FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

In the Matter of **CORNELIUS CAMPBELL BURGESS,** Individually and as an institution-affiliated party of Herring Bank, Amarillo, Texas (Insured State Nonmember Bank)	Docket Nos.: FDIC-14-0307e FDIC-14-0308k

ORDER DENYING RESPONDENT'S
MOTION FOR PARTIAL SUMMARY DISPOSITION

The Federal Deposit Insurance Corporation ("FDIC") commenced this action against Respondent Cornelius Campbell Burgess ("Respondent") on November 21, 2014, alleging that Respondent had abused his position as President and Chief Executive Officer at Herring Bank ("the Bank") and seeking to remove him from those positions, prohibit him from further participation in the banking industry, and assess against him a $200,000 civil money penalty. On August 17, 2017, following a hearing before this tribunal, the FDIC Board of Directors ("Board") issued a removal and prohibition order and $200,000 assessment against Respondent on the basis that he had "used the Bank's cash, debit, and credit cards for personal expenses . . . and attempted to appropriate dividends for Bank stock that he knowingly kept off the Bank's books."[1] The Board concluded that, through this conduct, Respondent had breached his fiduciary duties to the Bank, engaged in unsafe or unsound banking practices actionable under 12 U.S.C. §§ 1818(e) and 1818(i), and committed a violation of 12 C.F.R. § 215 ("Regulation O").[2]

[1] Decision and Order to Remove and Prohibit from Further Participation and Assessment of Civil Money Penalty, *In the Matter of Cornelius Campbell Burgess*, Nos. FDIC-14-0307e & -0308k, 2017 WL 4641701 at *1 (FDIC Aug. 17, 2017) ("Board Decision").

[2] *See id.* at **9-13.

On September 7, 2017, the Fifth Circuit stayed the Board's decision in light of Respondent's contention that the administrative law judge ("ALJ") who had presided over his hearing was not constitutionally appointed.[3] The matter was then remanded and reassigned to a different ALJ on July 19, 2018, after the Supreme Court's decision in *Lucia v. SEC*.[4] The Board directed that, upon remand, the reassigned ALJ conduct "a new hearing and fresh reconsideration of all prior actions."[5] The newly presiding ALJ subsequently retired and the undersigned was assigned to the case on November 26, 2019.

On April 6, 2020, following the undersigned's issuance of a Notice of Intention to Conduct Written Hearing, Respondent and Enforcement Counsel for the FDIC ("Enforcement Counsel") agreed to rely on the testimony and exhibits from the original hearing in this matter so that the new hearing could largely be conducted on the papers rather than in person.[6] In conjunction with this agreement, Respondent requested, and the undersigned granted, a supplemental in-person hearing to be limited to the issue of whether the FDIC's actions and charges against Respondent were motivated by bias.[7] On April 23, 2020, the undersigned issued a procedural schedule setting the supplemental hearing for October 27-28, 2020 and directing that any prehearing motions, including motions for summary disposition, be filed by August 7, 2020.[8] The deadline to submit prehearing motions was later extended to August 14, 2020, and the supplemental hearing rescheduled for February 9-10, 2021 in consideration of the ongoing global pandemic.[9]

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[3] *See Burgess v. FDIC*, 871 F.3d 297, 304 (5th Cir. 2017).

[4] 138 S. Ct. 2044 (2018).

[5] July 19, 2018 Resolution and Order in Pending Cases ("Resolution and Order") at 1.

[6] *See* April 6, 2020 Joint Letter to ALJ Jennifer Whang at 1.

[7] *See id.* at 1-2.

[8] *See* April 24, 2020 Notice Regarding Telephone Conference and Order Setting Procedural Schedule at 2; *see also* April 23, 2020 Joint Letter to ALJ Whang at 1 (characterizing prehearing motions as "including but not limited to motions to strike, motions in limine, and motions for summary disposition").

[9] *See* July 30, 2020 Order Granting Enforcement Counsel's Unopposed Motion to Adjust Procedural Schedule (extending time to file prehearing motions); August 28, 2020 Order Regarding August 25, 2020 Telephone

On August 14, 2020, Respondent filed a motion for partial summary disposition ("Motion") on the following grounds:[10] First, that Respondent's alleged use of the Bank's cash and cards on personal expenses did not constitute a violation of Regulation O;[11] Second, that Respondent's alleged actions in keeping Bank stock off the Bank's books and causing dividend checks from that stock to be deposited in Respondent's personal account did not demonstrate the requisite culpability necessary to sustain an action against him; and Third, that the agency could not demonstrate that the Bank had suffered a loss or that Respondent had experienced a financial gain through the allegedly wrongful deposit of dividend checks into Respondent's account, as required under the relevant statutes. *See* Motion at 2-3. Enforcement Counsel opposes each of these arguments on their merits and on the basis that genuine issues of material fact exist that preclude summary disposition in Respondent's favor.[12] *See* FDIC's Opposition to Respondent's Motion for Partial Summary Disposition ("Opposition") at 2-4. The undersigned agrees.

Conference and Amending the Procedural Schedule (rescheduling supplemental hearing).

[10] Enforcement Counsel likewise filed a motion for partial summary disposition on this date, which is addressed in a separate order being issued concurrently.

[11] Respondent does not seek summary disposition as to the FDIC's charges that he breached his fiduciary duty to the Bank and engaged in unsafe or unsound banking practices in causing the Bank to pay for his personal expenses. *See* November 21, 2014 Notice of Intention to Remove from Office and Prohibit from Further Participation and Notice of Assessment of Civil Money Penalty ("Notice") ¶¶ 14-59; February 4, 2016 Amended Notice of Intention to Remove from Office and Prohibit from Further Participation and Notice of Assessment of Civil Money Penalty ("Amended Notice") ¶¶ 14-15, 23-68. The undersigned notes that either one of these claims would be sufficient to sustain an action against Respondent under 12 U.S.C. §§ 1818(e) and 1818(i) based on the personal expense allegations even if the undersigned were to determine that the facts alleged in the Notice and Amended Notice do not constitute a violation of Regulation O. *See* 12 U.S.C. §§ 1818(e)(1)(A) ("misconduct" prong of removal and prohibition action independently satisfied by showings of unsafe or unsound practices or breach of fiduciary duty), 1818(i)(2)(B)(i) ("misconduct" prong of second-tier civil money penalty independently satisfied by breach of fiduciary duty or reckless engagement in unsafe or unsound practices).

[12] Enforcement Counsel also argues that Respondent's Motion is not a "prehearing motion" contemplated by the undersigned's April 23, 2020 procedural schedule because it does not relate to the issue of bias, and it is therefore inappropriate. *See* Opposition at 4-7. The undersigned finds that, although the supplemental hearing is certainly limited to the issue of bias, based on agreement of the parties, nothing in the procedural schedule or otherwise precluded Respondent from moving for summary disposition prior to that hearing on issues other than that of bias. Respondent's Motion concerns issues that have not been decided before this tribunal since the matter was remanded and that are dispositive of aspects of the FDIC's claims, and it is therefore appropriate.

The FDIC's Uniform Rules of Practice and Procedure ("Uniform Rules") provide that summary disposition on a given claim is appropriate when the "undisputed pleaded facts" and other evidence properly before this tribunal demonstrates that (1) "[t]here is no genuine issue as to any material fact," and (2) "[t]he moving party is entitled to a decision in its favor as a matter of law."[13] A genuine issue of material fact is one that, if the subject of dispute, "might affect the outcome of the suit under the governing law."[14] The summary disposition standard "is similar to that of the summary judgment standard under Rule 56 of the Federal Rules of Civil Procedure."[15] Thus, when determining the existence of a genuine factual dispute, all evidence must be evaluated "in the light most favorable to the non-moving party."[16] That means that this tribunal must "draw 'all justifiable inferences' in the non-moving party's favor and accept the non-moving party's evidence as true," although "mere allegations or denials" will not suffice.[17]

Alleged Violation of Regulation O

Respondent argues that "three of the FDIC's claims can, and should, be decided as a matter of law based on the existing record from the Original Hearing." Motion at 5. With respect to the FDIC's allegations that the Bank's payment of his personal expenses constituted a violation of Regulation O, which largely prohibits banks from making extensions of credit to their executive officers, *see* 12 C.F.R. § 215.3 *et seq.*, Respondent argues that no reasonable bank officer would recognize the challenged expenses as an extension of credit within the meaning of the regulation, *see* Motion at 14-18. In particular, Respondent asserts that (1) the types of charges he incurred and cash advances he received were not prohibited extensions of credit, *see id.* at 15-16; (2) all personal

[13] 12 C.F.R. § 308.29; *see also id.* § 308.30 (partial summary disposition).

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

[15] *In the Matter of William R. Blanton*, No. OCC AA-EC-2015-24, 2017 WL 4510840, at *6 (OCC July 10, 2017) ("*Blanton I*"), *aff'd on other grounds*, *Blanton v. OCC*, 909 F.3d 1161 (D.C. Cir. 2018) ("*Blanton II*").

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

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

charges "were regularly reimbursed within months of the purchase," such that the outstanding amount owed to the Bank never exceeded the permissible regulatory threshold of $15,000, *see id.* at 16-17; and (3) the Bank approved many of the expenses as properly business-related, both at the time they were made and following a forensic audit, and had no expectation that Respondent would pay the expenses back with interest, *see id.* at 17-18.

In response, Enforcement Counsel contends that many of the factual assertions upon which Respondent bases his claims for partial summary disposition on this issue are contradicted by record evidence or otherwise disputed. *See* Opposition at 9-22. For example, Enforcement Counsel disputes Respondent's characterization of the Bank's review, approval, and ratification process of the challenged expenses, arguing that "[t]he Bank's Board was not presented with information from which any reasonable person could determine the nature of many of the expenses." *Id.* at 11; *see id.* at 11-13 (citing evidence that "Respondent took affirmative steps to deceive the Board in order to obtain the ratification"). Likewise, Enforcement Counsel denies that Respondent's Motion accurately characterizes the record evidence regarding, *inter alia*, Respondent's expense and reimbursement practices, Respondent's compliance with the Bank's policy regarding the retention of vendor receipts, and the extent to which the forensic audit categorized the challenged expenses as "questionable" or "personal." *See id.* at 14-22. And Enforcement Counsel generally notes that Respondent's factual assertions are predicated on hearing testimony from Respondent and certain other witnesses that "conflicts with the documentary record," is "internally inconsistent," or otherwise "lacks the hallmarks of credibility." *Id.* at 7; *see also id.* at 5 (arguing that "the record is replete with evidence . . . from which a reasonable fact finder could determine that Respondent's word is neither reliable nor credible").

Enforcement Counsel also maintains that Respondent's arguments for partial summary disposition on the Regulation O issue fail as a matter of law. *See id.* at 27-30. Specifically, Enforcement Counsel argues that Respondent's non-bank expenses are reasonably classified as impermissible extensions of credit under the relevant precedent and that "the Bank Board's purported ratification of the expenses as business expenses" is tainted and not dispositive. *Id.* at 29. Enforcement Counsel further claims that the "credit card exception" to Regulation O is inapplicable to (1) any non-bank expenses made with cash advances or Bank debit cards and (2) any non-bank expenses charged to Bank credit cards to the extent that Respondent was allowed to charge the expenses "under terms more favorable than those offered to the general public." *Id.* (quoting 12 C.F.R. § 215.3(b)(5)(ii)(B)). Finally, Enforcement Counsel argues that Respondent's failure to reimburse the Bank for "at least $26,500 in non-bank goods or services" means that the challenged expenses exceeded the $15,000 limit of the credit card exception in any event. *Id.* (citing FDIC's July 7, 2020 Prehearing Statement on Remand Including Statement of Disputed Issues at 53, which itself cites to record evidence of unreimbursed expenses).

The undersigned agrees with Enforcement Counsel that material facts are in dispute that preclude summary disposition on the Regulation O issue, including whether Respondent incurred charges on non-bank expenses at preferential terms and whether more than $15,000 in such unreimbursed expenses was ever outstanding at one time. The undersigned further agrees that resolution of Respondent's arguments regarding his alleged violation of Regulation O depend on a determination of the credibility and reliability of testimony by Respondent and certain other witnesses. *See* Opposition at 5-7. Such a determination is not appropriate at this stage of the proceedings, and summary disposition on this claim must accordingly be denied.

Alleged Mistreatment of Stocks and Misappropriation of Stock Dividend Checks

As for the FDIC's allegations that Respondent wrongfully withheld MasterCard and Visa stocks from the Bank's books and deposited dividend checks from those stocks into his personal account, Respondent argues that summary disposition is warranted because the agency cannot prove the requisite culpability or effect elements of its claims. *See* Motion at 18-24. To begin with, Respondent contends that "there is no evidence [that he] took any deliberate acts to cause the dividend checks to be placed into his personal account as is required for a finding of culpability." *Id.* at 20-21. Respondent also asserts that the undisputed facts reflect a reasonable disagreement about the proper accounting treatment for the MasterCard and Visa stocks, rather than "an attempt to conceal the existence of that stock from the Bank and the Board." *Id.* at 21. Finally, Respondent maintains that the "inadvertent" placement of the dividend checks into Respondent's account cannot constitute loss to the Bank or financial gain to Respondent as a matter of law, because he reimbursed the dividend payments as soon as he learned of their "temporary misplacement," *id.* at 23, and because the $5,786 total of the dividends regardless cannot be categorized as "more than a minimal loss" to the Bank, as necessary for the assessment of a second-tier civil money penalty under 12 U.S.C. § 1818(i)(2)(B), *see id.* at 23-24.

Enforcement Counsel disputes Respondent's factual premises on multiple grounds, arguing that Respondent's narrative "is fiction and is wholly unsupported by the materials cited by [Respondent] in his motion." Opposition at 31; *see id.* at 22-27 (citing record evidence to identify disputed issues of fact). Enforcement Counsel asserts that "[t]he record contains ample evidence from which a reasonable fact finder could conclude that Respondent deliberately caused the dividend checks to be placed in his personal bank account intending to misappropriate them." *Id.* at 27. With respect to the misplacement of the dividend checks resulting in loss to the Bank or gain

to Respondent, Enforcement Counsel argues that "subsequent repayment does not negate or otherwise constitute a defense of the prior loss or gain" as a matter of law; that Respondent did not reimburse interest on the dividend payments in any event; and that there is basis to conclude from the record that the Bank's loss exceeded the $5,786 cited by Respondent. *Id.* at 34.

The undersigned agrees with Enforcement Counsel that disputed facts exist that preclude summary disposition on Respondent's alleged mistreatment of Bank stocks and misappropriation of the resulting dividends.[18] As Enforcement Counsel notes, Respondent is certainly entitled to argue that, for example, the deposit of the dividend checks into Respondent's personal account was genuinely inadvertent, *see id.* at 33, but that argument necessarily relies on facts that are in dispute and is therefore not suitable for summary disposition. The undersigned also agrees with Enforcement Counsel that Respondent's reimbursement of the dividend amounts does not foreclose a finding that he obtained a benefit or that the Bank suffered a loss through their misappropriation.[19] Finally, the undersigned notes that, as with the alleged violation of Regulation O, the validity of Respondent's arguments regarding his treatment of the MasterCard and Visa stock and the dividend payments intrinsically turns on the credibility and reliability of

[18] While Enforcement Counsel argues that "the record contains ample evidence from which a reasonable fact finder could conclude that the actual loss in this case was at least $73,300," Opposition at 34, the undersigned is not persuaded that a reasonable fact finder would agree as to the amount Respondent gained or the Bank benefited with respect to the dividend payments alone. The $73,300 figure cited by Enforcement Counsel relates to Respondent's alleged personal expense misconduct rather than his alleged misplacement of the Bank's dividend checks into his personal account. *See* Board Decision, 2017 WL 4641701, at *14 (finding from the original hearing record that "Respondent clearly received financial gain from his misconduct by using Bank-owned credit cards for at least $26,500 in personal charges and receiving $46,800 in cash for personal expenses"). Nevertheless, and regardless of whether the $5,786 in dividend payments could be considered "more than a minimal loss to the [Bank]," 12 U.S.C. § 1818(i)(2)(B)(ii)(II), the undersigned declines to grant Respondent's motion for summary disposition on this issue, because the effects prong of a second-tier civil money penalty as to the MasterCard and Visa stock equally may be satisfied on a showing that Respondent's actions were "part of a pattern of misconduct," *id.* § 1818(i)(2)(B)(ii)(I), or resulted in "pecuniary gain or other benefit" for Respondent, *id.* § 1818(i)(2)(B)(ii)(III), both of which the FDIC alleges and is entitled to prove.

[19] *See In the Matter of Michael*, 2010 WL 3849537, at *10 (FDIC Aug. 10, 2010), *aff'd*, *Michael v. FDIC*, 687 F.3d 337 (7th Cir. 2012) ("[B]ecause they had the use of the funds in the interim, Respondents benefited from their misconduct regardless of whether they ultimately repaid any of the wrongfully obtained loans.").

Respondent's testimony and the testimony of others from the original hearing and the upcoming supplemental hearing. That testimony is appropriately weighed not at summary disposition, but on consideration of the full record during the fact-finding stage of these proceedings.[20] For these reasons, Respondent's motion for partial summary disposition is denied.

SO ORDERED.

Date: November 16, 2020.

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Jennifer Whang
Administrative Law Judge
Office of Financial Institution Adjudication

[20] *See In the Matter of Kevin L. Jensen*, 1996 WL 768368, at *2 (FDIC July 22, 1996) ("Courts are reluctant to grant motions for summary disposition when central issues of intent, good faith, or credibility are involved."); *see also, e.g.*, *Johnson v. Perez*, 823 F.3d 701, 705 (D.C. Cir. 2016) ("In considering a motion for summary judgment, . . . [t]he court may not make credibility determinations or otherwise weigh the evidence.").