UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

In the Matter of:	Docket Nos.:
SAUL ORTEGA, Former Chief Financial Officer, Director, President, Chief Executive Officer, and Chairman of the Board,	AA-EC-2017-44
And	
DAVID ROGERS, JR., Former Chairman of the Board	AA-EC-2017-45
First National Bank Edinburg, Texas	

ORDER DENYING CROSS MOTIONS FOR SUMMARY DISPOSITION

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The Office of the Comptroller of the Currency ("OCC") commenced this action against Respondents Saul Ortega and David Rogers, Jr. ("Respondents") on September 25, 2017, filing a Notice of Charges ("Notice") that seeks an order of prohibition and the imposition of first- and second-tier civil money penalties against each Respondent pursuant to 12 U.S.C. §§ 1818(e) and 1818(i). The Notice alleges that Respondents, in their capacities as two of the directors and officers of First National Bank, Edinburg Texas ("the Bank"), engaged in actionable misconduct, including unsafe or unsound banking practices and the breach of their fiduciary duties of loyalty and care. *See* Notice ¶¶ 131-136. Following discovery, Enforcement Counsel for the OCC ("Enforcement Counsel") and Respondents have now filed cross-motions for summary disposition, each contending that there are no material facts in dispute that would preclude a resolution of this matter in their favor as a matter of law.

Specifically, Enforcement Counsel has moved for summary disposition on portions of Articles III (what will be termed the "Capital Raise Loans" issue),[1] IV ("OREO Lending Strategy"),[2] and VI ("Preferential Treatment") of the Notice, asserting that the statutory elements of its claims against Respondents on these charges have been satisfied and that a recommendation of the entry of a prohibition order and the assessment of a $250,000 civil money penalty against each Respondent is appropriate at this time.[3] *See* May 14, 2021 Enforcement Counsel's Brief in

[1] Articles III and IV each allege two types of misconduct, which Enforcement Counsel has previously distinguished as "lending-related misconduct" and "improper accounting practices." *See* January 16, 2018 Brief in Support of OCC's Motion for Partial Summary Disposition on Respondents' Seventh and Ninth Affirmative Defenses at 9, 10 (noting that "the [actionable] effects in this case are the losses suffered by the Bank as a result of the lending-related misconduct and the prejudice to the Bank's depositors as a result of the improper accounting practices"). To all appearances, the OCC's instant Motion seeks summary disposition of Articles III and IV (and offers arguments and evidence in support of summary disposition of these Articles) insofar as they allege lending-related misconduct, but *not* as to the allegations relating to improper accounting practices.

[2] As discussed further *infra*, "OREO" or "ORE" in an accounting context stands for "Other Real Estate Owned," or collateral in the form of real estate foreclosed upon by banks in lieu of a borrower's ability to make loan payments.

[3] Enforcement Counsel does not presently move for summary disposition on Article V of the Notice, relating to alleged misconduct in the accounting for nonaccrual loans. *See* Notice ¶¶ 89-108. With respect to Articles IV and VI, moreover, Enforcement Counsel has focused its instant motion on only a subset of the allegations therein: the $54 million loan to North American Hospital Systems ("NAHS") described in Article IV and the transactions involving

Support of Motion for Partial Summary Disposition ("OCC Mot.") at 1; Notice at 1. Respondents, for their part, argue that the OCC lacks the ability to marshal "sufficient evidence of [their] conduct, knowledge, and intent" in connection with any of the Notice's allegations and that they are therefore entitled to summary disposition in their favor. *See* May 14, 2021 Respondent's Motion for Summary Disposition ("Resp. Mot.") at 4. For the reasons set forth below, the undersigned concludes that there are genuine material facts at issue and that summary disposition in either side's favor is not presently warranted.

I. Summary Disposition Standard

The OCC'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."[4] 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."[5] The summary disposition standard "is similar to that of the summary judgment standard under Rule 56 of the Federal Rules of Civil Procedure."[6] 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."[7] 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.[8]

Griqualand, LLC ("Griqualand," and "Company X" in the Notice) described in Article VI. *See* OCC Mot. at 6 (stating that the NAHS loan is "the clearest example of the unsafe or unsound OREO Lending Strategy"), 10 n.7.

[4] 12 C.F.R. § 1929(a).

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

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

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

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

Any party moving for summary disposition of all or part of the proceeding must submit, along with such motion, "a statement of the material facts as to which the moving party contends there is no genuine issue."[9] A party that opposes summary disposition, moreover, must likewise "file a statement setting forth those material facts as to which he or she contends a genuine dispute exists."[10] In both cases, the enumeration of material facts "must be supported by documentary evidence [in] the form of admissions in pleadings, stipulations, depositions, transcripts, affidavits, [or] any other evidentiary materials that the . . . party contends support [its] position."[11] Where, as here, the parties have filed cross-motions for summary disposition, "the underlying facts and inferences in each party's motion" are to be considered in the light most favorable to the opposing party,[12] and summary disposition will be granted "only if one of the moving parties is entitled to judgment as a matter of law upon material facts that are not genuinely disputed."[13] Furthermore, "in granting a motion for summary of disposition, a trier of fact is not obliged to credit the non-moving party's factual assertions when they are not supported on the record," and the Tribunal "is not required to move a case past the summary [disposition] stage when inferences drawn from the evidence and upon which the non-moving party relies are implausible."[14]

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[9] 12 C.F.R. § 1929(b)(2).

[10] *Id.*

[11] *Id.*

[12] *Schaerr v. Dep't of Justice*, 435 F. Supp. 3d 99, 107 (D.D.C. 2020).

[13] *Heffernan*, 417 F. Supp. 3d at 7 (internal quotation marks and citation omitted).

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

II. Background and Summary of Facts

The following is drawn from the parties' pleadings, their respective statements of material fact,[15] and the exhibits submitted in support thereof.[16] Where the parties appear to be in some genuine factual dispute, both accounts are noted as well as the evidence that each side has marshaled in support. The undersigned will then address where appropriate in this Order the extent to which these disputes implicate facts that are material to the resolution of some aspect of the instant action.

Respondent Rogers held the position of Chairman at the Bank from 1981 to November 2011. *See* Notice ¶ 6; Answer at 2. Respondent Ortega, in turn, served variously as Chief Financial Officer ("CFO") and director of the Bank, Chief Executive Officer ("CEO") of the Bank, and President and Chairman of the Bank from 2001 until the Bank's closure in September 2013.[17] Both Respondents served on the Bank's Board of Directors and as voting members of the Bank's Loan & Discount Committee ("L&D Committee") between 2008 and 2011. *See* Notice ¶¶ 9-10; Answer at 2. The L&D Committee consisted of all of the Bank's directors, including five outside directors. *See* Notice ¶¶ 10-11; Answer at 2. Committee members met weekly and were charged with approving all of the Bank's loans greater than $1 million.[18] *See* Notice ¶ 10; Answer at 2.

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[15] Enforcement Counsel's Statement of Material Facts ("OCC SOF") was submitted separately, while Respondent incorporated his Statement of Material Facts into his Motion for Summary Disposition. Neither approach is precluded under the Uniform Rules. Enforcement Counsel also filed a Statement of Material Facts in Opposition to Respondents' Motion for Summary Disposition ("OCC Opp. SOF").

[16] Exhibits submitted by Enforcement Counsel in support of its Motion and in opposition to Respondents' Motion are styled "OCC-PSD" and "OCC-BIO," respectively. Exhibits submitted by Respondents in support of their Motion and in opposition to Enforcement Counsel's Motion are styled "R-MSD" and "R-BIO," respectively.

[17] Specifically, Respondent Ortega served as CFO from 1994 through October 2011 and as director from 1994 through September 2013. OCC SOF ¶ 7; *see also* OCC-PSD-5 (Sworn Statement Transcript of Saul Ortega) ("Ortega Dep.") at 12:18-13:3. He became Chairman of the Bank in November 2011 and President and CEO in approximately January 2012, remaining in all of these positions until the Bank's closure. *See* Notice ¶ 7; Answer at 2. Enforcement Counsel's Statement of Material Facts states that Respondent Ortega did not become President of the Bank until April 2013, *see* OCC SOF ¶ 7, but this is contradicted by the record evidence. *See* R-MSD-1 (May 15, 2012 letter from OCC to Bank Board of Directors) (referring to Respondent Ortega's assumption of the role of Bank President).

[18] The L&D Committee would occasionally approve loans by majority vote over the telephone (a "telephone tally") before ratifying those loans before the full Committee at the weekly meeting. *See* Notice ¶ 10; Answer at 2.

Respondents additionally served as officers and directors of the Bank's holding company, First National Bank Group, Inc. ("Holding Company") during the relevant period. *See* Notice ¶ 17; Answer at 3.

Between 2008 and 2011, Respondents comprised two of four individuals characterized by the OCC as collectively "responsible for the day-to-day management of the Bank," along with then-President/CEO Robert Gandy and then-Chief Lending Officer ("CLO") Michael McCarthy.[19] Particularly relative to Gandy and McCarthy, Respondents dispute the level of decision-making and involvement that they had in the Bank's day-to-day lending operations during this time beyond their roles on the Board of Directors and the L&D Committee and their general oversight and compliance responsibilities as officers and directors of the Bank.[20] Regardless, it appears undisputed that neither Respondent is trained as an accountant, lawyer, or lending officer and that CLO McCarthy, rather than Respondents, oversaw the Bank's lending department.[21]

It is no coincidence that the Notice's allegations largely take place against the backdrop of the global financial crisis of the late 2000s.[22] As with many other financial institutions, the Bank's OREO holdings began to grow significantly in 2008 "because of increasing delinquencies and foreclosures on loans made in prior years." OCC SOF ¶ 11; *see* Answer at 3. Then, in September 2008, the Bank suffered a $174 million investment loss in connection with the failure of the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage

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[19] OCC SOF ¶ 10 (quoting OCC-PSD-59 (Declaration of National Bank Examiner Ramah L. Chansen) ("Chansen Decl.") ¶ 4).

[20] *See* Resp. Mot. at 21-24; Resp. Opp. at 14-15; R-BIO-2 (Declaration of Saul Ortega) ("Ortega Decl.") ¶¶ 2, 6, 8, 18 (role at the Bank was to oversee branch operations and depositor relationships); R-BIO-6 (Declaration of David Rogers, Jr.) ("Rogers Decl.") ¶¶ 2, 7, 9, 19.

[21] *See* OCC-PSD-5 (Ortega Dep.) at 11:17-13:21, 35:5-19; OCC-PSD-11 (Sworn Statement Transcript of David Rogers, Jr.) ("Rogers Dep.") at 14:15-15:11, 21:11-24; OCC-PSD-12 (Sworn Statement Transcript of Michael McCarthy) ("McCarthy Dep.") at 18:3-15.

[22] *See* Notice ¶¶ 31-32 (alleged Capital Raise Loans misconduct beginning in April 2009), 55 (OREO Lending Strategy implemented "from late 2008 through at least September 2011"), 90 (improper accrual of interest "[b]eginning as early as 2007 and continuing until March 31, 2013"), 117 (allegedly improper preferential treatment in April 2009).

Corporation ("Freddie Mac"). *See* OCC SOF ¶ 12; Answer at 3. This caused the Bank to fall from "well capitalized" to "adequately capitalized" within the meaning of the federal banking agencies' statutory responsibility to take prompt corrective action.[23]

In light of the Bank's deteriorating financial condition, the OCC instituted measures in January and February of 2009 requiring the Bank, *inter alia*, to reduce criticized assets, achieve and maintain higher capital levels and minimum capital ratios, improve loan risk rating accuracy, and improve accounting for nonaccrual loans. *See* OCC SOF ¶¶ 13-14; Answer at 3. In doing so, the OCC described the Bank's need for adequate capital levels as "exigent."[24] The Bank's efforts to raise capital in the immediate wake of these communications from the agency are described in fuller detail in the appropriate section below.

In February 2011, the OCC issued a consent order against the Bank that increased its minimum required capital ratios and required the Bank to "correct unsafe or unsound practices concerning the Bank's loan portfolio management and nonaccrual loans." OCC SOF ¶ 15; *see* Answer at 3. Following this consent order and a June 2011 onsite examination by the OCC, the Bank made significant changes to its executive management: Gandy, McCarthy, and Respondent Rogers all resigned from their positions, and Respondent Ortega assumed three new roles as Chairman, President, and CEO.[25] After a January 2012 consent order and another onsite visit in March 2012, the OCC noted that the "new management team, under the direction of President Ortega, is much improved," and that the Bank had made "significant progress toward complying with the Order and [improving] both the credit and operations culture."[26] Nevertheless, the agency stated that the Bank's overall condition remained "critically deficient" and was getting worse,

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[23] *See generally* 12 U.S.C. § 1831o.
[24] OCC-PSD-6 (February 18, 2009 letter from OCC to Bank Board of Directors) at 2.
[25] *See* R-MSD-1 (May 15, 2012 letter from OCC to Bank Board of Directors) at 2.
[26] *Id.*

including a continued decline in capital levels and asset quality.[27] By June 2013, the Bank had become "critically undercapitalized," and the OCC ultimately closed the Bank and appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver several months later.[28]

Summary of Allegations

The gravamen of Enforcement Counsel's allegations against Respondents, as described in Articles III, IV, and V of the Notice, is that "[b]eginning in or around late 2008, Respondents masked the Bank's deteriorating financial condition through misconduct that inflated earnings and capital and improperly reduced or delayed reported losses." Notice ¶ 28. Enforcement Counsel also alleges, in Article VI, that Respondent Rogers "placed the interests of a member of his immediate family above those of the Bank" in connection with "one series of unsafe or unsound loans" taking place in or around April 2009 and January 2010. *Id.* ¶ 29; *see id.* ¶¶ 110-129. Because Enforcement Counsel now moves for summary disposition on aspects of Articles III, IV, and VI and Respondents move for summary disposition of the Notice in its entirety, it is worth examining the undisputed facts regarding each class of allegations against Respondents in greater detail.

Capital Raise Loans (Article III)

Article III alleges that "[f]rom approximately April 2009 to March 2011, Respondents originated, approved, and/or ratified unsafe or unsound loans to finance the purchase of stock in the Holding Company ("Capital Raise Loans") and then transferred the proceeds to the Bank to raise capital."[29] Notice ¶ 31. Unless otherwise noted, the facts relayed below in connection with the Capital Raise Loans and the OCC's allegations of misconduct are undisputed.

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[27] *Id.* at 1-2.

[28] *See* OCC SOF ¶¶ 16-17; Answer at 3.

[29] The Notice also alleges improper accounting practices relating to the Capital Raise Loans, in particular that "[f]rom June 30, 2009 to June 30, 2013, Respondents caused the Bank to improperly inflate its capital by including the proceeds of the Capital Raise Loans as regulatory capital in the Bank's Call Reports." Notice ¶ 31. As discussed in note 1 *supra*, however, Enforcement Counsel's instant Motion does not appear to seek summary disposition of the

On February 18, 2009, the OCC established higher minimum capital ratios for the Bank as the result of a "significant deterioration in the Bank's condition, including considerable problems with asset quality, exposure to substantial risk from concentrations of credit and inadequate risk management systems, and capital that is insufficient to support the risk profile of the Bank."[30] The agency and the Bank agreed that in order to meet these new capital ratios, the Bank would need to raise between $50 and $75 million in additional capital, given "the level of non-performing assets on the Bank's balance sheet and losses from [its] investment portfolio."[31] The OCC noted that "[t]he root cause of the significant increase in problem assets is due to an excessive concentration in residential real estate-related lending," resulting in greater risk to the Bank's capital "associated with exposure to a weakening real estate market."[32] The agency also stated that the Bank was "exposed to a high degree of asset depreciation and a high volume of, or particularly severe, problem loans."[33] The agency made it clear that the Bank could not be operated in a safe and sound condition "[a]bsent the necessary capital injection."[34]

To raise the capital required by the OCC, the Bank's Board of Directors focused on finding local investors in their Rio Grande Valley community.[35] Although the OCC stated that the Bank's capital raise efforts "may also need to attract institutional investors" from outside the region,[36] Respondents represent that it was very difficult for a community bank to attract investment on the

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accounting-related allegations in Article III, and Respondents' motion for summary disposition of these allegations is cursory and undeveloped. *See* Resp. Mot. at 21. There is therefore no need to examine those allegations in detail at the present time.

[30] OCC-PSD-6 (February 18, 2009 letter from OCC to Bank Board of Directors) at 2.

[31] *Id.* at 1.

[32] *Id.* at 3.

[33] *Id.* at 2.

[34] *Id.* at 3.

[35] *See id.* at 1-2. This Tribunal takes official notice that Edinburg, Texas, the small city in which the Bank was located, is in the Rio Grande Valley in South Texas near the Mexican border, far from any major metropolitan Texas population centers.

[36] OCC-PSD-6 (February 18, 2009 letter from OCC to Bank Board of Directors) at 1.

national capital markets at the time, given the severe economic climate.[37] At the same time, Respondents state—and Enforcement Counsel does not dispute—that the Rio Grande Valley and its inhabitants are not economically prosperous.[38] It is in this context that senior management of the Bank devised and implemented what Enforcement Counsel terms the "Capital Raise Loans Plan," the subject of the Notice's Article III allegations.

The Capital Raise Loans Plan may be summarized as follows: First, the Bank would solicit and then approve loans to prospective local investors, "a group including long-time customers of the Bank[] and others affiliated with the Bank." OCC SOF ¶ 20. Second, those borrowers would use the proceeds of the Bank loans to purchase stock in the Bank's Holding Company. *See id.* Third, the funds gained by the Holding Company from the stock sales would be "downstreamed" to the Bank and treated as a capital infusion. *See id.* ¶ 21.[39] Thus, the money transferred to the Bank by the Holding Company to serve as regulatory capital and help meet the higher minimum capital ratios imposed by the OCC was ultimately backed by funds from the Bank itself.

Although the basic structure of the Capital Raise Loans Plan is undisputed, the scope of Respondents' responsibility and involvement is not. Respondents take issue, for example, with the assertion that the two of them "caused the Bank to originate" the Capital Raise Loans or "helped develop and implement[]" the Capital Raise Loans Plan. OCC Mot. at 3, 23. Respondents aver that they "were not among those who came up with the idea of the loans or promoted making these kinds of loans within the Bank," instead stating that the plan originated with, and was executed by,

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[37] *See* R-BIO-2 (Ortega Decl.) ¶ 11; R-BIO-6 (Rogers Decl.) ¶ 12; OCC SOF ¶ 24; OCC-PSD-14 (April 28, 2009 letter from then-President Gandy to the OCC) ("We are very encouraged by the local reception to the offer, but the national capital markets, as you know, are essentially frozen for all community banks, and private capital is the only viable option for most of us. So we will have to go all local.").

[38] *See* Resp. Mot. at 6 n.2 (asserting that "[e]xcluding Puerto Rico, the Edinburg-McAllen metro area is the poorest in the United States").

[39] *See also* OCC-PSD-5 (Ortega Dep.) at 34:24-35:4 (agreeing that the Bank "[made] loans that the borrower would then use the proceeds of the loan to purchase stock in the bank holding company and the bank holding company would then downstream the funds back to [the Bank]").

CLO McCarthy and individuals in the loan department.[40] Respondents also identify CLO McCarthy as the person responsible for characterizing the Capital Raise Loans as for "investment" or "business investment" in the L&D Committee loan packages without disclosing that the true purpose of the loans was to purchase Holding Company stock.[41] And notwithstanding their positions on the L&D Committee, in which they voted in favor of the approval and ratification of a number of Capital Raise Loans identified by Enforcement Counsel,[42] Respondents state that they "did not make any loans in their roles at the Bank."[43] Resp. Opp. at 13.

Respondents take issue, moreover, with Enforcement Counsel's assertion that Respondents understood that the Capital Raise Loans were risky and indisputably acted with personal dishonesty or with willful or continuing disregard for the safety or soundness of the Bank in their conduct related to the Capital Raise Loans Plan. *See* OCC Mot. at 26-30. Respondents contend that they "were assured by the loan officers at the Bank that [the Capital Raise Loans] were good risks, and as such believed they were safe and sound."[44] Respondents maintain that they "relied on the expertise of their colleagues" and "had been told that the approach on these loans was legally permissible," including receiving assurances to this effect at a board meeting.[45] According to

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[40] Resp. Opp. at 14; *see* R-BIO-2 (Ortega Decl.) ¶ 8; R-BIO-6 (Rogers Decl.) ¶ 9. Respondent Ortega also identifies then-President Gandy as potentially the source of the Capital Raise Loans Plan. *See* OCC-PSD-5 (Ortega Dep.) at 35:7-19.

[41] *See* Resp. Opp. at 15 ("Respondents did not characterize the loans in the Bank's records and had no input or involvement in that. . . . McCarthy himself took full responsibility for this documentation."); *see also* OCC SOF ¶¶ 38-40.

[42] *See* OCC SOF ¶¶ 35-36.

[43] It should be noted that whatever else Respondents' participation in the Capital Raise Loans Plan, the undersigned finds that Enforcement Counsel offers credible evidence that Respondent Ortega was involved in the solicitation of two Capital Raise Loans, which Respondent Ortega denies. *Compare id.* ¶ 41 (details of Respondent Ortega "approach[ing] Jose S. Rodriguez regarding possible participation in the capital raise"); OCC SOF Opp. ¶ 1 (details of email exchange between Respondent Ortega and Laura Alonzo discussing "using the proceeds of a loan to fund the purchase of stock in [the Holding Company]") *with* Resp. Opp. at 14; R-BIO-2 (Ortega Decl.) ¶ 8.

[44] Resp. Opp. at 12; *see* R-BIO-2 (Ortega Decl.) ¶ 11; R-BIO-6 (Rogers Decl.) ¶ 12.

[45] Resp. Opp. at 14; *see* R-BIO-2 (Ortega Decl.) ¶ 8; R-BIO-6 (Rogers Decl.) ¶ 9; *see also* Resp. Mot. at 13 (asserting that "Respondents were assured that these loans were permissible as long as the loans were not made using the stock as collateral").

Respondents, "[t]he undisputed evidence shows that [CLO McCarthy] and his staff presented facially acceptable loans that were recommended and promoted by trusted experts and colleagues at the Bank." Resp. Mot. at 3. Neither Respondents nor Enforcement Counsel, however, present evidence beyond Respondents' bare assertions as to whether the propriety of the Capital Raise Loans was indeed raised at a board meeting or otherwise assured to Respondents or other members of the L&D Committee.[46]

Respondents also dispute Enforcement Counsel's characterization of the Capital Raise Loans Plan as a scheme carried out without knowledge of the Bank's lawyers and accountants and in contravention of OCC examiners. Respondents state that "[t]he OCC was very closely involved with the Bank during this time and were aware of everything the Bank was doing,"[47] and moreover that the agency should have understood that the only way for a community bank to raise capital at that point during the Great Recession was "through non-cash mechanisms like notes receivable, real estate, or other types of illiquid assets."[48] And Respondents aver that "[t]he Bank had accountants, lawyers, and examiners deeply involved in every aspect of the Bank's business" at the time the Capital Raise Loans plan was being implemented,[49] although they provide no evidence that the Bank's lawyers, its accountants, or the OCC itself were in fact contemporaneously aware that the Bank was raising capital by making loans to local investors for stock purchases in the Holding Company.[50]

[46] The parties do agree, however, that the topic of the Capital Raise Loans Plan generally was discussed during at least one board meeting. *See* OCC SOF ¶ 22 (citing OCC-PSD-11 (Rogers Dep.) at 36:4-18).

[47] Resp. Opp. at 15; *see* R-BIO-2 (Ortega Decl.) ¶ 9; R-BIO-6 (Rogers Decl.) ¶ 10.

[48] Resp. Opp. at 13; *see* R-BIO-2 (Ortega Decl.) ¶ 12; R-BIO-6 (Rogers Decl.) ¶ 13.

[49] Resp. Opp. at 15; *see* R-BIO-2 (Ortega Decl.) ¶ 14; R-BIO-6 (Rogers Decl.) ¶ 15.

[50] Respondents state that the Bank's lead legal counsel on the regulatory issues faced by the Bank at this time was Stormy Greef at the law firm then (and for purposes of this Order) known as Hunton & Williams, who has since passed away. Resp. Opp. at 15; *see* R-BIO-2 (Ortega Decl.) ¶ 14; R-BIO-6 (Rogers Decl.) ¶ 15.

For its part, Enforcement Counsel asserts that neither the Bank's audit firm nor the attorneys working with the Bank and its Holding Company on their capital raise efforts were told about the Capital Raise Loans Plan. *See* OCC SOF ¶¶ 30-32, 39. In support, Enforcement Counsel offers the testimony of Ben Pena, the Bank's audit manager from 2009 through 2011, and Heather Easterp, one of the attorneys advising the Holding Company during the relevant time period.[51] *See id.* Mr. Pena testified that he did not become aware that the Bank had issued loans to finance the purchase of Holding Company stock until after the Bank failed, and he stated that his audit firm never provided accounting advice to anyone at the Bank with respect to this practice.[52] Ms. Easterp testified in turn that although she was aware that the Bank was offering stock in its Holding Company to raise capital, she did not recall being told that the Bank would be "issu[ing] loans to allow potential investors to participate in the stock offering."[53] Ms. Easterp also testified that to her knowledge, neither she nor anyone else at her firm had been asked to advise as to whether the Bank could count the proceeds of loans made to finance the purchase of Holding Company stock as regulatory capital.[54] Ms. Easterp did state, however, that her firm did not generally provide

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[51] *See* OCC-PSD-23 (Sworn Statement Transcript of Heather Archer Easterp) ("Easterp Dep."); OCC-PSD-24 (Sworn Statement Transcript of Ben Pena) ("Pena Dep."). Enforcement Counsel represents that Ms. Easterp "advised the Bank on the capital raise," while Ms. Easterp's deposition states that any work she did for the Bank was "derivative to the work that [she] did for the Holding Company and preparing securities disclosures documents to raise capital, specifically common equity at the Holding Company." *Compare* OCC SOF ¶ 30 *with* OCC-PSD-23 (Easterp Dep.) at 33:5-10. To the extent that there is any material discrepancy between these two descriptions of Ms. Easterp's role (and in particular whether she would have been in a position to know whether her law firm as a whole had or had not been consulted about the appropriateness of the relevant aspects of the Capital Raise Loans Plan), it may be resolved at the hearing currently scheduled to begin on January 31, 2022.

[52] *See* OCC-PSD-24 (Pena Dep.) at 94:6-20, 100:16-102:6. Respondents do not directly contend that the Bank's audit firm was aware of the details of the Capital Raise Loans Plan or provided accounting advice regarding the plan, beyond their general assertion that "[t]he Bank had accountants . . . deeply involved in every aspect of the Bank's business." Resp. Opp. at 15. Given Mr. Pena's position as audit manager for the Bank during the relevant time period and the nature of his testimony, the undersigned finds that Enforcement Counsel has presumptively established that the Bank's audit firm was unaware of the allegedly problematic aspects of the Capital Raise Loans Plan at the time of its implementation. To the extent Respondents wish to rebut this presumption, they may do so by offering affirmative evidence at a later stage of the proceeding that the audit firm *did*, in fact, know about the plan contemporaneously.

[53] OCC-PSD-23 (Easterp Dep.) at 50:18-52:16, 54:15-20.

[54] *See id.* at 52:21-56:2.

specific compliance or accounting advice to the Bank[55] and that she was neither the firm's primary contact with the Bank nor the primary person giving legal advice to the Bank at that time.[56]

Enforcement Counsel also avers that the OCC was not aware of the Capital Raise Loans Plan until after the Bank's closure. *See* OCC SOF ¶ 29. A 2014 Office of the Inspector General for the Department of the Treasury ("OIG") report stated that it was not until 2013 that "OCC examiners learned from FDIC investigators that holding company shareholders obtained loans from [the Bank] in 2009 and may have used the proceeds to purchase holding company stock."[57] National Bank Examiner Ramah Chansen likewise, if conclusorily, represents that the Capital Raise Loans Plan was never disclosed to the OCC, and that—had it been disclosed—the agency would have rejected such a plan "because of its failure to result in new cash for the Bank."[58]

In any event, it is undisputed that on February 26, 2009, the Bank submitted a three-year capital plan to the OCC ("February 2009 capital plan").[59] This plan stated that the Bank would raise capital to meet the newly established minimum capital ratios by using the proceeds of the sale of Holding Company stock.[60] *See* OCC SOF ¶ 23. Nowhere in the February 2009 capital plan

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[55] *See id.* at 20:23-21:17, 33:11-13.

[56] *See id.* at 57:7-23. Ms. Easterp further testified that she did not believe that she ever communicated directly with either of the Respondents during her time representing the Bank and the Holding Company. *See id.* at 34:10-12. As discussed in Part IV.A.1 *infra*, the undersigned finds that Ms. Easterp's testimony is not sufficient to establish that Ms. Easterp's firm, as opposed to Ms. Easterp herself, lacked all knowledge of the Capital Raise Loans Plan during the relevant period.

[57] OCC-PSD-7 (April 17, 2014 report entitled Safety and Soundness: Material Loss Review of First National Bank) ("OIG Report") at 8.

[58] OCC-PSD-59 (Chansen Decl.) ¶ 23; *see id.* ¶¶ 5, 22. The undersigned credits the OIG Report and finds that Enforcement Counsel has presumptively established that the OCC had no knowledge of the allegedly problematic aspects of the Capital Raise Loans Plan during the relevant period, notwithstanding Respondents' bare contention to the contrary. To the extent Respondents wish to rebut this presumption, they may do so by offering affirmative evidence at a later stage of the proceeding that the OCC *did*, in fact, know about the plan contemporaneously.

[59] *See* OCC-PSD-17 (February 26, 2009 letter from Respondent Ortega to OCC) ("February 2009 Capital Plan"); *see also* OCC-PSD-6 (February 18, 2009 letter from OCC to Bank Board of Directors) at 1 ("In a letter dated January 27, 2009, the OCC informed you of the proposed individual minimum capital ratio (ICMR) and the need for a capital plan and provided you with an opportunity to submit a response.").

[60] *See* OCC-PSD-17 (February 2009 Capital Plan) at 4 ("The Company is actively pursuing an offering of shares of its common stock to raise capital. The proceeds from such an offering would qualify as Tier 1 capital at the Holding Company, and any portion injected into the Bank would count as Tier 1 capital, thereby increasing all applicable

did the Bank indicate that it planned to issue loans to prospective investors that would be used for the capital raise. *See id.* On April 28, 2009, then-President Gandy wrote to the OCC ("April 28, 2009 Letter"), updating the agency on the Bank's capital raise efforts.[61] *See id.* ¶ 23. The letter noted that the Bank had "communicated with 231 prospective stock purchasers so far," but did not mention the use of Bank loans to finance these stock purchases, even though the Bank had already begun issuing Capital Raise Loans by this date.[62] *See id.* ¶ 24. On May 12, 2009, the Bank resubmitted its capital plan to the OCC ("May 2009 capital plan"). *See id.* ¶ 28. This updated capital plan also did not divulge that the sale of Holding Company stock to raise capital, which had resulted in a $30 million capital infusion from the Holding Company to the Bank on May 11, 2009, was being partially financed by Bank loans. *See id.* ¶¶ 26-28. The undersigned notes that Enforcement Counsel makes no specific representation that Respondents were involved in the formulation or drafting of the April 28, 2009 Letter or the February 2009 capital plan, and no representation that Respondents were responsible for the specific alleged mischaracterizations in the May 2009 capital plan,[63] *see id.* ¶ 23, and Respondents deny having "misled examiners or misstated the purposes of the [Capital Raise Loans]," Resp. Opp. at 15-16.

In total, Enforcement Counsel contends that 63 Capital Raise Loans were originated between April 2009 and March 2011 and used to purchase approximately $21 million in Holding Company stock.[64] *See* OCC SOF ¶ 34. As members of the L&D Committee, Respondents each participated in the approval or ratification of a number of these loans—16 by Respondent Rogers,

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capital ratios."); *see also id.* at 1 (proposing to "raise approximately $60 million in [Holding Company] common stock and [] inject $43 million as equity to [the Bank] prior to May 10, 2009").

[61] *See* OCC-PSD-14 (April 28, 2009 letter from Robert Gandy III to the OCC).

[62] *Id.* at 1; *see* OCC-PSD-61 (Chansen Decl., Ex. 2) (identifying Capital Raise Loans, including five made on or before April 28, 2009).

[63] *See* OCC-PSD-22 (May 12, 2009 letter from Robert Gandy III to the OCC). The cover letter stated that Respondent Ortega was one of two individuals responsible for preparing the updated plan. *See id.* at 1.

[64] *See* OCC-PSD-61 (Chansen Decl., Ex. 2) (identifying Capital Raise Loans).

and 20 by Respondent Ortega.[65] *See id.* ¶ 35. In response, Respondents argue that Enforcement Counsel has not demonstrated that the May 2009 capital infusion "came from the Capital Raise Loans and not from other sources like [Respondent] Rogers," further noting that more than half of the Capital Raise Loans were made after May 11, 2009 and therefore could not have financed any part of that capital infusion. Resp. Opp. at 33 (citing OCC-PSD-61).

Enforcement Counsel asserts that in June 2013, the Bank suffered $387,240.63 in combined losses on two of the Capital Raise Loans.[66] *See* OCC SOF ¶ 45. Many other Capital Raise Loan borrowers, moreover, had not paid off their loans prior to the Bank's failure in September 2013. *See id.* ¶ 44 (citing exhibits). Enforcement Counsel further avers that the Deposit Insurance Fund ("DIF") suffered combined losses of $3,808,058.28 as a result of these outstanding Capital Raise Loans. *See id.* ¶ 46. Respondents dispute Enforcement Counsel's position that any loss to the Bank related to defaulted or outstanding Capital Raise Loans was necessarily "causally connected to the alleged misconduct," stating that "[t]he OCC makes no effort to explain why these loans defaulted, nor do they take issue with the creditworthiness of the borrowers or the underlying quality of the loans." Resp. Opp. at 34.

As discussed further in Part IV *infra*, the undersigned finds that disputed questions of material fact exist with respect to ***(1)*** the scope of Respondents' responsibility and involvement in developing and implementing the Capital Raise Loans Plan; ***(2)*** the scope of Respondents' responsibility and involvement in characterizing the Capital Raise Loans in L&D Committee loan packages and the Bank's capital raise efforts in communications with the OCC, including the April 28, 2009 Letter and the February 2009 and May 2009 capital plans; ***(3)*** whether and to what extent others at the Bank expressed to Respondents that the Capital Raise Loans Plan was legally

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[65] *See* OCC-PSD-59 (Chansen Decl.) ¶ 19; OCC-PSD-65 (Chansen Decl., Ex. 6).
[66] *See* OCC-PSD-31; OCC-PSD-61 (Chansen Decl., Ex. 2).

permissible or otherwise constituted safe and sound banking practices, including the extent to which Respondents possessed a good faith understanding that the Capital Raise Loans Plan complied with law and the prudent operation of financial institutions based on their reliance on the expertise and assurances of colleagues; ***(4)*** the extent to which the Bank's third-party legal counsel was aware of the details of the Capital Raise Loans Plan at the time and, if so, took any contemporaneous positions or offered any advice regarding the plan's propriety; ***(5)*** the riskiness of the Capital Raise Loans at the time they were made and Respondents' understanding thereof; ***(6)*** the extent to which Capital Raise Loans originated after the May 11, 2009 capital infusion were part of a plan to raise Bank capital through the downstreamed proceeds of the sale of Holding Company stock; and ***(7)*** whether and to what extent Respondents' alleged misconduct with respect to the Capital Raise Loans caused loss to the Bank.

OREO Lending Strategy (Article IV)

Article IV alleges that Respondents caused the Bank to inflate its capital by improperly accounting for OREO sales and loans with below-market interest rates ("OREO Lending Strategy"), thereby engaging in actionable misconduct. Notice ¶ 55; *see* OCC Mot. at 1. Due to the factual complexity of these allegations, Enforcement Counsel has moved for summary disposition of this Article solely with respect to the Bank's loan to NAHS Real Estate, L.P. ("NAHS"), which it asserts is "representative" of the Bank's OREO Lending Strategy.[67] Unless otherwise noted, the facts relayed below in connection with the NAHS loan and the OCC's allegations of misconduct are undisputed.

[67] OCC SOF ¶ 54 (quoting OCC-PSD-59 (Chansen Decl.) ¶ 29). In its opposition to Respondents' motion for summary disposition, Enforcement Counsel offers facts regarding other loans that were allegedly part of the OREO Lending Strategy perpetrated by Respondents, but because Enforcement Counsel does not itself move for summary disposition regarding these other loans, the undersigned does not consider them except to establish material facts in dispute that preclude summary disposition in Respondents' favor. *See* OCC Opp. SOF ¶¶ 4-21, 23-39; OCC Opp. at 17-20.

Background

Around 2008, the Bank's OREO increased significantly due to delinquencies and foreclosures on loans made in prior years. *See* OCC SOF ¶¶ 11, 54. In September 2008, as noted previously, the Bank incurred a $174 million loss on its Fannie Mae and Freddie Mac investments, causing it to fall from "well capitalized" to "adequately capitalized." *See id.* ¶ 12. Enforcement Counsel alleges that, in response to these events, Respondents developed and implemented a new lending strategy from late 2008 through September 2011 that was designed to avoid further decreases to the Bank's capital ratios by enticing borrowers to purchase the Bank's OREO properties at above-market prices with below-market loans, including the NAHS loan, in order to avoid recognizing losses on the sales.[68] *See id.* ¶ 54. According to Enforcement Counsel, the issues regarding the NAHS loan can be broken into three distinct areas: (1) approval of the loan, (2) terms of the loan, and (3) repayment.

Approval of the Loan

As previously established, and for all times relevant to this proceeding, both Respondents were voting members of the L&D Committee, which consisted of all of the Bank's directors. The L&D Committee met weekly and approved all loans greater than $1 million. *See id.* ¶ 8. Members of the Bank's L&D Committee also were required to approve the Bank's Loan Policy annually. *See id.* ¶ 47.

NAHS was formed on or about June 17, 2010 for the primary purpose of purchasing a hospital in Grand Prairie, Texas, which was part of the Bank's OREO. *See id.* ¶ 55. Because it was a "newly formed entity," the Bank lacked significant financial information about NAHS.[69] At the

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[68] *See* OCC-PSD-59 (Chansen Decl.) ¶¶ 27-29.

[69] *See* OCC SOF ¶ 66 (quoting OCC-PSD-37 (email thread including August 4, 2010 email from Loan Officer Rachel Kelman to the Bank's Credit Group) at 2 (stating that "[w]e have no [NAHS] financials since this is a newly formed entity")).

L&D Committee meeting on June 8, 2010, Respondent Ortega and the other present Committee members[70] "approved" verbal loan requests for two loans "subject to formal loan presentation":[71] 1) a $54 million loan to NAHS (hereinafter "the NAHS loan"),[72] which included $38 million to purchase the unfinished hospital and $16 million in new monies for construction,[73] and 2) a $2 million loan to North American Hospital Systems, LLC to purchase hospital equipment. *See id.* ¶ 56. The NAHS loan made the loan relationship with NAHS one of the largest at the Bank, if not the largest. *See id.* ¶ 59. The Bank formally entered into the loan agreement with NAHS on June 22, 2010, and the agreement was ratified by Respondents and the other Committee members at the August 10, 2010 L&D Committee meeting.[74]

The underwriting requirements set forth in the Bank's Loan Policy during this period required a credit analysis on all loans of $500,000 or more and likewise required that loan request packages include a credit analysis "documented in written form via financial spreads, annual reviews and credit reviews," which was generally prepared by the credit review department.[75] Enforcement Counsel asserts that the Bank did not perform a credit analysis on NAHS prior to loan approval and was therefore in violation of the Bank's Loan Policy.[76]

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[70] There is no dispute between the parties that Respondent Rogers was not present at the June 8, 2010 L&D Committee meeting and did not vote on the verbal loan request for the NAHS loan. *See id.* ¶ 56 n.8; Resp. Opp. at 42.

[71] OCC SOF ¶ 57 (quoting OCC-PSD-35 (June 8, 2010 L&D Committee meeting minutes) at 6). Respondent Ortega asserts that this approval "was conditional, subject to being provided a more detailed presentation later." Resp. Opp. at 42 (emphasis omitted).

[72] Enforcement Counsel notes that the minutes state that the loans would be made to "North American Hospital Systems, LLC"; however, the loan was ultimately made to NAHS, in which North American Hospital Systems, LLC was the general partner. *See* OCC Mot. at 7; OCC SOF ¶ 56 n.9.

[73] The Bank sold the hospital at cost basis on its books for $37,811,851, "thus avoid[ing] a loss on the sale." OCC SOF ¶ 61.

[74] *See id.* ¶¶ 63, 67; *see also* OCC-PSD-36 (June 22, 2010 loan agreement between NAHS and the Bank ("NAHS Loan Agreement")) at 2, 17-18; OCC-PSD-39 (L&D ratification signed by both Respondents) at 1; OCC-PSD-40 (August 10, 2010 L&D Committee meeting minutes) (indicating that both Respondents were present at the ratification of the NAHS loan).

[75] *See* OCC SOF ¶¶ 51-52 (quoting OCC-PSD-33 (Bank Loan Policy) at 37).

[76] *See id.* ¶¶ 56-57, 62, 68, 71.

Respondents dispute that the lack of a credit analysis being presented at the June 8, 2010 L&D Committee meeting for the loan's conditional approval is dispositive of a policy violation and contend that Enforcement Counsel cannot demonstrate that no credit analysis was performed prior to the loan's approval.[77] *See* Resp. Opp. at 42. Respondents also maintain that they were not responsible for preparing or ensuring the preparation of any required credit analysis, stating that their approval of the NAHS loan was necessarily based on a "trust that the loan department is following policy and procedures" and has "documentation to back [] up" its recommendation that a loan be approved. *Id.* at 43; *see also id.* at 42 (asserting that "it is the loan department who handles the credit analysis, appraisal, loan grading, and all the other myriad of loan documentation").[78] Finally, Respondents observe that "credit analysis on borrowers that are new or start-up businesses is often lacking," due to the paucity of information about them. *Id.* at 43.

In any event, there is evidence that a credit analysis was performed and finalized on August 12, 2010, two days after the L&D Committee's ratification of the NAHS loan.[79] The credit analysis showed that the NAHS owner-guarantors of the loan "had approximately $150,000 in combined liquidity, and one owner-guarantor had a [Fair Isaac Corporation ("FICO")] score of less than 500."[80] In his deposition, Respondent Rogers agreed that loaning $54 million to two guarantors

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[77] The undersigned finds that Enforcement Counsel has presumptively established, at minimum, that "[t]he loan officer recommendation package [for the NAHS loan] did not include a credit analysis by the Credit Review Department," something that was required by Bank loan policy. OCC SOF ¶ 62; *see id.* ¶¶ 51-52, 58. To the extent Respondents wish to rebut this presumption, they may do so by offering affirmative evidence at a later stage of the proceeding that a credit analysis for the NAHS loan was performed prior to the loan's approval.

[78] It appears undisputed that "the lending department strongly advocated for the [NAHS] loan" and that then-CLO McCarthy and then-President Gandy, who were in charge of the Bank's lending and ORE respectively, also recommended that the loan be approved. Resp. Opp. at 40; *see also* OCC SOF ¶ 57 (loan officer recommending approval of the NAHS loan). As before, it also appears undisputed that neither Respondent has training in lending or experience as a loan officer. *See* Resp. Opp. at 41 (asserting that Respondents "had to rely on the expertise of professionals within the Bank whose skillset was in the lending area").

[79] *See* OCC SOF ¶ 68; OCC-PSD-42 (NAHS Credit Analysis) at 1.

[80] *See* OCC SOF ¶ 68; OCC-PSD-42 (NAHS Credit Analysis) at 2-4.

with a combined liquidity of $150,000 "would not be a prudent thing for a bank to do."[81] It also appears undisputed that a FICO credit score of 500 would be below the "policy minimum of 650," and would therefore generate an exception under the Bank's Loan Policy that would require specific approval by, in this instance, the L&D Committee.[82]

Terms of the Loan

The terms of the NAHS loan included 30 months of interest-only payments and a 25-year repayment term.[83] The Loan Agreement did not require any equity contribution from NAHS or its owner-guarantors and "further provided that the two primary owners of NAHS would each guarantee up to $1.5 million of the $54 million loan."[84] Enforcement Counsel argues that each of these aspects of the loan constituted a concessionary "below-market" term, noting *inter alia* that the Bank's Loan Policy required 20 percent in "hard equity for loans made to the collateral code associated with NAHS" and that loan reviews of the NAHS loan reported multiple exceptions or policy violations, including that "the 30 months of interest-only payments exceeded the twelve-month maximum in the Loan Policy."[85]

In response, Respondents maintain that "the loan and its loan terms were the best alternative for the Bank at the time given its options," that the terms were "typical" for construction loans "in the context of the time, circumstances, and geographic region," and that Enforcement Counsel has offered "no evidence of comparable construction loans, comparable rates of interest,

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[81] OCC-PSD-11 (Rogers Dep.) at 113:19-114:1.

[82] OCC-PSD-44 (First National Bank 2011 Annual Loan Review); *see also* OCC-PSD-33 (Bank Loan Policy) at 97 (noting that for loans designated with the collateral code 394, "Credit score < 650" would be a "waiver/exception item" subject to L&D Committee approval); OCC-PSD-39 (NAHS Loan Ratification) at 1 (indicating that the NAHS loan is given the collateral code 394).

[83] *See* OCC SOF ¶ 63; OCC-PSD-36 (NAHS Loan Agreement) at 2-3.

[84] OCC SOF ¶ 64 (citing OCC-PSD-36 (NAHS Loan Agreement) at 6); *see also id.* ¶ 65 (citing OCC-PSD-36 (NAHS Loan Agreement) generally).

[85] OCC Mot. at 8-9; *see* OCC SOF ¶¶ 70-71 (citing exhibits).

or other market terms" that would indicate that the terms of the NAHS loan were indeed below-market or otherwise unusual.[86] Respondents also note that the appraised value of the loan's collateral "was $62 million as of June 9, 2010," which was "well in excess of the loan amount of $54 million."[87]

Repayment

Enforcement Counsel contends that Respondents "failed to enforce [the NAHS loan] repayment agreements and permitted NAHS to engage in excessive overdrafts and capitalize loan interest," OCC Mot. at 32, although it makes no showing as to the specific role Respondents played or should have played in enforcing the NAHS loan's repayment. In any event, it is undisputed that NAHS was permitted to overdraw its account at the Bank by over $3.6 million as of mid-November 2011 in order to make its first year of interest-only payments.[88] It appears undisputed that the Bank covered this overdraft by advancing to NAHS funds from a new $6.5 million loan approved in October 2011, "in effect[] capitalizing the interest payments onto the balance of the loan."[89] The 2013 Annual Loan Review of the $54 million NAHS loan stated that "[i]n essence, the borrower did not pay any scheduled/renewal interest only payments for any note since origination all the way to 11/17/11."[90] Enforcement Counsel argues that, as a result, NAHS "only kept the loan

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[86] Resp. Opp. at 43-44. Enforcement Counsel adduces several facts in its opposition to Respondents' motion for summary disposition regarding Respondents' allegedly improper accounting for terms of loans that were allegedly part of the OREO Lending Strategy, including the NAHS loans. *See* OCC Opp. SOF ¶¶ 46-49. As discussed further *infra* in Part IV.A.2, these facts are sufficient to defeat Respondents' motion for summary disposition on the OREO Lending Strategy issue and may be further developed at hearing, if Enforcement Counsel chooses, to address Respondents' arguments that the terms of the loans at issue were not concessionary.

[87] Resp. Opp. at 39; *see* OCC-PSD-39 (NAHS Loan Ratification) at 1.

[88] OCC SOF ¶ 72 (citing OCC-PSD-45 (May 22, 2013 Annual Loan Review of NAHS loan) ("2013 Annual Loan Review") at 16). The undersigned adopts Enforcement Counsel's denomination of this document as the "2013 Annual Loan Review" despite its title of "2012 Annual Loan Review," given that both the scope date and the review date are in 2013. *See id.* ¶ 72 n.2; OCC-PSD-45 (2013 Annual Loan Review) at 1.

[89] OCC SOF ¶ 72 (citing OCC-PSD-45 (2013 Annual Loan Review) at 16).

[90] *Id.* (quoting OCC-PSD-45 (2013 Annual Loan Review) at 16).

current via the use of the Bank's own funds."[91] Respondents contend in return that it is undisputed that the loan's guarantors made "approximately $26 million in principal payments, not to mention cash interest payments over the life of the loan."[92]

Loss Attributable to the NAHS Loan

The Bank's financial condition worsened and became "critically undercapitalized" as of June 30, 2013.[93] On September 13, 2013, the OCC closed the Bank and appointed the FDIC as receiver.[94] According to Enforcement Counsel, the DIF ultimately suffered a loss of over $35 million on the NAHS loan following the Bank's closure.[95] Enforcement Counsel does not claim, in connection with the instant briefing, that either the Bank or the receivership itself (as distinct from the DIF) suffered any loss as a result of the NAHS loan, although the Notice alleges that "[t]he Bank incurred at least $42 million in recorded losses on loans issued in connection with the OREO Lending Strategy, including approximately $12.5 million in losses recorded between September 25, 2012 and the Bank's closing."[96] For their part, Respondents argue that Enforcement Counsel has offered "no evidence of a net loss" arising from the Bank's approval of the NAHS loan, maintaining further that it is possible that the NAHS loan in fact resulted in a gain for the Bank relative to the amount for which it might otherwise have been able to sell the property in question, given "the climate at the time."[97]

In all, and as discussed further in Part IV *infra*, the undersigned finds that disputed questions of material fact exist with respect to ***(1)*** the extent to which Respondents possessed a

[91] OCC Mot. at 9.
[92] Resp. Opp. at 45.
[93] *See* OCC SOF ¶ 16; Answer ¶ 25.
[94] *See* OCC SOF ¶ 17; Answer ¶ 26.
[95] *See* OCC SOF ¶ 74 (citing exhibits).
[96] Notice ¶ 69.
[97] Resp. Opp. at 45; *see also id.* at 39 (stating that "[i]f the Bank had not done the NAHS loan, it would have been worse off in the long run").

good faith understanding that approval and ratification of the NAHS loan (and, as regards Respondents' instant motion, other loans that were allegedly part of the OREO Lending Strategy) complied with Bank policy, applicable law, and the prudent operation of financial institutions based on their reliance on the expertise and assurances of colleagues; ***(2)*** the extent to which the information presented to Respondents accurately and adequately reflected the level of risk of default inherent in the NAHS loan and other loans; ***(3)*** the extent to which the terms of the NAHS loan and other loans were "below-market" or otherwise deviated from typical market conditions at that time; ***(4)*** the scope and extent of Respondents' role in allegedly failing to enforce the NAHS loan repayment terms and permitting allegedly excessive overdrafts and interest capitalization; and ***(5)*** the extent to which the Bank or the FDIC receivership in fact incurred a loss as a result of the NAHS loan's approval and ratification or the approval and ratification of any of the other loans at issue, as distinct from losses suffered by the DIF.

Nonaccrual Loans Accounting (Article V)

Article V alleges that Respondents artificially inflated the Bank's earnings and capital by improperly accruing interest on nonaccrual loans using cash basis accounting, which resulted in the Bank filing materially inaccurate Call Reports from June 30, 2009 through June 30, 2013. *See* Notice ¶¶ 90, 107. Respondents have moved for summary disposition of the Nonaccrual Loans Accounting issue, contending that the practices alleged by the OCC were the result of "software with certain default coding" and that "procedures ensuring proper cost recovery accounting treatment" and correcting this issue were ultimately, and indisputably, implemented by Respondent Ortega. Resp. Mot. at 15. Respondents also assert that Enforcement Counsel has not produced, and cannot produce, evidence that Respondents knowingly engaged in the improper accounting practices alleged in the Notice or "did anything other than rely on the loan officers of

the Bank." *Id.* at 16. Unless otherwise noted, the facts relayed below in connection with the Nonaccrual Loans Accounting issue are undisputed.

Sometime between 2007 and 2009, the Bank switched its accounting system.[98] Enforcement Counsel asserts, and Respondents do not appear to dispute, that when this occurred, "the Bank adjusted its accounting software so that all non-accrual loans were automatically placed on cash basis" as a default setting. OCC Opp. SOF ¶ 55. It is unclear from the present factual record what role, if any, Respondents played in directing that the software setting be adjusted in this manner.[99]

According to Enforcement Counsel, Call Report Instructions during the relevant period required that, when doubt existed as to the collectability of the remaining recorded investment in an asset in nonaccrual status, banks must apply any payments received to reduce the recorded investment, or principal, in the asset. *See* Notice ¶ 91. The Call Report Instructions permitted banks to treat cash payments received as interest income on a cash basis, but only if the bank determined that the remaining recorded asset is fully collectible. *See id.* A determination of whether an asset is fully collectible must be based on a current, well-documented credit evaluation of the borrower's financial condition and prospects for repayment. *See id.* The OCC's Bank Accounting Advisory Series ("BAAS") further provided that banks should not use cash basis accounting when doubt exists about the ultimate collectability of the loan and that collateral values alone are insufficient to eliminate the issue of collectability. *See id.* ¶ 92.

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[98] Both the Notice and Respondents' motion identify 2007 as the year of the change. *See* Notice ¶ 93; Resp. Mot. at 15. Relying on a 2013 email recollecting that the change occurred "four or five years" prior, Enforcement Counsel now asserts that the accounting system was changed in 2008 or 2009. OCC-BIO-94 (email thread including April 3, 2013 email from Supervisory Examiner Bruce Staley) at 2; *see also* OCC Opp. SOF ¶ 55.

[99] *See* OCC-BIO-94 (email thread including April 3, 2013 email from Supervisory Examiner Bruce Staley) at 2 (stating that "senior management at the time wanted the default to be cash basis [nonaccrual] where cash payments were going to principal and income. They had [the new software provider] change the default.").

Enforcement Counsel adduces evidence that "the OCC repeatedly directed the Bank to improve its recognition and treatment of nonaccrual loans" in Reports of Examination issued from 2008 through 2012.[100] In 2009, the Bank entered into a Memorandum of Understanding ("MOU") with the OCC that required it to "immediately reverse or charge off all interest that has been accrued contrary to the requirements contained in the Call Report Instructions."[101] Respondents were members of the Bank's MOU Committee and would have been, along with then-President Gandy, the individuals "responsible within the Bank's management for implementing the actions required under the MOU."[102] The Consent Orders entered into by the Bank in 2011 and 2012 likewise "required the Bank to establish and adhere to procedures for the identification of, and accounting for, nonaccrual loans consistent with the Call Report Instructions and immediately reverse or charge off all interest that was accrued contrary to the Call Report Instructions."[103] Enforcement Counsel also contends that the issue of improper accounting for nonaccrual loans came up multiple times within the Bank from 2009 through 2012, and that "there is no evidence [that] Respondent Ortega took responsive action" during this time.[104] Ultimately, however, it is undisputed that the OCC credited Respondent Ortega, following an on-site visit in Spring 2013, with implementing "the appropriate processes and procedures ensuring proper cost recovery accounting treatment for non-accrual loans."[105] (To recollect, Respondent Rogers stepped down

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[100] OCC Opp. SOF ¶ 56 (citing exhibits).

[101] *Id.* ¶ 57 (quoting OCC-BIO-77 (2009 MOU) at 5) (internal quotation marks omitted).

[102] OCC-PSD-9 (Sworn Statement Transcript of Jack McClelland ("McClelland Dep.")) at 67:19-68:13. Respondents do not directly dispute this, but assert that with respect to the cash basis treatment of nonaccrual loans, it was "[t]he loan department of the Bank, including CLO McCarthy, Mark Magee, and others [who] were the ones . . . responsible for meeting these requirements." Resp. Mot. at 23.

[103] OCC Opp. SOF ¶¶ 64-65 (citing exhibits).

[104] OCC Opp. at 24; *see* OCC Opp. SOF ¶¶ 60-63, 66-67 (citing exhibits).

[105] Resp. Mot. at 22-23 (quoting R-MSD-12 (June 27, 2013 letter from OCC to Bank Board of Directors entitled "Conclusions from Onsite Target Examination as of December 31, 2012") (also stating that "[m]anagement is now aware of the proper accounting treatment and the Call Report requirements for cash basis non-accrual and indicated that all new non-accrual loans will receive proper coding for the cost recovery accounting method").

from his position as Bank Chairman in November 2011 and was no longer affiliated with the Bank following that date.[106])

Overall, Respondents do not appear to dispute that the accounting practice of accruing interest on nonaccrual loans using cash basis accounting was incorrect. Respondent Ortega asserts, however, that as soon as the error regarding the "default" software setting system was brought to his attention, he had that error fixed. *See* Resp. Mot. at 15-16, 23. Furthermore, Respondents maintain that other Bank individuals in the loan department—namely, then-CLO McCarthy and Mark Magee—were responsible for indicating whether nonaccrual loans should be treated on cash basis accounting, as they were ones who graded the loans and obtained the proper documentation to support cash basis accounting. *See id.* at 16, 23. To that end, Respondents contend that the allegedly improper accounting for the loans in question "flowed from the non-accrual determinations made by credit staff." *Id.* at 23.

Enforcement Counsel has a different view, asserting that the Bank requested that the default software settings be changed so that all nonaccrual loans would automatically be placed on cash basis accounting, rather than leaving it to the discretion of loan officers. *See* OCC Opp. at 24 (stating that "the Lending Department had no involvement in determining whether individual loans qualified for such treatment"). Enforcement Counsel also takes issue with Respondent Ortega's assertion that he corrected the accounting issue expeditiously, identifying multiple instances over the course of several years in which one or both Respondents were made aware of the Bank's improper accounting treatment of nonaccrual loans without any evidence of subsequent corrective action. *See id.* (citing exhibits).

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[106] *See* Notice ¶ 6.

As discussed further in Part IV *infra*, the undersigned finds that disputed questions of material fact remain with respect to ***(1)*** the extent of Respondents' alleged wrongdoing regarding the Bank's recognition and treatment of nonaccrual loans during the relevant time period, including Respondents' involvement in the alleged change of default software setting and the extent to which the lending department was responsible for the accounting treatment of nonaccrual loans; and ***(2)*** whether and to what extent Respondents took steps to address identified issues regarding the Bank's nonaccrual accounting once those issues were brought to their attention.

Preferential Treatment (Article VI)

Article VI alleges that Respondent Rogers "placed the interests of a member of his immediate family above those of the Bank" in connection with "one series of unsafe or unsound loans" taking place in or around April 2009 and January 2010 by concealing material information from the Bank's Board of Directors and L&D Committee. Notice ¶ 29; *see id.* ¶¶ 110-129. Enforcement Counsel has focused its motion for summary disposition of this Article on the allegations regarding the transaction involving Griqualand, which is styled as Company X in the Notice (hereinafter "the Griqualand transaction," or "the Griqualand loan" in pertinent part).[107] Unless otherwise noted, the facts relayed below in connection with the Griqualand transaction, and with other related transactions as relevant, are undisputed.

David Rogers, III ("Rogers III") is the son of Respondent Rogers. *See* OCC SOF ¶ 75. Among other companies, Rogers III had a 100 percent interest in Griqualand, a real estate company, and was the President and part-owner of Obra Homes, Inc. ("Obra Homes" or "Obra"),

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[107] *See* OCC Mot. at 10 n.7; Notice ¶¶ 117-120, 129.

a homebuilding company.[108] *See id.* ¶¶ 76, 82. At the beginning of the relevant period, Obra Homes had outstanding loans from the Bank that Rogers III had personally guaranteed. *See id.* ¶ 77.

On February 11, 2009, Rogers III forwarded an email to his father that had been sent from Rogers III's attorney, Erick Yollick, two days earlier.[109] *See id.* ¶¶ 78, 80. The forwarded email discussed the increasing likelihood that Obra Homes would be placed into receivership in order to satisfy a judgment from one of the 18 lawsuits then being brought against the company, the majority of which the lawyer asserted were "suits on debts which Obra is unlikely to win."[110] Mr. Yollick stated that such an outcome "would result in [Rogers III's] total loss of control of Obra and its assets," which would in turn thwart Rogers III's efforts to "liquidate [Obra's] assets in an orderly manner to satisfy [his] obligations to" the Bank and another institution denoted "RBC."[111] *See id.* ¶ 79. In light of this risk, Mr. Yollick urged Rogers III to consider "working with the banks to ensure swift foreclosure" of Obra Homes, entering into an agreement with them "to market the assets . . . so that you may maintain control of Obra's assets, maximize your chance of eliminating your personal liability to RBC and [the Bank], and end your payment of personal assets into Obra's coffers."[112] *See id.* ¶ 78. Mr. Yollick then stated that Rogers III "could even *have an arrangement with the banks to repurchase the assets in another corporation after foreclosure* (or, with greater risk, at the foreclosure) in order to market them."[113]

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[108] *See* OCC-PSD-47 (Sworn Statement Transcript of David Rogers III) ("Rogers III Dep.") at 23:25-24:8 (discussing ownership and nature of Griqualand); 30:15-25 (discussing ownership of Obra Homes).

[109] *See* OCC-PSD-49 (February 11, 2009 email from David Rogers III to Respondent Rogers, forwarding February 9, 2009 email from Erick Yollick to David Rogers III) ("February 11, 2009 Email"). Respondent Rogers has testified that he and Rogers III discussed the contents of this email after Respondent Rogers received it. *See* OCC-PSD-11 (Rogers Dep.) at 195:19-23.

[110] *See* OCC-PSD-49 ("February 11, 2009 Email") at 1.

[111] *See id.*

[112] *See id.*

[113] OCC SOF ¶ 78 (quoting February 11, 2009 Email at 1) (emphasis added by Enforcement Counsel).

Rogers III appears to have acted consistently with his attorney's advice, forming Griqualand in March 2009 and using it over the following months as a vehicle for the repurchase of Obra assets from the Bank. *See id.* ¶ 82. On April 7, 2009, the Bank foreclosed on its loans to Obra Homes and took ownership of certain Obra properties as collateral, paying those properties' outstanding property tax. *See id.* ¶¶ 83-84. On April 30, 2009, the L&D Committee approved a $3,234,688.90 loan to Griqualand by telephone tally. *See id.* ¶ 86. On May 12, 2009, the L&D Committee ratified the loan, with Respondent Rogers abstaining.[114] *See id.* ¶¶ 94-95. Through Griqualand, Rogers III then repurchased the foreclosed-upon Obra properties from the Bank using the proceeds of the loan. *See id.* ¶ 86. The materials provided to the L&D Committee during the approval and ratification process stated that the purpose of this loan was to "[p]urchase [OREO] property from [the Bank] to develop and resell."[115]

In effectuating the loan to Griqualand, "[t]he Bank did not require any equity contribution from Griqualand or Rogers III, financed 100 percent of the purchase price, and included $100,000 in new monies for development costs." *Id.* ¶ 97 (citing exhibits). Unlike the previous loans to Obra Homes, the Griqualand loan also did not require a personal guaranty from the borrower, which the L&D Committee ratification package stated was done "to facilitate" the sale of the newly Bank-owned Obra properties to Griqualand.[116] *See id.* ¶ 98.

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[114] *See* OCC-PSD-57 (May 12, 2009 meeting minutes of Bank L&D Committee) at 2.

[115] OCC-PSD-55 (Griqualand L&D ratification package) at 5; *see also* OCC-PSD-57 (May 12, 2009 meeting minutes of Bank L&D Committee) at 2.

[116] OCC-PSD-55 (Griqualand L&D ratification package) at 5; *see also* OCC-PSD-57 (May 12, 2009 meeting minutes of Bank L&D Committee) at 2 (stating that loan was ratified "with no personal guarantees and with no financial information since this is a start-up company"). In response, Respondents state that although the loan was not guaranteed at first, "the Bank did ultimately get a guaranty from [Rogers III]." Resp. Opp. at 23 (citing R-BIO-10 (excerpts of sworn statement testimony of loan officer Edna Martinez) ("Martinez Dep. Excerpts") at 68:19-70:6). The undersigned notes that the transcript excerpt attached as an exhibit omits part of the page range cited by Respondents in support of their assertion, although the pages that are provided do suggest that Rogers III ultimately guaranteed the loan. *See* Martinez Dep. Excerpts at 69:25-70:2 ("So from what I remember, we needed the guaranty. And so he needed to guarantee it, and I think eventually he did, if I'm not mistaken."). Respondents' use of selective excerpts of deposition testimony offers an incomplete picture of the factual record and risks omitting

It appears undisputed that, as Respondents assert, "Respondent Rogers was not involved in making this loan or handling it in any way." Resp. Opp. at 22. The Bank officers handling and ultimately recommending the loan for approval were Edna Martinez and Curtis Brockman,[117] and Enforcement Counsel does not allege that Respondent Rogers contacted Ms. Martinez and Mr. Brockman regarding the loan or actively attempted to influence the loan process.[118] Rather, it is Enforcement Counsel's contention that Respondent Rogers was aware of certain material information regarding the Griqualand loan and did not share that information with the L&D Committee—specifically, that his son was the owner of Griqualand, that the Griqualand loan was risky due to Rogers III's financial condition, and that the loan was part of Rogers III's "plan to release his personal liability on loans to the Bank while maintaining ownership of the assets," as detailed in the February 9, 2009 email forwarded from Rogers III to Respondent Rogers. OCC SOF ¶ 95; *see also*, *e.g.*, OCC Mot. at 42 (arguing that "Respondent Rogers failed to disclose material information related to a series of OREO transactions that benefited Griqualand, his son's company, at the expense of the Bank"), 44 (asserting that "it was highly unlikely that Rogers III, at the helm of a recently formed entity, would be able to repay the Griqualand loan in full, particularly when it was collateralized by the Obra Homes assets").

In support of this contention, Enforcement Counsel marshals the following facts: First, the loan package provided to the L&D Committee for the Griqualand loan did not "identify Rogers III as the owner of Griqualand or otherwise identify Rogers III's involvement in the loans."[119] OCC

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helpful context for the parties' assertions. In the future, both parties are directed to provide full transcripts of any deposition relied upon as an exhibit.

[117] *See*, *e.g.*, OCC-PSD-10 (Sworn Statement Transcript of Curtis Brockman) ("Brockman Dep.") at 56:1-14.

[118] *See* R-BIO-10 (Martinez Dep. Excerpts) at 72:17-21 (stating that Respondent Rogers never had any communications to Loan Officer Martinez during the 2009 Griqualand loan approval and ratification process).

[119] *See generally* OCC-PSD-55 (Griqualand L&D ratification package). As discussed further *infra*, Respondents contend that the loan package materials did "show Rogers III's involvement," Resp. Opp. at 21, but this contention is unsupported in the factual record as presently developed.

SOF ¶ 93. Instead of naming Rogers III—who, again, was indisputably Griqualand's sole owner—the package stated that Griqualand "was formed by Roland W. Drake and others," providing detailed biographical information on Drake and identifying him as Griqualand's managing director.[120] The loan package went on to state that "Griqualand's investors include a prominent homebuilder and financier who [has] substantial experience as a developer and real estate investor," in what Enforcement Counsel asserts without dispute was the document's only reference to Rogers III.[121] *See id.*

Second, Enforcement Counsel contends that members of the L&D Committee did not otherwise have pertinent information regarding Rogers III's involvement in Griqualand and the February 9, 2009 email to Rogers III from his attorney that would have allowed them to accurately assess the risk of approving the Griqualand loan. *See* OCC Mot. at 44-45. Enforcement Counsel notes that the minutes of the May 12, 2009 L&D Committee meeting in which the loan was approved "do not state that [Respondent Rogers] disclosed the contents of the February 9, 2009 email to the Board."[122] Enforcement Counsel points to then-President Gandy's testimony that he did not recall being aware of Rogers III's ownership of Griqualand or of the information contained in the February 9, 2009 email.[123] Enforcement Counsel also cites Respondent Ortega as testifying

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[120] OCC-PSD-55 (Griqualand L&D ratification package) at 5. According to Rogers III's deposition, Mr. Drake is a relative of Mr. Yollick, Rogers III's attorney. *See* OCC-PSD-47 (Rogers III Dep.) at 62:7-13. Documents proffered by Respondents as the minutes of March 27, 2009 meetings of the "Members" of Griqualand and of the Griqualand Board of Managers appear to reflect that Mr. Drake, serving as the Board's sole Board Member, President, and Secretary, sold a 100 percent ownership interest in Griqualand to Rogers III, the sole Member of the company, who had appointed Mr. Drake to his position on the Board earlier that day. *See* R-BIO-11 at 4-5 (March 27, 2009 meeting minutes of the Member of Griqualand), 7-10 (March 27, 2009 meeting minutes of Griqualand Board of Managers).

[121] OCC-PSD-55 (Griqualand L&D ratification package) at 5.

[122] OCC SOF ¶ 95 (citing OCC-PSD-57 (May 12, 2009 meeting minutes of Bank L&D Committee) at 2).

[123] *Id.* ¶ 88 (citing OCC-PSD-16 (Gandy Dep.) at 181:6-24, 19:12-195:19). The undersigned notes that, at the time of his deposition, then-President Gandy appears to have had virtually no recollection of Griqualand, the Obra Homes foreclosures, or the Griqualand loan in any respect, *see*, *e.g.*, OCC-PSD-16 (Gandy Dep.) at 172:13-173:1, 184:10-23, and was "not sure" if he knew that Rogers III was associated with Griqualand, *see id.* at 186:10-13.

"that Respondent Rogers never informed him of the contents of the February 9, 2009 email" and that knowledge of the email's contents "would have 'obviously' made a difference in his decision to approve the loan."[124] Finally, Enforcement Counsel states that at the time that the Griqualand loan was approved, then-CLO McCarthy "was not aware of Obra Homes' financial difficulties."[125] In its summary disposition briefing, Enforcement Counsel does not adduce any testimony from any other L&D Committee members regarding their knowledge of Rogers III's involvement with Griqualand or whether the information conveyed in the February 9 email in fact would have made them less likely to approve the Griqualand loan, as the OCC's present Motion implies.

Respondents, by contrast, contend that the L&D Committee members were aware at least that Rogers III was the owner of Griqualand at the time of the loan's approval and ratification, offering testimony from Loan Officer Martinez to this effect.[126] Resp. Opp. at 21. Respondents also assert that "[t]he documents attached to the loan ratification signed by L&D Committee members as presented to the loan officer at her deposition show Rogers III's involvement," *id.*,

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[124] OCC SOF ¶ 89 (citing OCC-PSD-5 (Ortega Dep.) at 224:23-227:25). The undersigned notes that Enforcement Counsel does not represent that Respondent Ortega was unaware that Rogers III was the owner of Griqualand at the time the Griqualand loan was approved, nor did Respondent Ortega testify as such. *See* OCC-PSD-5 (Ortega Dep.) at 216:12-16 ("Q: So the only reason to make this loan is that you knew that the borrower is related to Mr. Rogers? A: No, and knowing his history with the bank."), 217:18-22 ("Q: At the time you made the decision, is there any rational basis for the committee to approve this loan? A: I think we know the borrower. We knew the borrower, who the borrower was.").

[125] OCC SOF ¶ 90 (citing OCC-PSD-12 (McCarthy Dep.) at 243:10-245:15). The undersigned notes that CLO McCarthy expressed confusion during his deposition testimony as to whether he understood at the time of the Griqualand loan that Rogers III owned Griqualand or was otherwise involved in the company or the loan application. *See* OCC-PSD-12 (McCarthy Dep.) at 227:21-228:6, 237:16-238:17). The undersigned also notes that, as with Respondent Ortega, *see supra* n. 124, CLO McCarthy's testimony indicates that knowledge of Rogers III's ownership of Griqualand would have been a positive, rather than negative, factor for CLO McCarthy when determining whether or not to approve the Griqualand loan. *See id.* at 238:13-17 ("David Rogers III always took care of his business, paid on time, and worked very well with whoever he was assigned to work with.").

[126] *See* R-BIO-10 (Martinez Dep. Excerpts) at 64:1-9 ("Q: So if these packets were typically presented to the Board of Directors, is it fair to say that the Board of Directors was aware that the owner of Griqualand was David Rogers III? A: Yes."). The undersigned notes that Ms. Martinez's answer here appears to be contingent on being shown a document that states "in the background section [that] David Rogers III owns Griqualand LLC 100 percent," *see id.* at 64:1-3, which is represented during her deposition to be part of the Griqualand loan ratification package shown to the L&D Committee in 2009, *see id.* at 62:6-63:21. Due to the excerpted nature of Ms. Martinez's deposition transcript as provided in connection with the instant Motions, the specific document being referred to cannot be discerned, and her testimony on the topic is taken as speculative and cannot be fully credited.

although the exhibit cited in support of this proposition shows only that Ms. Martinez emailed certain Griqualand-related materials to Mr. Brockman in September 2011, some dated prior to the loan approval at issue and some afterward, stating: "Enclosed are some of the documents located in the file. *Not real sure what they viewed.*"[127] In any event, however, Ms. Martinez evinces an awareness that, at the time of the Griqualand loan, it was part of a transaction in which (1) the Bank foreclosed upon Obra properties and (2) "the same individual who had originally owned the properties . . . bought [them] again subsequently . . . under the name of a new company."[128] It also appears uncontested (irrespective of what other material information may or may not have been conveyed) that the purpose of the loan, as presented to the L&D Committee, was for the transfer of former Obra assets from the Bank to Griqualand.[129] Respondents cite testimony from Mr. Brockman, one of the credit officers who recommended the loan, agreeing that the transaction "was in the bank's best interest because the bank was trying to move OREO and Griqualand was going to take this ORE and sell it."[130]

The other major area of dispute between the parties is the extent to which the Bank incurred a loss on the Griqualand loan. Enforcement Counsel contends that "[t]he DIF suffered an $88,946.32 loss on the loan to Griqualand on or after the Bank's failure on September 13, 2013,"

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[127] R-BIO-11 (September 23, 2011 email from Edna Martinez to Curtis Brockman, including attachments) (emphasis added). Thus, the undersigned rejects Respondents' contention that the 2009 Griqualand loan package divulged to the L&D Committee the identity of Rogers III as Griqualand's owner, because it is unsupported as currently adduced.

[128] R-BIO-10 (Martinez Dep. Excerpts) at 56:2-22 (further stating that "I foreclosed it . . . [a]nd then they transacted it back to him.").

[129] *See* OCC-PSD-55 (Griqualand L&D ratification package) at 1 (stating that the purpose of the loan was to "[p]urchase [Bank OREO] Property to develop, to re-sell & for working capital" and identifying ten Bank-owned properties as the subject of the intended purchase); R-BIO-10 (Martinez Dep. Excerpts) at 55:14-22 (recollecting that the Bank was motivated to sell the property it had newly acquired from Obra); OCC-PSD-12 (McCarthy Dep.) at 234:22-236:11 (confirming understanding prior to Griqualand loan that it was to purchase Obra real estate assets that had been foreclosed by the Bank).

[130] Resp. Opp. at 22 (quoting OCC-PSD-10 (Brockman Dep.) at 69:4-10.

OCC SOF ¶ 102, and that this loss constituted a loss to the Bank itself.[131] Respondents, on the other hand, assert that the Bank did not take any loss on the Griqualand loan, which they claim "performed the entire time it was at the Bank and all payments were made."[132] Respondents also claim that even "a loss of $88,946.32 on a loan of $3,234,688.90 would make this loan one of the best performing commercial real estate loans in the financial crisis," asserting that the Bank would have lost much more on the foreclosed-upon Obra properties had the Griqualand loan not been made.[133] Resp. Opp. at 24.

In sum, Respondents maintain that the Bank's credit and loan departments, without input or influence from Respondent Rogers, recommended the Griqualand loan as being in the Bank's best interests; that the L&D Committee possessed all material information regarding Rogers III's involvement with Griqualand when approving and ratifying the loan; and that the loan was ultimately "beneficial to the Bank." *Id.* As discussed further in Part IV *infra*, the undersigned finds that disputed questions of material fact exist with respect to ***(1)*** the information regarding Obra, Rogers III, and Griqualand available to the L&D Committee prior to its approval of the Griqualand loan; ***(2)*** the extent of Respondent Rogers's involvement in determining or influencing what

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[131] *See* OCC Mot. at 19 (stating that "the DIF is administered by the FDIC" and that "[p]recisely how the FDIC accounted for the losses caused by the failure of the Bank is immaterial"). The undersigned addresses Enforcement Counsel's conflation of the FDIC as receiver of a failed bank and the FDIC's role in its corporate capacity as administrator of the DIF *infra* in Part IV.C.2.

[132] Resp. Opp. at 23 (citing OCC-PSD-47 (Rogers III Dep.) at 25:22-26:9 (recollecting that Griqualand was "still paying on the note when [the Bank] was taken over by the FDIC" and expressing the belief that Griqualand paid off the loan after the Bank's closure). The undersigned notes that both Respondent Ortega and CLO McCarthy also expressed an understanding that payments continued to be made on the Griqualand loan at least through the Bank's closure. *See* OCC-PSD-5 (Ortega Dep.) at 217:15 ("I think this loan performed."); OCC-PSD-12 (McCarthy Dep.) at 242:13-18 ("I don't remember ever having any kind of trouble on this deal, at all, and if there is a charge-off, David [Rogers III] would make it good.").

[133] Respondents also question the basis of Enforcement Counsel's assertion that the Griqualand loan caused $88,946.32 in loss to the DIF. *See* Resp. Opp. at 50 (asserting that "the evidence put forward on the loss issue fails to explain where the numbers come from, whose files it came from, who calculated it, and, most importantly, that it is true and correct"). Enforcement Counsel will have the opportunity to address these questions at the hearing, as well as whether the $88,946.32 in question is fairly considered a loss to the Bank sufficient to satisfy the effect elements of 12 U.S.C. §§ 1818(e) and 1818(i), as discussed further below.

information pertinent to the Griqualand loan was made available to the L&D Committee; ***(3)*** the extent to which any information that was not available to the L&D Committee was in fact material to its decision to approve the loan, in light of the loan officers' recommendation; ***(4)*** whether, based on *all* information available at the time, the loan can be said to have been in the Bank's best interest when it was approved; and ***(5)*** whether the Bank in fact suffered loss as a result of the loan's approval.

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

Any evaluation of the parties' cross-motions for summary disposition must begin with the statutory elements that undergird the OCC's claims. The OCC brings this action against Respondents as institution-affiliated parties ("IAP") of the Bank for a prohibition order under 12 U.S.C. § 1818(e) and first- and second-tier civil money penalties under 12 U.S.C. § 1818(i).[134] *See* Notice ¶¶ 2, 48-50. To merit a prohibition order against an IAP under Section 1818(e), an 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." 12 U.S.C. § 1818(e)(1)(A). The effect element may be satisfied, in turn, by showing either that the institution at issue thereby "has suffered or probably will suffer financial loss or other damage," that the institution's depositors' interests "have been or could be prejudiced," or that the charged party "has received financial gain or other benefit." *Id.* § 1818(e)(1)(B). And the culpability element may be satisfied

[134] The undersigned finds that Respondents are IAPs of the Bank as that term is defined in 12 U.S.C. § 1818(u).

that the alleged violation, practice, or breach either "involves personal dishonesty" by the IAP or "demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution." *Id.* § 1818(e)(1)(C).

The assessment of civil money penalties under Section 1818(i) also contains an "effect" element of a sort, at least with respect to the criteria necessary for the imposition of the second-tier penalty sought by the OCC.[135] The statute authorizes different levels of money penalties contingent on an increasingly stringent showing by the agency regarding the nature and consequences of the alleged misconduct. The lowest level, a first-tier penalty, may be assessed solely upon a showing of misconduct: specifically, that an IAP has violated some law, regulation, order, or written condition or agreement with a federal banking agency.[136] For a second-tier penalty to be assessed, by contrast, the agency must show not only misconduct,[137] but also some external consequence or characteristic of the misconduct: (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 institution"; or (3) that it "results in pecuniary gain or other benefit to such party."[138] As with Section 1818(e), fulfillment of this prong for the assessment of a second-tier money penalty does not require satisfaction of all three conditions; a second-tier penalty may be assessed (assuming misconduct has been shown) if the misconduct is part of a pattern even if it has not caused more than a minimal loss to the institution, and so forth.

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[135] *See* 12 U.S.C. § 1818(i)(2)(B). The assessment of a third-tier civil money penalty similarly requires a showing of "effect," but the OCC does not seek such a penalty here, and it is accordingly unnecessary for the undersigned to discuss. *See id.* § 1818(i)(2)(C); Notice ¶¶ 133-34 (seeking first- and second-tier civil money penalties).

[136] 12 U.S.C. § 1818(i)(2)(A).

[137] In addition to the violations described in Section 1818(i)(2)(A), a second-tier showing of misconduct can be made as to a breach of a fiduciary duty or the reckless engagement in unsafe or unsound practices while conducting the institution's affairs, *see id.* § 1818(i)(2)(B)(i), both of which the Notice also alleges against Respondents. *See* Notice ¶¶ 135 (alleging reckless engagement in unsafe or unsound practices and breach of fiduciary duty of care against Respondents with respect to Articles III through V), 136 (alleging breach of fiduciary duty of loyalty against Respondent Rogers with respect to Article VI).

[138] 12 U.S.C. § 1818(i)(2)(B)(ii).

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 whom he 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 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."[139] This so-called Horne Standard has long guided federal banking agencies, including the OCC, in bringing and resolving enforcement actions.[140] It has also been recognized as "the authoritative definition of an unsafe or unsound practice" by federal appellate courts.[141] The undersigned accordingly adopts the Horne Standard, both for purposes of the instant motions and going forward in this proceeding, when evaluating allegations of unsafe or unsound practices under the relevant statutes.

Here, with respect to the misconduct element of Section 1818(e) and as applicable for Section 1818(i), the OCC alleges in the Notice as follows:

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[139] *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), 122 Cong. Rec. 26,474 (1966).

[140] *See*, *e.g.*, *In the Matter of Patrick Adams*, No. AA-EC-11-50, 2014 WL 8735096 (Sep. 30, 2014) (OCC final decision) (discussing Horne Standard in detail).

[141] *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).

	Article III (Capital Raise Loans)	Article IV (OREO Lending)	Article V (Non-Accrual Loans)	Article VI (Preferential Treatment)
Violated 12 U.S.C. § 161	x	x	x	
Violated cease-and-desist orders		x	x	
Engaged in unsafe/unsound practices	x	x	x	
Breached fiduciary duty of care	x	x	x	
Breached fiduciary duty of loyalty				x

With respect to the culpability element of Section 1818(e) and as applicable for Section 1818(i), the OCC alleges in the Notice as follows:

	Article III (Capital Raise Loans)	Article IV (OREO Lending)	Article V (Non-Accrual Loans)	Article VI (Preferential Treatment)
Personal dishonesty	x	x	x	x
Willful disregard	x	x	x	x
Continuing disregard	x	x	x	x
Recklessness (1818(i))	x	x	x	

And with respect to the effect elements of Section 1818(e) and 1818(i), the OCC alleges in the Notice as follows:

	Article III (Capital Raise Loans)	Article IV (OREO Lending)	Article V (Non-Accrual Loans)	Article VI (Preferential Treatment)
Financial loss or other damage to the Bank	x	x	x	x
Prejudice to depositors	x	x	x	
Pattern of misconduct (1818(i))	x	x	x	x

Of all of those, Enforcement Counsel now seeks summary disposition with respect to the following issues, arguing that undisputed material facts support a judgment in its favor as a matter

of law: (1) engagement in unsafe or unsound practices (Article III and portions of Article IV);[142] (2) breach of fiduciary duty of care (Article III and portions of Article IV); (3) breach of fiduciary duty of loyalty (portions of Article VI);[143] (4) financial loss to the Bank as a result of Respondents' misconduct (Article III and portions of Articles IV and VI); (5) willful disregard (Article III and portions of Articles IV and VI); (6) continuing disregard (Article III); (7) personal dishonesty (Article III and portions of Article VI); (8) engagement in a pattern of misconduct (Article III); and (9) recklessness for purposes of a second-tier civil money penalty (Article III and portions of Article IV). Enforcement Counsel does not presently seek summary disposition with respect to its Article V allegations regarding nonaccrual accounting.

Respondents, by contrast, argue that judgment in their favor is appropriate on the current factual record on all charges set forth in the Notice, including Article V.

IV. Argument and Analysis

Enforcement Counsel contends that the undisputed facts of Respondents' conduct with respect to the Capital Raise Loans Plan, the NAHS loan, and (as to Respondent Rogers) the Griqualand transaction constitute, as relevant, actionably unsafe or unsound practices and the breach of Respondents' fiduciary duties of loyalty and care.[144] Enforcement Counsel also argues that the loss element of Sections 1818(e) and 1818(i) has been satisfied with respect to these aspects of the Notice, whether by financial loss suffered by the DIF or (in the case of the Capital

[142] As discussed *supra* at 18, Enforcement Counsel seeks summary disposition of the charges in Article IV solely with regard to its allegations concerning the NAHS loan.

[143] As discussed *supra* at 29, Enforcement Counsel seeks summary disposition of the charges in Article VI solely with regard to its allegations concerning the Griqualand transaction.

[144] *See* OCC Mot. at 23-26 (unsafe or unsound practices and breach of fiduciary duty of care as to Capital Raise Loans Plan), 32-39 (unsafe or unsound practices and breach of fiduciary duty of care as to NAHS loan), 43-45 (breach of fiduciary duty of loyalty as to Griqualand transactions).

Raise Loans Plan) by the Bank itself pre-failure as a result of Respondents' misconduct.[145] Enforcement Counsel further asserts that Respondents indisputably acted with personal dishonesty and willful or continuing disregard for the Bank's safety or soundness, thereby satisfying the statutory culpability element of a Section 1818(e) prohibition order with respect to Articles III, IV, and VI.[146] Finally, Enforcement Counsel argues that Respondents' engagement in unsafe or unsound practices was reckless and their conduct was part of a pattern of misconduct, as relevant to the imposition of a second-tier civil money penalty under Section 1818(i) for the Capital Raise Loans Plan and the NAHS loan.[147]

For their part, Respondents contest each aspect of Enforcement Counsel's arguments, *see generally* Resp. Opp., and assert that they are entitled to summary disposition of all claims against them on the grounds that the OCC does not have, and cannot adduce, sufficient evidence that Respondents engaged in misconduct or possessed a requisite state of mind with respect to any of the agency's allegations. *See* Resp. Mot. at 4. Respondents also contend that Enforcement Counsel has offered no evidence that the Bank suffered a loss as a result of the Capital Raise Loans Plan and the NAHS loan, and additionally assert that the OCC cannot prove that the Griqualand transaction caused loss to the Bank as a matter of law.[148]

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[145] *See id.* at 26 (loss to Bank and DIF as to Capital Raise Loans Plan), 39 (loss to DIF as to NAHS loan), 45 (loss to DIF as to Griqualand transaction).

[146] *See id.* at 26-30 (personal dishonesty, willful disregard, and continuing disregard as to Capital Raise Loans Plan), 39-40 (willful disregard as to NAHS loan), 45-46 (personal dishonesty and willful disregard as to Griqualand transaction).

[147] *See id.* at 30-31 (recklessness and pattern of misconduct as to Capital Raise Loans Plan), 40-42 (recklessness as to NAHS loan).

[148] *See* Resp. Opp. at 33-34, 45, 50-51.

A. Disputed Questions of Fact Exist With Respect to Respondents' Alleged Misconduct

As discussed further below, the undersigned finds that genuine material facts remain in dispute as to the OCC's allegations of Respondents' misconduct that are at issue in the instant Motions. The undersigned therefore denies both parties' motions for summary disposition on the issue of misconduct.[149] Furthermore, because disputed questions of fact remain as to whether Respondents engaged in unsafe or unsound practices or other actionable misconduct, the undersigned likewise concludes that it is premature at this juncture to decide whether Respondents' alleged conduct constitutes an actionable "pattern" for purposes of Section 1818(i).

1. The Capital Raise Loans Plan (Article III)

The present factual record reflects multiple areas of genuine dispute regarding whether and to what extent Respondents engaged in lending-related misconduct with respect to the Capital Raise Loans Plan—that is, the efforts by the Bank to lend money to local investors so that the loan proceeds ultimately could be used to fund a capital infusion from the Holding Company to the Bank. *See supra* at 17-18. Any of these disputes standing alone would be sufficient to preclude summary disposition of the OCC's Article III misconduct claims at this time.[150]

First, the parties disagree about the role played by Respondents in devising and executing the plan, and the factual record as constituted does not resolve this question. Enforcement Counsel

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[149] With respect to the issue of misconduct and the other statutory elements on which each side moves for summary disposition, the undersigned notes that the identification of certain genuine issues of material fact herein does not necessarily preclude the existence of other genuine issues of material fact as may be revealed through further development or elucidation of the factual record before this Tribunal.

[150] In addition to the arguments regarding the Capital Raise Loans Plan discussed elsewhere in this Order, Respondents argue that summary disposition in their favor is merited on the claim that the Bank filed materially inaccurate Call Reports regarding the Capital Raise Loans, *see* Notice ¶¶ 44-52, on the basis that "[t]here is an absence of admissible evidence that the call report instructions in place at the time required the accounting treatment suggested by the OCC." Resp. Mot. at 21. The undersigned agrees with Enforcement Counsel that Respondents have failed to establish that the genuine undisputed material facts permit resolution of this issue at the present stage. *See* OCC Opp. at 12. The undersigned therefore denies Respondents' motion in this regard.

contends that Respondents "caused the Bank to originate" the Capital Raise Loans and "helped develop and implement[]" the Capital Raise Loans Plan. OCC Mot. at 3, 23. Respondents, by contrast, assert that they did not conceive of the plan or promote it within the Bank, identifying instead then-CLO McCarthy and then-President Gandy as the individuals responsible, as well as the Bank's loan department generally. *See* Resp. Opp. at 31-32.

Second, the parties disagree as to Respondents' involvement in the allegedly misleading and incomplete characterizations of the Capital Raise Loans and the Bank's capital raise efforts set forth in L&D Committee loan presentation documents, the February 2009 and May 2009 capital plans, and Gandy's April 28, 2009 Letter to the OCC. Enforcement Counsel suggests that these materials support a conclusion that Respondents engaged in actionable misconduct, *see* OCC Mot. at 3-4, while Respondents deny any responsibility for the statements, characterizations, and alleged omissions at issue, *see* Resp. Opp. at 32-33.

Third, Respondents aver that they received assurances from Bank colleagues that the Capital Raise Loans were legally permissible and otherwise "relied on the expertise of their colleagues" in the course of the implementation of the Capital Raise Loans Plan. Resp. Opp. at 14. While the parties agree that the plan was raised in at least one board meeting, *see* OCC SOF ¶ 22, no party has presented evidence establishing whether and to what extent others at the Bank on whom Respondents had reason to rely expressed to Respondents, or in Respondents' presence, that the Capital Raise Loans Plan complied with the law or constituted safe and sound banking practices.[151] The parties also disagree regarding the extent to which Respondents contemporaneously possessed a good faith understanding that the Capital Raise Loans Plan was compliant with law and prudent banking practices as a result of any such assurances or the

[151] *See* Resp. Opp. at 12 (asserting that Respondents "were assured by the loan officers at the Bank that [the Capital Raise Loans] were good risks, and as such believed they were safe and sound").

expertise of others. *See* Resp. Mot at 20; OCC Opp. at 9-10. These questions are potentially material not only to the culpability of Respondents' state of mind (see Part IV.B.1 *infra*) but to the actionable nature of their conduct, and they cannot be resolved on the present record.

Fourth, the parties disagree with respect to whether the details of the Capital Raise Loans Plan were known by the Bank's third-party advisors and regulators at the time it was implemented. *See* Resp. Opp. at 15 (asserting that "[t]he Bank had accountants, lawyers, and examiners deeply involved in every aspect of the Bank's business"). The undersigned finds that Enforcement Counsel has presumptively established that the Bank's audit firm and the OCC itself had no knowledge of the allegedly problematic aspects of the Capital Raise Loans Plan during the relevant period.[152] With respect to the Bank's third-party legal counsel, however, the undersigned cannot conclude on the basis of Ms. Easterp's testimony that no one at Hunton & Williams had contemporaneous knowledge of the Capital Raise Loans Plan. Given that Ms. Easterp was neither the firm's primary contact with the Bank nor the primary person giving legal advice to the Bank at that time, the undersigned finds that Ms. Easterp's testimony, without more, at most establishes that Ms. Easterp herself had no personal knowledge of the plan. *See supra* at 14-15. To the extent that either side seeks to establish the knowledge or lack of knowledge of the Bank's external attorneys with respect to this element, they may do so at a later stage.

Fifth, the parties disagree regarding the riskiness (and thus the safety and soundness) of the Capital Raise Loans at the time they were made and Respondents' understanding thereof. *See* OCC Opp. at 14; Resp. Opp. at 34. These questions are potentially material not only to the culpability of Respondents' state of mind (see Part IV.B.1 *infra*) but to the actionable nature of their conduct, and they cannot be resolved on the present record.

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[152] *See* notes 52 and 58 *supra*.

Sixth, it is unclear from the record the extent to which Capital Raise Loans originated after the May 11, 2009 capital infusion were part of a plan to raise Bank capital through the downstreamed proceeds of the sale of Holding Company stock, as Enforcement Counsel alleges. *See* OCC SOF ¶¶ 26, 34 (alleging that "[b]etween approximately April 2009 and March 2011, Respondents caused the Bank to originate 63 Capital Raise Loans to purchase approximately $21 million in Holding Company stock" but identifying only one capital infusion from the Holding Company to the Bank, which occurred in May 2009);[153] Resp. Opp. at 33 (noting that more than half of the Capital Raise Loans at issue were originated following the May 2009 capital infusion). This is potentially material to the scope of Respondents' alleged misconduct as well as the question of whether and to what extent such misconduct caused actionable loss to the Bank, and it cannot be resolved on the present record.

2. The NAHS Loan (Article IV)

The present factual record likewise reflects multiple areas of genuine dispute regarding whether and to what extent Respondents engaged in lending-related misconduct with respect to the NAHS loan, which is the only aspect of Article IV of the Notice on which Enforcement Counsel moves for summary disposition.[154]

First, the parties disagree as to whether Respondents contemporaneously possessed a good faith understanding that the L&D Committee's June 2010 approval and ratification of the NAHS loan complied with Bank policy, applicable law, and the prudent operation of financial institutions

[153] The Notice also identifies a $5 million capital infusion from the Holding Company to the Bank on August 12, 2009, but provides no details linking the Capital Raise Loans to that or any future capital infusions. *See* Notice ¶ 44.

[154] Respondents assert that they are entitled to summary disposition on all lending-related and accounting-related claims regarding the OREO Lending Strategy that are set forth in Article IV of the Notice. *See* Resp. Mot. at 21-22. The undersigned agrees with Enforcement Counsel that Respondents have failed to establish that the genuine undisputed material facts permit resolution of the Notice's Article IV claims in their favor at the present stage. *See* OCC Opp. at 15-23.

based on their reliance on the expertise and assurance of colleagues. *See*, *e.g.*, OCC Mot. at 32 (asserting that Respondents engaged in unsafe or unsound practices and violated Bank policy when "Respondent Ortega approved and both Respondents ratified the NAHS loan without conducting a credit analysis"); Resp. Opp. at 42 (asserting that "Respondents believed that [the NAHS loan] was in the best interests of the Bank because the lending department had determined the NAHS group had a strong business plan and presented the least amount of risk to the Bank"). This question is potentially material not only to the culpability of Respondents' state of mind at the time of their approval and ratification of the NAHS loan (see Part IV.B.2 *infra*) but to the actionable nature of their conduct, and it cannot be resolved on the present record.

Second, there appears to be a disputed question of material fact regarding the extent to which the information presented to Respondents and the rest of the L&D Committee by the Bank's loan department accurately and adequately reflected the level of risk of default inherent in the NAHS loan. *See* Resp. Opp. at 42-43 (stating that in approving loans, "the [non-loan department] members of the L&D Committee trust that the loan department is following policy . . . and that when they represent facts about a borrower, . . . they have documentation to back it up"); OCC Mot. at 33 (asserting that the NAHS loan was approved "without *any* financial information" and that a subsequent credit analysis demonstrated that the loan was risky) (emphasis in original). As above, this question is potentially material both to the culpability of Respondents' state of mind at the time of their approval and ratification of the NAHS loan (see Part IV.B.2 *infra*) and to the actionable nature of their conduct.

Third, the parties disagree on the extent to which the terms of the NAHS loan were "below-market" or otherwise deviated from typical market conditions at that time, and the undersigned

finds that there is a genuine issue of material fact in this regard.[155] Enforcement Counsel contends that the NAHS loan was concessionary (and therefore unsafe or unsound) because it did not require the borrowers to provide equity; because the loan featured insufficient guarantees "to a newly formed entity . . . with minimal ability to repay"; and because the loan "included inadequate repayment terms and features" such as a low interest rate, 30 months of interest-only payments, and a 25-year repayment period "to reduce the borrower[s]' loan payments and artificially delay default." OCC Mot. at 35-36 (internal quotation marks and citation omitted). Respondents, in turn, argue that "the loan terms were reasonable in the context of the time, circumstances, and geographic region for loans of this type or character," asserting that Enforcement Counsel "offers no evidence of comparable construction loans, comparable rates of interest, or other market terms." Resp. Opp. at 43. This issue is material and cannot be resolved on the present record.

Fourth, Enforcement Counsel argues that Respondents engaged in unsafe or unsound practices by failing to enforce the NAHS loan repayment terms and by "permitt[ing] NAHS to engage in excessive overdrafts and capitalize loan interest." OCC Mot. at 32. The undersigned finds that a genuine issue of material fact exists regarding the scope and extent of Respondents' personal responsibility or involvement in the alleged failure to enforce the loan's repayment terms and the Bank's decision to permit NAHS to engage in allegedly excessive overdrafts and interest capitalization. Consequently, summary disposition on the topic is not presently appropriate.

3. Nonaccrual Loan Accounting (Article V)

The present factual record reflects areas of genuine and material dispute regarding whether and to what extent Respondents engaged in misconduct with respect to the Bank's accounting

[155] *See* OCC Opp. at 15 (maintaining, as to all loans that were the subject of the alleged OREO Lending Strategy other than the NAHS loan, that "there is a genuine issue of material fact as to whether Respondents approved or ratified OREO loans with concessionary and liberal terms and without underwriting in order to mask the Bank's deteriorating financial condition").

treatment for nonaccrual loans as detailed in Article V of the Notice. These issues of material fact must be resolved at a later stage of the proceedings, and Respondents' motion for summary disposition of the misconduct element of the OCC's Article V claims is therefore denied.

First, the parties disagree as to the extent to which the Bank's allegedly improper accounting treatment of nonaccrual loans is attributable, in whole or in part, to "nonaccrual determinations made by credit staff" as opposed to conduct by Respondents. Resp. Mot. at 16; *see* OCC Mot. at 24. The undersigned agrees with Enforcement Counsel that Respondents have thus far "failed to put forward any facts demonstrating that loan officers caused all the Bank's loans to be placed on cash basis accounting," particularly in light of the evidence offered by Enforcement Counsel regarding the change in the default setting of the Bank's accounting system. OCC Mot. at 24. By the same token, Enforcement Counsel has not adduced evidence linking either Respondent to the change made to that default setting, which it must do if it seeks to use the Bank's adoption of the new default (as opposed to Respondents' failure to timely correct improper accounting treatment arising from that adoption) as a basis for its allegations of misconduct by Respondents. Likewise, to the extent that the OCC alleges that Respondents consciously "caused the Bank to artificially inflate earnings and capital" through the intentional perpetuation of the allegedly improper accounting treatment over the period of 2007 through 2013, Notice ¶ 90, the undersigned finds that the factual record also does not yet support that conclusion.

Second, the parties disagree about the extent to which Respondents took steps to address identified issues regarding the Bank's accounting treatment of nonaccrual loans once those issues were brought to their attention. Respondents contend that under the leadership of Respondent Ortega, the Bank indisputably "implemented the appropriate process and procedures ensuring proper cost recovery accounting treatment" after the OCC determined that the nonaccrual loans

were being accounted for improperly and directed the Bank to correct its accounting. Resp. Mot. at 16 (quoting R-MSD-12 (June 27, 2013 letter from OCC to Bank Board of Directors entitled "Conclusions from Onsite Target Examination as of December 31, 2012"). Enforcement Counsel counters with multiple instances in which the Bank's Chief Audit Officer expressed concerns to Respondents regarding the Bank's nonaccrual loans accounting, in 2009 and again in 2012, without any apparent responsive action. *See* OCC Mot. at 24. The undersigned finds that a genuine issue of material fact exists with respect to the question of whether, when, and to what extent Respondents were aware of, and sought to correct, the allegedly improper accounting treatment prior to the ultimate resolution of that issue under Respondent Ortega.

4. The Griqualand Transaction (Article VI)

Finally, the present factual record reflects areas of genuine dispute regarding whether and to what extent Respondent Rogers engaged in misconduct with respect to the Griqualand transaction, which is the only aspect of Article VI of the Notice on which Enforcement Counsel moves for summary disposition (and thus is the only instance of allegedly preferential treatment by Respondent Rogers that is addressed in detail in the parties' briefing).[156]

First, the parties disagree as to what information was available to the L&D Committee prior to its approval of the Griqualand loan. *See* Part II *supra* at 32-35. Enforcement Counsel contends that the L&D Committee, which included the Bank's Board of Directors,[157] lacked full information regarding, *inter alia*, Rogers III's ownership interest in Griqualand, the extent to which Obra was

[156] Respondents argue in relatively cursory fashion that Respondent Rogers is entitled to summary disposition on all claims regarding allegedly preferential treatment that are set forth in Article VI of the Notice, contending broadly that there is no evidence that the loans in question "were the result of an effort to benefit a family member" or were "in any way dissimilar" to other OREO loans made by the Bank during the relevant time period. Resp. Mot. at 25; *see id.* at 17, 24-25. The undersigned agrees with Enforcement Counsel that Respondents have failed to establish that the genuine undisputed material facts permit resolution of the Notice's Article VI claims in Respondent Roger's favor at the present stage. *See* OCC Opp. at 24-25.

[157] *See* OCC SOF ¶ 8 (L&D Committee "consisted of all of the Bank's directors").

experiencing financial difficulties, and the outline of the proposed transaction involving Griqualand and Obra set forth in the February 9, 2009 email to Rogers III and subsequently disclosed to Respondent Rogers. *See supra* at 32-34. Respondents, by contrast, offer evidence that at least some members of the Board were better informed about the Griqualand transaction at the time of the loan's approval than Enforcement Counsel claims. *See supra* at 34-35. This disputed question of fact bears directly on the premise underlying Respondent Rogers's alleged misconduct.

Second, and similarly, Enforcement Counsel charges that Respondent Rogers deliberately contrived to conceal from the Bank's Board pertinent information regarding the Griqualand transaction prior to the loan's approval and ratification, most notably by failing to share the contents of the February 2009 email that his son had forwarded to him. *See* OCC Mot. at 43-44. Respondents dispute this, asserting that Respondent Rogers did not withhold any information from other Board members or otherwise play any role in influencing the Griqualand loan approval process, leaving that entirely in the hands of the loan department. *See* Resp. Opp. at 48. This question is material both to the culpability of Respondent Rogers's state of mind at the time of the Griqualand transaction (see Part IV.B.4 *infra*) and to the actionable nature of his conduct.

Third, Enforcement Counsel asserts that without full knowledge of the contents of the February 9, 2009 email and awareness of the fact that Rogers III owned both Obra and Griqualand, Board members did not have all of the information necessary to accurately assess the risk of the Griqualand loan. OCC Mot. at 45; *see id.* at 43-44. The present factual record, however, reflects that certain members of the Board, at least, apparently viewed Rogers III's involvement with the Griqualand transaction as a positive factor that would have made, or did make, loan approval more likely. *See supra* at 34. The loan officers who recommended the loan likewise evinced an understanding that the owner of the Obra assets was selling them to the Bank to be repurchased by

him under another company's name, and nevertheless concluded that the loan was in the Bank's best interests. *See supra* at 35. The undersigned therefore finds that it is a genuine issue in dispute whether the information in the February 9, 2009 email in fact would have made the L&D Committee less likely to approve the Griqualand loan.

<u>Fourth</u>, Respondents contend that the Griqualand transaction was indeed to the benefit of the Bank based on all information available to Respondent Rogers at that time, including the contents of the February 9, 2009 email. *See* Resp. Opp. at 49. Respondents argue that the transaction permitted the Bank to ensure that its interest in the Obra property remained fully realized by moving the assets from an entity in danger of liquidation to a newly formed entity managed by the same individual, thus "ultimately prevent[ing] a giant loss for the Bank." *Id.* The undersigned finds that this issue is potentially material to the question of whether Respondent Rogers engaged in actionable misconduct and cannot be resolved on the present record.

<u>B. Respondents' Culpability Cannot Be Established At This Time</u>

As with the element of misconduct, there exist genuine issues of material fact with respect to whether Respondents acted with the requisitely culpable state of mind under Sections 1818(e) and 1818(i)—that is, with personal dishonesty, willful or continuing disregard, and recklessness, as applicable—that preclude resolution of the OCC's claims against them at this time. The undersigned therefore denies both parties' motions for summary disposition with respect to the issue of culpability.

1. <u>The Capital Raise Loans Plan (Article III)</u>

For the reasons articulated above in Part IV.A.1, the undersigned has found that the present record does not establish the extent to which Respondents possessed a contemporaneous, good-faith understanding of (1) the legality and prudence of the Capital Raise Loans Plan and (2) the safety and soundness of the Capital Raise Loans. These are disputed questions of fact that are

potentially material to whether Respondents were actionably culpable when engaging in the conduct alleged by the OCC in its Article III claims.

2. The NAHS Loan (Article IV)

Likewise, the undersigned has found that the present record does not establish the extent to which (1) Respondents contemporaneously possessed a good faith understanding that the L&D Committee's approval and ratification of the NAHS loan (and other loans related to the OREO Lending Strategy, for the purpose of Respondents' instant motion) complied with Bank policy, applicable law, and the prudent operation of financial institutions; and (2) the information presented to Respondents and the rest of the L&D Committee by the Bank's loan department accurately and adequately reflected the level of risk of default inherent in the NAHS loan and other loans at issue. *See supra* at 46-47. These are disputed questions of fact that are potentially material to whether Respondents were actionably culpable when engaging in the conduct alleged by the OCC in its Article IV claims.

3. Nonaccrual Loan Accounting (Article V)

The undersigned finds that Respondents have failed to establish that no genuine issues of material fact exist with respect to their state of mind related to the conduct alleged by the OCC in its Article V claims. Summary disposition of Respondents' culpability with respect to the allegedly improper accounting treatment for nonaccrual loans is therefore precluded.

4. The Griqualand Transaction (Article VI)

The undersigned has found that the present record does not establish the extent to which Respondent Rogers deliberately acted to withhold material information from the Bank's Board regarding the Griqualand transaction. *See supra* at 51. Respondents also have failed to establish that no genuine issues of material fact exist with respect to Respondent Rogers's state of mind as

it relates to the other allegedly preferential conduct encompassed by the OCC's Article VI claims. The question of Respondent Rogers's culpability here consequently remains at issue.

C. Enforcement Counsel Has Not Yet Demonstrated That Respondents' Conduct Resulted in Bank Loss or Other Actionable Effects

Material facts also remain in dispute with respect to whether, through the misconduct alleged in the Notice, Respondents caused the Bank to suffer financial loss or otherwise precipitated an actionable "effect" under Sections 1818(e) and 1818(i). As a result, the undersigned denies Enforcement Counsel's motion for summary disposition on this issue.[158]

1. The Capital Raise Loans

Enforcement Counsel identifies two of the Capital Raise Loans which it asserts were ultimately charged off, thus causing the Bank to suffer financial loss in the amount of $387,240.63. OCC Mot. at 26; *see* OCC SOF ¶ 45. Specifically, Enforcement Counsel asserts that loans of $250,000 to Blanca Gonzalez and Jose S. Rodriguez were made on May 8, 2009, permitting Ms. Gonzalez and Mr. Rodriguez to purchase commensurate shares of Holding Company stock on May 11, 2009, and that approximately $193,000 of the outstanding balance of each loan was ultimately charged off by the Bank on June 12, 2013. *See* OCC-PSD-61 (Chansen Decl., Ex. 2) (spreadsheet entitled "Capital Raise Loans Summary"); OCC-PSD-31 (spreadsheet entitled "All Loan Losses and Recoveries 1994 to 7/12/2013") (lines 24107 and 24108). Putting aside that Enforcement Counsel has not yet established that the loans to Ms. Gonzalez and Mr. Rodriguez are evidence of actionable misconduct by Respondents, *see supra* at 43-46, the undersigned finds that the unauthenticated spreadsheet proffered by Enforcement Counsel as OCC-PSD-31 does not by itself demonstrate that the Bank suffered financial loss from the loans in question. Should Enforcement Counsel wish to establish that the loans made to Ms. Gonzalez and Mr. Rodriguez in May 2009

[158] Respondents do not move for summary disposition of the statutory effect element. *See generally* Resp. Mot.

for the purpose of purchasing Holding Company stock were charged off in June 2013, it must make a more robust showing to do so, whether by providing the actual loan documents and charge-off documents or by otherwise laying a proper foundation through sworn statements and testimony or other evidentiary material.[159]

2. Loss to the DIF is Not Loss to the Bank

Section 1818 provides that in order to satisfy the applicable portion of the statutory effect elements for the entry of a prohibition order or the assessment of a second-tier civil money penalty, the institution with which a respondent is affiliated must "suffer financial loss or other damage" as a result of the respondent's misconduct.[160] It may be true that post-failure loss to the FDIC in its capacity as receiver for a failed bank can stand in for loss to the bank itself prior to its failure within the meaning of Section 1818, just as the FDIC as receiver stands in for the failed bank for all legal purposes.[161] *See* OCC Mot. at 26-27. Enforcement Counsel, however, suggests that loss to the DIF also qualifies as loss to the failed bank, because the FDIC administers the DIF and because any distinction between loss to the DIF and loss to the FDIC as receiver is merely a matter of accounting. *See id.* at 27. This is wrong.

Enforcement Counsel has cited to no authority, and the undersigned is aware of none, indicating that loss to the DIF constitutes loss to a failed bank for which the FDIC is acting as

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[159] The Capital Raise Loans Summary compiled as an exhibit to Examiner Chansen's declaration, for example, may suffice to establish that individuals named Blanca Gonzalez and "Joe Rodriguez" (sic) obtained loans of $250,000 in May 2009 and then proceeded to purchase Holding Company stock, but neither it nor the declaration itself (nor any of the other exhibits to the declaration, as far as the undersigned can determine) links those loans to a subsequent charge-off in June 2013 by anything other than bare assertion. *See* OCC-PSD-59 (Chansen Decl.) ¶ 16(b) (stating that "2 of the Capital Raise Loans were charged off in June 2013" and referencing an August 2013 trial balance that is either not attached as an exhibit or does not demonstrate what the declaration purports); OCC-PSD-61 (Chansen Decl., Ex. 2) (Capital Raise Loans Summary) at 1. Something more is needed.

[160] 12 U.S.C. § 1818(e)(1)(B)(i); *see also id.* § 1818(i)(2)(B)(II)(ii) (requiring that the misconduct "causes . . . more than a minimal loss to [the] depository institution").

[161] *See id.* § 1821(d)(2)(A) (stating that FDIC as receiver for a failed insured depository institution succeeds to "all rights, titles, powers, and privileges of the insured depository institution").

receiver, whether for Section 1818 enforcement actions or for any other purpose. To the contrary, courts have made it consistently and emphatically clear that the FDIC in its corporate and receivership capacities are "two distinct entities with entirely different purposes."[162] To wit, the "primary responsibility [of the FDIC in its corporate capacity] is to insure bank deposits and to pay depositors when an insured bank fails. Consequently, it administers the federal deposit insurance fund, a pool of assets used to guarantee the safety of federally insured deposits."[163] On the other hand, the assets administered by the FDIC in its receivership capacity "are limited to the funds making up the failed bank's estate."[164] The two sets of funds belong to legally separate entities and do not intermingle. As the Seventh Circuit observes, "[t]he FDIC acting as receiver has no authority to make deposit insurance determinations," and conversely the DIF does not serve as an extension or repository of the funds of an FDIC receivership that is standing in the shoes of a failed bank;[165] indeed, the relevant statutory framework is explicit that the losses that may be suffered by the FDIC as receiver are limited to the assets of the receivership estate.[166]

Here, Enforcement Counsel uses loss to the DIF as a basis to seek summary disposition of the effect element for its claims regarding the Capital Raise Loans Plan in Article III, the NAHS

[162] *Bullion Svcs., Inc. v. Valley State Bank*, 50 F.3d 705, 708 (9th Cir. 1995); *see also*, *e.g.*, *FDIC ex rel. Co-op. Bank v. Rippy*, 799 F.3d 301, 307 n.1 (4th Cir. 2015) ("The FDIC in its corporate capacity is an insurer and federal regulator, and it performs a separate function from the FDIC in its capacity as receiver of failed banks."); *Miller v. FDIC*, 738 F.3d 836, 838 n.1 (7th Cir. 2013) ("[I]t is well-settled that the FDIC operates in two separate and legally distinct capacities, each with very different responsibilities. . . . FDIC Corporate functions as an insurer of bank deposits, and is charged with paying the insured deposits of failed bank [from the DIF] within a reasonable time.") (internal quotation marks and citations omitted) *Nat'l Trust for Hist. Preserv. in U.S. v. FDIC*, 21 F.3d 469, 471 (D.C. Cir. 1994) ("The FDIC is authorized to operate in the capacity of a corporate insurer under [12 U.S.C.] § 1823 and in the capacity as receiver for failed institutions under [12 U.S.C.] § 1821. The FDIC has discretion regarding whether it will wear one hat or the other, or both."); *FDIC v. Bernstein*, 944 F.2d 101, 106 (2d Cir. 1991) (referring to the FDIC's separate capacities as "discrete legal entities")

[163] *Bullion Svcs.*, 50 F.3d at 708 (citation omitted).

[164] *Id.* at 708-09.

[165] *Miller*, 738 F.3d at 838 n.1 (internal quotation marks and citation omitted); *see also Bullion Svcs.*, 50 F.3d at 709 ("Because FDIC Corporate and FDIC Receiver perform two different functions and protect wholly different interests, courts have been careful to keep the rights and liabilities of these two entities legally separate.").

[166] *See* 12 U.S.C. § 1821(i)(2).

loan in Article IV, and the Griqualand transaction in Article VI. *See* OCC SOF ¶¶ 46, 74, 102. For avoidance of doubt, the undersigned hereby holds that financial loss to the DIF that is administered by the FDIC in its corporate capacity does not constitute loss to a failed depository institution for which the FDIC acted as receiver, even if the loss to the DIF arose from that institution's failure. Enforcement Counsel will have an opportunity at the hearing to show that the Bank, not simply the DIF, suffered a loss caused by Respondents' alleged misconduct with respect to each of these sets of claims. For now, however, disputed questions of act remain.

3. Depositor Prejudice

In addition to alleging that the Bank suffered financial loss or other damage, the Notice also contends that depositors of the Bank were prejudiced due to the conduct alleged in Article III, Article IV, and Article V. *See* Notice ¶ 131(b). Depositor prejudice, when proven, is an independently sufficient way to satisfy the effect element of Section 1818(e). *See supra* at 37. Enforcement Counsel, however, does not seek summary disposition on its claims of depositor prejudice, and the undersigned finds that summary disposition is not warranted.

V. Conclusion

For the reasons set forth above, and in light of the disputed questions of material fact that have been identified on the present record, the undersigned hereby denies Enforcement Counsel's instant motion for partial summary disposition and Respondents' instant motion for summary disposition in all respects.

SO ORDERED.

October 5, 2021

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Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication