with the 618 Holdings loan" should therefore be cast not on him, but on "the actual voting members who made the decision to approve the loan."[486] This argument is not persuasive.

It is abundantly clear from the record that Respondent was the architect of the 618 Holdings loan request, its driving force, and its principal advocate, as well as the single person most responsible for the board's decision to approve the loan as structured. Respondent devised the plan to assist Evergreen that included the sale of the Carmi Warehouse; persuaded Harbison and Tate to obtain financing for the purchase of the warehouse from Evergreen in furtherance of that plan; provided the terms and structure of the loan and the related purchase-leaseback transaction, which the borrowers did not even see until closing; directed Gaskins to prepare a loan request on behalf of Harbison and Tate in the name of 618 Holdings (a company created at Respondent's direction as well, with the Bank's attorney drafting incorporation papers at his behest); and arranged for Gaskins to present the loan to the Bank's board and to vote in favor of its approval.[487] As in *Hendrickson v. FDIC*, where the Seventh Circuit held that an IAP's facilitation of a bank client's money laundering activities resulted in a loss to the bank,[488] and *Calcutt*, in which the Sixth Circuit found

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[486] R Br. at 53.

[487] *See* Part V(G) *supra* at 34-38, 42-44.

[488] *See Hendrickson v. FDIC*, 113 F.3d 98, 103 (7th Cir. 1997) (holding that, for purposes of causation, it was sufficient to establish that an IAP's actions "facilitated" the conduct resulting in the harm even if it was one of many causes).

proximate causation where the IAP had negotiated and approved the transaction that led to bank loss from a loan charge-off,[489] Respondent here not only "proposed the loan to the voting committee," but also directly conceived of, structured, and orchestrated the transaction such that it would be approved by the Bank's board.

Even beyond Respondent's specific actions, the record reflects that his dominant influence at the Bank and his intimidating and vindictive management style resulted in the majority of the Grand Rivers board approving the 618 Holdings loan, despite several board members having expressed significant concerns about aspects of the transaction. Grady Gaskins testified that he approved the loan *even though he did not think that Harbison and Tate had the ability to repay it*, because he was directed to do so by Respondent—and that he believed he "would have been removed" from the board if he had not voted yes.[490] Jake Campbell raised questions about the lack of proper loan documentation, the speculative cash flow of the borrower, and the "very favorable appraisal" of the collateral, yet voted for the loan anyway because Respondent convinced him to do so.[491] Lucas Phelps, the third board member to vote to approve the loan, had no prior banking experience and was viewed as someone who did not "know the correct questions to ask upon a loan approval" and

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[489] *Calcutt*, 37 F.4th at 330.

[490] Gaskins Tr. 76:15-77:2.

[491] EX 284 (December 22, 2015 email chain including email from J. Campbell to Bank board); *see* EX 294 (December 23, 2015 email chain from F. Bonan II to Bank board); Gaskins Tr. 397:13-22, 399:4-6.

"who would vote yes without a whole lot of questions."[492] And Whitney Stringer, who opposed the loan's approval, chose to limit who she spoke to about her concerns and ultimately voted to abstain because she feared reprisal from Respondent if she had expressed more direct opposition.[493] All in all, it was clear to the Bank's board that Respondent not only wanted the 618 Holdings transaction approved, but expected them to approve it.

Respondent's other argument, that he is not responsible for loss attributable to the 618 Holdings loan because he is not the one who charged it off, similarly fails. From the moment of the loan's approval, it was foreseeable that some portion of it would need to be charged off: Examiners Cash and Floersch recognized the many issues with the structure of the loan and how that structure was implemented during their examination beginning in January 2016, and classified the loan as substandard no more than two months after its approval.[494]

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[492] Winters Tr. 59:5-6, 172:23-173:3; *see also* EX 314 (2016 ROE) at 7 (noting that Phelps "voted affirmatively on every measure or loan presented by or under the direction of [Respondent]").

[493] *See* Stringer Tr. 64:16-22, 67:3-7, 129:3-6.

[494] *See* Part V(G) *supra* at pp. 49-52; *see also* EX 314 (2016 ROE) at 56 (noting that the classification was "due to the lack of financial capacity of the debtors, the inappropriate structuring of the 618 Holdings credit in which an indirect [principal and interest] reserve account was establish[ed] to make loan payments, the lack of collateral protection, and the questionable ability of Evergreen Properties to generate sufficient income to pay lease payments"); EX 325 (email chain including February 18, 2016 email from W. Stringer to F. Bonan II) (stating that examiners "[s]aid we financed 1st 18 months of lease payments,

Nor does it matter that it was the Bank rather than Respondent who charged off the loan. Respondent himself recognizes that "acts or omissions need not be the sole cause of the bank's losses," as long as they are "a substantial factor" and the risk of loss was "reasonably foreseeable at the time of the wrongful act."[495] And the FDIC Board has made it clear that a respondent in a Section 1818 enforcement action "cannot escape liability simply because others have contributed to the bank's loss as well."[496]

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a structure that they have not seen before. 2 borrowers that cannot support the debt if lease payments aren't made, and the ability for the lease payments is questionable. Questioned collateral value. Borrowers did not have a down payment and didn't bring anything to the table on this deal.").

[495] R Br. at 49 (internal quotation marks and citation omitted).

[496] *Michael Sapp*, 2019 WL 5823871, at *15; *see also*, *e.g.*, *Landry*, 204 F.3d at 1139 (IAP responsible for misconduct causing loss even if "others may have been more guilty"); *In the Matter of Jeffrey Adams*, No. 93-91(e), 1997 WL 805273, at *5 (Nov. 12, 1997) (FDIC final decision) (noting that "multiple factors, and individuals, may contribute to a bank's losses" without absolving respondent of liability). Interpreting a related statutory provision in *In the Matter of Grant Thornton LLP*, the OCC likewise concluded that an independent auditor had caused actionable loss to a bank through its issuance of an unqualified audit opinion, even though it was the bank's actions in response to the opinion that arguably were more directly responsible for any loss suffered. *In the Matter of Grant Thornton LLP*, Nos. AA-EC-04-02 & -03, 2006 WL 5432171, at *25 (Dec. 29, 2006) (OCC final decision) (noting that under the auditor's theory of causation, "conduct of independent contractors could never be the cause of a loss or other adverse effect for purposes of [the applicable statute], because it would always be the financial institution's acts or omissions that led to the loss to, or adverse effect on, the bank"), *vacated on other*

As the undersigned observed at the summary disposition stage, "if it was Respondent's conduct that led the Bank to approve a substandard loan for which a charge-off was later deemed necessary, then it may fairly be said that he caused the Bank loss for purposes of Section 1818."[497] It does not matter if Respondent was no longer at Grand Rivers when the charge-off occurred and played no part in the decision to charge off the loan—if an IAP originates an imprudent loan, thereby exposing their institution to a reasonably foreseeable risk of loss, causation cannot be premised on whether or not the IAP themself is on hand to remediate that risk. The undersigned therefore concludes that the effect element of Section 1818(e) has been met.

3. Culpability

Before a Section 1818(e) prohibition order is merited for the engagement in unsafe or unsound banking practices or a breach of fiduciary duty, the federal banking agency must demonstrate that the respondent acted with either personal dishonesty or willful or continuing disregard for the safety and soundness of the institution in question.[498] 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.[499] Evidence

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grounds sub nom. Grant Thornton LLP v. OCC, 514 F.3d 1328 (D.C. Cir. 2008).

[497] MSD Order at 61.

[498] *See* 12 U.S.C. § 1818(e)(1)(C).

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

that the respondent's conduct was merely negligent is not sufficient.[500]

Here, Enforcement Counsel argues that Respondent's misconduct in connection with the 618 Holdings loan was actionably culpable in all three statutory respects.[501] While there is some evidence of personal dishonesty and continuing disregard, as discussed below, the undersigned concludes that the evidence most clearly shows that Respondent acted with a willful disregard for the safety and soundness of Grand Rivers when he contrived to engineer the Bank's approval of an imprudently structured $1.25 million loan to an unqualified borrower with uncreditworthy guarantors for the benefit of Evergreen and PNB.

Generally speaking, "[w]illful disregard is deliberate conduct that exposes the bank to abnormal risk of loss or harm contrary to prudent banking practices."[502] Most of this formulation is familiar as the Horne Standard for unsafe or unsound practices: "deliberate" conduct that is unsafe or unsound, then, constitutes willful disregard. Moreover, conduct is "deliberate" merely if it is intentional rather than "technical or inadvertent."[503] In other words, the respondent need only be "aware of [their] conduct" or lack thereof; they need not have knowledge that the conduct in question was wrongful at the time they

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[500] *See id.*

[501] *See* EC Br. at 40-42 (personal dishonesty), 42-45 (willful and continuing disregard).

[502] *Michael Sapp*, 2019 WL 5823871, at *16.

[503] *Douglas Conover*, 2016 WL 10822038, at *26.

were engaging in it.[504] Quintessentially, willful disregard exists when a respondent "deliberately and consciously takes part in an action that evidences utter lack of attention to an institution's safety or soundness" or demonstrates "a willingness to turn a blind eye to the institution's interests in the face of known risk."[505]

As has been described at length, Respondent deliberately embarked on a course of action, in originating and advocating for the 618 Holdings loan, that he had reason to understand would leave Grand Rivers worse off than before. His conduct throughout this episode evidenced a distinct lack of regard or attention for Grand Rivers' interests and its safety and soundness. There can be no suggestion that his choice to direct the approval of a substandard loan that paid off PNB and assisted Evergreen at the expense of Grand Rivers was "technical or inadvertent"; he understood the loan structure, he knew or should have known how unqualified the borrowers were, and he nevertheless proceeded "in the face of known risk" to the Bank. This is willful disregard.

On the other hand, the undersigned declines to conclude on the present record that Respondent acted with continuing disregard or with personal dishonesty in connection with the 618 Holdings loan. Continuing disregard is "conduct which has been

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[504] *Id.* at *24 (noting that "willfulness does not require a showing that Respondent was aware of the law").

[505] *Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995); *accord Donald Watkins*, 2019 WL 6700075, at *8; *see also Faigin & Lannan*, 2015 WL 9855325 ("An IAP cannot claim ignorance by turning a blind eye to obvious violations of his statutory and fiduciary duties.").

voluntarily engaged in over a period of time with heedless indifference to the prospective consequences,"[506] and although there is no specific minimum length that a respondent must be heedlessly indifferent in order for their disregard to be "continuing" for purposes of culpability, a review of previous matters in which that threshold has been met reveals periods of misconduct longer than the several weeks at issue here.[507] Likewise, it is unclear from the record that Respondent sufficiently evinced "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"[508]—the touchstones of personal dishonesty—specifically with regard to the 618 Holdings loan. Certainly, Respondent was untruthful to Carrollton's loan officer about his reasons for not proceeding with his own purchase of the Carmi Warehouse,[509] and used his dominant authority at the Bank to strong-arm the loan's approval, but there is little indication that Respondent lied to the Board or sought deliberately to deceive

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

[507] *See*, *e.g.*, *Donald Watkins*, 2019 WL 6700075, at *9 (continuing disregard where misconduct took place "repeatedly . . . between July 2010 and November 2012"); *Steven Ellsworth*, 2016 WL 11597958, at *17 (continuing disregard where misconduct "involved repeated acts over more than a year"); *Dodge v. OCC*, 744 F.3d 148, 161 (D.C. Cir. 2014) (affirming holding of continuing disregard when the respondent "exposed the Bank and its depositors to substantial risk . . . on multiple occasions over several reporting periods").

[508] *Tonya Williams*, 2015 WL 3644010, at *10 (internal citation omitted).

[509] *See* Bonan Tr. 914:23-916:1; Part V(F) *supra* at p. 31-32.

them, or Harbison and Tate, in the process.[510] The undersigned thus concludes that only willful disregard as to the 618 Holdings loan has been shown by a preponderance of the evidence.

4. Section 1818(i)

The undersigned has concluded that Respondent has breached his fiduciary duties of care and loyalty and caused more than minimal loss to the Bank in connection with the 618 Holdings loan. As a result, the statutory elements for the assessment of a second-tier civil money penalty under 12 U.S.C. § 1818(i) have been met as well as the elements for a 12 U.S.C. § 1818(e) prohibition order.[511]

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[510] The undersigned is not persuaded that Enforcement Counsel has shown that Respondent consciously withheld material information regarding the Evergreen Loan Relationship from the Grand Rivers board in a manner that demonstrates personal dishonesty on that score. *See* EC Br. at 40.

[511] *See* Part III *supra* at pp. 7-8 (elements of Section 1818(i)). As noted previously in n. 24, Enforcement Counsel did not develop its assertion that Respondent's conduct constituted *recklessly* unsafe and unsound banking practices as to the 618 Holdings loan, as necessary for that prong of Section 1818(i). As also noted, the undersigned additionally rejects Enforcement Counsel's unsupported assertion that Respondent's "actions relating to the release of Rig 23, his attempt to refinance, in part, PNB's loan to Evergreen Drilling at the Bank through Bentley Operating, and his [] orchestration of the 618 Holdings loan were 'part of a pattern of misconduct'" for purposes of 12 U.S.C. § 1818(i)(2)(B)(ii)(I). EC Br. at 59; *see* Part IV *supra* at n. 25. Regardless, the elements of Section 1818(i) are met here by Respondent's breach of fiduciary duty causing more than a minimal loss to the Bank.

B. The Release of the Rig 23 Collateral

Enforcement Counsel argues that a prohibition order and civil money penalty against Respondent are also warranted on the basis of the Bank's release of its Rig 23 collateral in November 2015.[512] Here, again, the undersigned finds that Respondent's conduct exhibited far more regard for the interests of PNB and Evergreen than it did for the interests of the Bank.

1. Misconduct

According to Enforcement Counsel, Respondent's actions—and lack of action—over the course of the events that culminated in the release of the Bank's Rig 23 security interest evinced a failure of supervision and oversight and a general indifference to the best interests of Grand Rivers that constituted a breach of his fiduciary duties of care and loyalty to that institution as well as recklessly unsafe or unsound banking practices.[513] The undersigned agrees.

a. Breach of Fiduciary Duty

At no point over the course of the sale of Rig 24 did Respondent exhibit "the proper supervision of subordinates" or "the constant concern for [Grand Rivers'] safety and soundness" required of him as a fiduciary of the Bank.[514] Indeed, and as discussed in

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[512] *See* EC Br. at 45-58.

[513] *See id.* at 52-53 (recklessly unsafe or unsound), 53-56 (breach of fiduciary duty).

[514] *Faigin & Lannan*, 2015 WL 9855325, at *82 (internal quotation marks and citation omitted); *see* Part V(H) *supra* at pp. 59-73 (describing sale of Rig 24 and release of Bank's interest in Rig 23).

much greater detail in Part V(H) *supra*, the record reflects that had Respondent been mindful of the Bank's interests to even a minimal degree while facilitating the transaction between Evergreen and U.S. Energy in the fall of 2015, it is likely that the Bank's PMSI in Rig 23 would not have been terminated and the Bank's loan to Evergreen Drilling would not have been left unsecured. Respondent, unique among Grand Rivers personnel, had access to full information regarding the details of the Rig 24 sale, not only through his role at Grand Rivers but as PNB's principal in the transaction and as someone who had been intimately involved in the state of Evergreen's debt to both banks over the preceding months.[515] Only Respondent at Grand Rivers had knowledge of which rig numbers corresponded to which rigs and possession of Appendix A, the lone document that identified the rig being sold as a Service King 775. Respondent knew, and was told repeatedly, including on the morning that he "directed for Rig 24 to be released,"[516] that the Bank had no security interest in such a rig, nor did it have any kind of blanket subordinate interest in Evergreen assets. He also knew, and was also told, that the Bank *did* have an interest in another rig, a Cabot 900—Rig 23—that was the Bank's only collateral securing its $550,000 loan to Evergreen Drilling.

The terms of the Rig Purchase Agreement required Grand Rivers to release its interest in Rig 24, an interest that Respondent knew the Bank did not

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[515] *See* EX 180 (October 27, 2015 email from F. Bonan II to C. Zimmerman, S. Collins, F. Bonan Sr., and H. Bonan).

[516] Bonan Tr. 906:15.

possess. Exhibit C to that agreement, drafted by someone at PNB or Evergreen, nevertheless somehow listed an Illinois filing number for Grand Rivers' purported interest in that rig and stated that it needed to be released for the transaction to be consummated. At any point between October 9, 2015—when Respondent, already in possession of Appendix A, is confirmed to have received Exhibit C—and November 13, 2015—when Respondent, by his own admission, pressured his subordinates Grady Gaskins and Kassie Winters to "[r]elease Rig 24"[517]—Respondent could have brought this seeming impossibility to the attention of the involved parties, informing them that the Bank had no interest to release and that the transaction could proceed without the Bank's involvement. At any point after October 13, 2015, when Winters emailed Respondent copies of unrecorded termination statements for security interests in Illinois and Indiana that had been filed in January 2013—the same as Rig 23[518]—Respondent could have taken a single step to confirm with his subordinates what it was, in fact, that the Bank would be releasing if it had no interest to release.[519] And certainly at some point on November

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[517] Bonan Tr. 855:18-19.

[518] *See* EC Reply at 13 (noting that "both unrecorded UCC-3 terminations emailed to Bonan II identified that the security interests being terminated were recorded by the Bank in early January 2013, the filing dates of its PMSI financing statements for Indiana and Illinois").

[519] *See* Bonan Tr. 880:12-20 ("Q: So although you don't know what's being terminated, you know Ms. Winters has just sent you an unrecorded termination of a Financing Statement of collateral of Grand Rivers Community Bank pertaining to

12, 2015, when Winters told Respondent that the Bank's only Evergreen Drilling collateral of any kind was a Cabot 900 rig,[520] or the morning of November 13, 2015, when April Riecken emphasized that the Bank had no collateral in Rig 24, Respondent could have pushed back in any way on the apparent belief by U.S. Energy that the deal would not be done without a release from Grand Rivers. Instead, focused solely on the funds that PNB would receive once the transaction was complete (and indifferent to the prospect of Grand Rivers receiving any compensation for its own part in the deal),[521] Respondent not only did not question anything, but he angrily and immediately ordered Winters and Gaskins to release an interest that he knew did not exist—an order that Winters interpreted as a command to file the unrecorded termination statements that she had sent to Respondent a month prior, regarding a rig with which she was unfamiliar beyond the filing number on Exhibit C, and to which he had raised no objections and asked nothing further. Throughout the transaction, in short, Winters had only some of the

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Evergreen Drilling. Is that correct? A: Yeah, I assumed it was a release on Rig 24.").

[520] As always, it is important to underscore that—contrary to his hearing testimony—Respondent knew well at the time that Rig 23 was a Cabot 900, in contrast to Rig 24, which was a Service King 775. *See*, *e.g.*, EX 180 (October 27, 2015 email from F. Bonan II to C. Zimmerman, S. Collins, F. Bonan Sr., and H. Bonan) (referring to Evergreen rigs by number and by model); *see also* Part V *supra* at n. 31 (additional examples).

[521] *See* Bonan Tr. 908:8-14 ("Q: And you were more concerned about Peoples getting the 1.262 million dollars—A: Because I knew Grand Rivers had no interest in Rig 24. Q: Grand Rivers weren't getting anything? A: That's right.").

puzzle pieces, while Respondent had the whole puzzle but never bothered to open the box or even show his subordinates the picture on the lid.

The undersigned concludes that Respondent thus breached his fiduciary duty of care regarding the Rig 23 release in the following ways:

First, Respondent not only failed to properly supervise his subordinates, but acted in such a way towards those subordinates as to make their accidental release of the Rig 23 interest foreseeably more likely. When Riecken emailed him on November 13, 2015 informing him that "[e]ven though there is no collateral for rig 24 at Grand Rivers[,] Denny still wants a recorded UCC-1,"[522] Respondent did not take any time to evaluate the state of affairs or inquire with Evergreen or U.S. Energy or the appropriate personnel at the Bank about what "a recorded UCC-1" on a nonexistent security interest might look like, nor did he consider the potential consequences for the Bank in acceding to this request. Instead, he immediately pressured Gaskins and Winters to do the thing that he knew or should have known could not be done, placing them in an impossible position without the benefit of the information he possessed.[523] This alone is a breach of Respondent's fiduciary duty.

Among other things, Respondent also breached his fiduciary duty of care in this manner by failing to question why Winters had sent him unrecorded UCC-

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[522] EX 233 (email chain including November 13, 2015 email from A. Riecken to F. Bonan II and S. Collins).

[523] *See* Bonan Tr. 906:3-4 ("I knew that Grand Rivers Bank did not have Rig 24 as collateral."), 906:15 ("I directed for Rig 24 to be released.").

3 terminations for security interests in Illinois and Indiana when the Rig Purchase Agreement specified only an Illinois UCC.[524] While Respondent attempts to explain this away by saying that he "assumed" that what Winters had given him "was a release on Rig 24" because he "never looked at this attachment until [he] just looked at it in front of" Enforcement Counsel at the hearing,[525] this is simply more evidence of derelict supervision—particularly since, as detailed in Part V(H) *supra* at pp. 73-74, he could not have both assumed that Winters had given him a release on Rig 24 and simultaneously understood (as he repeatedly claims he did) that such a release was not possible. Even a small amount of diligence in the face of this apparent paradox would have served the interests of the Bank by alerting Winters that the UCC-3 termination statements she had provided were actually for Rig 23, but Respondent either did not recognize the contradiction or did not care.[526]

Second, Respondent failed to discharge his fiduciary responsibility "to investigate, verify, clarify, and explain" while participating in a transaction in which he should have understood that not all involved appeared to be operating with the same

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[524] *See* EX 143 (October 16, 2015 email from K. Winters to F. Bonan II, A. Evans, and A. Riecken attaching unrecorded Illinois UCC-3 termination statement); EX 142 (October 16, 2015 email from K. Winters to F. Bonan II attaching unrecorded Indiana UCC-3 termination statement).

[525] Bonan Tr. 880:12-25.

[526] As Enforcement Counsel puts it, "Winters had sent Bonan II unrecorded terminations, and his only action, thereafter, was to instruct her to file them." EC Reply at 14.

information[527]—to act, that is, "with the care an ordinarily prudent person in a like position would exercise under similar circumstances."[528] The greater the scope of authority, the broader the duty, and here Respondent had authority to effectuate the transaction on behalf of PNB as well as Grand Rivers.[529] Respondent "had access to all of the relevant information—indeed, he was the only person at the Bank aware of the entirety of the Rig 24 sale transaction and in contact with each of Evergreen Drilling, U.S. Energy, the escrow agent, and PNB."[530] In that capacity, Respondent could and should have served as a conduit to ensure that all parties to the transaction were on the same page and had an accurate understanding of, for example, whether the Bank had any kind of security interest in the rig being sold and whether any kind of release was actually necessary from that bank as a result. All it would have taken was passing along to Denny Boyer or Abbey Evans (who should have known already) the information that the Bank had no interest in Rig 24, supported if necessary by the results of a UCC-1 search of the kind that Scott Collins had performed

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[527] *Faigin & Lannan*, 2015 WL 9855325, at *82 (internal quotation marks and citation omitted).

[528] *Michael*, 687 F.3d at 350-51 (internal quotation marks and citation omitted).

[529] *See* EX 216 (November 11, 2015 email chain indicating that Respondent was responsible for the transaction on behalf of PNB); *see also Faigin & Lannan*, 2015 WL 9855325, at *82 ("The greater the authority of the director or officer, the broader the range of his duty.") (internal quotation marks and citation omitted).

[530] EC Br. at 53; *see also* EPF ¶¶ 300-310, 338.

for PNB at the end of that September.[531] Conversely, Respondent never communicated to Winters and Gaskins his apparent understanding that Boyer believed the Bank to have some kind of blanket subordinate interest in Evergreen that covered Rig 24 and that needed to be released—had he done so, they could have disabused him of that notion in even clearer terms than Winters did on November 12, 2015.[532] Enforcement Counsel states that Respondent "directed Bank staff to release collateral before determining whether the Bank was obligated to release its collateral,"[533] but it is worse than that: Respondent knew that Grand Rivers was not obligated to release any collateral, yet directed his subordinates there to release the collateral anyway in order to placate a party to the transaction who was under the mistaken impression that the Bank had collateral in Rig 24 to release.[534]

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[531] *See* EC Br. at 55 (arguing that "[w]hen Bonan II did not review documentation or failed to challenge or investigate US Energy's claim that the Bank had a security interest in Rig 24, he breached his duty of care").

[532] *See* EX 226 (November 12, 2015 email chain including emails from K. Winters to F. Bonan II confirming multiple times that the only Evergreen collateral held by the Bank was the Carmi Warehouse on a loan to Evergreen Properties and "a Cabot 900 series drilling rig" on a loan to Evergreen Drilling).

[533] EC Reply at 5.

[534] *See* Bonan Tr. 905:16-18 ("Q: Why didn't you tell Mr. Boyer that [the Bank did not have an interest in Rig 24]? You say hey pal—A: Well, I told him that I was getting the UCC releases that he requested. That's what I kept telling him."); *see also* R Reply at 25 (claiming that Respondent was "simply pacifying a buyer that someone at Grand Rivers would do what needed to be done to finalize the sale of Rig 24").

Third, Respondent did not act "in a manner reasonably believed to be in the [B]ank's best interest" over the course of the Rig 24 sale, as his fiduciary duty of care to the Bank obligated him to do.[535] The lack of compensation for the Bank in exchange for the release of its collateral is but one example: even if the Grand Rivers had had a Rig 24 security interest, whether as a PMSI or as part of a blanket subordinate lien securing an Evergreen loan, Respondent's order to Gaskins and Winters to (in his words) "release Rig 24" would have resulted in the Bank losing something of value in exchange for nothing at all. The Rig Purchase Agreement expressly contemplated that liens and encumbrances on Rig 24 would "be removed by application of all or a portion of the purchase price at closing,"[536] but there is no evidence that Respondent ever sought to advance the Bank's interests under this provision or expressed any concern about the possibility that the Bank would be releasing collateral without being paid for it—or, indeed, had the Bank's interests in mind to any degree. (For an example of a Grand Rivers employee properly discharging their fiduciary duty to the Bank, compare Respondent's conduct to that of Bank loan officer Don Nave—who, when pressed by Scott Collins to release the Bank's interest in Rig 23, responded that he would not be doing so unless the Bank was fully compensated for the loss of

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[535] *Steven Ellsworth*, 2016 WL 11597958, at *17; *see also Smith & Kiolbasa*, 2021 WL 1590337, at *15 ("Officers and directors of depository institutions have a strict fiduciary duty to act in the institution's best interests.") (internal quotation marks and citation omitted).

[536] RX 40 (Rig Purchase Agreement) § 3.1(c).

collateral.)[537] To the contrary, Respondent's focus was on the compensation due to PNB, which would be receiving virtually all of the proceeds from the Rig 24 sale.[538]

In that vein, the undersigned concludes that Respondent breached his fiduciary duty of loyalty in addition to his fiduciary duty of care. Reviewing the record, there is no fair conclusion other than that concern for the interests of Evergreen and PNB in the fall of 2015 led Respondent to be—at best—inattentive to his responsibilities as a fiduciary of Grand Rivers.[539] Given the level of control exerted by Respondent over the Evergreen Loan Relationship at both banks, moreover, the undersigned finds it implausible that Respondent would not have been aware of PNB's efforts to get Grand Rivers to release its interest in Rig 23 or Evergreen's subsequent pledge of Rig 23 as collateral to PNB free and clear of all liens and encumbrances.[540] It is reasonable to wonder how much Respondent's divided loyalties affected his ability to bear Grand Rivers' interests in

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[537] *See* EC-OPP-13 (Nave Decl.) ¶ 16 (refusing to release the Bank's PMSI in Rig 23 unless the Bank "was paid the full amount of its lien pursuant to the UCC-1 on file with the Illinois and Indiana Secretaries of State").

[538] Respondent's testimony that he was not focused on Grand Rivers' lack of compensation because he "knew [it] had no interest in Rig 24," Bonan Tr. 908:10, is a logical merry-go-round already discussed in Part V(H) *supra* at pp. 61-66.

[539] *See Smith & Kiolbasa*, 2021 WL 1590337, at *15 (noting that "conflicts of interest [and] divided loyalties are inconsistent with fiduciary responsibilities") (quoting *Michael*, 687 F.3d at 351).

[540] *See* Part V(H) *supra* at pp. 56-59.

mind; certainly the ultimate outcome of the Rig 24 sale—including, but not only, the Bank's unnecessary release of Rig 23, leaving PNB with first position on that collateral—benefited PNB and Evergreen at the Bank's expense, much in the way the 618 Holdings loan did.[541] If the inclusion of information pertaining to the Bank's Rig 23 security interest in the Rig 24 purchase agreement was truly error, it was a convenient one for PNB, and the best that may be said for Respondent's role in the matter is that he was too focused on Evergreen and PNB to discharge his duties to the Bank with the diligence, care, and loyalty they required.

Respondent marshals several arguments for why he did not breach his fiduciary duties to the Bank in connection with Rig 23, none of which are availing. To begin with, Respondent argues broadly that his duty to supervise subordinates does not extend to "menial task[s] that should easily be handled by lower-level employees," such as "drafting financing statements" or "confirming collateral referenced by serial number."[542] He asserts that "[i]n his position as Chairman of Grand Rivers, it would be wholly inefficient and unreasonable to expect [Respondent] to review all filings made by employees."[543] And he

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[541] *See* EC Br. at 56 (noting that "as with the 618 Holdings loan, Bonan II's actions [in connection with the Rig 23 release] only benefited Evergreen Drilling and PNB, but placed significantly greater risk on the Bank. . . . [T]he [Rig 24] sale resulted in nearly $1.2 million being paid to PNB while the Bank converted the fully secured loan to Evergreen Drilling into an unsecured credit with $549,495 outstanding to a troubled borrower.").

[542] R Reply at 25.

[543] R Br. at 2.

cites an Eleventh Circuit case, *Doolittle v. NCUA,* for the proposition that "[a] banker ordinarily 'cannot be held to have breached his fiduciary duty simply because his underlings failed to follow his orders.'"[544]

Respondent's argument is specious. Gaskins and Winters were no mere underlings, but the Bank's CFO and Head of Loan Operations, tasked by Respondent with effectuating a million-dollar transaction that Respondent viewed as "critical" to the financial health of Evergreen and its ability to pay down its debt at PNB.[545] Further, the tasks being performed were not "menial," but rather a core component of the transaction's terms. Grand Rivers was being asked to release its interest in the rig being sold. Insofar as Winters understood, this was the rig identified in Exhibit C of the Rig Purchase Agreement; the file numbers corresponded, and the Bank did not have any other rigs as collateral.[546] But the evidence shows that Respondent knew better: he knew the model of the rig for sale, information Winters did not have, and he knew the Bank had no interest it could release in that rig. He also knew that the PMSI that the Bank *did* possess, in a different rig, was its only collateral on a $550,000 loan. And he

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[544] *Id.* at 35 (quoting *Doolittle v. NCUA*, 992 F.2d 1531, 1537 (11th Cir. 1993)).

[545] *See* Bonan Tr. 848:23-25 ("[I]t was critical for Gary [Evans] to sell this rig. It was critical for Evergreen to sell this rig to pay down debt. . . . They were in a place where they had to pay down debt, so the sale of that rig was critical during that time period.").

[546] *See* Winters Tr. 159:5-8 ("I wasn't sure what Rig 24 was at any point. I just knew what the UCC number that they had listed in the purchase agreement, was the UCC I had in file.").

had been provided with UCC-3 termination statements for his review which, had he only reviewed them, would have made it clear to him that the Bank was poised to release its interest in the wrong rig. To be sure, Respondent is not expected "to review all filings made by employees," but it is not asking too much for him to notice here that he has been given termination statements for Indiana and Illinois, for example, when the UCC interest ostensibly requiring release is only in Illinois; when the Bank's only collateral on its Evergreen Drilling loan was recorded in both of those states; and when there is no reason for any terminations on any Bank UCCs to be filed in the first instance.

Moreover, *Doolittle* is inapposite: as Enforcement Counsel observes, the bank official in that case "instructed a loan supervisor to not make any more commercial loans to a credit union member" and "took steps to prevent further escalation of the situation," but "the loan supervisor ignored the instructions." [547] Here, by contrast, Winters is following Respondent's instructions, but the instructions themselves are impossible—something that Respondent has reason to know and that Winters does not. The undersigned agrees with Enforcement Counsel that "[u]nlike the officer in *Doolittle*, [Respondent] took no affirmative steps to supervise Gaskins and Winters and he did not attempt to explain to them that he wanted them to release a lien on a rig that he knew had no connection to the Bank."[548]

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[547] EC Reply at 15 n.17; *see Doolittle*, 992 F.2d at 1537.

[548] EC Reply at 15.

As for Respondent's contention that he "expects his employees to handle the tasks that are part of the responsibilities of their employment, not his, correctly,"[549] this hands-off approach is a far cry from the micromanaging, controlling style on display from Respondent throughout the record in regard to his multiple businesses, from determining which junior employees in properties owned by him but managed by others should be getting $1/hour raises[550] to directing Gaskins and Whitney Stringer to visit a new Bank branch to "[t]ime how long it takes to open an account and tell those dumb mother fuckers exactly what to do."[551] The managerial restraint described in Respondent's brief is uncharacteristic at the very least, and describes a trust felt by Respondent in his subordinates' actions that is otherwise absent from the record. Likewise, Respondent protests that "if Winters and Gaskins were confused, they should have followed up and asked [him] to clarify what he wanted,"[552] but the force of this suggestion as a reasonable course of action to have expected at that time is belied by testimony by Winters, Gaskins, and others that Respondent was—

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[549] R Reply at 27 (emphasis omitted).

[550] *See* EX 43 (September 14, 2015 email chain including email from F. Bonan II to G. Gaskins, D. O'Bright, and A. Sosenko) at 3 ("The person assisting Chaurdas with eldorado gets named manager and get 1.00. West city girl is named manager and gets a 1.00 increase. Herrin girl named manager and given $1.00.").

[551] EX 24 (June 11, 2015 email from F. Bonan II to G. Gaskins and W. Stringer).

[552] R Br. at 35.

to put it lightly—not receptive to requests for clarification.[553]

Respondent next argues that Winters and Gaskins have admitted that the release of Rig 23 was their mistake for which they bear full responsibility.[554] This is irrelevant to the question of fiduciary duty. Whether or not the filing of the "wrong" UCC-3 statements—wrong in quotation marks because Respondent has never identified what the "right" statements that Winters could have filed are—was ultimately a mistake by Winters, it was one that Respondent was in position to correct or at least check to some extent, and yet he did not lift a finger. As the FDIC Board has held, a respondent in a Section 1818 enforcement proceeding "cannot escape liability by pointing the finger at his subordinate, even if the subordinate or subordinates in following the instructions of [the respondent as their superior] contributed to the losses and also engaged in the violative conduct."[555] Winters was unquestionably following Respondent's instructions here, as she reasonably interpreted them with the information that she had.

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[553] *See*, *e.g.*, Gaskins Tr. 167:4-7 ("In my experience with him when he gives a direction he wants it done exactly how he has told it to be done and any changes he's—he is—doesn't—that doesn't sit well with him."); Winters Tr. 22:3-8 ("[Respondent was] demanding and aggressive. . . . When he wanted something, he wanted it right then and he wanted it without question."); Nave Tr. (stating that he did not feel comfortable asking Respondent for clarification if he did not understand a request).

[554] *See* R Br. at 15-17.

[555] *Michael Sapp*, 2019 WL 5823871, at *13.

Respondent also makes much of the fact that "Gaskins acknowledged that, as CFO of Grand Rivers, he had a fiduciary duty to protect Grand Rivers and that 'part of that duty would be to make sure that the bank is not releasing . . . the wrong collateral on a loan."[556] But surely any duty held by Gaskins in this regard applied with equal if not greater force to Respondent, should he have had reason to question whether a release of collateral would be in the Bank's best interests, as he did here. Respondent knew that the Bank had a security interest in Rig 23 and no interest in Rig 24; it was his duty to take some affirmative step to ensure that the UCC releases that were seemingly being filed for a nonexistent security interest did not somehow impact the interest that the Bank actually held.

Finally, Respondent claims that he is absolved from responsibility because "Rig 24 is the only rig mentioned in the emails" that he forwarded to Gaskins and Winters on the morning that Rig 23 was released, thereby showing that "when [Respondent] said 'get this bulkshit done,' Winters understood that [Respondent] was referring to a release of Rig 24."[557] If anything, however, this statement neatly demonstrates how Respondent breached his fiduciary duty that day. Respondent's brief (and his testimony) says that he was directing "a release of Rig 24," but no such thing could have been achieved by Gaskins or

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[556] R Br. at 35 (quoting Gaskins Tr. 117:13-22).

[557] *Id.* at 11; *see also id.* at 31 ("Rig 24 was the only rig discussed or referenced in the emails [Respondent] forwarded to Winters and Gaskins. When [Respondent] instructed Gaskins and Winters to 'get this bulkshit done,' he was referring to releases for Rig 24.").

Winters, because—as Respondent, but not Gaskins or Winters, knew and understood at that time—the Bank did not have any interest in Rig 24 that could be released. Respondent was demanding that his subordinates do something that they did not know could not be done. This is a circle that fundamentally cannot be squared: Respondent cannot simultaneously acknowledge that he was directing Winters and Gaskins to release an interest that he knew was nonexistent and then claim that he was acting prudently by doing so.

Perhaps recognizing this, Respondent's reply brief doubles down on two alternate explanations for what he was asking Gaskins and Winters to do. First, Respondent states that when Gaskins told him, on October 9, 2015, that "[o]ur ucc-1 is not a blanket it is just on this specific rig," [558] this representation satisfied his duty to investigate further because "[h]e had no reason to supervise more fully at this point."[559] To the extent that Respondent is here suggesting that he had some reason to believe that the Bank *did* have an interest in Rig 24 because Gaskins told him so, that is patently nonsensical and contradicts Respondent's testimony and his consistent litigation position.[560] Second, Respondent claims that he was

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[558] EX 124 (October 9, 2015 email chain including email from G. Gaskins to F. Bonan II).

[559] R Reply at 30.

[560] Furthermore, in a world where Respondent somehow genuinely did believe this, a prudent individual in his position with the best interests of the Bank in mind would have followed up with Gaskins once Winters informed him that the only rig that the Bank had an interest in was Rig 23, to clear up the contradictory information.

simply "mistaken in his understanding that Grand Rivers had some sort of blanket lien, junior, or other security interest (because *he was hearing from people within and outside the bank* that Grand Rivers did)."[561] But Respondent, of course, has offered no evidence or testimony that anyone from inside the Bank ever told him that Grand Rivers had a blanket lien or junior interest that covered Rig 24—indeed, Gaskins and Winters told him precisely the opposite.[562] And it is of course worth noting that if Respondent had based his understanding of what collateral the Bank had on the unsupported representations of a third party that were contradicted by what he was being told by his own personnel, this would likely constitute a breach of Respondent's fiduciary duty by itself.

b. Recklessly Unsafe or Unsound

Enforcement Counsel contends that Respondent's conduct in connection with the Rig 23 release was not just unsafe or unsound—a threshold met by Respondent's breach of his fiduciary duties, as previously discussed[563]—but recklessly so, which is one way to satisfy the misconduct element for the assessment of a second-tier civil money penalty under

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[561] R Reply at 32 (emphasis added).

[562] *See*, *e.g.*, EX 124 (October 9, 2015 email chain including email from G. Gaskins to F. Bonan II) ("Our ucc-1 is not a blanket it is just on this specific rig"); EX 226 (November 12, 2015 email chain in which Winters tells Respondent that the only Evergreen Drilling collateral the Bank has is on "a Cabot 900 series drilling rig").

[563] *See Michael Sapp*, 2019 WL 5823871, at *13 ("Because of their inherent danger, breaches of fiduciary duty also constitute unsafe and unsound practices.").

Section 1818(i).[564] Conduct is "reckless" for these purposes "when it is done in disregard of, and evidencing a conscious indifference to, a known or obvious risk of substantial harm."[565] In the *Blanton* case, for example, the D.C. Circuit affirmed the OCC's determination of recklessly unsafe or unsound practices where the IAP "was aware of the risk posed by [his misconduct] but took only perfunctory steps to mitigate [that] risk."[566]

Here, Respondent took no steps at all to mitigate the obvious risk posed by his indifference to the Bank's best interests over the course of the Rig 24 transaction: namely, that because his subordinates lacked the information he possessed that the rig being sold was not the rig the Bank held as collateral, and because Respondent himself did not adequately supervise the process or properly communicate with either his subordinates or outside parties, it was foreseeable that the Bank's actual security interest in Rig 23 would be jeopardized when Respondent demanded that Gaskins and Winters release what he knew to be an imaginary interest in Rig 24.

That is, despite being told by individuals at Grand Rivers and at Evergreen "that the Bank did not have an interest in Rig 24, and knowing the Bank was getting no proceeds for the sale," Respondent "never challenged US Energy's assertion" that a Bank release was necessary or otherwise "investigate[d]

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[564] *See* EC Br. at 52-53; Part III *supra* at pp. 7-8 (elements of Section 1818(i)).

[565] *Patrick Adams*, 2014 WL 8735096, at *49 (internal quotation marks and citation omitted).

[566] *Blanton*, 909 F.3d at 1175.

the validity of its claim,"[567] instead letting Winters file UCC-3 termination statements that he had multiple opportunities to review and would have seen, with even a perfunctory glance, related to a genuine security interest held by the Bank. And because he knew, furthermore, that the only such security interest on Evergreen Drilling assets represented the Bank's only collateral on a $550,000 loan, Respondent's conduct exhibited "a conscious indifference to[] a known or obvious risk of substantial harm" and therefore constituted recklessly unsafe or unsound banking practices.

2. Effect

The Bank's release of its Rig 23 security interest left its Evergreen Drilling loan unsecured, causing the Bank to obtain a junior lien position on Evergreen's equipment (behind the blanket lien already held by PNB) in order to secure the loan and—and after Evergreen continued to experience financial woes—ultimately resulting in the loan's full balance of $489,268 being charged off in early January 2017.[568] Enforcement Counsel argues that Respondent's misconduct in connection with the Rig 23 release therefore caused financial loss to the Bank—or, in the alternative, made it probable that the Bank would suffer loss—sufficient to satisfy the effect elements of Section 1818.[569]

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[567] EC Br. at 48.

[568] *See* EPF ¶¶ 345 (junior lien position), 346 (financial woes), 347 (charge-off); *see also* Stringer Tr. 111:14-24; Clark Tr. 736:25-737:6.

[569] *See* EC Br. at 56-57, 59.

In response, Respondent advances four arguments as to why his actions did not cause loss or risk of loss to the Bank relating to the release of Rig 23: (1) the Bank never properly perfected its PMSI in Rig 23 at the time of its making; (2) even if the Bank had a properly perfected security interest in Rig 23 sometime before its release, that security interest was lost when the Bank consolidated its Evergreen Drilling loans in May 2014; (3) the Bank still believes it has a Rig 23 security interest that was not released; and (4) it was the negligence of other IAPs, and not Respondent's own acts or omissions, that caused the release of Rig 23.[570] The undersigned finds Respondent's arguments unpersuasive and agrees with Enforcement Counsel that the effect element of Section 1818 has been satisfied.

At the summary disposition stage, the undersigned concluded as a matter of law that the May 2014 consolidation of the Bank's Evergreen Drilling loans did not constitute a "novation that extinguished Evergreen Drilling's obligations under the January 2013 loan purporting to grant Grand Rivers a PMSI in Rig 23,"[571] not least because the paperwork for the refinanced loans expressly references the January 2013 PMSI on Rig 23 as collateral for the consolidated loan[572]— something that Respondent's

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[570] *See* R Br. at 51-53; R Reply at 23-24.

[571] R Br. at 53.

[572] *See* MSD Order at 67-69; EX 15 (May 6, 2014 Commercial Loan Application) at 1 (identifying the loan type as "Comm. Secured" and listing a "Cabot 900 series self-propelled Drilling Rig" as collateral); EX 17 (May 8, 2014 Promissory Note) at 3 (stating, in section titled "COLLATERAL," that "this Note is secured by Commercial Security Agreement dated January 9,

brief never mentions.[573] The undersigned therefore rejects Respondent's renewed novation argument.

With respect to Respondent's argument that the Rig 23 PMSI was never properly perfected because it was a titled vehicle, the undersigned identified

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2013 and securing UCC file #17906194"); *see also* R-MSD-D (exhibit showing both documents).

[573] Respondent suggests that "[i]n considering whether there has been a novation as opposed to a simple renewal, courts consider the 'degree to which the original obligation of the debtor has changed and, to some extent . . . any additional consideration which was conveyed by the debtor to the creditor." R Br. at 52 (internal citation omitted) (ellipses in original). He then notes that the consolidated loan included an additional $126,000 to Evergreen Drilling, reduced the interest rate that Evergreen had to pay, and extended the maturity date of the loans being consolidated "by over three years." *Id.* at 52-53. Yet all of these things only support the conclusion that no novation occurred—as the undersigned observed in the MSD Order, it would make no sense for a loan that provided additional monies and *more favorable terms* across-the-board to the borrower to "have the effect of *decreasing* the amount of collateral identified to secure that debt." MSD Order at 69 (emphasis in original). Incidentally, Respondent's brief on this point contains a significant factual error. He states that the May 2014 loan operated to "consolidate[] the January 2013 loan with another non-PMSI loan, the June 2013 loan," R Br. at 52, but this is plainly not true: the June 2013 loan, just like the January 2013 loan, was expressly secured with a PMSI on Rig 23. *See* EX 14 (June 21, 2013 Commercial Loan Application) at 1 (identifying the loan type as "Commercial Secured" and listing a "Cabot 900 series self-propelled Drilling Rig" as collateral); EX 40 (September 1, 2015 email from D. Nave to S. Collins attaching June 27, 2013 Promissory Note) at 3 (stating, in section titled "COLLATERAL," that "Borrower acknowledges this Note is secured by the following collateral described in security instrument listed herein; described in a Commercial Security Agreement dated January 9, 2013").

several disputed questions of material fact at the summary disposition stage, including "whether and where Rig 23 was titled; whether the Bank's interest in Rig 23 was noted on any certificate of title for Rig 23; and whether the nature of Evergreen Drilling's use of Rig 23 subjected it to regulation under Indiana's vehicle code."[574] The undersigned further noted that Respondent had thus far failed to produce Rig 23's certificate of title or otherwise produce any evidence that Rig 23 was ever registered as a vehicle in Indiana, which was the applicable jurisdiction.[575]

At the hearing, Respondent proffered the report and testimony of his expert Steven Wallace—incorrectly identified in Respondent's post-hearing brief as his other expert, Gary Schwartz—"that the carrier/chassis of Rig 23 was a titled vehicle subject to perfection under the motor vehicle codes in Illinois and Indiana."[576] Relying on the opinion of Wallace, Respondent now declares that Enforcement Counsel "was required to present evidence that Grand Rivers properly noted its security interest [in Rig 23] on a certificate of title" to "prove that Grand Rivers had a properly perfected security interest."[577] The undersigned does not credit Wallace's conclusion that Rig

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[574] MSD Order at 67.

[575] *See id.* at 65 (finding that "Indiana law governs whether the Bank's interest in Rig 23 was perfected by the Bank's initial filing of its UCC financing statement," and that "[u]nder Indiana's Vehicle Code, a security interest in a vehicle . . . is perfected when it is filed with the Indiana Bureau of Motor Vehicles"); *see also id.* at 64-67.

[576] R Br. at 51 (citing RX 52 (Expert Report of Steven Wallace ("Wallace Report") at 2).

[577] *Id.*

23 was a titled vehicle because, as Enforcement Counsel notes, "he based this conclusion solely on a photograph of an unidentified Cabot 900 bearing an Oklahoma license plate."[578] As was the case at the summary disposition stage, Respondent provided no evidentiary foundation to establish that the rig in this photograph was Rig 23, nor why—if it was—the photograph would support Respondent's contention that the Bank's security interest should have been, but was not, recorded on a certificate of title in Indiana or Illinois.[579] Neither did Respondent offer any certificate of title for Rig 23, any reason to believe that Wallace or Respondent himself had ever reviewed any certificate of title for Rig 23,[580] or any evidence that the nature of Evergreen's use of Rig 23 subjected it to regulation under the Indiana motor

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[578] EC Reply at 22; *see also* RX 39 (photograph of Cabot 900 rig with Oklahoma plates).

[579] *See* MSD Order at 66 ("Indiana law provides that the Indiana Bureau of Motor Vehicles is only authorized to issue a certificate of registration for vehicles that have been titled in Indiana. Respondent's photograph suggests that Rig 23 was not titled in Indiana, and thus any efforts by the Bank to record the lien on Rig 23's certificate of title with the Indiana Bureau of Motor Vehicles would have been fruitless."); *see also* EC Reply at 21 n. 30 (noting further that Wallace's expert report "does not explain . . . why an Oklahoma license plate on the Rig in the photograph required a title from Indiana").

[580] *See* RX 52 (Wallace Report) at 2 (stating only that "I have seen photographic evidence that the carrier or chassis is a titled vehicle subject to perfection under the motor vehicle codes of Illinois and/or Indiana"); Wallace Tr. 770:23 771:9 (agreeing that the photograph in RX 39 was the "photographic evidence that the carrier or chassis is a titled vehicle" to which his report referred).

vehicle code,[581] as the MSD Order required for a finding in Respondent's favor on these questions of fact.[582]

By contrast, Enforcement Counsel presented testimony from Bank officer Don Nave, who indicated that the Bank had asked for a certificate of title for Rig 23 and was "told it was equipment and it did not have a title."[583] Moreover, the June 2017 Order of Replevin proffered by Enforcement Counsel, which established PNB's priority interest in Evergreen Drilling's personal property, differentiated between titled vehicles and equipment, and specifically listed Rig 23 as equipment.[584] All in all, the undersigned agrees with Enforcement Counsel that Respondent has "provided no credible evidence that [Rig 23] was a titled vehicle" and has accordingly failed to meet his burden of proof on that issue.[585]

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[581] *See* MSD Order at 66-67 (finding that "Enforcement Counsel highlights evidence in the record that Rig 23 was often transported using other vehicles, suggesting that the extent of its operation on roadways may not have called for registration under Indiana law, and therefore it may not have been subject to the requirement that liens be recorded on the certificate of title").

[582] *See id.* at 67 (denying Respondent's motion for summary disposition on the issue of whether the Bank properly perfected its security interest in Rig 23 because he did not offer evidence supporting a conclusion that Rig 23 was a titled vehicle subject to perfection under the motor vehicle codes of Illinois or Indiana).

[583] EC Reply at 22; *see* Nave Tr. 177:18-22 (also stating that he never got "any information at any time while . . . at Grand Rivers that indicated that the Cabot 900 was a titled vehicle").

[584] *See* EC Reply at 22; EX 354 (Order of Replevin) at 5.

[585] EC Reply at 21; *see also* n. 253 *supra*.

Respondent also argues that the Bank did not suffer a loss from the release of its security interest in Rig 23 because it "believes it still has a security interest in Rig 23."[586] In support of this statement, Respondent points to an unspecified filing in *Grand Rivers Community Bank v. Evergreen Energy, L.L.C., et al.*, Case No. 2017-LM-28 (2nd Judicial Circuit, State of Illinois), in which the Bank purportedly alleged that it had a priority interest in that rig as of September 2022.[587] This argument is misguided. It is irrelevant what representations are made by the Bank for purposes of advancing its litigation position in an action apparently seeking to resolve the existence, validity, and priority of competing interests in Rig 23 in the present day. Rather, what matters for Section 1818 is whether the Bank in fact suffered a loss or probable loss as a result of the filing of the UCC-3 termination statements for the Bank's interest in Rig 23 in November 2015—or, as Respondent puts it, whether his misconduct was "a substantial factor in producing [an] injury" that was "reasonably foreseeable at the time of the wrongful act."[588] Here, it was reasonably foreseeable that "[t]he conversion of a previously secured credit to an unsecured credit, due to [Respondent's] misconduct, [would] create[] significant risk of loss to the Bank"—

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[586] R Br. at 51.

[587] *See id.* (citing RX 275 (September 7, 2022 Response to Peoples National Bank, N.A.'s Combined Motion and Memorandum of Law to Dismiss Grand Rivers Community Bank's Petition for Relief from Judgment) at 2).

[588] *Id.* at 49 (internal quotation marks and citation omitted).

loss that manifested in the Bank's $489,268 charge-off of the Evergreen Drilling loan in January 2017.[589]

Finally, Respondent argues that "any losses sustained by Grand Rivers in connection with the Rig 23 release were caused by the negligence of Gaskins and Winters," rather than by Respondent himself.[590] But the law is clear that "multiple factors, and individuals, may contribute to a bank's losses,"[591] and an IAP may be held responsible for misconduct causing bank loss even if "others may have been more guilty." [592] In this instance, while Winters was responsible for erroneously filing the UCC-3 termination statements that caused the Bank's interest in Rig 23 to be released, she did so at the direction of Respondent, and under his ostensibly watchful eye.[593] The undersigned has already detailed numerous ways in which Respondent's conduct was a subs-

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[589] EC Br. at 57; *see Calcutt*, 2020 WL 847520, at *16 ("[L]oan charge-offs represent a loss to the bank as a matter of law."), *aff'd*, 37 F.4th at 330 ("The charge-off on the loan to Bedrock Holdings, which was part of the Bedrock Transaction, is an effect under [Section 1818]."); *James Leuthe*, 1998 WL 438323, at *15 ("The charge-off requirement has been held as a matter of law to result in loss to the Bank.").

[590] R Br. at 53.

[591] *Jeffrey Adams*, 1997 WL 805273, at *5.

[592] *Landry*, 204 F.3d at 1139.

[593] *See Michael Sapp*, 2019 WL 5823871, at *13 ("Respondent cannot escape liability by pointing the finger at his subordinate, even if the subordinate or subordinates in following the instructions of their superior (Respondent) contributed to the losses and also engaged in the violative conduct.").

tantial factor in the Rig 23 release,[594] but two more examples will suffice:

First, when Gaskins emailed Respondent on October 9, 2015 to tell him that the Bank's "ucc-1 is not a blanket it is just on this specific rig," he added that he "***[j]ust need[s] the attachments to confirm its same equipment and same wording in ucc and purchase agreement***." [595] Respondent had received a copy of Appendix A three weeks earlier and could have provided it to Gaskins at this point, informing him that the rig being sold was a Service King 775. [596] That information would have been crucial, because Gaskins had asked Winters two days prior whether Grand Rivers had Rig 24 as current collateral, and he was told that she did not know the rig number, but that the Bank's collateral was a "Cabot 900 series self-propelled drilling rig."[597] Thus, if Gaskins had possessed Appendix A when Winters emailed him later on October 9 about the UCC releases for Rig 24 and stated, "Not sure we had this is collateral but he wants it released if they do,"[598] he would have known for certain that the rig for sale was not the same rig that the Bank held as collateral

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[594] *See* Parts V(H) and VI(B)(1) *supra* at pp. 67-73, 111-125.

[595] EX 124 (October 9, 2015 email chain including email from G. Gaskins to F. Bonan II) (emphasis added).

[596] *See* EX 45 (September 15, 2015 email from A. Evans to F. Bonan II, S. Collins, and K. Botsch) (attaching Letter of Intent between Evergreen Drilling and U.S. Energy as well as Appendix A).

[597] EX 88 (October 7, 2015 email chain including email from K. Winters to G. Gaskins).

[598] EX 128 (email chain including October 9, 2015 email from G. Gaskins to K. Winters).

and could have communicated that to Winters, thereby avoiding any real possibility of the Rig 23 release mistakenly being filed. Instead, despite having the attachment Gaskins was looking for, Respondent did not pass along Appendix A in response to Gaskins's email seeking confirmation that the UCC and the Rig Purchase Agreement were referring to the "same equipment," nor did he ever provide that document to Gaskins or Winters, permitting Gaskins's misconception that the Bank had a UCC on "this specific rig" to persist and setting the stage for disaster because his subordinates lacked the information he possessed.

Second, on October 16, 2015, Respondent directed Gaskins to call him in relation to "abbeys release."[599] Less than an hour later, Winters sent two emails to Respondent—one of which copied Abbey Evans—attaching unfiled UCC-3 termination statements for the Bank's security interest in Rig 23.[600] While there is no testimony regarding the contents of the phone conversation between Respondent and Gaskins, it may reasonably be inferred that the call was the impetus for the transmission of the termination statements from Winters to Respondent. Again, unlike Respondent, there is no indication in the

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[599] EX 141 (October 16, 2015 email from F. Bonan II to G. Gaskins); *see* Gaskins Tr. 94:17-18 (stating that Respondent was "referring to the release of collateral from Grand Rivers Community Bank").

[600] *See* EX 143 (October 16, 2015 email from K. Winters to F. Bonan II, A. Evans, and A. Riecken attaching unrecorded Illinois UCC-3 termination statement); EX 142 (October 16, 2015 email from K. Winters to F. Bonan II attaching unrecorded Indiana UCC-3 termination statement).

record that Gaskins or Winters had seen Appendix A at this or any point. Yet Respondent, by his own admission, never opened the attachments containing the termination statements or otherwise communicated with Winters regarding their contents.[601] As a result, when Respondent forwarded Boyer's email seeking the "Grand Rivers Bank UCC Release" to Gaskins and Winters on November 13, 2015 with the command to "[g]et this bulkshit done this morning. Do both of you understand me,"[602] Winters had no basis to believe anything other than that the documents that she had sent Respondent for his review, and at his request, a month earlier were the appropriate ones to file.[603] These examples, as well as the others detailed previously, demonstrate that Respondent played a substantial and active role in causing the Rig 23 interest to be released, which in turn caused the Bank loss, thus satisfying the effect element of Section 1818(e).

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[601] *See* Bonan Tr. 880:12-25 ("Q: So although you don't know what's being terminated, you know Ms. Winters has just sent you an unrecorded termination of a Financing Statement of collateral of Grand Rivers Community Bank pertaining to Evergreen Drilling. Is that correct? A: Yeah, I assumed it was a release on Rig 24. . . . I never looked at this attachment until I just looked at it in front of you.").

[602] EX 233 (email chain including November 13, 2015 email from F. Bonan II to G. Gaskins, K. Winters, and A. Riecken).

[603] *See* Winters Tr. 118:24-119:22 ("Q: [W]hy then did you create this document? A: His—he wanted the security interest released and terminated. . . . Q: But why did you send it to Mr. Bonan and not Mr. Gaskins? A: Honestly, I do not know. . . . Probably at his request, would probably be my only reason for just sending it to him.").

3. Culpability

Enforcement Counsel argues that Respondent acted with willful disregard for the Bank's safety and soundness "when he ordered Bank employees to file UCC releases relating to Evergreen Drilling . . . to meet U.S. Energy's demand for the Bank's UCC terminations to be recorded," despite knowing that the UCC security interest that U.S. Energy wanted released did not exist and that the only UCC release that was possible would leave the Bank's $550,000 Evergreen Drilling loan completely unsecured.[604] The undersigned agrees with Enforcement Counsel.

As a reminder, an IAP acts with willful disregard when, through their unsafe or unsound misconduct, he or she "deliberately and consciously takes part in an action that evidences utter lack of attention to an institution's safety or soundness" or demonstrates "a willingness to turn a blind eye to the institution's interests in the face of known risk." [605] Here, Respondent did not at any point during the Rig 24 transaction appear to be bearing the Bank's interests

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[604] EC Br. at 57. Enforcement Counsel also argues briefly that the combination of misconduct relating to the 618 Holdings loan and the Rig 23 release constituted continuing disregard on the part of Respondent "over the course of months in the fall of 2015," *id.* at 58, but Enforcement Counsel offers no support for the proposition that continuing disregard can comprise multiple distinctly different instances of misconduct—in this case, indifference to the Bank's interests leading to the release of Bank collateral on one loan in November 2015 and imprudent behavior in connection with a separate loan in December 2015—and the undersigned need not decide the issue.

[605] *Cavallari*, 57 F.3d at 145; *accord Donald Watkins*, 2019 WL 6700075, at *8.

in mind, and the undersigned concludes that the standard for willful disregard is easily met.

The undersigned will not presume to draw conclusions regarding the contents of Respondent's mind during the relevant period, but this much is unmistakable from the record: Respondent knew—and testified that he knew, repeatedly—that the Bank did not hold any security interest in Rig 24. Respondent also knew that the Bank *did* have a security interest in Rig 23 that served as the only collateral for its loan to Evergreen Drilling. Finally, Respondent knew that his subordinates, at his express direction, would be releasing *some* security interest held by the Bank relating to *some* rig owned by Evergreen. Yet, despite there being only one rig that could conceivably have been released, Respondent did not inquire further.

All of the dots were there to connect; a prudent bank chairman with the interests of Grand Rivers in mind need simply have picked up a pencil—or, in this case, a phone, and communicated with Evergreen and U.S. Energy to clear up the matter: The Rig Purchase Agreement requires the Bank to release its security interest in Rig 24. However, the Bank does not have a security interest in Rig 24—here are the UCC-1 search results to prove it. Therefore, the Rig Purchase Agreement is in error, and there is no need for the Bank to release anything in order for U.S. Energy to have free and clear title to the rig and the transaction to be completed.

Instead of conveying this, however, or taking even a single step to ensure that the Bank's actual security interest in Rig 23 would not be accidentally released as a result of the impossible-to-fulfill request being made by U.S. Energy, Respondent hectored his

subordinates into acting with urgency to release whatever rig it was that they had the ability to release—regardless of the reasonably foreseeable risk to the Bank that this entailed. Respondent had more information than Kassie Winters and better information than Denny Boyer, and yet was seemingly content to let Boyer's misconception go uncorrected—even as it was jeopardizing a transaction that Respondent deemed "critical" for Evergreen—while allowing Winters to believe that the unrecorded UCC-3 termination statements she had provided Respondent in October 2015 were the ones that needed to be filed in response to his demand to "release Rig 24" a month later.[606] In so doing, and through his other misconduct described in Part VI(B)(1) *supra*, Respondent turned a blind eye to the Bank's interests in the face of known risk, thereby acting with willful disregard for the safety and soundness of Grand Rivers and satisfying the culpability element of Section 1818(e).

4. Section 1818(i)

Because the undersigned concludes that Respondent has breached his fiduciary duties of care and loyalty and engaged in recklessly unsafe or unsound banking practices in a manner that caused the Bank to suffer more than a minimal loss, the misconduct and effect elements for the assessment of a second-tier civil money penalty under 12 U.S.C. § 1818(i) have been met with respect to the issue of the Rig 23 release.

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[606] Bonan Tr. 855:18-19 ("Q: What were you directing [Gaskins and Winters] to do? A: Release Rig 24.").

C. Respondent's Other Arguments

Respondent makes a number of additional arguments in his post-hearing brief regarding, *inter alia*, the timeliness of this action, the inherent structure of administrative enforcement actions before OFIA ALJs, the constitutionality of the appointment process for ALJs and for FDIC Board members, his right to a jury trial under the Seventh Amendment, and whether or not he was properly served with the Notice of Charges.[607] All of these arguments were considered and rejected by the undersigned at the summary disposition stage, and they are hereby preserved for review by the FDIC Board should Respondent choose to assert them once more.[608]

D. Civil Money Penalty

Before assessing a civil money penalty, the federal banking agencies are bound to consider the appropriateness of the amount being assessed in light of five mitigating factors: (1) the size of the respondent's financial resources; (2) the respondent's good faith; (3) the gravity of the respondent's violation; (4) the history of any previous violations; and (5) "such other

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[607] *See* R Br. at 57-66.

[608] *See* MSD Order at 39-42 (holding that the FDIC's adjudication structure does not impermissibly allow the FDIC to act as both prosecutor and judge), 42-44 (holding that the FDIC's discovery rules do not violate Respondent's right to due process), 44-46 (holding that Respondent was properly served), 47-50 (holding that this proceeding does not violate Respondent's Seventh Amendment rights), 50-51 (holding that the FDIC Board's removal protections do not warrant dismissal of this action), 51-53 (holding that OFIA ALJs are not unconstitutionally protected from removal), 53-56 (holding that this action is not barred by the applicable statute of limitations).

matters as justice may require."[609] With respect to the $105,000 civil money penalty sought by Enforcement Counsel in this matter, the Parties have made submissions adverting to these factors and to the thirteen interagency factors that financial institution regulatory agencies must also weigh in conjunction when determining a civil money penalty amount.[610] Considering the Parties' submissions, assessing the relevant factors, and for the reasons given below, this Tribunal recommends to the FDIC Board that $105,000 is an appropriate monetary penalty for Respondent's misconduct in this case.

The purpose of a civil money penalty "is to deprive the violators of any financial benefit derived as a result of the violations, provide a sufficient degree of punishment, and [act as] an adequate deterrent to the respondents and others from future violations of banking laws and regulations."[611] The interagency guidance regarding the assessment of civil money penalties further states that "in cases where the violation, practice, or breach causes quantifiable,

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[609] 12 U.S.C. § 1818(i)(2)(G).

[610] *See* EC Br. at 59-60; EX 361 (Expert Report of Traci L. Hefner) ("Hefner Report") at 4-6 (in support of $105,000 civil money penalty); R Br. at 55-56 (in opposition to $105,000 civil money penalty).

[611] *In the Matter of Richard D. Donohoo and Craig R. Mathies*, Nos. 92-249c & b *et seq.*, 1995 WL 618673, at *27 (July 5, 1995) (FDIC final decision); *see also Long v. Bd. of Gov. of the Fed. Res. Sys.*, 117 F.3d 1145, 1154 (10th Cir. 1997) (civil money penalties provide banking agencies with "the flexibility [they] need[] to secure compliance" with the relevant banking laws and to "serve as deterrents to violations of laws, rules, regulations, and orders of the agencies") (internal quotation marks and citation omitted).

economic benefit or loss," a civil money penalty amount that merely recompenses the loss or strips the violator of their benefit will be insufficient "to promote compliance with statutory and regulatory requirements." [612] Rather, "[t]he penalty amount should reflect a remedial purpose and should provide a deterrent to future misconduct."[613] The undersigned will address each of the five mitigating factors in turn, bearing in mind the punitive, deterrent, and remedial goals that civil money penalties are intended to achieve.

1. Respondent's Financial Resources

The Parties have jointly stipulated that Respondent "has the financial ability to pay a civil money penalty in an amount up to and including the respective [$105,000] civil money penalty set forth in the Notice."[614] This factor therefore does not warrant mitigation of the penalty amount sought in this matter.

2. Respondent's Good Faith

The mitigating factor of good faith, in the undersigned's view, encompasses both good faith shown (or not shown) in the course of a respondent's misconduct as well as any showing of good faith made by a respondent, for example through willing cooperation

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[612] Civil Money Penalties Interagency Statement, 63 Fed. Reg. 30226-02, 1998 WL 280287 (adopting Federal Financial Institutions Examination Council's Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies (June 3, 1998)) ("Interagency CMP Policy").

[613] *Id.*

[614] JX 1 (Joint Stip.) ¶ 60.

or genuinely expressed regret and responsibility for their actions, during the agency's investigation and the enforcement proceedings themselves. Such an interpretation provides an incentive for respondents to be forthcoming and cooperative through the investigative and enforcement process. That interpretation also lessens the duplicative effect that a finding of personal dishonesty or willfulness or a conscious engagement in misconduct might otherwise have on this mitigating factor—otherwise, no showing of good faith sufficient to mitigate an assessed penalty could ever be made in most cases before this Tribunal.

Here, Respondent's contradictory, inconsistent, self-serving, and generally non-credible testimony during the hearing, as detailed at pages 12-13 *supra* and throughout this Decision, did not demonstrate any good faith that might mitigate the amount of an appropriate civil money penalty. In particular, Respondent's claim not to recognize his own handwriting, when he had already stipulated earlier in the action that the document in question had been written by him, is reflective of—in the undersigned's view—an intent to obscure the facts set before this Tribunal rather than any genuine desire to tell his side of the story in a forthcoming way. Likewise, Respondent's statement that he did not know the numbers of Evergreen's rigs at the time of the Rig 24 sale was contradicted by so much record evidence that the only reasonable conclusion to be drawn is that Respondent was consciously seeking to bolster his litigation position rather than testify truthfully and with candor. The same may be said for Respondent's choice to stand by his representation to Carrollton Bank loan officer Chris Dickey—that he backed out of the Carmi Warehouse purchase

because he did not get along with the warehouse owner—when the representation was clearly untrue and he had admitted as much in a prior sworn statement, and when it was contradicted by his own testimony earlier in the day.[615] This kind of reflexive and pointless recalcitrance surfaced repeatedly during Respondent's testimony and, when combined with a lack of any expressed regret or responsibility for the consequences of his actions or understanding of the nature of his misconduct, does not lend itself to a finding of good faith. The undersigned also notes that Respondent's brief does not seek to argue that the civil money penalty amount should be mitigated on good faith grounds.

3. Gravity of the Violation

In her report, Enforcement Counsel expert Traci Hefner opined that the civil money penalty amount sought by the FDIC is appropriate due to Respondent's high positions of authority at both Grand Rivers and PNB and his use of the former to favor the latter.[616] The undersigned must agree that Respondent's breach of his fiduciary duties of loyalty and care to Grand Rivers in a way that consistently served to advance the interests of another bank at Grand Rivers' expense adds a level of gravity to Respond-

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[615] *Compare* Bonan Tr. 816:19-817:16 (testifying that he pulled out of Carrollton Bank purchase because "Abbey and I had gone on a date or two during that time period, so I was afraid of the close appearance of it," and because "there was a lot going on") *with* 914:23-916:1 (maintaining that it "was an accurate statement" to say that he did not purchase the warehouse because he and the property owner could not get along).

[616] *See* EX 361 (Hefner Report) at 6.

ent's misconduct that must be taken into consideration. The fact that Respondent's actions similarly benefited a significant borrower at both banks, one of the principals of which Respondent was engaged in a romantic relationship with during the relevant period, at the Bank's expense is also notable. The undersigned therefore concludes that this factor weighs in favor of the civil money penalty amount that the agency seeks.

4. History of Violations

Enforcement Counsel did not present any evidence of a history of previous violations. This criterion thus serves as a potential mitigating factor for the civil money penalty amount.

5. Such Other Matters as Justice May Require

Neither party invokes this factor in their post-hearing briefing with respect to the assessment of a civil money penalty, and the undersigned therefore does not consider it as a mitigating factor.

Overall, having considered the Parties' relatively cursory submissions regarding the appropriateness of the civil money penalty amount being assessed in light of the five statutory mitigating factors,[617] and with the deterrent purpose of civil money penalties in mind, the undersigned concludes that the $105,000 civil money penalty sought by Enforcement Counsel

[617] Both parties advert briefly to the thirteen interagency factors that financial institution regulatory agencies must also weigh when determining a civil money penalty amount, *see* Interagency CMP Policy, 1998 WL 280287, but they do not discuss the factors in any detail, and accordingly this Tribunal need not address them.

is appropriate based on the lack of good faith exhibited by Respondent and the gravity of the violation, in addition to Respondent's undisputedly sufficient financial resources.

VII. Conclusion and Recommended Order

For all of the reasons above, the undersigned finds that the statutory elements for a prohibition order under 12 U.S.C. § 1818(e) have been met in this action. Specifically, the undersigned concludes that Respondent's actions in connection with the 618 Holdings loan and Grand Rivers' release of its Rig 23 collateral constituted a breach of the fiduciary duties of care and loyalty that Respondent owed that institution, as well as the engagement in unsafe or unsound banking practices; that this misconduct demonstrated willful disregard for the safety and soundness of Grand Rivers; and that Grand Rivers suffered loss as a result. With respect to the release of Rig 23, the undersigned also concludes that Respondent's unsafe or unsound conduct met the threshold for recklessness under 12 U.S.C. § 1818(i). And the undersigned concludes that Section 1818(i)'s elements for a second-tier civil money penalty have been met as to both the 618 Holdings loan and the Rig 23 release, that no mitigation is warranted, and that $105,000 is an appropriate monetary penalty for Respondent's misconduct in this case.

In accordance with 12 C.F.R. § 308.28, the undersigned therefore recommends that the FDIC Board enter a prohibition order against Respondent and assess a second-tier civil money penalty in the amount of $105,000 in consequence of Respondent's misconduct. The record of this proceeding will be transmitted to the Board in conjunction with this Recommended Decision, as well as a certified index of

the administrative record and a certified index of exhibits.

SO ORDERED.

November 20, 2023

/s/Jennifer Whang
Jennifer Wang, Administrative Law Judge
Office of Financial Institution Adjudication

CERTIFICATE OF SERVICE

On November 20, 2023, I served a copy of the foregoing **Recommended Decision** upon the following individuals via email:

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APPENDIX D

U.S. Constitution

Article III, Section 2, paragraph 1:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Seventh Amendment:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

APPENDIX E

12 U.S.C. § 1818

(a) Termination of insurance

(1) Voluntary termination

Any insured depository institution which is not--

(A) a national member bank;

(B) a State member bank;

(C) a Federal branch;

(D) a Federal savings association; or

(E) an insured branch which is required to be insured under subsection (a) or (b) of section 3104 of this title,

may terminate such depository institution's status as an insured depository institution if such insured institution provides written notice to the Corporation of the institution's intent to terminate such status not less than 90 days before the effective date of such termination.

(2) Involuntary termination

(A) Notice to primary regulator

If the Board of Directors determines that--

(i) an insured depository institution or the directors or trustees of an insured depository institution have engaged or are engaging in unsafe or unsound practices in conducting the business of the depository institution;

(ii) an insured depository institution is in an unsafe or unsound condition to continue operations as an insured institution; or

(iii) an insured depository institution or the directors or trustees of the insured institution have violated any applicable law, regulation, order, condition imposed in writing by the Corporation in connection with the approval of any application or other request by the insured depository institution, or written agreement entered into between the insured depository institution and the Corporation, the Board of Directors shall notify the appropriate Federal banking agency with respect to such institution (if other than the Corporation) or the State banking supervisor of such institution (if the Corporation is the appropriate Federal banking agency) of the Board's determination and the facts and circumstances on which such determination is based for the purpose of securing the correction of such practice, condition, or violation. Such notice shall be given to the appropriate Federal banking agency not less than 30 days before the notice required by subparagraph (B), except that this period for notice to the appropriate Federal banking agency may be reduced or eliminated with the agreement of such agency.

(B) Notice of intention to terminate insurance

If, after giving the notice required under subparagraph (A) with respect to an insured depository institution, the Board of Directors determines that any unsafe or unsound practice or condition or any violation specified in such notice requires the termination of the insured status of the insured depository institution, the Board shall--

(i) serve written notice to the insured depository institution of the Board's intention to terminate the insured status of the institution;

(ii) provide the insured depository institution with a statement of the charges on the basis of which the determination to terminate such institution's insured status was made (or a copy of the notice under subparagraph (A)); and

(iii) notify the insured depository institution of the date (not less than 30 days after notice under this subparagraph) and place for a hearing before the Board of Directors (or any person designated by the Board) with respect to the termination of the institution's insured status.

(3) Hearing; termination

If, on the basis of the evidence presented at a hearing before the Board of Directors (or any person designated by the Board for such purpose), in which all issues shall be determined on the record pursuant to section 554 of Title 5 and the written findings of the Board of Directors (or such person) with respect to such evidence (which shall be conclusive), the Board of Directors finds that any unsafe or unsound practice or condition or any violation specified in the notice to an insured depository institution under paragraph (2)(B) or subsection (w) has been established, the Board of Directors may issue an order terminating the insured status of such depository institution effective as of a date subsequent to such finding.

(4) Appearance; consent to termination

Unless the depository institution shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the termination of its status as an insured depository institution and termination of such status thereupon may be ordered.

(5) Judicial review

Any insured depository institution whose insured status has been terminated by order of the Board of Directors under this subsection shall have the right of judicial review of such order only to the same extent as provided for the review of orders under subsection (h) of this section.

(6) Publication of notice of termination

The Corporation may publish notice of such termination and the depository institution shall give notice of such termination to each of its depositors at his last address of record on the books of the depository institution, in such manner and at such time as the Board of Directors may find to be necessary and may order for the protection of depositors.

(7) Temporary insurance of deposits insured as of termination

After the termination of the insured status of any depository institution under the provisions of this subsection, the insured deposits of each depositor in the depository institution on the date of such termination, less all subsequent withdrawals from any deposits of such depositor, shall continue for a period of at least 6 months or up to 2 years, within the discretion of the Board of Directors, to be

insured, and the depository institution shall continue to pay to the Corporation assessments as in the case of an insured depository institution during such period. No additions to any such deposits and no new deposits in such depository institution made after the date of such termination shall be insured by the Corporation, and the depository institution shall not advertise or hold itself out as having insured deposits unless in the same connection it shall also state with equal prominence that such additions to deposits and new deposits made after such date are not so insured. Such depository institution shall, in all other respects, be subject to the duties and obligations of an insured depository institution for the period referred to in the 1st sentence from the date of such termination, and in the event that such depository institution shall be closed on account of inability to meet the demands of its depositors within such period, the Corporation shall have the same powers and rights with respect to such depository institution as in case of an insured depository institution.

(8) Temporary suspension of insurance

(A) In general

If the Board of Directors initiates a termination proceeding under paragraph (2), and the Board of Directors, after consultation with the appropriate Federal banking agency, finds that an insured depository institution (other than a savings association to which subparagraph (B) applies) has no tangible capital under the capital guidelines or regulations of the appropriate Federal banking agency, the Corporation may issue a

temporary order suspending deposit insurance on all deposits received by the institution.

(B) Special rule for certain savings institutions

(i) Certain goodwill included in tangible capital

In determining the tangible capital of a savings association for purposes of this paragraph, the Board of Directors shall include goodwill to the extent it is considered a component of capital under section 1464(t) of this title. Any savings association which would be subject to a suspension order under subparagraph (A) but for the operation of this subparagraph, shall be considered by the Corporation to be a "special supervisory association".

(ii) Suspension order

The Corporation may issue a temporary order suspending deposit insurance on all deposits received by a special supervisory association whenever the Board of Directors determines that--

(I) the capital of such association, as computed utilizing applicable accounting standards, has suffered a material decline;

(II) that such association (or its directors or officers) is engaging in an unsafe or unsound practice in conducting the business of the association;

(III) that such association is in an unsafe or unsound condition to continue operating as an insured association; or

(IV) that such association (or its directors or officers) has violated any applicable law, rule, regulation, or order, or any condition imposed in writing by a Federal banking agency, or any written agreement including a capital improvement plan entered into with any Federal banking agency, or that the association has failed to enter into a capital improvement plan which is acceptable to the Corporation within the time period set forth in section 1464(t) of this title.

Nothing in this paragraph limits the right of the Corporation or the Comptroller of the Currency to enforce a contractual provision which authorizes the Corporation or the Comptroller of the Currency, as a successor to the Federal Savings and Loan Insurance Corporation or the Federal Home Loan Bank Board, to require a savings association to write down or amortize goodwill at a faster rate than otherwise required under this chapter or under applicable accounting standards.

(C) Effective period of temporary order

Any order issued under subparagraph (A) shall become effective not earlier than 10 days from the date of service upon the institution and, unless set aside, limited, or suspended by a court in proceedings authorized hereunder, such temporary order shall remain effective and enforceable until an order of the Board under paragraph (3) becomes final or until the Corporation dismisses the proceedings under paragraph (3).

(D) Judicial review

Before the close of the 10-day period beginning on the date any temporary order has been served upon an insured depository institution under subparagraph (A), such institution may apply to the United States District Court for the District of Columbia, or the United States district court for the judicial district in which the home office of the institution is located, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order, and such court shall have jurisdiction to issue such injunction.

(E) Continuation of insurance for prior deposits

The insured deposits of each depositor in such depository institution on the effective date of the order issued under this paragraph, minus all subsequent withdrawals from any deposits of such depositor, shall continue to be insured, subject to the administrative proceedings as provided in this chapter.

(F) Publication of order

The depository institution shall give notice of such order to each of its depositors in such manner and at such times as the Board of Directors may find to be necessary and may order for the protection of depositors.

(G) Notice by Corporation

If the Corporation determines that the depository institution has not substantially complied with the notice to depositors required by the Board of Directors, the Corporation may provide such

notice in such manner as the Board of Directors may find to be necessary and appropriate.

(H) Lack of notice

Notwithstanding subparagraph (A), any deposit made after the effective date of a suspension order issued under this paragraph shall remain insured to the extent that the depositor establishes that--

(i) such deposit consists of additions made by automatic deposit the depositor was unable to prevent; or

(ii) such depositor did not have actual knowledge of the suspension of insurance.

(9) Final decisions to terminate insurance

Any decision by the Board of Directors to--

(A) issue a temporary order terminating deposit insurance; or

(B) issue a final order terminating deposit insurance (other than under subsection (p) or (q));

shall be made by the Board of Directors and may not be delegated.

(10) Low- to moderate-income housing lender

In making any determination regarding the termination of insurance of a solvent savings association, the Corporation may consider the extent of the association's low- to moderate-income housing loans.

(b) Cease-and-desist proceedings

(1) If, in the opinion of the appropriate Federal banking agency, any insured depository institution, depository institution which has insured deposits, or

any institution-affiliated party is engaging or has engaged, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to engage, in an unsafe or unsound practice in conducting the business of such depository institution, or is violating or has violated, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to violate, a law, rule, or regulation, or any condition imposed in writing by a Federal banking agency in connection with any action on any application, notice, or other request by the depository institution or institution-affiliated party, or any written agreement entered into with the agency, the appropriate Federal banking agency for the depository institution may issue and serve upon the depository institution or such party a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the depository institution or the institution-affiliated party. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or a later date is set by the agency at the request of any party so served. Unless the party or parties so served shall appear at the hearing personally or by a duly authorized representative, they shall be deemed to have consented to the issuance of the cease-and-desist order. In the event of such consent, or if upon the record made at any such hearing, the agency shall find that any violation or unsafe or unsound practice

specified in the notice of charges has been established, the agency may issue and serve upon the depository institution or the institution-affiliated party an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the depository institution or its institution-affiliated parties to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

(2) A cease-and-desist order shall become effective at the expiration of thirty days after the service of such order upon the depository institution or other person concerned (except in the case of a cease-and-desist order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable as provided therein, except to such extent as it is stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

(3) This subsection, subsections (c) through (s) and subsection (u) of this section, and section 1831aa of this title shall apply to any bank holding company, and to any subsidiary (other than a bank) of a bank holding company, as those terms are defined in the Bank Holding Company Act of 1956, any savings and loan holding company and any subsidiary (other than a depository institution) of a savings and loan holding company (as such terms are defined in section 1467a of this title))[1], any noninsured State member bank and to any organization organized

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[1] So in original. The second closing parenthesis probably should not appear.

and operated under section 25(a) of the Federal Reserve Act or operating under section 25 of the Federal Reserve Act, in the same manner as they apply to a State member insured bank. Nothing in this subsection or in subsection (c) of this section shall authorize any Federal banking agency, other than the Board of Governors of the Federal Reserve System, to issue a notice of charges or cease-and-desist order against a bank holding company or any subsidiary thereof (other than a bank or subsidiary of that bank) or against a savings and loan holding company or any subsidiary thereof (other than a depository institution or a subsidiary of such depository institution).

(4) This subsection, subsections (c) through (s) and subsection (u) of this section, and section 1831aa of this title shall apply to any foreign bank or company to which subsection (a) of section 3106 of this title applies and to any subsidiary (other than a bank) of any such foreign bank or company in the same manner as they apply to a bank holding company and any subsidiary thereof (other than a bank) under paragraph (3) of this subsection. For the purposes of this paragraph, the term "subsidiary" shall have the meaning assigned to it in section 2 of the Bank Holding Company Act of 1956.

(5) This section shall apply, in the same manner as it applies to any insured depository institution for which the appropriate Federal banking agency is the Comptroller of the Currency, to any national banking association chartered by the Comptroller of the Currency, including an uninsured association.

(6) Affirmative action to correct conditions resulting from violations or practices

The authority to issue an order under this subsection and subsection (c) which requires an insured depository institution or any institution-affiliated party to take affirmative action to correct or remedy any conditions resulting from any violation or practice with respect to which such order is issued includes the authority to require such depository institution or such party to--

(A) make restitution or provide reimbursement, indemnification, or guarantee against loss 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;

(B) restrict the growth of the institution;

(C) dispose of any loan or asset involved;

(D) rescind agreements or contracts; and

(E) employ qualified officers or employees (who may be subject to approval by the appropriate Federal banking agency at the direction of such agency); and

(F) take such other action as the banking agency determines to be appropriate.

(7) Authority to limit activities

The authority to issue an order under this subsection or subsection (c) includes the authority to

place limitations on the activities or functions of an insured depository institution or any institution-affiliated party.

(8) Unsatisfactory asset quality, management, earnings, or liquidity as unsafe or unsound practice

If an insured depository institution receives, in its most recent report of examination, a less-than-satisfactory rating for asset quality, management, earnings, or liquidity, the appropriate Federal banking agency may (if the deficiency is not corrected) deem the institution to be engaging in an unsafe or unsound practice for purposes of this subsection.

(9) Repealed. Pub.L. 111-203, Title III, § 363(3)(C), July 21, 2010, 124 Stat. 1551

(10) Standard for certain orders

No authority under this subsection or subsection (c) to prohibit any institution-affiliated party from withdrawing, transferring, removing, dissipating, or disposing of any funds, assets, or other property may be exercised unless the appropriate Federal banking agency meets the standards of Rule 65 of the Federal Rules of Civil Procedure, without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and immediate.

(c) Temporary cease-and-desist orders

(1) Whenever the appropriate Federal banking agency shall determine that the violation or threatened violation or the unsafe or unsound practice or practices, specified in the notice of charges served upon the depository institution or any institution-

affiliated party pursuant to paragraph (1) of subsection (b) of this section, or the continuation thereof, is likely to cause insolvency or significant dissipation of assets or earnings of the depository institution, or is likely to weaken the condition of the depository institution or otherwise prejudice the interests of its depositors prior to the completion of the proceedings conducted pursuant to paragraph (1) of subsection (b) of this section, the agency may issue a temporary order requiring the depository institution or such party to cease and desist from any such violation or practice and to take affirmative action to prevent or remedy such insolvency, dissipation, condition, or prejudice pending completion of such proceedings. Such order may include any requirement authorized under subsection (b)(6). Such order shall become effective upon service upon the depository institution or such institution-affiliated party and, unless set aside, limited, or suspended by a court in proceedings authorized by paragraph (2) of this subsection, shall remain effective and enforceable pending the completion of the administrative proceedings pursuant to such notice and until such time as the agency shall dismiss the charges specified in such notice, or if a cease-and-desist order is issued against the depository institution or such party, until the effective date of such order.

(2) Within ten days after the depository institution concerned or any institution-affiliated party has been served with a temporary cease-and-desist order, the depository institution or such party may apply to the United States district court for the judicial district in which the home office of the depository institution is located, or the United States District Court for the District of Columbia,

for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the depository institution or such party under paragraph (1) of subsection (b) of this section, and such court shall have jurisdiction to issue such injunction.

(3) Incomplete or inaccurate records

(A) Temporary order

If a notice of charges served under subsection (b)(1) specifies, on the basis of particular facts and circumstances, that an insured depository institution's books and records are so incomplete or inaccurate that the appropriate Federal banking agency is unable, through the normal supervisory process, to determine the financial condition of that depository institution or the details or purpose of any transaction or transactions that may have a material effect on the financial condition of that depository institution, the agency may issue a temporary order requiring--

(i) the cessation of any activity or practice which gave rise, whether in whole or in part, to the incomplete or inaccurate state of the books or records; or

(ii) affirmative action to restore such books or records to a complete and accurate state, until the completion of the proceedings under subsection (b)(1).

(B) Effective period

Any temporary order issued under subparagraph (A)--

(i) shall become effective upon service; and

(ii) unless set aside, limited, or suspended by a court in proceedings under paragraph (2), shall remain in effect and enforceable until the earlier of--

(I) the completion of the proceeding initiated under subsection (b)(1) in connection with the notice of charges; or

(II) the date the appropriate Federal banking agency determines, by examination or otherwise, that the insured depository institution's books and records are accurate and reflect the financial condition of the depository institution.

(4) False advertising or misuse of names to indicate insured status

(A) Temporary order

(i) In general

If a notice of charges served under subsection (b)(1) specifies on the basis of particular facts that any person engaged or is engaging in conduct described in section 1828(a)(4) of this title, the Corporation or other appropriate Federal banking agency may issue a temporary order requiring--

(I) the immediate cessation of any activity or practice described, which gave rise to the notice of charges; and

(II) affirmative action to prevent any further, or to remedy any existing, violation.

(ii) Effect of order

Any temporary order issued under this subparagraph shall take effect upon service.

(B) Effective period of temporary order

A temporary order issued under subparagraph (A) shall remain effective and enforceable, pending the completion of an administrative proceeding pursuant to subsection (b)(1) in connection with the notice of charges--

(i) until such time as the Corporation or other appropriate Federal banking agency dismisses the charges specified in such notice; or

(ii) if a cease-and-desist order is issued against such person, until the effective date of such order.

(C) Civil money penalties

Any violation of section 1828(a)(4) of this title shall be subject to civil money penalties, as set forth in subsection (i), except that for any person other than an insured depository institution or an institution-affiliated party that is found to have violated this paragraph, the Corporation or other appropriate Federal banking agency shall not be required to demonstrate any loss to an insured depository institution.

(d) Temporary cease-and-desist orders; enforcement

In the case of violation or threatened violation of, or failure to obey, a temporary cease-and-desist order issued pursuant to paragraph (1) of subsection (c) of this section, the appropriate Federal banking agency may 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 an injunction to enforce such order, and, if the court shall determine that there has been such violation or threatened violation or failure to obey, it shall be the duty of the court to issue such injunction.

(e) Removal and prohibition authority

(1) Authority to issue order

Whenever the appropriate Federal banking agency determines that--

(A) any institution-affiliated party has, directly or indirectly--

(i) violated--

(I) any law or regulation;

(II) any cease-and-desist order which has become final;

(III) any condition imposed in writing by a Federal banking agency in connection with any action on any application, notice, or request by such depository institution or institution-affiliated party; or

(IV) any written agreement between such depository institution and such agency;

(ii) engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution; or

(iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty;

(B) by reason of the violation, practice, or breach described in any clause of subparagraph (A)--

(i) such insured depository institution or business institution has suffered or will probably suffer financial loss or other damage;

(ii) the interests of the insured depository institution's depositors have been or could be prejudiced; or

(iii) such party has received financial gain or other benefit by reason of such violation, practice, or breach; and

(C) such violation, practice, or breach--

(i) involves personal dishonesty on the part of such party; or

(ii) demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution or business institution, the appropriate Federal banking agency for the depository institution may serve upon such party 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.

(2) Specific violations

(A) In general

Whenever the appropriate Federal banking agency determines that--

(i) an institution-affiliated party has committed a violation of any provision of subchapter II of chapter 53 of Title 31 and such violation was not inadvertent or unintentional;

(ii) an officer or director of an insured depository institution has knowledge that an institution-affiliated party of the insured depository institution has violated any such provision or any provision of law referred to in subsection (g)(1)(A)(ii);

(iii) an officer or director of an insured depository institution has committed any violation of the Depository Institution Management Interlocks Act; or

(iv) an institution-affiliated party of a subsidiary (other than a bank) of a bank holding company or of a subsidiary (other than a savings association) of a savings and loan holding company has been convicted of any criminal offense involving dishonesty or a breach of trust or a criminal offense under section 1956, 1957, or 1960 of Title 18 or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such an offense, the agency may serve upon such party, officer, or director a written notice of the agency's intention to remove such party from office.

(B) Factors to be considered

In determining whether an officer or director should be removed as a result of the application of subparagraph (A)(ii), the agency shall consider whether the officer or director took appropriate action to stop, or to prevent the recurrence of, a violation described in such subparagraph.

(3) Suspension order

(A) Suspension or prohibition authorized

If the appropriate Federal banking agency serves written notice under paragraph (1) or (2) to any institution-affiliated party of such agency's intention to issue an order under such paragraph, the appropriate Federal banking agency may suspend such party from office or prohibit such party from further participation in any manner in the conduct of the affairs of the depository institution, if the agency--

(i) determines that such action is necessary for the protection of the depository institution or the interests of the depository institution's depositors; and

(ii) serves such party with written notice of the suspension order.

(B) Effective period

Any suspension order issued under subparagraph (A)--

(i) shall become effective upon service; and

(ii) unless a court issues a stay of such order under subsection (f), shall remain in effect and enforceable until--

(I) the date the appropriate Federal banking agency dismisses the charges contained in the notice served under paragraph (1) or (2) with respect to such party; or

(II) the effective date of an order issued by the agency to such party under paragraph (1) or (2).

(C) Copy of order

If an appropriate Federal banking agency issues a suspension order under subparagraph (A) to any institution-affiliated party, the agency shall serve a copy of such order on any insured depository institution with which such party is associated at the time such order is issued.

(4) A notice of intention to remove an institution-affiliated party from office or to prohibit such party from participating in the conduct of the affairs of an insured depository institution, shall contain a statement of the facts constituting grounds therefor, and shall fix a time and place at which a hearing will be held thereon. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after the date of service of such notice, unless an earlier or a later date is set by the agency at the request of (A) such party, and for good cause shown, or (B) the Attorney General of the United States. Unless such party shall appear at the hearing in person or by a duly authorized representative, such party shall be deemed to have consented to the issuance of an order of such removal or prohibition. In the event of such consent, or if upon the record made at any such hearing the agency shall find that any of the grounds specified in such notice have been established, the agency may issue such orders of suspension or removal from office, or prohibition from participation in the conduct of the affairs of the depository institution, as it may deem appropriate. Any such order shall become effective at the expiration of thirty days after service upon such depository institution and such party concerned (except in the case of an order issued upon consent, which shall become effective at the time specified

therein). Such order shall remain effective and enforceable except to such extent as it is stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

(5) For the purpose of enforcing any law, rule, regulation, or cease-and-desist order in connection with an interlocking relationship, the term "officer" within the term "institution-affiliated party" as used in this subsection means an employee or officer with management functions, and the term "director" within the term "institution-affiliated party" as used in this subsection includes an advisory or honorary director, a trustee of a depository institution under the control of trustees, or any person who has a representative or nominee serving in any such capacity.

(6) Prohibition of certain specific activities

Any person subject to an order issued under this subsection shall not--

(A) participate in any manner in the conduct of the affairs of any institution or agency specified in paragraph (7)(A);

(B) solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent, or authorization with respect to any voting rights in any institution described in subparagraph (A);

(C) violate any voting agreement previously approved by the appropriate Federal banking agency; or

(D) vote for a director, or serve or act as an institution-affiliated party.

(7) Industrywide prohibition

(A) In general

Except as provided in subparagraph (B), any person who, pursuant to an order issued under this subsection or subsection (g), has been removed or suspended from office in an insured depository institution or prohibited from participating in the conduct of the affairs of an insured depository institution may not, while such order is in effect, continue or commence to hold any office in, or participate in any manner in the conduct of the affairs of--

(i) any insured depository institution;

(ii) any institution treated as an insured bank under subsection (b)(3) or (b)(4), or as a savings association under subsection (b)(9);

(iii) any insured credit union under the Federal Credit Union Act;

(iv) any institution chartered under the Farm Credit Act of 1971;

(v) any appropriate Federal depository institution regulatory agency; and

(vi) the Federal Housing Finance Agency and any Federal home loan bank.

(B) Exception if agency provides written consent

If, on or after the date an order is issued under this subsection which removes or suspends from office any institution-affiliated party or prohibits such party from participating in the conduct of the affairs of an insured depository institution, such party receives the written consent of--

(i) the agency that issued such order; and

(ii) the appropriate Federal financial institutions regulatory agency of the institution described in any clause of subparagraph (A) with respect to which such party proposes to become an institution-affiliated party,

subparagraph (A) shall, to the extent of such consent, cease to apply to such party with respect to the institution described in each written consent. Any agency that grants such a written consent shall report such action to the Corporation and publicly disclose such consent.

(C) Violation of paragraph treated as violation of order

Any violation of subparagraph (A) by any person who is subject to an order described in such subparagraph shall be treated as a violation of the order.

(D) "Appropriate Federal financial institutions regulatory agency" defined

For purposes of this paragraph and subsection (j), the term "appropriate Federal financial institutions regulatory agency" means--

(i) the appropriate Federal banking agency, in the case of an insured depository institution;

(ii) the Farm Credit Administration, in the case of an institution chartered under the Farm Credit Act of 1971;

(iii) the National Credit Union Administration Board, in the case of an insured credit union (as defined in section 101(7) of the Federal Credit Union Act); and

(iv) the Secretary of the Treasury, in the case of the Federal Housing Finance Agency and any Federal home loan bank.

(E) Consultation between agencies

The agencies referred to in clauses (i) and (ii) of subparagraph (B) shall consult with each other before providing any written consent described in subparagraph (B).

(F) Applicability

This paragraph shall only apply to a person who is an individual, unless the appropriate Federal banking agency specifically finds that it should apply to a corporation, firm, or other business enterprise.

(f) Stay of suspension and/or prohibition of institution-affiliated party

Within ten days after any institution-affiliated party has been suspended from office and/or prohibited from participation in the conduct of the affairs of an insured depository institution under subsection (e)(3) of this section, such party may apply to the United States district court for the judicial district in which the home office of the depository institution is located, or the United States District Court for the District of Columbia, for a stay of such suspension and/or prohibition pending the completion of the administrative proceedings pursuant to the notice served upon such party under subsection (e)(1) or (e)(2) of this section, and such court shall have jurisdiction to stay such suspension and/or prohibition.

(g) Suspension, removal, and prohibition from participation orders in the case of certain criminal offenses

(1) Suspension or prohibition

(A) In general

Whenever any institution-affiliated party is the subject of any information, indictment, or complaint, involving the commission of or participation in--

(i) a crime involving dishonesty or breach of trust which is punishable by imprisonment for a term exceeding one year under State or Federal law, or

(ii) a criminal violation of section 1956, 1957, or 1960 of Title 18 or section 5322 or 5324 of Title 31, the appropriate Federal banking agency may, if continued service or participation by such party posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution (as defined in subparagraph (E)), by written notice served upon such party, suspend such party from office or prohibit such party from further participation in any manner in the conduct of the affairs of any depository institution.

(B) Provisions applicable to notice

(i) Copy

A copy of any notice under subparagraph (A) shall also be served upon any depository institution that the subject of the notice is affiliated with at the time the notice is issued.

(ii) Effective period

A suspension or prohibition under subparagraph (A) shall remain in effect until the information, indictment, or complaint referred to in such subparagraph is finally disposed of or until terminated by the agency.

(C) Removal or prohibition

(i) In general

If a judgment of conviction or an agreement to enter a pretrial diversion or other similar program is entered against an institution-affiliated party in connection with a crime described in subparagraph (A)(i), at such time as such judgment is not subject to further appellate review, the appropriate Federal banking agency may, if continued service or participation by such party posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution (as defined in subparagraph (E)), issue and serve upon such party an order removing such party from office or prohibiting such party from further participation in any manner in the conduct of the affairs of any depository institution without the prior written consent of the appropriate agency.

(ii) Required for certain offenses

In the case of a judgment of conviction or agreement against an institution-affiliated party in connection with a violation described in subparagraph (A)(ii), the appropriate Federal banking agency shall issue and serve upon such

party an order removing such party from office or prohibiting such party from further participation in any manner in the conduct of the affairs of any depository institution without the prior written consent of the appropriate agency.

(D) Provisions applicable to order

(i) Copy

A copy of any order under subparagraph (C) shall also be served upon any depository institution that the subject of the order is affiliated with at the time the order is issued, whereupon the institution-affiliated party who is subject to the order (if a director or an officer) shall cease to be a director or officer of such depository institution.

(ii) Effect of acquittal

A finding of not guilty or other disposition of the charge shall not preclude the agency from instituting proceedings after such finding or disposition to remove such party from office or to prohibit further participation in depository institution affairs, pursuant to paragraph (1), (2), or (3) of subsection (e) of this section.

(iii) Effective period

Any notice of suspension or order of removal issued under this paragraph shall remain effective and outstanding until the completion of any hearing or appeal authorized under paragraph (3) unless terminated by the agency.

(E) Relevant depository institution

For purposes of this subsection, the term "relevant depository institution" means any dep-

ository institution of which the party is or was an institution-affiliated party at the time at which--

(i) the information, indictment, or complaint described in subparagraph (A) was issued; or

(ii) the notice is issued under subparagraph (A) or the order is issued under subparagraph (C)(i).

(2) If at any time, because of the suspension of one or more directors pursuant to this section, there shall be on the board of directors of a national bank less than a quorum of directors not so suspended, all powers and functions vested in or exercisable by such board shall vest in and be exercisable by the director or directors on the board not so suspended, until such time as there shall be a quorum of the board of directors. In the event all of the directors of a national bank are suspended pursuant to this section, the Comptroller of the Currency shall appoint persons to serve temporarily as directors in their place and stead pending the termination of such suspensions, or until such time as those who have been suspended, cease to be directors of the bank and their respective successors take office.

(3) Within thirty days from service of any notice of suspension or order of removal issued pursuant to paragraph (1) of this subsection, the institution-affiliated party concerned may request in writing an opportunity to appear before the agency to show that the continued service to or participation in the conduct of the affairs of the depository institution by such party does not, or is not likely to, pose a threat to the interests of the bank's[2] depositors or threaten

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[2] So in original. Probably should be "depository institution's".

to impair public confidence in the depository institution. Upon receipt of any such request, the appropriate Federal banking agency shall fix a time (not more than thirty days after receipt of such request, unless extended at the request of such party) and place at which such party may appear, personally or through counsel, before one or more members of the agency or designated employees of the agency to submit written materials (or, at the discretion of the agency, oral testimony) and oral argument. Within sixty days of such hearing, the agency shall notify such party whether the suspension or prohibition from participation in any manner in the conduct of the affairs of the depository institution will be continued, terminated, or otherwise modified, or whether the order removing such party from office or prohibiting such party from further participation in any manner in the conduct of the affairs of the depository institution will be rescinded or otherwise modified. Such notification shall contain a statement of the basis for the agency's decision, if adverse to such party. The Federal banking agencies are authorized to prescribe such rules as may be necessary to effectuate the purposes of this subsection.

(h) Hearings and judicial review

(1) Any hearing provided for in this section (other than the hearing provided for in subsection (g)(3) of this section) shall be held in the Federal judicial district or in the territory in which the home office of the depository institution is located unless the party afforded the hearing consents to another place, and shall be conducted in accordance with the provisions of chapter 5 of Title 5. After such hearing, and within ninety days after the appropriate

Federal banking agency or Board of Governors of the Federal Reserve System has notified the parties that the case has been submitted to it for final decision, it shall render its decision (which shall include findings of fact upon which its decision is predicated) and shall issue and serve upon each party to the proceeding an order or orders consistent with the provisions of this section. Judicial review of any such order shall be exclusively as provided in this subsection (h). Unless a petition for review is timely filed in a court of appeals of the United States, as hereinafter provided in paragraph (2) of this subsection, and thereafter until the record in the proceeding has been filed as so provided, the issuing agency may at any time, upon such notice and in such manner as it shall deem proper, modify, terminate, or set aside any such order. Upon such filing of the record, the agency may modify, terminate, or set aside any such order with permission of the court.

(2) Any party to any proceeding under paragraph (1) may obtain a review of any order served pursuant to paragraph (1) of this subsection (other than an order issued with the consent of the depository institution or the institution-affiliated party concerned, or an order issued under paragraph (1) of subsection (g) of this section) by the filing in the court of appeals of the United States for the circuit in which the home office of the depository institution is located, or in the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the agency be modified, terminated, or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the agency, and thereupon the agency shall file in

the court the record in the proceeding, as provided in section 2112 of Title 28. Upon the filing of such petition, such court shall have jurisdiction, which upon the filing of the record shall except as provided in the last sentence of said paragraph (1) be exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the agency. Review of such proceedings shall be had as provided in chapter 7 of Title 5. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

(3) The commencement of proceedings for judicial review under paragraph (2) of this subsection shall not, unless specifically ordered by the court, operate as a stay of any order issued by the agency.

(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 1831*o* 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 1831*o* 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.

(2) Civil money penalty

(A) First tier

Any insured depository institution which, and any institution-affiliated party who--

(i) violates any law or regulation;

(ii) violates any final order or temporary order issued pursuant to subsection (b), (c), (e), (g), or (s) or any final order under section 1831*o* or 1831p-1 of this title;

(iii) violates any condition imposed in writing by a Federal banking agency in connection with any action on any application, notice, or other request by the depository institution or institution-affiliated party; or

(iv) violates any written agreement between such depository institution and such agency,

shall forfeit and pay a civil penalty of not more than $5,000 for each day during which such violation continues.

(B) Second tier

Notwithstanding subparagraph (A), any insured depository institution which, and any institution-affiliated party who--

(i)(I) commits any violation described in any clause of subparagraph (A);

(II) recklessly engages in an unsafe or unsound practice in conducting the affairs of such insured depository institution; or

(III) breaches any fiduciary duty;

(ii) which violation, practice, or breach--

(I) is part of a pattern of misconduct;

(II) causes or is likely to cause more than a minimal loss to such depository institution; or

(III) results in pecuniary gain or other benefit to such party,

shall forfeit and pay a civil penalty of not more than $25,000 for each day during which such violation, practice, or breach continues.

(C) Third tier

Notwithstanding subparagraphs (A) and (B), any insured depository institution which, and any institution-affiliated party who--

(i) knowingly--

(I) commits any violation described in any clause of subparagraph (A);

(II) engages in any unsafe or unsound practice in conducting the affairs of such depository institution; or

(III) breaches any fiduciary duty; and

(ii) knowingly or recklessly causes a substantial loss to such depository institution or a substantial pecuniary gain or other benefit to such party by reason of such violation, practice, or breach, shall forfeit and pay a civil penalty in an amount not to exceed the applicable maximum amount determined under subparagraph (D) for each day during which such violation, practice, or breach continues.

(D) Maximum amounts of penalties for any violation described in subparagraph (C)

The maximum daily amount of any civil penalty which may be assessed pursuant to subparagraph (C) for any violation, practice, or breach described in such subparagraph is--

(i) in the case of any person other than an insured depository institution, an amount to not exceed $1,000,000; and

(ii) in the case of any insured depository institution, an amount not to exceed the lesser of--

(I) $1,000,000; or

(II) 1 percent of the total assets of such institution.

(E) Assessment

(i) Written notice

Any penalty imposed under subparagraph (A), (B), or (C) may be assessed and collected by the appropriate Federal banking agency by written notice.

(ii) Finality of assessment

If, with respect to any assessment under clause (i), a hearing is not requested pursuant to subparagraph (H) within the period of time allowed under such subparagraph, the assessment shall constitute a final and unappealable order.

(F) Authority to modify or remit penalty

Any appropriate Federal banking agency may compromise, modify, or remit any penalty which

such agency may assess or had already assessed under subparagraph (A), (B), or (C).

(G) Mitigating factors

In determining the amount of any penalty imposed under subparagraph (A), (B), or (C), the appropriate agency shall take into account the appropriateness of the penalty with respect to--

(i) the size of financial resources and good faith of the insured depository institution or other person charged;

(ii) the gravity of the violation;

(iii) the history of previous violations; and

(iv) such other matters as justice may require.

(H) Hearing

The insured depository institution or other person against whom any penalty is assessed under this paragraph shall be afforded an agency hearing if such institution or person submits a request for such hearing within 20 days after the issuance of the notice of assessment.

(I) Collection

(i) Referral

If any insured depository institution or other person fails to pay an assessment after any penalty assessed under this paragraph has become final, the agency that imposed the penalty shall recover the amount assessed by action in the appropriate United States district court.

(ii) Appropriateness of penalty not reviewable

In any civil action under clause (i), the validity and appropriateness of the penalty shall not be subject to review.

(J) Disbursement

All penalties collected under authority of this paragraph shall be deposited into the Treasury.

(K) Regulations

Each appropriate Federal banking agency shall prescribe regulations establishing such procedures as may be necessary to carry out this paragraph.

(3) Notice under this section after separation from service

The resignation, termination of employment or participation, or separation of an institution-affiliated party (including a separation caused by the closing of an insured depository institution) shall not affect the jurisdiction and authority of the appropriate Federal banking agency to issue any notice or order and proceed under this section against any such party, if such notice or order is served before the end of the 6-year period beginning on the date such party ceased to be such a party with respect to such depository institution (whether such date occurs before, on, or after August 9, 1989).

(4) Prejudgment attachment

(A) In general

In any action brought by an appropriate Federal banking agency (excluding the Corporation when acting in a manner described in section

1821(d)(18) of this title) pursuant to this section, or in actions brought in aid of, or to enforce an order in, any administrative or other civil action for money damages, restitution, or civil money penalties brought by such agency, the court may, upon application of the agency, issue a restraining order that--

(i) prohibits any person subject to the proceeding from withdrawing, transferring, removing, dissipating, or disposing of any funds, assets or other property; and

(ii) appoints a temporary receiver to administer the restraining order.

(B) Standard

(i) Showing

Rule 65 of the Federal Rules of Civil Procedure shall apply with respect to any proceeding under subparagraph (A) without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and immediate.

(ii) State proceeding

If, in the case of any proceeding in a State court, the court determines that rules of civil procedure available under the laws of such State provide substantially similar protections to a party's right to due process as Rule 65 (as modified with respect to such proceeding by clause (i)), the relief sought under subparagraph (A) may be requested under the laws of such State.

(j) Criminal penalty

Whoever, being subject to an order in effect under subsection (e) or (g), without the prior written approval of the appropriate Federal financial institutions regulatory agency, knowingly participates, directly or indirectly, in any manner (including by engaging in an activity specifically prohibited in such an order or in subsection (e)(6)) in the conduct of the affairs of--

(1) any insured depository institution;

(2) any institution treated as an insured bank under subsection (b)(3) or (b)(4);

(3) any insured credit union (as defined in section 101(7) of the Federal Credit Union Act); or

(4) any institution chartered under the Farm Credit Act of 1971,

shall be fined not more than $1,000,000, imprisoned for not more than 5 years, or both.

(k) Repealed. Pub.L. 101-73, Title IX, § 920(c), Aug. 9, 1989, 103 Stat. 488

(l) Notice of service

Any service required or authorized to be made by the appropriate Federal banking agency under this section may be made by registered mail, or in such other manner reasonably calculated to give actual notice as the agency may by regulation or otherwise provide. Copies of any notice or order served by the agency upon any State depository institution or any institution-affiliated party, pursuant to the provisions of this section, shall also be sent to the appropriate State supervisory authority.

(m) Notice to State authorities

In connection with any proceeding under subsection (b), (c)(1), or (e) of this section involving an insured State bank or any institution-affiliated party, the appropriate Federal banking agency shall provide the appropriate State supervisory authority with notice of the agency's intent to institute such a proceeding and the grounds therefor. Unless within such time as the Federal banking agency deems appropriate in the light of the circumstances of the case (which time must be specified in the notice prescribed in the preceding sentence) satisfactory corrective action is effectuated by action of the State supervisory authority, the agency may proceed as provided in this section. No bank or other party who is the subject of any notice or order issued by the agency under this section shall have standing to raise the requirements of this subsection as ground for attacking the validity of any such notice or order.

(n) Ancillary provisions; subpena power, etc.

In the course of or in connection with any proceeding under this section, or in connection with any claim for insured deposits or any examination or investigation under section 1820(c) of this title, the agency conducting the proceeding, examination, or investigation or considering the claim for insured deposits, or any member or designated representative thereof, including any person designated to conduct any hearing under this section, shall have the power to administer oaths and affirmations, to take or cause to be taken depositions, and to issue, revoke, quash, or modify subpenas and subpenas duces tecum; and such agency is empowered to make rules and regulations with respect to any such proceedings, claims, examinations, or investigations. The attendance of

witnesses and the production of documents provided for in this subsection may be required from any place in any State or in any territory or other place subject to the jurisdiction of the United States at any designated place where such proceeding is being conducted. Any such agency or any party to proceedings under this section may apply to the United States District Court for the District of Columbia, or the United States district court for the judicial district or the United States court in any territory in which such proceeding is being conducted, or where the witness resides or carries on business, for enforcement of any subpena or subpena duces tecum issued pursuant to this subsection, and such courts shall have jurisdiction and power to order and require compliance therewith. Witnesses subpenaed under this subsection shall be paid the same fees and mileage that are paid witnesses in the district courts of the United States. Any court having jurisdiction of any proceeding instituted under this section by an insured depository institution or a director or officer thereof, may allow to any such party such reasonable expenses and attorneys' fees as it deems just and proper; and such expenses and fees shall be paid by the depository institution or from its assets. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in such person's power so to do, in obedience to the subpoena of the appropriate Federal banking agency, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year or both.

(o) Termination of membership of State bank in Federal Reserve System

Whenever the insured status of a State member bank shall be terminated by action of the Board of Directors, the Board of Governors of the Federal Reserve System shall terminate its membership in the Federal Reserve System in accordance with the provisions of subchapter VIII of chapter 3 of this title, and whenever the insured status of a national member bank shall be so terminated the Comptroller of the Currency shall appoint a receiver for the bank, which shall be the Corporation. Except as provided in subsection (c) or (d) of section 1814 of this title, whenever a member bank shall cease to be a member of the Federal Reserve System, its status as an insured depository institution shall, without notice or other action by the Board of Directors, terminate on the date the bank shall cease to be a member of the Federal Reserve System, with like effect as if its insured status had been terminated on said date by the Board of Directors after proceedings under subsection (a) of this section. Whenever the insured status of an insured Federal savings bank shall be terminated by action of the Board of Directors, the Comptroller of the Currency shall appoint a receiver for the bank, which shall be the Corporation.

(p) Banks not receiving deposits

Notwithstanding any other provision of law, whenever the Board of Directors shall determine that an insured depository institution is not engaged in the business of receiving deposits, other than trust funds as herein defined, the Corporation shall notify the depository institution that its insured status will terminate at the expiration of the first full assessment period following such notice. A finding by the Board of Directors that a

depository institution is not engaged in the business of receiving deposits, other than such trust funds, shall be conclusive. The Board of Directors shall prescribe the notice to be given by the depository institution of such termination and the Corporation may publish notice thereof. Upon the termination of the insured status of any such depository institution, its deposits shall thereupon cease to be insured and the depository institution shall thereafter be relieved of all future obligations to the Corporation, including the obligation to pay future assessments.

(q) Assumption of liabilities

Whenever the liabilities of an insured depository institution for deposits shall have been assumed by another insured depository institution or depository institutions, whether by way of merger, consolidation, or other statutory assumption, or pursuant to contract (1) the insured status of the depository institution whose liabilities are so assumed shall terminate on the date of receipt by the Corporation of satisfactory evidence of such assumption; (2) the separate insurance of all deposits so assumed shall terminate at the end of six months from the date such assumption takes effect or, in the case of any time deposit, the earliest maturity date after the six-month period. Where the deposits of an insured depository institution are assumed by a newly insured depository institution, the depository institution whose deposits are assumed shall not be required to pay any assessment with respect to the deposits which have been so assumed after the assessment period in which the assumption takes effect.

(r) Action or proceeding against foreign bank; basis; removal of officer or other person; venue; service of process

(1) Except as otherwise specifically provided in this section, the provisions of this section shall be applied to foreign banks in accordance with this subsection.

(2) An act or practice outside the United States on the part of a foreign bank or any officer, director, employee, or agent thereof may not constitute the basis for any action by any officer or agency of the United States under this section, unless--

(A) such officer or agency alleges a belief that such act or practice has been, is, or is likely to be a cause of or carried on in connection with or in furtherance of an act or practice within any one or more States which, in and of itself, would constitute an appropriate basis for action by a Federal officer or agency under this section; or

(B) the alleged act or practice is one which, if proven, would, in the judgment of the Board of Directors, adversely affect the insurance risk assumed by the Corporation.

(3) In any case in which any action or proceeding is brought pursuant to an allegation under paragraph (2) of this subsection for the suspension or removal of any officer, director, or other person associated with a foreign bank, and such person fails to appear promptly as a party to such action or proceeding and to comply with any effective order or judgment therein, any failure by the foreign bank to secure his removal from any office he holds in such bank and from any further participation in its affairs shall, in and of itself, constitute grounds for termination of

the insurance of the deposits in any branch of the bank.

(4) Where the venue of any judicial or administrative proceeding under this section is to be determined by reference to the location of the home office of a bank, the venue of such a proceeding with respect to a foreign bank having one or more branches or agencies in not more than one judicial district or other relevant jurisdiction shall be within such jurisdiction. Where such a bank has branches or agencies in more than one such jurisdiction, the venue shall be in the jurisdiction within which the branch or branches or agency or agencies involved in the proceeding are located, and if there is more than one such jurisdiction, the venue shall be proper in any such jurisdiction in which the proceeding is brought or to which it may appropriately be transferred.

(5) Any service required or authorized to be made on a foreign bank may be made on any branch or agency located within any State, but if such service is in connection with an action or proceeding involving one or more branches or one or more agencies located in any State, service shall be made on at least one branch or agency so involved.

(s) Compliance with monetary transaction recordkeeping and report requirements

(1) Compliance procedures required

Each appropriate Federal banking agency shall prescribe regulations requiring insured depository institutions to establish and maintain procedures reasonably designed to assure and monitor the compliance of such depository institutions with the

requirements of subchapter II of chapter 53 of Title 31.

(2) Examinations of depository institution to include review of compliance procedures

(A) In general

Each examination of an insured depository institution by the appropriate Federal banking agency shall include a review of the procedures required to be established and maintained under paragraph (1).

(B) Exam report requirement

The report of examination shall describe any problem with the procedures maintained by the insured depository institution.

(3) Order to comply with requirements

If the appropriate Federal banking agency determines that an insured depository institution--

(A) has failed to establish and maintain the procedures described in paragraph (1); or

(B) has failed to correct any problem with the procedures maintained by such depository institution which was previously reported to the depository institution by such agency,

the agency shall issue an order in the manner prescribed in subsection (b) or (c) requiring such depository institution to cease and desist from its violation of this subsection or regulations prescribed under this subsection.

(t) Authority of FDIC to take enforcement action against insured depository institutions and institution-affiliated parties

(1) Recommending action by appropriate Federal banking agency

The Corporation, based on an examination of an insured depository institution by the Corporation or by the appropriate Federal banking agency or on other information, may recommend in writing to the appropriate Federal banking agency that the agency take any enforcement action authorized under section 1817(j) of this title, this section, or section 1828(j) of this title with respect to any insured depository institution, any depository institution holding company, or any institution-affiliated party. The recommendation shall be accompanied by a written explanation of the concerns giving rise to the recommendation.

(2) FDIC's authority to act if appropriate Federal banking agency fails to follow recommendation

If the appropriate Federal banking agency does not, before the end of the 60-day period beginning on the date on which the agency receives the recommendation under paragraph (1), take the enforcement action recommended by the Corporation or provide a plan acceptable to the Corporation for responding to the Corporation's concerns, the Corporation may take the recommended enforcement action if the Board of Directors determines, upon a vote of its members, that--

(A) the insured depository institution is in an unsafe or unsound condition;

(B) the institution or institution-affiliated party is engaging in unsafe or unsound practices, and the recommended enforcement action will prevent the institution or institution-affiliated party from continuing such practices;

(C) the conduct or threatened conduct (including any acts or omissions) poses a risk to the Deposit Insurance Fund, or may prejudice the interests of the institution's depositors or[3]

(D) the conduct or threatened conduct (including any acts or omissions) of the depository institution holding company poses a risk to the Deposit Insurance Fund, provided that such authority may not be used with respect to a depository institution holding company that is in generally sound condition and whose conduct does not pose a foreseeable and material risk of loss to the Deposit Insurance Fund;[4]

(3) Effect of exigent circumstances

(A) Authority to act

The Corporation may, upon a vote of the Board of Directors, and after notice to the appropriate Federal banking agency, exercise its authority under paragraph (2) in exigent circumstances without regard to the time period set forth in paragraph (2).

(B) Agreement on exigent circumstances

The Corporation shall, by agreement with the appropriate Federal banking agency, set forth

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[3] So in original. Probably should be "; or".

[4] So in original. The semicolon probably should be a period.

those exigent circumstances in which the Corporation may act under subparagraph (A).

(4) Corporation's powers; institution's duties

For purposes of this subsection--

(A) the Corporation shall have the same powers with respect to any insured depository institution and its affiliates as the appropriate Federal banking agency has with respect to the institution and its affiliates; and

(B) the institution and its affiliates shall have the same duties and obligations with respect to the Corporation as the institution and its affiliates have with respect to the appropriate Federal banking agency.

(5) Requests for formal actions and investigations

(A) Submission of requests

A regional office of an appropriate Federal banking agency (including a Federal Reserve bank) that requests a formal investigation of or civil enforcement action against an insured depository institution or institution-affiliated party shall submit the request concurrently to the chief officer of the appropriate Federal banking agency and to the Corporation.

(B) Agencies required to report on requests

Each appropriate Federal banking agency shall report semiannually to the Corporation on the status or disposition of all requests under subparagraph (A), including the reasons for any decision by the agency to approve or deny such requests.

(6)[5] Powers and duties with respect to depository institution holding companies

For purposes of exercising the backup authority provided in this subsection--

(A) the Corporation shall have the same powers with respect to a depository institution holding company and its affiliates as the appropriate Federal banking agency has with respect to the holding company and its affiliates; and

(B) the holding company and its affiliates shall have the same duties and obligations with respect to the Corporation as the holding company and its affiliates have with respect to the appropriate Federal banking agency.

(6)[5] Referral to Bureau of Consumer Financial Protection

Subject to subtitle B of the Consumer Financial Protection Act of 2010, each appropriate Federal banking agency shall make a referral to the Bureau of Consumer Financial Protection when the Federal banking agency has a reasonable belief that a violation of an enumerated consumer law, as defined in the Consumer Financial Protection Act of 2010, has been committed by any insured depository institution or institution-affiliated party within the jurisdiction of that appropriate Federal banking agency.

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[5] So in original. Two pars. (6) have been enacted.

(u) Public disclosures of final orders and agreements

(1) In general

The appropriate Federal banking agency shall publish and make available to the public on a monthly basis--

(A) any written agreement or other written statement for which a violation may be enforced by the appropriate Federal banking agency, unless the appropriate Federal banking agency, in its discretion, determines that publication would be contrary to the public interest;

(B) any final order issued with respect to any administrative enforcement proceeding initiated by such agency under this section or any other law; and

(C) any modification to or termination of any order or agreement made public pursuant to this paragraph.

(2) Hearings

All hearings on the record with respect to any notice of charges issued by a Federal banking agency shall be open to the public, unless the agency, in its discretion, determines that holding an open hearing would be contrary to the public interest.

(3) Transcript of hearing

A transcript that includes all testimony and other documentary evidence shall be prepared for all hearings commenced pursuant to subsection (i). A transcript of public hearings shall be made available to the public pursuant to section 552 of Title 5.

(4) Delay of publication under exceptional circumstances

If the appropriate Federal banking agency makes a determination in writing that the publication of a final order pursuant to paragraph (1)(B) would seriously threaten the safety and soundness of an insured depository institution, the agency may delay the publication of the document for a reasonable time.

(5) Documents filed under seal in public enforcement hearings

The appropriate Federal banking agency may file any document or part of a document under seal in any administrative enforcement hearing commenced by the agency if disclosure of the document would be contrary to the public interest. A written report shall be made part of any determination to withhold any part of a document from the transcript of the hearing required by paragraph (2).

(6) Retention of documents

Each Federal banking agency shall keep and maintain a record, for a period of at least 6 years, of all documents described in paragraph (1) and all informal enforcement agreements and other supervisory actions and supporting documents issued with respect to or in connection with any administrative enforcement proceeding initiated by such agency under this section or any other laws.

(7) Disclosures to Congress

No provision of this subsection may be construed to authorize the withholding, or to prohibit the disclosure, of any information to the Congress or any committee or subcommittee of the Congress.

(v) Foreign investigations

(1) Requesting assistance from foreign banking authorities

In conducting any investigation, examination, or enforcement action under this chapter, the appropriate Federal banking agency may--

(A) request the assistance of any foreign banking authority; and

(B) maintain an office outside the United States.

(2) Providing assistance to foreign banking authorities

(A) In general

Any appropriate Federal banking agency may, at the request of any foreign banking authority, assist such authority if such authority states that the requesting authority is conducting an investigation to determine whether any person has violated, is violating, or is about to violate any law or regulation relating to banking matters or currency transactions administered or enforced by the requesting authority.

(B) Investigation by Federal banking agency

Any appropriate Federal banking agency may, in such agency's discretion, investigate and collect information and evidence pertinent to a request for assistance under subparagraph (A). Any such investigation shall comply with the laws of the United States and the policies and procedures of the appropriate Federal banking agency.

(C) Factors to consider

In deciding whether to provide assistance under this paragraph, the appropriate Federal banking agency shall consider--

(i) whether the requesting authority has agreed to provide reciprocal assistance with respect to banking matters within the jurisdiction of any appropriate Federal banking agency; and

(ii) whether compliance with the request would prejudice the public interest of the United States.

(D) Treatment of foreign banking authority

For purposes of any Federal law or appropriate Federal banking agency regulation relating to the collection or transfer of information by any appropriate Federal banking agency, the foreign banking authority shall be treated as another appropriate Federal banking agency.

(3) Rule of construction

Paragraphs (1) and (2) shall not be construed to limit the authority of an appropriate Federal banking agency or any other Federal agency to provide or receive assistance or information to or from any foreign authority with respect to any matter.

(w) Termination of insurance for money laundering or cash transaction reporting offenses

(1) In general

(A) Conviction of Title 18 offenses

(i) Duty to notify

If an insured State depository institution has been convicted of any criminal offense under section 1956 or 1957 of Title 18, the Attorney General shall provide to the Corporation a written notification of the conviction and shall include a certified copy of the order of conviction from the court rendering the decision.

(ii) Notice of termination; pretermination hearing

After receipt of written notification from the Attorney General by the Corporation of such a conviction, the Board of Directors shall issue to the insured depository institution a notice of its intention to terminate the insured status of the insured depository institution and schedule a hearing on the matter, which shall be conducted in all respects as a termination hearing pursuant to paragraphs (3) through (5) of subsection (a).

(B) Conviction of Title 31 offenses

If an insured State depository institution is convicted of any criminal offense under section 5322 or 5324 of Title 31 after receipt of written notification from the Attorney General by the Corporation, the Board of Directors may initiate proceedings to terminate the insured status of the

insured depository institution in the manner described in subparagraph (A).

(C) Notice to State supervisor

The Corporation shall simultaneously transmit a copy of any notice issued under this paragraph to the appropriate State financial institutions supervisor.

(2) Factors to be considered

In determining whether to terminate insurance under paragraph (1), the Board of Directors shall take into account the following factors:

(A) The extent to which directors or senior executive officers of the depository institution knew of, or were involved in, the commission of the money laundering offense of which the institution was found guilty.

(B) The extent to which the offense occurred despite the existence of policies and procedures within the depository institution which were designed to prevent the occurrence of any such offense.

(C) The extent to which the depository institution has fully cooperated with law enforcement authorities with respect to the investigation of the money laundering offense of which the institution was found guilty.

(D) The extent to which the depository institution has implemented additional internal controls (since the commission of the offense of which the depository institution was found guilty) to prevent the occurrence of any other money laundering offense.

(E) The extent to which the interest of the local community in having adequate deposit and credit services available would be threatened by the termination of insurance.

(3) Notice to State banking supervisor and public

When the order to terminate insured status initiated pursuant to this subsection is final, the Board of Directors shall--

(A) notify the State banking supervisor of any State depository institution described in paragraph (1), where appropriate, at least 10 days prior to the effective date of the order of termination of the insured status of such depository institution, including a State branch of a foreign bank; and

(B) publish notice of the termination of the insured status of the depository institution in the Federal Register.

(4) Temporary insurance of previously insured deposits

Upon termination of the insured status of any State depository institution pursuant to paragraph (1), the deposits of such depository institution shall be treated in accordance with subsection (a)(7).

(5) Successor liability

This subsection shall not apply to a successor to the interests of, or a person who acquires, an insured depository institution that violated a provision of law described in paragraph (1), if the successor succeeds to the interests of the violator, or the acquisition is made, in good faith and not for

purposes of evading this subsection or regulations prescribed under this subsection.

(6) "Senior executive officer" defined

The term "senior executive officer" has the same meaning as in regulations prescribed under section 1831i(f) of this title.