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

In the Matter of: **BIAGIO MAFFETTONE**, Former Vice President and Home Mortgage Area Manager Citizens Bank, N.A. Providence, Rhode Island	OCC Docket No.: AA-EC-2020-38

RECOMMENDED DECISION

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication
(January 31, 2022)

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The Office of the Comptroller of the Currency ("OCC") commenced this action against Respondent Biagio Maffettone ("Respondent") on May 7, 2020, filing a Notice of Charges ("Notice") that seeks an order of prohibition and the imposition of a $150,000 second-tier civil money penalty against Respondent pursuant to 12 U.S.C. §§ 1818(e) and (i). The Notice alleges that Respondent, in his capacity as Vice President and Home Mortgage Area Manager ("Area Manager") of Citizens Bank, N.A. ("the Bank"), engaged in actionable misconduct by impermissibly soliciting and receiving ongoing secret cash payments from a subordinate in connection with referrals provided by Respondent for the subordinate's origination of mortgage loans. *See* Notice ¶¶ 26-54.

On April 5, 2021, following briefing by Respondent and Enforcement Counsel for the OCC ("Enforcement Counsel") (collectively "the Parties"), the undersigned issued an order granting in part and denying in part Enforcement Counsel's motion for partial summary disposition of the claims in the Notice ("MSD Order"). Specifically, the MSD Order concluded that Respondent had breached the fiduciary duty of loyalty he owed to the Bank and received personal financial gain as a result of his conduct, thus satisfying the misconduct and effect elements of Sections 1818(e) and 1818(i). *See* MSD Order at 17-20, 23. The MSD Order also found that disputed questions of material fact precluded resolution of any other issues, including the matter of Respondent's culpability under Section 1818(e), until a hearing before this Tribunal in its fact-finding capacity. *See id.* at 13-17, 23-26.

A three-day hearing was held in the District of Rhode Island between August 31, 2021 and September 2, 2021 to resolve the questions of material fact that remained in genuine dispute following the partial grant of summary disposition. During the course of the hearing, this Tribunal heard testimony from eight fact witnesses, including Respondent, and two expert witnesses. A

total of sixty-seven exhibits were introduced and admitted into evidence in connection with witness testimony. Now, on the strength of the full record of this case, including the undersigned's credibility determinations based on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole, and after considering the Parties' post-hearing briefs ("EC Br." and "Resp. Br.") and response briefs ("EC Reply" and "Resp. Reply") containing their proposed findings and conclusions, the undersigned makes the following findings of fact, conclusions of law, and recommended orders.

I. Jurisdiction

At all times pertinent to this proceeding, the Bank was an insured depository institution pursuant to 12 U.S.C. § 1813(c)(2), and Respondent was an institution-affiliated party ("IAP") as that term is defined in 12 U.S.C. § 1818(u). *See* Notice ¶¶ 1-2. The Bank is a national banking association within the meaning of 12 U.S.C. § 1813(q)(1)(A) and is chartered and examined by the OCC. *See id.* ¶ 3. The OCC is therefore the appropriate federal banking agency with jurisdiction over the Bank and its IAPs for purposes of 12 U.S.C. § 1813(q), and it is authorized to initiate and maintain this prohibition and civil money penalty action against Respondent. *See id.* ¶ 4.

II. Applicable Standard

The burden of proof in an administrative proceeding, unless otherwise provided by statute, is on the administrative agency to establish its charges by a preponderance of the evidence. *See* 5 U.S.C. § 556(d); *Steadman v. SEC*, 450 U.S. 91, 102 (1981). Under the preponderance-of-the-evidence standard, the party with the burden of proof must adduce evidence making it more likely than not that the facts it seeks to prove are true.[1] Here, the OCC has the burden to prove that the

[1] *See In the Matter of Patrick Adams*, Final Decision, No. AA-EC-11-50, 2014 WL 8735096, at *23 (OCC Sep. 30, 2014) (applying preponderance standard in OCC enforcement action); *Concrete Pipe & Prods. of Calif. v. Constr. Laborers Pension Tr.*, 508 U.S. 602 (1993) ("The burden of showing something by a preponderance of the evidence . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.")

statutory elements for the entry of a prohibition order and the assessment of a second-tier civil money penalty have been satisfied. *See* 12 U.S.C. §§ 1818(e), 1818(i). This Tribunal is then tasked with making "a comparative judgment" to determine whether the agency has presented "the greater weight of the evidence" as to the satisfaction of the statutory elements.[2]

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

To merit the entry of a prohibition order against an IAP under 12 U.S.C. § 1818(e), an 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) "violated any law or regulation," (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."[3] 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."[4] And the culpability element may be satisfied when 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."[5]

The imposition of a second-tier civil money penalty under 12 U.S.C. § 1818(i) also requires the satisfaction of multiple elements. First, the agency must show misconduct, which can take the

(internal quotation marks and citation omitted).

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

[3] 12 U.S.C. § 1818(e)(1)(A).

[4] *Id.* § 1818(e)(1)(B).

[5] *Id.* § 1818(e)(1)(C).

form of a violation of "any law or regulation,"[6] the breach of "any fiduciary duty," or the reckless engagement "in an unsafe or unsound practice in conducting the affairs" of the institution in question.[7] Second, the agency must show some external consequence or characteristic of the IAP's alleged misconduct, likewise generally termed "effect" in past decisions issued by the Comptroller of the Currency ("Comptroller"): (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."[8] Moreover, before any civil money penalty can be assessed upon satisfaction of these elements, the agency must take into account the appropriateness of the amount of penalty sought when considered in light of certain potentially mitigating factors, including the "good faith of the . . . person charged," "the gravity of the violation," and "such other matters as justice may require."[9]

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 Federal Deposit Insurance ("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,

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

[7] *Id.* § 1818(i)(2)(B)(i).

[8] *Id.* § 1818(i)(2)(B)(ii). *See In the Matter of William R. Blanton*, No. OCC AA-EC-2015-24, 2017 WL 4510840, at *16 (OCC July 10, 2017), *aff'd on other grounds*, *Blanton v. OCC*, 909 F.3d 1161 (D.C. Cir. 2018) (referring to this as the statute's "effect" prong).

[9] 12 U.S.C. § 1818(i)(2)(G); *see also In re Sealed Case (Administrative Subpoena)*, 42 F.3d 1412, 1416 (D.C. Cir. 1994) ("In assessing money penalties, Congress requires [banking] agencies to consider several mitigating factors."); *accord*, *e.g.*, *Blanton*, 2017 WL 4510840, at *27.

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."[10] This so-called Horne Standard has long guided federal banking agencies, including the Comptroller, in bringing and resolving enforcement actions.[11] It has also been recognized as "the authoritative definition of an unsafe or unsound practice" by federal appellate courts.[12] The undersigned accordingly adopts the Horne Standard when evaluating charges of unsafe or unsound practices under the relevant statutes.

It is a central aspect of this statutory scheme that *only one* of the potential triggering conditions is necessary for the satisfaction of each element of Sections 1818(e) and 1818(i). That is, the "misconduct" element of Section 1818(e) is fulfilled if an IAP has breached a fiduciary duty to the institution, regardless of whether the IAP has also violated any laws or engaged in unsafe or unsound practices, and vice versa. Likewise, a second-tier civil money penalty may be assessed (assuming misconduct can be shown) if the misconduct has resulted in pecuniary gain to the IAP, even if it has not caused loss to the institution and is not part of an actionable pattern. Each component of the "misconduct" element is an independent and sufficient basis on which to ground an enforcement action if the other elements have also been shown. The same is true of the "effect" element and the "culpability" element. The OCC need only prove one component of each.

In this case, the OCC charges that, in participating in the allegedly impermissible referral arrangement with his subordinate, Respondent (1) violated the law, namely 18 U.S.C. § 215(a)(2) and 12 U.S.C. § 2607(a); (2) engaged in unsafe or unsound practices in conducting the Bank's

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[10] *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).

[11] *See*, *e.g.*, *Patrick Adams*, 2014 WL 8735096, at **8-24 (discussing Horne Standard in detail).

[12] *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).

affairs; and (3) breached his fiduciary duties of care and loyalty to the Bank, thus satisfying the statutory misconduct prongs.[13] *See* Notice ¶¶ 64-65. Further, with respect to the effect and culpability elements of the relevant statutes, the OCC asserts that Respondent received financial or pecuniary gain or other benefit as a result of his alleged conduct; that the conduct involved personal dishonesty on the part of Respondent; that Respondent demonstrated a willful or continuing disregard for the Bank's safety or soundness; and that Respondent's conduct was part of a pattern of misconduct. *See id.*

In her April 5, 2021 MSD Order, the undersigned concluded that Respondent's conduct constituted a breach of his fiduciary duty of loyalty and resulted in his personal financial gain, fulfilling the misconduct and effect prongs of Section 1818 respectively. Following the hearing, the undersigned now also concludes, *inter alia*, that Respondent demonstrated the requisite culpability through his actions and that no mitigating factors exist to reduce the amount of civil money penalty sought by the OCC. The entry of a prohibition order and assessment of a $150,000 second-tier civil money penalty are both therefore appropriate.

IV. **Findings of Fact**

These findings are drawn as appropriate from the Parties' pleadings, from Enforcement Counsel's Statement of Undisputed Material Facts ("SOF") and Respondent's Counterstatement ("CSOF"), from hearing testimony ("Tr."), and from supporting exhibits admitted therewith ("EX," "RX," and "JX") and submitted in connection with the Parties' summary disposition briefing ("EC-PSD" and "R-PSD").

Respondent was hired by the Bank as a Producing Sales Manager in 2015, in which capacity he received personal commissions based on his own origination of individual mortgage

[13] The agency does not allege that Respondent recklessly engaged in unsafe or unsound practices for the purposes of Section 1818(i). *See* Notice ¶ 65(a).

loans. *See* Notice ¶¶ 6-7; Respondent's May 27, 2020 Answer ("Answer") ¶¶ 6-7. Respondent's primary area of geographic responsibility was Westchester County, New York, where he was assigned to cover the Chappaqua and Katonah offices of real estate company Douglas Elliman.[14] Generally speaking, developing and maintaining relationships with a network of real estate agents is an important and valuable source of loan referrals for bank personnel.[15] Douglas Elliman in particular was "a principal, substantial center of influence for [the Bank] in generating leads."[16] To that end, the Bank contracted with Douglas Elliman under a marketing sales agreement in which the Bank's loan officers were permitted "to go into [Douglas Elliman] offices, make presentations, things of that nature . . . to create a good relationship, a good rapport, with [Douglas Elliman agents] . . . [and] make sure they understand what [the Bank] can do to service their clients."[17] By the spring of 2017, Respondent had cultivated an extensive network of realtors and other referral sources in the course of his many years in the mortgage business, including at Douglas Elliman.[18]

Respondent's Promotion

During the first half of 2017, Respondent began to transition from Producing Sales Manager into the role of Area Manager, a "non-producing" supervisory position in which he was no longer permitted to originate loans himself or receive commission on new loans that he originated.[19] Instead of being paid commission, Respondent's terms of employment as Area

[14] Maffettone Tr. 410:17-23. The designation "Tr." in this Order refers to the official transcript of testimony given during the three-day hearing in this matter in late August and early September 2021. The name preceding that designation refers to the witness whose testimony is being given.

[15] *See* Jablonski Tr. 95:25-96:2 ("The most common type of referral network that a loan officer would have is a network of different real estate agents.").

[16] Barras Tr. 626:8-9.

[17] Watanasuparp Tr. 27:2-13; *see also* Jablonski Tr. 84:18-20 (noting that the agreement "was a way to get in front of real estate agents"), 96:2-4 ("To grant access to an office and have an open-door policy like that would have been a positive way to build my referral network.").

[18] *See* JX 1 (June 19, 2019 Sworn Statement of Biagio Maffettone) ("Maffettone S.S.") 58:19-21; Barras Tr. 607:16-608:3 (noting that Respondent had "a tremendous pipeline with the Douglas Elliman firm").

[19] *See* Gundlach Tr. 62:14-20, 63:2-3; Maffettone Tr. 414:13-17.

Manager provided that he would receive (in addition to a base salary) an "override" payment corresponding to a percentage of all loans originated by loan officers and producing managers who reported to him ("subordinates").[20]

As Area Manager, Respondent assumed a greatly expanded managerial role, including the supervision of approximately 50 loan officers (compared to ten or twelve as Producing Sales Manager) over a greater geographical area that included both Westchester County and Manhattan.[21] The primary responsibility of loan officers at the Bank was "[t]o originate mortgage applications, see them through processing and get them to underwriting and ultimately funding."[22] Among other things, Respondent became responsible as Area Manager for assigning loan officers to be given access to the Douglas Elliman offices in Chappaqua and Katonah.[23] Respondent was also in charge of reviewing and escalating certain pricing exception requests made by his subordinates, which were significant because they gave loan officers the opportunity to match lower interest rates being offered by competitors.[24] Other Area Manager duties included handling and approving "rush requests" from loan officers—for example, if an officer "need[s] a file to be looked at before a certain timeline" in order to get a loan finalized[25]—and acting as a liaison between loan officers and the loan underwriter when an officer did not agree with the underwriter's decision regarding a given loan.[26]

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[20] *See* Notice ¶ 10; Answer ¶ 10; Watanasuparp Tr. 22:22-25; JX 31 (June 29, 2017 Letter from Amy Fitzgerald to Biagio Maffettone) ("Offer Letter") at 1-2.

[21] *See* Maffettone Tr. 431:15-432:4; Watanasuparp Tr. 25:20-23 ("[T]he role of an Area Manager is very large. You have a very large team."). For reference, the September 2018 Citizens Home Mortgage – Metro NY Sales Organizational Chart ("Organizational Chart") shows Respondent overseeing seven Producing Sales Managers or Assistant Producing Sales Managers and 55 loan officers at the time of his ultimate departure from the Bank. *See* JX 32 (Organizational Chart) at 1.

[22] Anderson Tr. 303:1-3.

[23] Watanasuparp Tr. 28:5-11.

[24] *See id.* 29:4-30:9.

[25] *Id.* 30:11-15.

[26] *See id.* 24:3-14.

Respondent recognized that his duties and responsibilities in the Area Manager role, compared to that of Producing Sales Manager, had shifted from producing and originating loans to "driving sales initiatives and growth strategy, more on a macro level."[27] Respondent also understood at the time that assuming the Area Manager position meant that he could no longer originate loans.[28] Indeed, Respondent's compensation as Area Manager was structured to "pay him more money in exchange for losing the commissions he would earn from the relationships he had with the Douglas Elliman firm and for the potential that he would lose some of those relationships if he ever moved on to different employment."[29]

Notwithstanding his change to a non-producing role, it was nevertheless an expectation at the Bank that Respondent would continue to use his existing network at Douglas Elliman and elsewhere "to refer [potential mortgage] business to [his] subordinate employees."[30] It is important to note, however, Respondent's position that he was under no obligation to bring new business to the Bank upon becoming Area Manager and that he could have, if he chose, withheld all loan referrals that he might have otherwise generated on the strength of his relationships:

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[27] Maffettone Tr. 438:15-18. Respondent's testimony regarding the difference between the Producing Sales Manager and Area Manager roles is at times inconsistent and self-serving. Respondent elsewhere asserts, for example, that "I was, as Area Manager, doing exactly the same things that I was doing as a Producing Sales Manager, with the caveat of putting a loan application in my name." *Id.* 421:6-8. This conflicts not only with his statement above, but also the testimony of his then-supervisor Ace Watanasuparp as well as his deposition testimony that "when I took on the Area Manager role, I gave up soliciting for new realtors and new business at any of my preexisting relationships." JX 2 (December 8, 2020 Deposition of Biagio Maffettone) ("Maffettone Dep.") 33:14-19; *see also* Watanasuparp Tr. 25:7-9 ("The key difference there is the PSM has the ability to produce and the Area Manager doesn't have the ability to produce.").

[28] *See* Watanasuparp Tr. 32:4-7; Gundlach Tr. 55:2-7. To the extent that Respondent now suggests that he was permitted to continue to originate loans in his position as Area Manager as long as he did not do so under his own name, *see* Maffettone Tr. 445:17-18, this is contradicted by the testimony of then-Senior Vice President Chace Gundlach and other record evidence. *See* Gundlach Tr. 63:20-25 (stating that it would not have been appropriate under Bank policy for an Area Manager "to continue loan production activities[] as long as the loans were in someone else's name"); EX 2 (May 30, 2017 email from Chace Gundlach to Biagio Maffettone) ("[Y]ou can originate loans until taking the Area Manager Non-Producing position.").

[29] Barras Tr. 607:18-24 (stating that this was done to address Respondent's concerns at the time of his promotion).

[30] *Id.* 607:25-608:2 (adding that "[t]hat's one of the main job functions that our managers have"); *see also* Gundlach Tr. 69:17-20 ("Q: And the Bank does not discourage Area Manager non-producing people from bringing business to the Bank that would otherwise go to other banks, correct? A: Bringing it in, no. Writing it, yes.").

> Q: [Y]ou understood that any loan that came in from your prior referral sources, that someone else would be getting the commission on those, correct?
>
> A: I understood that I would not be getting the commission on those. Who would have gotten the commission on those would depend *because arguably those loans wouldn't even be coming into the bank.*
>
> Q: And I understand—so you're saying the loans would not be coming into the bank had you not developed those sources. I want to focus on your understanding of who would be getting the commission on those loans.
>
> A: *Possibly no one. I was not under any directive that I had to take my referral sources and if a loan came in, after my transition period, to do anything in particular with that loan.*[31]

The Transition Plan

Before formally assuming the position of Area Manager at the end of June 2017, Respondent was required to assign all mortgage loans that he was in the process of originating at the time of his transition ("active pipeline loans") to one of his subordinate loan officers.[32] Respondent and the Bank agreed on a plan to compensate Respondent for his active pipeline loans that had not yet become final as of May 31, 2017.[33] Under this transition plan, Respondent would be paid full commission on any active pipeline loans that were finalized ("closed" or "funded") by June 16, 2017.[34] For pipeline loans that closed on or after June 17, 2017, Respondent would receive 75 percent of the commission, and the subordinate loan officer to whom Respondent had assigned the loan would receive the remaining 25 percent.[35]

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[31] Maffettone Tr. 430:2-16 (emphases added); *see also id.* 464:12-14 ("And quite frankly, I was under no obligation to refer [loans] to Matt or to anyone else, for that matter.").

[32] *See id.* 413:23-414:3; Answer ¶ 19.

[33] *See* Watanasuparp Tr. 49:1-4; Gundlach Tr. 61:4-7 ("[W]e wanted to make sure that Biagio got paid specifically everything that he was due, whether it was pipeline loans or a prorated bonus, from the old position.").

[34] *See* JX 31 (Offer Letter) at 1, 9.

[35] *See id.* at 2, 9; Maffettone Tr. 423:5-9 ("I was asked to select one loan officer to transition my book of business to. And I would get 75 percent commission on those loans when they funded, and the loan officer would get 25 percent.")

Respondent chose Loan Officer Matthew Jablonski to take over his active pipeline loans, stating that Jablonski had been his "first recruit at Citizens Bank" and had "100 percent customer service scores" at that time.[36] Respondent further noted that Jablonski "was very well-liked by the realtors" and "had a lot of realtor relationships" as of the summer of 2017.[37] According to Respondent, the other loan officers he supervised felt "definitely" jealous that Jablonski had been selected to assume Respondent's active pipeline.[38] As Jablonski put it, "[t]here were some loans during that transition phase that I helped get to the finish line, and [Respondent] was compensated by [the Bank] for those specific loans."[39]

The 72-25 transition plan that was approved by the Bank was thus "limited to a documented set of 16 loans" already in Respondent's pipeline upon his ascension to Area Manager.[40] The commission percentage received by Respondent for these loans was paid through the Bank's official payroll system.[41] Once the 16 loans in Respondent's active pipeline were funded, Respondent understood that he would not be earning further commission on loans through the Bank, and there would no longer be any kind of Bank-approved plan to split commissions between himself and Jablonski.[42] Furthermore, it was made clear to Respondent that his Area Manager "override" payments would not include compensation from any of the active pipeline loans that were the subject of the transition plan.[43] In fact, Bank policy prohibited, and Respondent knew

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[36] JX 2 (Maffettone Dep.) 25:5-8.

[37] *Id.* 25:9-12 ("And I never heard anything negative from those realtors about him.").

[38] Maffettone Tr. 528:1-9.

[39] Jablonski Tr. 176:1-4.

[40] Maffettone Tr. 464:5-7; *see* JX 31 (Offer Letter), Ex. A.

[41] *See* JX 2 (Maffettone Dep.) at 26:14-23.

[42] *See* Maffettone Tr. 464:18-20.

[43] *See* JX 31 (Offer Letter) at 2; Maffettone Tr. 428:23-429:2 (stating his understanding that "any loans on which [he] received a personal production commission would be excluded from the Area Manager override").

that it prohibited, any manager from receiving a personal commission on any loan for which they had been compensated via override, and vice versa.[44]

The Off-Book Arrangement

Sometime after his formal promotion to Area Manager and following the expiration of the transition plan, Respondent provided Jablonski with a handwritten list of real estate agents from Douglas Elliman's Chappaqua and Katonah offices who Respondent deemed to be part of his "book of business."[45] Respondent and Jablonski then entered into a private referral arrangement ("the off-book arrangement") whereby Jablonski would be given access to agents from that list, and in return Respondent would be entitled to half of Jablonski's commission for any Bank-funded mortgage loan originated by Jablonski based on a referral from those agents.[46]

Respondent and Jablonski offer competing narratives about the off-book arrangement that differ in numerous material ways, and the undersigned will note these differences when relevant to the instant findings. On balance, and as discussed further *infra*, there is a preponderance of evidence to support the most important aspects of Jablonski's account of events where there is a dispute—namely, that Jablonski entered into the arrangement with at least some reluctance in a situation where a superior held power over his career; that Respondent took steps to keep the arrangement secret, including directing Jablonski to pay only in cash and to make payments away from Bank premises; that payments made under the off-book arrangement were based solely on the amount of Jablonski's commission from the referral without regard to any assistance Respondent may have provided in originating a given loan; that Respondent likely did not play an

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[44] *See* Gundlach Tr. 62:21-25; Maffettone Tr. 429:3-6.

[45] *See* Answer ¶ 31; JX 41 (Handwritten List); JX 1 (Maffettone S.S.) (stating that the purpose of the list was "just to memorialize my agreement with Matt and so that we had on paper my existing referral sources that I had cultivated both prior to Citizens and while at Citizens").

[46] *See* Jablonski Tr. 90:15-19, 108:20-109:3 (stating that he would pay 50 percent of each commission under the arrangement, net of anticipated tax); JX 2 (Maffettone Dep.) 95:5-21 (same).

active role beyond his normal Area Manager duties in helping to originate most, or even many, of the loans subject to the arrangement; and that Respondent enlisted the help of Jablonski's assistant Bob Anderson in tracking Jablonski's referral sources to ensure accurate payment under the arrangement.[47] As in the MSD Order, and for avoidance of doubt given Respondent's ongoing elisions to the contrary,[48] the undersigned further finds that Respondent's private, off-book referral arrangement with Jablonski is entirely distinct from, and unrelated to, the active pipeline transition plan agreed upon by the Bank as part of Respondent's promotion.[49]

Respondent and Jablonski disagree as to which of them initiated the off-book arrangement and when, although in some respects the details are marginal. According to Respondent, Jablonski approached him in October 2017, seeking to indefinitely "continue the partnership" that the two had enjoyed under the active pipeline transition plan, except with a more even distribution of commission.[50] Respondent stated that he decided to agree to Jablonski's proposal not out of any desire for money, but because he "wanted to maintain [his] referral network," and being involved with the origination of new loans from those sources would allow him to do that.[51]

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[47] Jablonski's testimony is also corroborated in several places by the testimony of other Bank employees, specifically Gundlach, Anderson, Watanasuparp, Matthew Fox, Joel Barras, and Fernando DaCunha, while Respondent's testimony is largely bare assertion, unsupported by evidence, and at times contradicted by what he said in his sworn statement, his deposition, and at other points in the hearing. *See generally infra*.

[48] *See*, *e.g.*, JX 2 (Maffettone Dep.) 18:43-21:11 (stating, among other things, that Respondent and Jablonski "had a split arrangement that was preapproved by Citizens Bank," and then using the term "split arrangement" to refer interchangeably to the active pipeline transition plan described in "the formal offer letter from Citizens Bank" and the subsequent private off-book arrangement between Respondent and Jablonski); Resp. Reply at 20 (arguing that "Mr. Maffettone believed that he was continuing a compensation arrangement that was already established by the Bank in other situations").

[49] *See* MSD Order at 6. In particular, the undersigned rejects Respondent's implication that the referral arrangement between Respondent and Jablonski was, as a factual matter, "preapproved" by the Bank or that it otherwise flowed naturally and consequently from the active pipeline transition plan.

[50] Maffettone Tr. 431:1-8; *see also*, *e.g.*, *id.* 464:21-465:13.

[51] JX 2 (Maffettone Dep.) 131:1-8; *see also id.* 49:25-50:2 ("For me it wasn't about the money, it was about maintaining my relationships."), 113:4-8 ("I didn't need to receive partial commissions in order to maintain the relationship[s], but I needed to be involved with the loan process and my referral partners from beginning to end.").

Jablonski, by contrast, testified that soon after Respondent's promotion to Area Manager, Respondent invited Jablonski into his office, handed him the handwritten list of referral contacts at Douglas Elliman, and offered him access to those agents in exchange for splitting any resulting commissions.[52] Jablonski recalled that one of Respondent's stated motivations for the arrangement was to "reclaim [his] relationships" in the event that he decided to return to a producing position.[53] Jablonski stated that the offer was attractive to him because eventual access to the valuable referral network at Douglas Elliman was something that had been discussed with him when he began at the Bank eighteen months beforehand.[54]

At the same time, Jablonski testified that he felt he had little choice one way or the other but to accept Respondent's proposition.[55] He was very conscious that Respondent was his superior, "somebody that was about to get promoted to an even higher position. And if I say no, in that instance, I don't know where that leaves me going forward at the company."[56] In particular, Jablonski was concerned that Respondent would be in a position to approve or reject his pricing exception requests, which were critical to his success as a loan officer.[57] Jablonski was also worried that refusing would have negative consequences for the livelihood of his assistants and junior loan officer.[58] And Jablonski recounted a moment in the meeting where Respondent insinuated that if Jablonski did not accept the arrangement, Respondent would simply remain in his current position and keep the referral sources for himself.[59]

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[52] *See* Jablonski Tr. 88:13-90:23.

[53] *Id.* 90:7-9 ("[T]he first thing he said was, if this doesn't work out, I want to be able to reclaim these relationships.").

[54] *See id.* 88:15-17, 90:10-14, 95:21-96:4, 132:21-133:12 (noting that "the opportunity to go work the branches, build relationships, get referrals" was central to his decision to join the Bank).

[55] *See id.* 91:9-94:3.

[56] *Id.* 91:10-14.

[57] *See id.* 94:1-13.

[58] *See id.* 91:22-93:24.

[59] *See id.* 95:7-9 (recalling Respondent saying "if you don't like this, I don't necessarily have to take this other job and I can just go back to servicing the branches myself").

Jablonski testified that another reason for his decision was that Respondent represented that the off-book arrangement would only last for four months, enough time for Respondent "to see if he was comfortable in the new position."[60] Later, however, Respondent told Jablonski that the arrangement would need to continue indefinitely, because there had been unfavorable changes to the Bank's compensation of Area Managers that had resulted in Respondent taking "a significant pay cut."[61] And, in fact, the off-book arrangement never ceased, continuing until Respondent's abrupt resignation and exit from the Bank in October 2018.[62] *See infra* at 37-38.

Evaluating these different accounts of how the off-book arrangement came to be, the undersigned finds that Jablonski's account is by far the most credible on the totality of evidence. This is particularly true in light of the inherent imbalance in power dynamic between a superior and subordinate, especially in a context where a subordinate's ability to generate commission can be easily hindered or aided by their superior;[63] witness testimony offering perspectives on Respondent's and Jablonski's respective personalities;[64] and the observed demeanor and candor of the two individuals during their own hearing testimony, including the level of detail offered by

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[60] *Id.* 94:14-18; *see also id.* 95:15-18 ("I was hoping that it would all end very quickly, and at the end of the four months, you know, it would be back to normal and I would get the branches, as I was promised when I came in.").

[61] *Id.* 135:9-18; *see also* Maffettone Tr. 477:5-24 (agreeing that he "became unhappy with the Area Manager compensation plan" in or around January 2018); EX 1 (January 8, 2018 email chain in which Maffettone expresses "deep concerns" about the changes to Area Manager compensation for 2018).

[62] *See* JX 2 (Maffettone Dep.) 100:19-102:2 (stating that the last payment he received from Jablonski was in August 2018, but that he did not "know at the time that that would be the last one" given the lag between a loan funding and Jablonski receiving his commission); *see also* Notice ¶ 62; Answer ¶ 62.

[63] *See* Watanasuparp Tr. 24:17-22 ("Loan officers are paid on a tier level. Depending on their volume, they'll get certain basis points per month. . . . They are paid on basically tier levels, commission-based, 100 percent commission-based."). The undersigned credits the observation of Enforcement Counsel's expert that "[h]owever you want to say it, there's an unequal balance of power there. . . . Mr. Maffettone had an unequal balance of power when this arrangement was created with his subordinate." Ouellette Tr. 575:2-3.

[64] *See* DaCunha Tr. 348:24-350:2 (describing Respondent's management style as being "a bully" with "an aggressive demeanor"), 381:6-7 (describing Jablonski as "generally a nervous person"); Fox Tr. 330:2-5 (describing Jablonski as "distressed" and "flustered"); *cf.* RX 1 (November 6, 2018 Citizens Bank Investigation Report) ("Investigation Report") at 3 (noting that Respondent "had a reputation as an aggressive loan officer, aggressive personality").

each of them. Put simply, it is much more plausible that Respondent generally acted in the way described by Jablonski than the other way around.[65]

In addition, given the emphasis repeatedly placed by Respondent on the importance of maintaining his existing referral relationships,[66] the undersigned finds that it is likely that a conversation regarding a possible off-book arrangement was initiated by Respondent and first took place soon after he had become Area Manager and was no longer able to personally produce, as Jablonski contends, rather than some months later.[67] As described below, the timing of payments under the arrangement relative to the closure of the subject loans also suggests that the arrangement began substantially earlier than Respondent claims. While the difference between an arrangement beginning in July or August 2017 and one beginning in October 2017 is relatively minor for purposes of this action since the arrangement spanned over a year under either party's account, it is nevertheless indicative of a sense that Respondent, while now claiming remorse for not being "candid" with the Bank,[68] is still not being fully truthful or forthcoming about the circumstances of the off-book arrangement, and his testimony is weighed with that in mind.

Details of the Arrangement

Respondent and Jablonski are largely in accord regarding the most salient details of the off-book arrangement. For each loan subject to the arrangement, Respondent would receive fifty percent of Jablonski's commission on that loan after subtracting taxes.[69] All payments were made

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[65] Of course, even if Respondent is telling the truth that the off-book arrangement began at Jablonski's instigation, this would have little bearing on the question of whether Respondent's indisputable agreement to and participation in the arrangement over the course of the following year constituted actionable misconduct under 12 U.S.C. §§ 1818(e) and 1818(i). *See* Part V.A *infra*; MSD Order at 5 n.12.

[66] *See*, *e.g.*, JX 1 (Maffettone S.S.) 59:16-18, 58:19-21; JX 2 (Maffettone Dep.) 33:14-19, 49:25-50:2.

[67] Indeed, Respondent himself testified that "[s]hortly after getting promoted, I was strongly considering going back to an origination role. And I felt it very necessary to be intimately involved with my clients and book of business." Maffettone Tr. 452:25-453:3.

[68] *See*, *e.g.*, JX 2 (Maffettone Dep.) 64:23-65:2; Maffettone Tr. 423:16-19.

[69] *See* Jablonski Tr. 108:20-109:3; JX 2 (Maffettone Dep.) 95:5-21.

in cash.[70] Given the time it normally took for Jablonski to be paid his commission on a funded loan through the Bank's system, there was typically "a two-month lag time between a loan funding and [Respondent and Jablonski] actually exchanging money."[71]

The amount due to Respondent for a given loan was calculated by hand on a slip of paper and shown to Jablonski, usually in Respondent's office with the door closed.[72] The size of Respondent's share of a commission was not dependent on any services performed by Respondent following the referral itself—rather, Respondent would receive half of each commission regardless whether he did nothing further to help originate the loan or whether he did all of the origination work and Jablonski merely put his name on the final paperwork.[73] In the words of Respondent, "[i]f the loan funded and it was my client, I would have received cash on it."[74]

The agents on the handwritten list were not the only referral sources that Respondent considered to be part of the off-book arrangement.[75] According to Jablonski, Respondent would sometimes approach him and verbally add names of individuals at Douglas Elliman that he had forgotten to include on the initial list; any loans originated after a referral from one of those agents would therefore also be subject to the arrangement.[76] Jablonski also stated that Respondent would

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[70] *See* Jablonski Tr. 106:4-107:3; JX 2 (Maffettone Dep.) 27:8-23.

[71] JX 2 (Maffettone Dep.) 101:15-22 (explaining that "when a loan closes it doesn't pay out until 30 to 45 days after[,] [a]nd then from that time to when we would meet again there would usually be about a 30-day lag"); *see also* Watanasuparp Tr. 49:3-4 (noting that commissions "get paid 30 days in arrears").

[72] *See* Jablonski Tr. 108:5-15, 116:21-117:13; *see also id.* 243:21-244:5 (stating that the calculation "was done at the end of the month when we knew how many loans were closed" and that Jablonski would come into the meeting with some understanding of what the calculated amount should be). Respondent's account is similar, although he suggests that he and Jablonski calculated the amount during the meeting. *See*, *e.g.*, JX 1 (Maffettone S.S.) 71:9-19 (stating that he "sketched [the calculation] on the pad and we reviewed it together"), 87:13-20 (the meetings would "typically" happen on Fridays in Respondent's White Plains office); JX 2 (Maffettone Dep.) 87:2-13, 90:9-20.

[73] *See* Jablonski Tr. 109:4-7.

[74] Maffettone Tr. 446:24-25.

[75] *See* Jablonski Tr. 96:14-17.

[76] *See id.* 96:23-25 (stating that Respondent would have "[c]onversations like, I forgot about this particular real estate agent. I want to add this agent to the list and make it part of the same setup."), 299:21-24 (all agents added verbally were from Douglas Elliman).

occasionally pass along clients who had called Respondent directly, and Jablonski would split the commission on any loans originated in that manner as well.[77]

Jablonski testified that some of the agents subsequently added to the list were people that he already had a preexisting referral relationship with, including some who he had been "working with closely" on his own.[78] He recounted one instance in which he was asked to add "one of [his] best referral sources" to the list and raised this issue with Respondent: "I mentioned, hey, I'm already working with them, I have this relationship. It doesn't seem to make sense."[79] Jablonski further stated that while he could have "pushed back" harder, he believed that the arrangement was "almost over" and that he wouldn't need to be paying Respondent on commissions from that source "for that much longer."[80] While Jablonski recalled that Respondent "dismissed" his concerns "pretty quickly and matter-of-factly,"[81] Respondent testified that he ultimately excluded that source from the arrangement, as well as "two or three" other agents, because Jablonski "was now getting their referrals directly, or could have gotten them directly."[82]

Respondent and Jablonski disagree as to whether referrals were ever given directly to Jablonski from real estate agents on Respondent's list and, if so, whether those referrals were subject to the off-book arrangement. Jablonski stated that he made use of the access he had been given to the Douglas Elliman offices by visiting those offices frequently and cultivating

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[77] *See id.* 97:7-10 ("Separate from adding names along the way, there were some referrals that Mr. Maffettone did get on his own where people called him directly and he did refer some of those clients to me.").

[78] *See id.* 97:13-18 (stating that "I didn't understand why they would be added to the list, in particular, if I already had a working relationship with the agent").

[79] *Id.* 98:7-9.

[80] *Id.* 98:10-15.

[81] *Id.* 98:15-16.

[82] Maffettone Tr. 468:21-469:14. Neither party offers anything other than testimonial evidence regarding whether any of Jablonski's preexisting referral relationships were part of the off-book arrangement, and the undersigned makes no finding on that question.

relationships with the agents there.[83] As a result, Jablonski stated that he "started getting referrals directly from the agents in these offices. And I would write the loan."[84] Jablonski estimated that 80 to 90 percent of the loans he originated "were referred directly to [him] by the real estate agent as opposed to being referred" through Respondent.[85] Nevertheless, loans originated in this way were "understood to be part of [the off-book] arrangement" if the agents who referred them had been on Respondent's initial list or were verbally added afterwards by Respondent.[86] That is, if an agent was on the list, Jablonski had to pay Respondent for any loans originated through that agent, even if Jablonski was the one who made the initial contact.

Respondent tells a different story. According to him, every loan originated by Jablonski that fell within the off-book arrangement came because of Respondent's referral, and no real estate agent on the list would ever have called Jablonski directly unless Respondent told them to do so.[87] Even Jablonski's ability to contact the realtors and their clients himself was limited, under Respondent's recollection: "There were times when if I was in a meeting or what have you, I would have Matt reach out to the client, he would be the first point of contact."[88] Otherwise, Respondent stated, Jablonski played strictly a supporting and background role for Respondent's referral sources: "Even when he was assigned to that office, he still didn't develop a relationship."[89]

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[83] *See* Jablonski Tr. 101:14-21 ("I did come prepared every week for the meeting. I usually would speak to all of the agents in the office about . . . different things where finance options could help them with their own business. . . . I tried to bring something of value to connect with the agents. I also worked directly with them at open houses.")

[84] *Id.* 101:22-24.

[85] *Id.* 102:4-11.

[86] *Id.* 101:25-102:3.

[87] *See* Maffettone Tr. 466:13-16 ("I would have to go through loan by loan to see whether an agent called Matt directly under my direction or if they called me and I told them to call Matt."), 467:6-8 ("Matt would only receive a call directly from the realtor if it was under my discretion, or direction, I should say."), 467:17-20 ("Q: Is it your testimony that there were zero loans subject to the referral arrangement where a realtor called Matt Jablonski directly, outside of your direction? A: As far as I can remember, yes.").

[88] *Id.* 462:11-14.

[89] *Id.* 466:7-8. *See also id.* 452:10-13 (stating that it was only necessary to involve Jablonski in the origination of the loans "because I couldn't go into Matt's application system and lock a rate or do anything in Matt's system. Or I should say in the system under Matt.").

In all, Jablonski paid Respondent somewhere between $52,000 and $63,000 in cash over the course of the off-book arrangement. Respondent averred that the total amount he received from Jablonski was $52,023,[90] further stating his firm belief that the first payment was made no earlier than January 2018.[91] Enforcement Counsel, on the other hand, has identified fourteen cash advances on Jablonski's bank statements between September 2017 and October 2018, in the total amount of $63,100, that Jablonski testified were withdrawals for payments to Respondent.[92]

Requested	Posted	Amount	Exhibit
9/29/17	10/2/17	$6,000	EX 29 at 4
10/20/17	10/23/17	$5,000	EX 30 at 3
10/27/17	10/30/17	$5,000	EX 30 at 3
11/03/17	11/06/17	$5,000	EX 30 at 4
11/10/17	11/13/17	$5,000	EX 30 at 6
12/1/17	12/4/17	$5,000	EX 31 at 4
12/15/17	12/18/17	$2,500	EX 31 at 6
1/29/18	1/30/18	$5,000	EX 32 at 3
3/16/18	3/19/18	$3,000	EX 33 at 6
3/27/18	3/28/18	$5,000	EX 34 at 3
4/13/18	4/16/18	$4,400	EX 34 at 6
6/29/18	7/2/18	$3,200	EX 35 at 3
9/21/18	9/24/18	$5,000	EX 36 at 3
10/5/18	10/9/18	$4,000	EX 36 at 5

[90] *See* Answer ¶ 65; JX 2 (Maffettone Dep.) 138:8-15; Maffettone Tr. 492:4 ("I kept a tab of the exact amount."). Respondent testified that he knows this figure because he "kept a tally of the amount" in connection with his 2018 tax return, although he has given inconsistent testimony on the subject. Maffettone Tr. 540:18-19; *see id.* 492:7-8 ("When I met with my accountant, I gave him [the written calculation]."); JX 2 (Maffettone Dep.) 138:16-20, 138:24-139:1 ("I definitely reviewed the number with the accountant. I don't recall if I gave him the piece of paper though."). Respondent did not produce to the OCC either his 2018 tax return or any tabulation of the amount he was paid by Jablonski, despite receiving requests for production that encompassed both of these items. *See* EC Br. at 15 n.1 (stating that "Enforcement Counsel's June 2, 2020 request for production included, in relevant part, 'all records related to payments received pursuant to [the Referral Arrangement]' and 'Respondent's Federal Income Tax Return for the years 2015 through 2020'") (bracketing in original). Respondent also invoked the Fifth Amendment multiple times in response to questions about his payment of taxes in connection with the off-book arrangement. *See* JX 1 (Maffettone S.S.) 73:24-74:16; JX 2 (Maffettone Dep.) at 126:8-24, 128:15-129:4.

[91] *See* JX 2 (Maffettone Dep.) 128:4-5 ("I didn't receive any cash payments from Matt Jablonski in in 2017."); Maffettone Tr. 492:22-495:4, 521:15-17 (stating that the first payment was made in "either January or February" 2018 and "definitely was not" in 2017).

[92] *See* EX 29 through EX 36 (bank statements from USAA Federal Savings Bank); Jablonski Tr. 110:15-116:18.

According to Jablonski, cash advances were the only method by which he obtained money to pay Respondent,[93] and he never withdrew cash in these amounts for any other purpose,[94] with the exception of one instance in which he paid demolition workers in cash while he was restoring a house.[95] Jablonski also testified that he would keep $100 to $200 of each advance for personal spending money, but that the rest of the cash would be given to Respondent each time.[96] Jablonski acknowledged that he did not "know the precise amount" that he paid Respondent under the off-book arrangement and that he did not keep records of it beyond the bank statements.[97]

It is unnecessary (and likely infeasible) to determine exactly how much cash Respondent received from Jablonski as a result of the arrangement—the Parties' agreement that it was at least $50,000 is surely sufficient for the purposes of this enforcement action. The undersigned notes, however, that the bank statements adduced by Enforcement Counsel cast doubt on both the amount that Respondent claims to have been paid in total and his asserted timeline. Even presuming that the earliest and largest cash advance of $6,000 on September 29, 2017 was for a demolition crew rather than Respondent, there are too many cash advances over too long a time to comport with Respondent's representations. As long as one credits Jablonski's testimony and finds that *at least some* of the cash advances in the latter half of 2017 and in September and October 2018 are attributable to the off-book arrangement, which (in absence of any evidence to the contrary) the undersigned does, it is not possible for either Respondent's figure of $52,023 or his testimony that the payments began in January 2018 and ended in August 2018 to be accurate.

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[93] *See* Jablonski Tr. 107:8-108:4, 110:15-23.

[94] *See id.* 112:6-8.

[95] *See id.* 112:12-18 ("I do recall one time, in this same range of time, that I purchased a house and I did have a crew come out to rip out carpets and take down old wallpaper. And I did pay basically a demolition crew in cash. That's the only time I ever used this method of getting cash out. That's the only other time I had done that.").

[96] *See id.* 199:5-200:8.

[97] *Id.* 198:20-21; *see id.* 201:8-14, 216:19-24.

The first two cash advances, requested on September 29, 2017 and October 20, 2017, together total $11,000.[98] Removing *both* of these advances from the tally of payments to Respondent and presuming that the next advance marked the start of payment under the arrangement yields a total of $52,000, in line with Respondent's claim. But Respondent is also adamant that the payments did not begin until January 2018 at the earliest, and the total amount in cash advances in the 2018 calendar year was only $29,600.[99] Taking Respondent at his word that the last payment came in August 2018, moreover, would mean that he was paid no more than $20,600, rather than the $52,023 that he confidently claims to have tallied. (There was also no cash advance recorded in August 2018, according to Enforcement Counsel's exhibits, or indeed at any point between early July and late September of that year.)

Furthermore, given Respondent's statement that there would be a two-month lag each time between a loan funding and Jablonski paying Respondent half of the resultant commission,[100] it cannot be true that the arrangement was first proposed in October 2017, as Respondent avers, unless none of the five cash advances between September 29, 2017 and November 10, 2017 are relevant to this action, which is vanishingly unlikely (and which would mean that Respondent could have received no more than $37,000 in any event, since those pre-December advances total $26,000 alone).[101] One way or the other, Respondent's expressed certainty regarding core aspects of the arrangement's scope and timeline must be misplaced, mistaken, or contrived to mislead.

Finally, in addition to whatever he gained in cash from Jablonski's personal commission, Respondent received his normal Area Manager override compensation based on the volume of

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[98] *See* EX 29 at 4; EX 30 at 3.

[99] *See* EX 32 at 3; EX 33 at 6; EX 34 at 3, 6; EX 35 at 3; EX 36 at 3, 5.

[100] *See* JX 2 (Maffettone Dep.) 101:15-22; Maffettone Tr. 521:24-522:2 ("Once a loan funds, we get paid 30 days after that loan funds or maybe more. So if a loan, for example, funds in December, you wouldn't get paid on it until the end of February.").

[101] *See* EX 29 at 4; EX 30 at 3, 4, 6.

loans originated by his subordinates, including every loan that was subject to the off-book arrangement, thus being compensated twice on those loans in contravention of Bank policy.[102] At the hearing, Respondent estimated that he had gained $9,000 of impermissible override payments in this manner, which he did not return to the Bank.[103]

Respondent's Continued Involvement in the Loan Process

When describing the division of labor on the origination of loans subject to the off-book arrangement, the respective accounts of Jablonski and Respondent could hardly be more divergent. According to Respondent, he "was intimately involved with every one of these loans," shepherding them from origination to funding just as he did as Producing Sales Manager, except that they were being originated under Jablonski's name rather than his own.[104] Respondent has asserted that his work on the loans in question amounted to "loan officer tasks" that were "outside of what the responsibilities of an Area Manager would be."[105] To wit, Respondent recounted a variety of tasks that he performed to help advance the subject loans, including "making sure the appraisal was ordered," "making sure that all documents were collected," "mak[ing] sure the loan was structured and submitted to underwriting," and generally following up with the referring agent throughout the process and after the loan was closed.[106] Respondent stated that if there was no documentary evidence of the services he provided, this was because it was all being done by phone calls, text messages, in-person meetings, or by Respondent's assistant at his direction.[107]

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[102] *See* Maffettone Tr. 439:13-440:2, 440:16-22; *see also* Notice ¶ 54; Answer ¶ 54.

[103] *See* Maffettone Tr. 440:7-15.

[104] *Id.* 451:10-11; *see also id.* 421:6-8.

[105] JX 2 (Maffettone Dep.) at 130:9-22; *see also* Maffettone Tr. 441:11-14 ("The off-the-book arrangement between Matt and myself was a partnership. I was pretty much doing the same exact things I was doing with the loans when I was a loan officer."), 504:22-505:2 (agreeing that "the services [he] performed pursuant to the off-book arrangement were completely in addition to everything [he was] doing as an Area Manager").

[106] Maffettone Tr. 441:24-443:7; *see also id.* 459:22-460:1.

[107] *See id.* 484:23-488:8 (stating, among other things, that he "had hundreds of calls with the clients and realtors" for the off-book arrangement loans, that "the services that [he] performed would not be over email," and that his business is "primarily . . . done over the phone and in person"); *see also id.* 484:7-22 (agreeing that his assistant

With respect to Jablonski's own role in the process, Respondent has alternated between describing the arrangement as a "partnership" in which Jablonski "was heavily involved in the processing of the loans and bringing them to closing,"[108] and minimizing Jablonski's contributions by characterizing his primary value as being someone in a producing position in whose name Respondent could continue to originate loans and maintain his referral relationships.[109] It is also worth noting that in Respondent's 2019 sworn statement to the OCC, he described his own involvement in the loan process in connection with the arrangement as much more discrete, leaving the bulk of the work to Jablonski.[110] Regardless, however, Respondent has claimed that he performed tasks for loans subject to the off-book arrangement that he did not do for loans being originated by other loan officers under his purview.[111] When asked why he only did these things for the loans of one loan officer out of the fifty who reported up through him, Respondent replied: "[I]t wasn't my job responsibility to do it for the rest of them."[112]

By contrast, Jablonski testified that he and his team did virtually everything in originating and advancing the loans subject to the off-book arrangement, and Respondent virtually nothing beyond receiving updates at the weekly pipeline review meeting.[113] Jablonski stated that it was

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is the one who would have made sure appraisals were ordered and rate locks were done).

[108] *Id.* 441:15-17; *see also* JX 1 (Maffettone S.S.) 47:9-13.

[109] *See*, *e.g.*, Maffettone Tr. 446:8-12 (Q: And is it correct that you passed that client off to Matt Jablonski and Bob Anderson? A: I wouldn't say pass, but I would definitely say that I made the introduction to my team so that the loan could be placed in Matt Jablonski's name."), 448:15-17 ("I instructed my team to help handle the loan with me. Again, by default, I couldn't put loans in my name. So it would have to go under Matt's name."), 449:9-13 ("Q: So your team was the one actually discussing rates and qualifications with the client? A: I couldn't myself, because it was under Matt's name, lock in a rate, so either Bob or Matt would actually have to [do that]. . . . I could have easily discussed rates and qualifications with them, but I did make them available to Bob and Matt as well.").

[110] *See* JX 1 (Maffettone S.S.) 46:15-23 (stating that he "had the initial conversation with both the referral partner and the client," "gave weekly updates to the referral partner throughout the transaction," spoke with the client about pricing, and sometimes took the application itself, "depending on my schedule"). Respondent's recollection of the scope of his own role in originating these loans appears to have evolved since then.

[111] *See* Maffettone Tr. 457:16-20, 460:10-13; *see also* JX 2 (Maffettone Dep.) 130:9-22 ("Q: Did you perform similar activities on loans with loan officers other than Mr. Jablonski? A: I don't believe so.").

[112] Maffettone Tr. 460:2-9.

[113] *See* Jablonski Tr. 99:24-100:5 ("Q: Would Mr. Maffettone have any other involvement with loans subject to the referral arrangement? A: Other than the pipeline review meeting, in most instances, nothing at all. If he got a phone

never part of the arrangement that Respondent would do any extra work on the loans he had a hand in referring.[114] Rather, Jablonski described the arrangement like this:

> Most of the loans were referred directly to me by the agents in these offices. And myself and my team would get them through the loan process from start to finish. Everything that had to be done during that process was handled by myself and my team. And [Respondent's] only involvement was that pipeline review meeting where this is what's going on with them.[115]

Jablonski testified that he had been in a position to know whether loan files subject to the off-book arrangement had been advanced through the Bank's loan systems, and he never had any indication that Respondent had done anything to advance the files.[116] Bob Anderson likewise testified at the hearing that, in his time as Jablonski's assistant, he saw no indication that Respondent was doing "any work to advance Mr. Jablonski's loans in the bank system."[117] Anderson also agreed with Jablonski that "[o]ther than handing off the leads," he did not observe Respondent "doing any additional work on [Jablonski's] loans."[118] When presented with prior deposition testimony in which he characterized Respondent as being "involved in the loan process" following his promotion to Area Manager, Anderson clarified that the loan-related activities that he observed from Respondent, such as "checking up on people," "getting back to people," and "getting [people] pre-approved" for loan applications, were "consistent with what [he] would expect an Area Manager to do."[119]

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call from one of the loans that were referred directly to him, he might have provided an update to that referral source, but no actual work on the loan itself.").

[114] *See id.* 98:22-25.

[115] *Id.* 102:18-24.

[116] *See id.* 294:10-23.

[117] Anderson Tr. 312:15-23.

[118] *Id.* 312:6-14.

[119] *Id.* 319:18-319:5, 322:3-12.

In sum, Respondent has asserted that he did most of the "loan officer" work originating each of the loans subject to the off-book arrangement; Jablonski has testified otherwise, with Anderson's corroboration. The undersigned concludes that it is plausible that Respondent would have a heightened interest in helping to advance loans coming to Jablonski from Respondent's preexisting referral sources, particularly given his strong and repeatedly expressed desire to preserve "the relationships and the clients that [he] had cultivated for 15 years."[120] The undersigned also agrees with Respondent that Jablonski and Anderson would not necessarily be in a position to see all of the ways that Respondent could have assisted with the loans during the origination process, given his stated predilection for telephone calls and meetings in person. But the undersigned ultimately finds that there is a preponderance of evidence that there were at least some loans subject to the off-book arrangement for which Respondent did not do any work outside of his normal duties as Area Manager but got compensated with half of Jablonski's commission nevertheless. Respondent had greatly expanded supervisory responsibilities in his new role, including a much larger geographic area and many more loan officers under his supervision, and while he may have had a personal and financial incentive to treat the loans being originated by Jablonski with more attention than other loans, it is not likely that he would be able to sustain the level of involvement that he claims, particularly in the absence of documentary evidence and considering the testimony of Jablonski and Anderson that Respondent was doing nothing tangible to advance the loans in the Bank's system. The undersigned therefore finds that the compensation Respondent received on a given loan under the off-book arrangement was not based in any respect on the level of work that Respondent may or may not have done to originate that loan, either in his official capacity as Area Manager or otherwise.

[120]JX 1 (Maffettone S.S.) 58:19-21; *see also*, *e.g.*, JX 2 (Maffettone Dep.) 49:25-50:2; Maffettone Tr. 453:19-20.

Respondent's Efforts to Conceal the Arrangement

Although Respondent contends in the instant briefing that he never deliberately acted to conceal the off-book arrangement from the Bank,[121] the record is replete with evidence to the contrary. To begin with, Respondent testified that he "was not candid with the Bank" and that he did not disclose the existence of the arrangement to the Bank or anyone else.[122] He was also aware, or should have been aware, that the Bank did not know that he was soliciting money from Jablonski in exchange for providing access to referral sources, and further that the Bank would not have permitted him to continue the arrangement if and when it came to light. To the extent that Respondent viewed the arrangement as a way for him to continue originating loans and earning commission from his referral sources despite his promotion to a non-producing position, he was also aware or should have been aware that the Bank prohibited him from doing so. All of this suggests that Respondent's failure to disclose any aspect of the arrangement to anyone at the Bank at any point during its time did not occur simply by happenstance.

The undersigned additionally credits Jablonski's testimony that Respondent asked that payments pursuant to the arrangement be made in cash because he was concerned about there being a paper trail.[123] Respondent concedes that the payments from Jablonski were not recorded in the Bank's payroll system or memorialized in any fashion, nor were they ever discussed in the presence of others at the Bank. While Respondent did hold weekly pipeline review meetings with Jablonski and his team, he avoided any mention of the off-book arrangement during those meetings,[124] even though (according to Respondent) he knew that commission-splitting

[121] *See*, *e.g.*, Resp. Reply at 27 (stating that there was "no active concealment on the part of Mr. Maffettone"), 29 (stating that he "did not intentionally conceal material information . . . [or] intentionally mislead the Bank").

[122] Maffettone Tr. 423:16-17; *see id.* 424:1-3 ("I didn't hide it from anyone, but I certainly didn't go out of my way to broadcast it and disclose it to anyone.").

[123] *See* Jablonski Tr. 106:10-12.

[124] *See* Anderson Tr. 313:10-12.

arrangements between managers and subordinates were generally permitted in the industry and had previously occurred at the Bank.[125] This, again, points to an intent to conceal.

The payments themselves offer powerful evidence of a deliberately clandestine arrangement as well. Payments under the arrangement were typically made in the parking lot outside of the Bank building in which Respondent had his office or otherwise off premises, including Jablonski bringing payments to Respondent's house over the weekend or arranging to put them in his mailbox.[126] Jablonski testified that on one occasion, he left the payment "in an envelope in a desk drawer in an unused office" near Respondent's office, which prompted Respondent tell him "not to do that anymore," because "there could be cameras."[127] Jablonski stated that after that, Respondent made the suggestion "to do payments in the parking lot . . . so nobody else would see it."[128] The undersigned credits this testimony and finds, overall, that Respondent made an affirmative effort to conceal the existence of the arrangement from others.

Tracking the Referrals

Respondent also engaged Anderson to track Jablonski's referral sources on a monthly basis to ensure accurate payment under the arrangement. According to Anderson, Respondent asked him "[t]o provide a list of fundings and new applications of the loan amount and the referral source" for Jablonski's loans, but not for any other loan officer for whom Anderson served as assistant.[129]

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[125] *See* DaCunha Tr. 377:24-378:3 (Q: "[Y]ou have given an example at Wells Fargo where Mr. Maffettone was a manager and was permitted to split revenue with a junior employee, correct? A: Correct."); Maffettone Tr. 425:18-21 (stating his understanding that his predecessor "was getting paid for loan origination activities as the Area Manager"); Resp. Br. at 15 ("In good faith, Mr. Maffettone believed that he was continuing a compensation arrangement that was already established by the Bank in other situations which included a junior loan officer program and a team of loan officers who split commission on their pipeline."); Reply at 6 (asserting without evidence that "Citizens Bank had previously approved of comparable arrangements in the past").

[126] *See* Jablonski Tr. 117:16-118:6; EX 16 through EX 27 (text messages between Respondent and Jablonski discussing payment logistics).

[127] Jablonski Tr. 116:21-117:13.

[128] *Id.* 117:19-118:1.

[129] Anderson 307:4-14; *see* Jablonski Tr. 105:21-106:3 ("[W]hen I originated loans, Bob Anderson would reach out and ask me specifically who referred those loans to me. And Bob Anderson would maintain a list showing who

Anderson continued to track these referrals at Respondent's direction even after he stopped working directly for Jablonski.[130] Anderson provided this information to Respondent from the time that Respondent became Area Manager until his resignation from the Bank.[131]

The email chain between Respondent and Anderson about the month-to-month transmittal of the requested information shows that Respondent was inordinately focused on the question of who had referred Jablonski's loans.[132] Anderson believed that Respondent asked him to track referral sources for Jablonski but not other loan officers because Respondent "was handing off leads to Matt Jablonski for referral that [Respondent] had cultivated over the years."[133] Respondent did not tell Anderson about the off-book arrangement.[134]

Respondent has acknowledged that he tracked the referrals on Jablonski's loans through Anderson, although his candor on this point has varied significantly over time. At the hearing, Respondent testified that he asked Anderson for referral information because "as part of the pipeline review and review of the loan officer, we would want to know where business was coming from."[135] He stated that he "did the same exact thing with other loan officer assistants and their loans," not just Anderson and Jablonski.[136] Respondent downplayed the notion that he wanted

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the referral sources were on those loans. . . . He [told] me that Mr. Maffettone asked him to take that information for him.").

[130] *See* Anderson 322:13-19.

[131] *See id.* 308:14-17.

[132] *See* JX 33 (August and September 2018 email chain) ("Referral Tracking Emails") at 2 ("Please email me the list below for August – Fundings and Apps and who referred"), 3 ("Reminder to please get me the referral sources on the applications"), 5 ("[P]lease get me the referral sources"), 7 ("Please email me the funding and apps for July with the referral partner as in the past").

[133] *See* Anderson Tr. 308:8-13; *see also id.* 307:17-22 ("My understanding was that . . . if it didn't work out as Area Manager, [Respondent] wanted to maintain the relationships that he had cultivated over a long period of time with his referral sources. And this allowed him to maintain that relationship, but pass the lead on to Matt Jablonski.").

[134] *See id.* 313:7-9.

[135] Maffettone Tr. 509:22-510:2; *see also id.* 513:16-19 ("Quite frankly, we would put the referral sources in the system as well, so I could have just gone into the system and taken out the report, but I guess this was a little lazy or easier for me to do.").

[136] *Id.* 512:9-10.

regular information on Jablonski's loans in particular because they involved his prior referral sources, stating that "I wouldn't have needed the information on my referral sources. I already had that information."[137]

During his 2019 sworn statement, however, Respondent made it clear that he was focused on finding out what Jablonski was doing with Respondent's referral sources:

> Q: Can you give me some context about what sort of things you were looking for here from Bob Anderson?
>
> A: I was looking for primarily any loans from my book of business and my referral partners; hence, asking, you know, to include the referral source.
>
> Q: And when you say from your book of business, can you explain what you mean by that?
>
> A: Yeah. So either past clients, repeat clients, clients that I cultivated over the years, referral partners that were cultivated by me either previous to Citizens or while at Citizens that I continued to cultivate.[138]

Respondent further testified in his sworn statement that he held pipeline review meetings "specifically with Matt Jablonski" because he was the person "that I had designated as the loan officer to transition my book to at Citizens' request when I got the offer, promotion offer."[139]

By his 2020 deposition, Respondent had changed his mind. When asked whether he had "ask[ed] Bob Anderson to track any specific information for these pipeline meetings," Respondent replied: "No. I was already tracking it and Citizens as a whole was tracking it."[140] The undersigned notes that this directly contradicts his sworn statement testimony cited above, despite Respondent's averment that he had reviewed the transcript of the sworn statement prior to the deposition and that it was "an accurate and complete reflection of [his] recollection of events."[141]

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[137] *Id.* 514:15-20.
[138] JX 1 (Maffettone S.S.) 42:21-43:9.
[139] *Id.* 45:3-8.
[140] JX 2 (Maffettone Dep.) 93:13-16.
[141] *Id.* 13:5-8.

The Arrangement is Discovered

Fernando DaCunha was a former subordinate of Respondent's at Wells Fargo Bank ("Wells Fargo") who joined the Bank in late 2017 as an Assistant Producing Sales Manager, in which capacity he was Jablonski's supervisor and reported directly to Respondent.[142] Sometime in the spring of 2018, Jablonski came to DaCunha and disclosed the details of the off-book arrangement.[143] DaCunha testified that Jablonski seemed "distraught" and "out of options" during that conversation.[144] He recalled that Jablonski "was worried that if he were to terminate the agreement, there might be some other action taken where he would be terminated or his reputation would be slandered or something like that."[145] According to Jablonski, DaCunha confided that something similar had happened between DaCunha and Respondent while at Wells Fargo[146] and told him that he should end the arrangement immediately.[147] Contrary to DaCunha's advice, Jablonski did not end the off-book arrangement, and DaCunha was later terminated for his failure to report the arrangement to the Bank.[148]

Jablonski told another colleague, Matthew Fox, about the arrangement at a sales event in September 2018.[149] Fox relayed their conversation, which he said lasted over an hour, like this:

> The conversation started out with Matt expressing how unhappy he was at the company. . . . From there, he opened up about he felt stuck in a relationship between him and Biagio in terms of even though he was producing all this business, he wasn't actually making money doing all this work.

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[142] *See* Jablonski 137:11-20; DaCunha Tr. 353:4-23.

[143] *See* Jablonski 136:4-137:10; DaCunha Tr. 354:21-356:19.

[144] DaCunha Tr. 356:11.

[145] *Id.* 356:12-15; *see also id.* 356:18-357:4 (stating that Jablonski was "anxious" and "fidgety" and recounting that Jablonski "felt pressured into this arrangement with Mr. Maffettone" and had agreed because "[i]t was supposedly temporary").

[146] *See infra* at 34-36.

[147] *See* Jablonski Tr. 238:4-8; DaCunha 357:11-21.

[148] *See* Jablonski Tr. 238:9-10; DaCunha Tr 360:9-18.

[149] *See* Jablonski Tr. 138:7-139:18.

> He explained that he was required to pay half of his commissions to Biagio for various agents, real estate agents, from Biagio's book of business. . . . [T]here was an actual list in writing of agents that Biagio provided to him.
>
> And he also explained that there was a, I believe it was a junior loan officer or assistant, somebody that was keeping tabs on the arrangement on what loans closed for which agent. We talked in depth quite a bit about that part of it. . . . [H]e was very clear that he wanted out of the arrangement. He felt stuck.[150]

Fox described Jablonski's demeanor as "very distressed" and "very unhappy."[151] According to him, Jablonski stated that "when the relationship began, it was supposed to be short-term and that it ended up being a lot longer than he wanted it to be."[152] Fox testified that he "was just stunned at what [he] had heard," and then shared the details of the conversation with his manager at the Bank the following day.[153] Fox's manager was "just as shocked as [he] was" and reported the arrangement to the Bank's Human Resources Department.[154]

Respondent's History

Generally speaking, there is no evidence of Respondent engaging in behavior similar to that alleged in this action—that is, soliciting money from subordinates in exchange for access to referral sources, or otherwise taking part in financial arrangements with other bank employees that existed outside of the bank's payroll system—during his career.[155] The one exception is the

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[150] Fox Tr. 327:23-329:24.

[151] *Id.* 330:2-5.

[152] *Id.* 337:13-15.

[153] *Id.* 330:16-25; *see also id.* 331:3-5 ("I was in a management role. It was an employee who was vulnerable, and I felt I had a duty to forward that information on to [my manager].").

[154] *Id.* 331:10-16.

[155] In challenging Jablonski's credibility and narrative of events, Respondent's counsel made much throughout the hearing of an arrangement between Jablonski and his assistant, Donna Attili, in which Jablonski would reward Attili with bonuses outside of the Bank's system for her work bringing referrals to the Bank and helping to originate loans. *See* Jablonski Tr. 129:24-132:6 (noting that the bonuses were exclusively paid via Venmo); *see also*, *e.g.*, Resp. Reply at 10 (referencing Attili). Despite Respondent's repeated efforts to draw equivalencies between Jablonski rewarding a subordinate for work performed and Respondent eliciting money from a subordinate for access to referral sources, circumstances in which the respective power dynamics are indisputably and significantly different, the undersigned finds that the facts of Jablonski's arrangement with Attili are neither relevant nor

transaction alluded to above between Respondent and DaCunha when both were employed at Wells Fargo, and it is worth briefly unpacking each individual's account of the incident.

As a junior loan officer at Wells Fargo, DaCunha had a split commission arrangement with Respondent that had been approved by that bank and was processed through the bank's system, in which 75 percent of the commission would be given to the person who originated the lead for a given loan, while 25 percent went to the other individual.[156] Separate from this bank-approved arrangement, DaCunha testified that on one occasion while he was transitioning from junior to senior loan officer (and thus no longer had to split commissions with Respondent), Respondent asked that DaCunha compensate him in cash outside of the bank's system for a loan that DaCunha had originated based on a referral from Respondent.[157] According to DaCunha, Respondent was not permitted to originate the loan himself because it was for a family member, so he assigned the loan to DaCunha's pipeline and it closed in DaCunha's name.[158] DaCunha stated that "once the commission was paid, there was a conversation in which [Respondent] requested payment via cash to compensate him because it was, per his mind, his loan."[159] DaCunha recalled that Respondent calculated the specific amount owed to him, which was approximately $1,600, in a similar manner to Jablonski's testimony: "[H]e just took the gross commission and subtracted any taxes that may have been incurred and requested his portion of the commission."[160]

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material for determination of the question of whether Enforcement Counsel has satisfied its burden under the applicable statutes for the entry of a prohibition order and assessment of a civil money penalty against Respondent for his conduct in connection with the off-book arrangement.

[156] *See* DaCunha 343:2-13, 344:13-16.

[157] *See id.* 344:25-345:2, 346:2-21.

[158] *See id.* 346:2-16.

[159] *Id.* 346:18-21.

[160] *Id.* 347:10-13. Like Jablonski, DaCunha stated that it was Respondent who requested that the payment be made in cash. *See id.* 347:22-25 ("[H]e was asking for the cash prior to a weekend because I believe he was going on a vacation, like a guy's trip or something like that. He asked that I obtain the cash payment and pay him that day.").

Perhaps unsurprisingly, Respondent has a different recollection of events. Respondent testified that DaCunha was simply paying Respondent back for a personal loan that he had previously borrowed from Respondent in cash.[161] According to Respondent, DaCunha "is a compulsory liar" and that the actual amount in question was $1,800.[162] Respondent further testified that he recalled the incident vividly because "I have lent money to friends over the years, so I remember."[163] Respondent stated that he never would have given a family loan to DaCunha or put it in DaCunha's name in order to get paid for it outside of the system, because Wells Fargo had processes in place to refer such loans to other officers and be compensated for them.[164]

The undersigned finds that of the two accounts, DaCunha's is the more detailed and more plausible. As mentioned, it is also consistent with Jablonski's testimony regarding aspects of the off-book arrangement. Furthermore, the undersigned credits Jablonski's recollection that DaCunha referenced this incident when Jablonski told him about his arrangement with Respondent, which DaCunha would have had no reason or impetus to do if the payment were merely a return of a personal loan. At the same time, Respondent's explanation of events differs drastically from DaCunha's, and no evidence has been presented as to whether Wells Fargo loan officers seeking to be compensated for loans to family members could, in fact, have easily done so through official channels, which is a relevant factor. Accordingly, the undersigned will not give this incident significant weight when determining the extent of Respondent's misconduct and culpability or the appropriateness of the civil money penalty amount sought by Enforcement Counsel.

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[161] *See* Maffettone Tr. 530:5-10; JX 2 (Maffettone Dep.) 144:10-145:22.

[162] Maffettone Tr. 530:1-5 ("I have never seen someone lie so much."); *see also id.* 530:9-10 ("He asked me if he could borrow some money, which I immediately agreed to.").

[163] *Id.* 532:6-10.

[164] *See id.* 531:13-19.

Investigation and Aftermath

After becoming aware of the referral arrangement in the fall of 2018, the Bank initiated an internal investigation, interviewing Jablonski and seeking to interview Respondent.[165] On October 17, 2018, Jablonski received a call from Human Resources requiring him to be at the Bank's Corporate Security office in Newark, New Jersey in two hours.[166] In a telephone conversation between Jablonski and Respondent before Jablonski arrived at Corporate Security, the two discussed the possibility that he was being called in due to late timesheets or removing a printer from Bank premises.[167] Jablonski testified that Respondent then told him, "if it's the other thing," which Jablonski took to mean the off-book arrangement, "deny, deny, deny."[168]

On October 25, 2018, one day before his own interview with Bank investigators, Respondent submitted an immediately effective resignation.[169] On November 6, 2018, Bank investigators completed an initial report of the circumstances surrounding the off-book arrangement.[170] The undersigned notes that Jablonski's contemporaneous account of events as relayed in this report is strikingly consistent with his hearing testimony.[171] On November 19, 2018, Senior Vice President and Managing Counsel Joel Barras authored a follow-up report stating the Bank's conclusion that Respondent had required Jablonski "to pay [him] unauthorized referral fees for mortgages sourced through specified realtors from the Douglas Elliman firm," something that

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[165] *See* Answer ¶¶ 58, 60-61.

[166] *See* Jablonski Tr. 139:15-:140-7.

[167] *See id.* 141:10-142:13; Maffettone Tr. 495:22-496:13.

[168] Respondent denies this. *See* Jablonski Tr. 142:1-13; Maffettone Tr. 496:14-16 ("My reply to him was, don't worry, just tell them what you know and tell them the truth, and that's easily explainable, the printer.").

[169] *See* Answer ¶¶ 60-62; Maffettone Tr. 501:22-502:3. Respondent stated that Corporate Security would not tell him what they wanted to talk about, but acknowledged that the off-book arrangement "would have been one of the things, one of the options, in my head." Maffettone Tr. 500:11-15.

[170] *See* RX 1 (Investigation Report).

[171] *See id.* at 3-4. Jablonski was not terminated because he cooperated with the investigation, and the Bank "decided to give him credit for cooperating in hopes that that would encourage others to similarly cooperate in future investigations." Barras Tr. 614:22-615:1.

"constituted egregious violations of multiple Bank policies."[172] On February 15, 2019, the Bank's Conduct Office completed its final review and report regarding the off-book arrangement, which repeated these conclusions and was circulated to Bank executives and to regulatory agencies, including the OCC.[173]

Barras testified that the Bank suffered reputational harm, including in its recruiting and in its relationship with Douglas Elliman, as a result of the off-book arrangement.[174] The November 6, 2018 Investigation Report also relayed the statement of an external loan officer, made to Bank personnel in early October 2018, that "he had heard that [loan officers] who work for Citizens Bank are required to pay their manager an envelope of cash to gain access to high performing [Douglas Elliman] brokers."[175] In addition, Barras, Ace Watanasuparp, and Chace Gundlach all testified that Respondent's involvement in the off-book arrangement was foreseeably detrimental to the managers and loan officers he was supervising at the Bank.[176] Respondent's expert agreed that Respondent's conduct violated Bank policy, "was not appropriate behavior in a regulated financial institution," and was cause for termination.[177]

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[172] RX 2 (November 19, 2018 Home Mortgage Follow-Up memorandum from Joel Barras to Kate Gallivan) ("Follow-Up Report") at 1. Among other things, the Bank's Code of Business Conduct and Ethics ("Code of Conduct") at the time prohibited "kickbacks or other similar payments in any form . . . made directly or indirectly to or for anyone for the purpose of obtaining or retaining business or obtaining any other favorable action," as well as the "use [of] corporate property, information, or position for personal gain." EX 37 (2017 Code of Conduct) at 8, 12; EX 38 (2018 Code of Conduct) at 8, 12.

[173] *See* JX 17 (Conduct Office Report) at 1.

[174] Barras 603:21-24; *see also id.* 626:1-6 (noting the "tremendous harm" to the Bank's recruiting to have a reputation, "particularly in New York, as an employer that has managers requiring payments from loan officers to managers"), 627:24-628:1 ("There was clear reputational harm that we had to repair through a number of conversations and interactions with [Douglas Elliman].").

[175] RX 1 (Investigation Report) at 8.

[176] *See* Watanasuparp Tr. 34:16-19 ("When you transition into that [Area Manager] role, if you have your own personal production, it takes away the value that you'll have for your team members."); Gundlach Tr. 54:22-25 ("Since your responsibilities have grown [as Area Manager], your organization has grown, the main responsibility is to support the people on your team, help them grow their production."); Barras Tr. 630:1-5 (noting that if Jablonski received all of Respondent's referrals from his valuable Douglas Elliman sources, it would be "to the detriment of other loan officers").

[177] Faulkner Tr. 646:6-16; *see also id.* 648:12-15.

V. Analysis

The April 5, 2021 Order in this case concluded, based on the undisputed material facts, that Respondent had breached the fiduciary duty of loyalty he owed to the Bank and received personal financial gain in connection with the conduct described above, and that summary disposition in favor of Enforcement Counsel was appropriate on those issues.[178] Having made its factual findings, this Tribunal now addresses the remaining questions of law relevant to whether, and to what extent, Respondent has engaged in actionable misconduct and demonstrated a requisitely culpable state of mind sufficient for the imposition of the prohibition order and the assessment of a $150,000 second-tier civil money penalty sought by the OCC under 12 U.S.C. §§ 1818(e) and 1818(i), respectively.[179] The undersigned also considers the appropriateness of the desired civil money penalty amount in light of the mitigating factors set forth in 12 U.S.C. § 1818(i)(2)(G).

A. Misconduct

Enforcement Counsel argues that, through his participation in the off-book arrangement, Respondent (1) accepted impermissible kickbacks in exchange for mortgage loan-related referrals in violation of Section 8(a) of the Real Estate Settlement Procedures Act ("RESPA"), codified at 12 U.S.C. § 2607(a); (2) corruptly accepted something of value in connection with the business of a financial institution in violation of the bank bribery statute, 18 U.S.C. § 215(a); (3) engaged in actionably unsafe or unsound bank practices; and (4) breached his fiduciary duties of loyalty and care to the Bank, any one of which is enough to fulfill Section 1818's misconduct elements. *See* EC Br. at 19-37. The undersigned will address each argument in turn.

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[178] *See* MSD Order at 17-20, 23.

[179] Respondent's admitted financial gain as a result of the off-book arrangement is alone sufficient to satisfy the "effect" elements of Sections 1818(e) and 1818(i). As discussed *infra* in Part V.B, the undersigned also finds that Respondent's conduct constituted a pattern of misconduct for the purpose of 12 U.S.C. § 1818(i)(2)(B)(ii).

1. The Off-Book Arrangement Violated RESPA

Section 8(a) of RESPA provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person."[180] In her MSD Order, the undersigned concluded that the "basic elements" of RESPA had been met: (1) Respondent had an "agreement or understanding" that mortgage loans would be referred to Jablonski for origination and settlement; (2) Jablonski gave Respondent a "thing of value" based on that agreement or understanding, namely periodic large sums of cash; and (3) the plain language of Section 8(a)'s prohibition of referral kickback agreements encompassed off-book arrangements between individuals at the same financial institution.[181] Nevertheless, the undersigned held that it could not be determined, based on the undisputed factual record at that time, whether Respondent had performed actual services in exchange for those referral fees within the meaning of RESPA's safe harbor provision, thus precluding summary disposition on that issue.[182]

Now that the record has been further developed, Enforcement Counsel again argues that payments under the off-book arrangement "were made by Jablonski to Respondent for access to referrals, not as compensation for services provided by Respondent," and do not fall within the statutory safe harbor. EC Br. at 22. Respondent, meanwhile, renews his argument that Jablonski's payments were compensating Respondent for work actually performed on the loans being originated, and argues for the first time that Jablonski was not paying for "referrals" *per se*, but for

[180] Real estate "settlement services" for purposes of this statute include "service[s] provided in connection with . . . the origination of a federally related mortgage loan." 12 U.S.C. § 2602(3).

[181] *See* MSD Order at 13 ("Section 2607(a) does not only govern scenarios where a referral fee is given to or received by a third party; referral arrangements between co-workers that occur outside the formal structures of the work environment . . . are equally within the statute's scope.").

[182] *See id.* at 15-17; 12 U.S.C. § 2607(c)(2).

"business that had already entered Citizens Bank," and therefore 12 U.S.C. § 2607(a) is entirely inapplicable. Resp. Br. at 1; *see id.* at 2-11. For the reasons below, Respondent is wrong.

Respondent Was Providing Referrals to Jablonski

Respondent contends that the off-book arrangement did not involve any "actual referrals," and thus could not have violated RESPA, because Respondent's referral of an agent to Jablonski did not have the effect of changing the financial entity that would be originating the resulting mortgage loan—that is, "[n]o consumer was being directed to Citizens Bank as a result of the alleged payment scheme," and the only difference for the Douglas Elliman agent and their client is that Jablonski would be the one at the Bank handling their loan rather than some other Bank loan officer. Resp. Br. at 2. In support of this argument, Respondent cites 12 C.F.R. § 1024.14 ("Regulation X"), a regulation promulgated by the Department of Housing and Urban Development to interpret RESPA. *See id.* Regulation X states, in relevant part, that "[a] referral includes any oral or written action directed to a person which has the effect of affirmatively influencing the selection . . . of a provider of a settlement service."[183] As Respondent's expert stated, the agent being referred by Respondent has already chosen the settlement service provider that will be originating the loan—namely, the Bank.[184] Therefore, the selection of provider is not being influenced by Jablonski's involvement in originating the loan, and no referral—and thus no RESPA violation—has taken place under the arrangement.[185]

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[183] 12 C.F.R. § 1024.14(f)(1).

[184] *See* Faulkner Tr. 637:13-15 (contending that "the referral had already come into the Bank" and "[t]he settlement service provider was already selected, Citizens Bank"); *see also id.* 658:3-10, 659:23-660:21.

[185] Respondent's expert also testified that the arrangement was not a RESPA violation because the purpose of RESPA is to avoid additional costs to the consumer as a result of improper kickback arrangements, and there were no increased consumer costs here. *See id.* 661:1-5. The expert later conceded, however, that whether or not there is consumer harm is not a relevant factor to determining if a RESPA violation has occurred, *see id.* at 667:7-10, and the undersigned does not give it weight in making her conclusion.

This argument fails on multiple levels. To begin with, the undersigned agrees with Enforcement Counsel that Respondent is simply reframing his prior argument, already rejected at the summary disposition stage, that improper referral arrangements cannot occur between two individuals at the same institution. *See* EC Reply at 4. To that, the undersigned repeats her previous holding: if there is an arrangement between two co-workers to exchange referrals for cash in a manner that is not disclosed to, or approved by, their employing institution, then this conduct falls within the scope of RESPA.[186] While arrangements for splitting referral fees at banks are to all appearances common and permissible when executed through the bank's payroll system and subject to bank oversight, a clandestine and unapproved arrangement between employees offers no similar safeguards and should certainly not be entitled to *de facto* exclusion.

Second, there is nothing in Regulation X that mandates that a "provider of a settlement service" must be a bank rather than an individual. *See* EC Reply at 6-7. To the contrary, the regulations (like RESPA itself) define "settlement services" to include "the taking of loan applications, loan processing," and any other services related to the origination of mortgage loans, all of which Jablonski indisputably provided as loan officer.[187] By directing business to Jablonski, Respondent is influencing his referral source's choice of one loan officer over another, and thereby one settlement service provider over another, to originate the source's loan—this is squarely within the ambit of Regulation X. Moreover, RESPA prohibits the referral of origination-related services from one "person" to another "person" in exchange for a thing of value.[188] Respondent is a person;

[186] *See* MSD Order at 13-14.

[187] 12 U.S.C. § 2602(3) (defining "settlement services"); 12 C.F.R. § 1024.2 (same). In this vein, the undersigned agrees with Enforcement Counsel that the report submitted by Respondent's expert undermines Respondent's argument by presuming that individuals can be "settlement service providers" in their personal capacity. *See* EC Reply at 7; JX 16 (Faulkner Expert Report) ¶ 37 (stating that "Mr. Maffettone performed settlement services, as defined by RESPA, on loans Mr. Jablonski originated."). Respondent's expert also previously testified that Respondent providing a lead to Jablonski *was* a referral under RESPA, before reversing herself at the hearing. *See* JX 14 (Faulkner Dep.) at 78:2-25; Faulkner Tr. 658:17-18.

[188] 12 U.S.C. § 2607(a).

Jablonski is a person: this is good enough.[189] There is no support for Respondent's novel and self-serving notion that only certain classes of "persons" can be settlement service providers under Regulation X or that loan referrals, at least for RESPA purposes, can only be given to institutions rather than individual loan officers.[190]

Third, Respondent himself repeatedly uses the term "referral" to mean a non-producing manager sending business to a producing subordinate, over the course of his hearing testimony, his deposition, and his sworn statement to the OCC. At the beginning of his December 2020 deposition testimony, for example, Respondent characterized the off-book arrangement as "a mutually beneficial relationship whereby *I referred Mr. Jablonski my clients, my realtors*."[191] Likewise, in his sworn statement, Respondent testified that the purpose of the pipeline review meetings was "[t]o get status on loans, specifically on . . . *referrals that I had made to Matt, to Bob and Donna*."[192] During that same testimony, Respondent stated that the off-book arrangement encompassed "any loans *that I had referred Matt* from, you know, my book of business or my referral sources."[193] And in explaining his understanding of his predecessor's compensation scheme at the hearing, Respondent testified that that individual "was a big producer prior to going into that non-production role and bringing in and divvying up or *referring the loans to various loan officers* at [the Bank]."[194] At minimum, this establishes that Respondent understood himself

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[189] *See id.* § 2602(5) (defining "person").

[190] *Cf.* Black's Law Dictionary (11th ed. 2019) (defining "referral" as "[t]he act . . . of sending or directing to another for information, service, consideration, or decision").

[191] JX 2 (Maffettone Dep.) 18:23-19:2 (emphasis added); *see also*, *e.g.*, *id.* 89:20-21 ("I kept track of all my clients and my referrals to Matt."), 92:9-16 (Q: And I guess of those loans how would Mr. Jablonski know which ones would be subject to the arrangement? A: He would know because I referred it to him."), 111:11-18 ("I started referring my deals to other loan officers at Citizens Bank.").

[192] JX 1 (Maffettone S.S.) 43:20-44:8 (emphasis added).

[193] *Id.* 72:4-9 (emphasis added).

[194] Maffettone Tr. 425:426:4 (emphasis added).

to be engaging in loan referrals to specific officers, notwithstanding that the business on the loan in question may have "already entered" the Bank as a whole.

Finally, and most crucially, Respondent made it clear on multiple occasions during the hearing that he did not have to be providing these referrals to *anyone* at the Bank.[195] By Respondent's own admission, he was passing contacts on to Jablonski that might not have come into the Bank otherwise, belying his current argument. Indeed, as Area Manager, Respondent was not permitted to originate, and so a prospective loan would not have "entered Citizens Bank," Resp. Br. at 1, as he puts it, until the point that it was given to a producing loan officer—and Respondent would not guarantee that this would happen absent the off-book arrangement. One exchange in particular highlights this point:

> Q: Notwithstanding the fact that the transition plan would be completely over after these 16 loans ran their course, it's your testimony that Matt Jablonski came to you and asked you to engage in what you call a partnership and to take 50 percent of his commissions going forward indefinitely?
>
> A: Matt approached me. And I'm not sure if you said it this way, but he's the one that suggested the 50 percent.
>
> Q: And he asked you to—notwithstanding the fact that the official transition plan would end after these 16 loans ran their course, he wanted to engage in an arrangement that would go forward indefinitely, is that your testimony?
>
> A: That's correct, because he knew that the clients I had and were referring to him would continue to refer to me. *And quite frankly, I was under no obligation to refer them to Matt or to anyone else, for that matter.*[196]

As this demonstrates, Respondent—despite being in a non-producing position—was willing to let his referral sources go to a different bank entirely if he could not be compensated for the referral by a loan officer who was willing to pay him money in exchange.[197] This is the very essence of a

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[195] *See* Part IV *supra* at 11-12.

[196] Maffettone Tr. 464:21-465:13 (emphasis added).

[197] *See id.* 430:7-16 ("Who would have gotten the commission on those would depend because *arguably those loans wouldn't even be coming into the Bank*. . . . I was not under any directive that I had to take my referral sources and

RESPA violation. The undersigned therefore holds that directing business from realtors to a particular loan officer within a given bank in exchange for off-book cash payments is a "referral" within the meaning of RESPA.

The Off-Book Arrangement Does Not Fall Under the RESPA Safe Harbor

Respondent's expert agrees that "a payment that is made in exchange for a loan referral and nothing else" would not qualify under the safe harbor exception.[198] Here, Enforcement Counsel has demonstrated by a preponderance of the evidence that the payments made by Jablonski to Respondent were solely made in exchange for referrals, and were not contingent in any way on any level of work Respondent performed in the origination process after the referral was made.[199] Enforcement Counsel has further demonstrated, moreover, that it is more likely than not that there are at least some loans (and perhaps many or most) subject to the off-book arrangement that Respondent did not do *any* work on above and beyond his normal duties as Area Manager, for which he was already being compensated.[200] Even if Respondent performed actual services, what he called "loan officer tasks"[201] and what others at the Bank might call "impermissible personal production for an Area Manager," on some of the loans within the meaning of the safe harbor, he did not do so on all of them.

At bottom, Jablonski was paying for referrals, in all their forms: referrals directly from Respondent, referrals from Respondent's referral sources, access to those sources to cultivate his own relationships for future referrals. Referrals were what he valued, because referrals led to business, and business led to commissions, to developing a referral network, to more business, to

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if a loan came in, after my transition period, to do anything in particular with that loan.") (emphasis added).

[198] Faulkner Tr. 664:12-21.

[199] *See* Part IV *supra* at 25-28.

[200] *See id.*

[201] JX 2 (Maffettone Dep.) at 130:10.

more commissions. And the payment to Respondent was the same—half of Jablonski's personal commission, net of taxes, on each loan funded from one of the referral sources—regardless of any subsequent level of assistance in originating the loan that Respondent may or may not have given. Respondent would be compensated equally on a $500,000 loan for which he did not lift a finger as for one on which he worked tirelessly. The statutory safe harbor therefore does not apply.

2. <u>It is Unnecessary to Decide Whether 18 U.S.C. § 215(a) Was Violated</u>

18 U.S.C. § 215(a), which courts have referred to as "the bank bribery statute,"[202] imposes criminal liability on any individual who, "as an officer . . . of a financial institution, corruptly solicits or demands for the benefit of any person, or corruptly accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business or transaction of such institution."[203] As with RESPA, this statute includes a safe harbor for "bona fide salary, wages, fees, or other compensation paid . . . in the usual course of business."[204] Enforcement Counsel argues that Respondent's conduct falls within the purview of this statute and constitutes a violation of Section 215(a) by the statute's plain terms. *See* EC Br. at 24-30. Respondent, on the other hand, argues both that he did not act "corruptly" under this statute and that Section 215(a) was enacted "to protect FDIC insured bank deposits by preventing bank officers and directors from extending unsound and improvident lines of credit" and is therefore inapposite here.[205]

The undersigned agrees with Respondent that, at the very least, the focus of the statute appears to be on preventing bank officials from accepting bribes from external sources in exchange

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[202] *See*, *e.g.*, *United States v. McElroy*, 910 F.2d 1016, 1021 (2d Cir. 1990); *accord United States v. Jennings*, 160 F.3d 1006, 1016 n.4 (4th Cir. 1998).

[203] 18 U.S.C. § 215(a)(2).

[204] *Id.* § 215(c).

[205] Resp. Reply at 30 (quoting *United States v. Stoecker*, 920 F. Supp. 867, 872 (N.D. Ill. 1996)); *see id.* at 29-36.

for engaging in risky activity, something that is not a perfect fit for the facts at hand.[206] This Tribunal will not extend the scope of the statute unnecessarily when there is ample evidence that Respondent has engaged in actionable misconduct for purposes of Sections 1818(e) and 1818(i) in multiple other respects. The undersigned therefore makes no finding as to whether or not Respondent's conduct under the off-book arrangement violated 18 U.S.C. § 215(a).[207]

3. Respondent Engaged in Unsafe or Unsound Bank Practices

As discussed in Part III *supra*, an unsafe or unsound banking practice is defined as "any action or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds."[208] Here, Respondent's expert has agreed that his conduct pursuant to the off-book arrangement was "contrary to accepted standards of prudent operation."[209] The only remaining question, then, is whether a possible consequence of that conduct was abnormal risk or loss or harm to the Bank. The undersigned concludes that it was.

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[206] *See*, *e.g.*, *McElroy*, 910 F.2d at 1021 (violation of Section 215(a) where officials at different banks "[e]ach granted the other large, unsecured, improvident bank loans in order to receive large unsecured loans from the other's bank"); *United States v. Denny*, 939 F.2d 1449, 1450 (10th Cir. 1991) (violation of Section 215(a) where bank employee "bought and sold securities not only for the bank but for two of the bank's customers by using the bank's funds, credit, and name").

[207] Because Respondent did not address his alleged violation of 12 U.S.C. § 215(a) in his initial post-hearing brief beyond a perfunctory footnote, *see* Resp. Br. at 18 n.3, Enforcement Counsel argues that he has abandoned any ability to subsequently be heard on the topic before this Tribunal. *See* EC Reply at 27-28; *see also* 12 C.F.R. § 19.37(a)(2) ("Any party who fails to file timely with the administrative law judge any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion."); October 13, 2021 Order Adopting Proposed Transcript Corrections and Setting Post-Hearing Briefing Deadlines at 2 n.3 ("[P]ursuant to the undersigned's ground rules, all issues that are in dispute must be addressed in the post-hearing briefs, . . . [and] any issue not specifically addressed on brief will be considered abandoned by that party."). The undersigned agrees that Respondent abandoned any argument on Section 215(a) when he did not substantively address it in his initial post-hearing brief, but nonetheless declines to make any findings regarding that statute's potential violation, in the interests of judicial restraint and administrative efficiency.

[208] *In the Matter of Steven J. Ellsworth*, Nos. AA-EC-11-41 & -42, 2016 WL 11597958, at *13 (Mar. 23, 2016) (OCC final decision) (internal quotation marks and citation omitted).

[209] *See* Faulkner Tr. 651:2-5.

Actionably unsafe or unsound practices are those that pose "a reasonably foreseeable undue risk to the institution," which the Comptroller has held to mean an "increased risk of some kind."[210] Enforcement Counsel's expert identified multiple types of heightened risk posed by Respondent's decision to enter into an ongoing clandestine arrangement with a subordinate in which he provided access to referral sources in exchange for cash payments.[211] Specifically, the expert opined that Respondent's conduct had resulted in increased risk that the Bank would be subject to enforcement actions due to regulatory violations ("compliance risk"), risk that the Bank would suffer harm to its public or industry perception, including consumer confidence in the Bank, if the arrangement was exposed ("reputation risk"), and risk that the Bank would face legal exposure or liability due to Respondent's actions ("legal risk").[212] The expert further observed that "[b]ecause the payment scheme was undisclosed," the Bank would be unable to properly "measure, monitor, or control" whatever risk resulted from the arrangement.[213]

The undersigned concurs that Respondent's illicit arrangement exposed the Bank to reasonably foreseeable risk of harm to its reputation, of legal liability, and of potential enforcement actions, and further that the Bank's ability to monitor and manage this increased risk was hindered by Respondent's efforts to keep the arrangement concealed. In particular, the undersigned finds that the increased risk to the Bank's reputation brought about by Respondent's participation in the arrangement has been amply established by Enforcement Counsel. It is entirely foreseeable that the perception of a manager soliciting secret cash payments from subordinates in exchange for access to referral sources from a particular firm would have a detrimental effect on both the Bank's

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[210] *See Adams*, 2014 WL 8735096, at *5; *see also*, *e.g.*, *Blanton*, 909 F.3d at 1172.
[211] *See* Ouellette Tr. 548:19-551:20.
[212] *See id.*; *see also* JX 15 (Ouellette Expert Report) at 4-5.
[213] JX 15 (Ouellette Expert Report) at 4.

recruiting and its relationship with that firm, as Barras testified that it did.[214] To understand why, one need only consider Jablonski's account about being told he would have the opportunity to build referrals at the Douglas Elliman branches when he was recruited for the Bank:

> I didn't expect that when I was finally given the opportunity that I was promised, that there would be so many conditions attached to it. . . . I never really imagined a scenario where I would have to pay somebody to get an assignment like that. It wasn't, obviously, a part of the conversation during my recruitment or at any point, up until the day it became a discussion.[215]

It takes little imagination to anticipate that word of Respondent's arrangement with Jablonski would have a markedly negative effect on the Bank's ability to recruit loan officers desirous of being able to earn access to valuable referral sources without needing to make cash payments to their superiors in mailboxes and parking lots for the privilege.[216]

Finally, despite focusing largely on whether the Bank suffered not just risk but discernible harm as a result of the arrangement,[217] Respondent's expert conceded that abnormal risk need not materialize to be actionable as unsafe or unsound conduct, and that "[j]ust the presence of the abnormal risk"—including compliance risk, legal risk, or reputational risk—would be enough.[218] Regardless, to the extent that actual harm is in some way a helpful indicium of increased risk, the undersigned credits Barras's testimony that Respondent's conduct did, in fact, cause "clear reputational harm" to the Bank's relationship with Douglas Elliman that it was forced to repair, and the undersigned further finds that such harm was foreseeable from the arrangement.

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[214] *See* Barras Tr. 603:21-24, 626:1-15 ("Certainly it hurt our reputation with Douglas Elliman, who is a principal, substantial influence for us in generating leads. So that was a major risk and a major harm that we had to repair.").

[215] Jablonski Tr. 133:3-17.

[216] *See* RX 1 (Investigation Report) (external candidate for loan officer position telling Bank personnel that "he had heard that [loan officers] who work for Citizens Bank are required to pay their manager an envelope of cash to gain access to high performing [Douglas Elliman] brokers").

[217] *See*, *e.g.*, JX 16 (Faulkner Expert Report) at 6 ("As far as legal risk, there was no harm to consumers, so I am unclear on how this arrangement elevated the Bank's legal risk to a level supporting unsafe or unsound banking practices. . . . There was no headline risk (reputation) or harm to the bank or consumers.")

[218] Faulkner Tr. 651:17-652:6.

4. Respondent Breached His Fiduciary Duties of Loyalty and Care

The undersigned has already found that Respondent's conduct amounted to a breach of his fiduciary duty of loyalty to the Bank, holding that by entering into the arrangement, Respondent used his position for personal financial gain in a manner that caused him to put his own interests above those of the institution "in whose interests he was obliged to be wholly acting."[219] The undersigned further noted that one "crucial component" of the duty of loyalty is the duty of candor, which Respondent likewise breached by failing to disclose to the Bank everything he knew about Bank transactions—the origination of the subject loans—in which he held a personal financial interest and derived a personal benefit.[220]

At the time, the undersigned also held that it could not yet be determined whether Respondent had likewise breached his fiduciary duty of care, finding that "there still exist genuine issues of material fact as to whether Respondent acted 'in good faith and in a manner reasonably believed to be in the bank's best interest' that are better addressed at a later stage."[221] Although acknowledging that he had exercised poor judgment, Respondent contended during the summary disposition briefing "that he 'believed in good faith that Citizens would not prohibit him continuing to work to generate loans,' albeit not in his own name, 'so long as he also fulfilled all of his Area Manager responsibilities.'"[222] The factual record as now developed contradicts this claim.

The fiduciary duty of care requires individuals at all times to "act diligently, prudently, honestly, and carefully in carrying out their responsibilities and [to] ensure their bank's compliance

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[219] MSD Order at 19; *see also*, *e.g.*, *Ellsworth*, 2016 WL 11597958, at *15 (duty of loyalty requires fiduciaries "to avoid conflicts of interests and to act solely for the [bank's] benefit").

[220] MSD Order at 18-19; *see also In the Matter of Michael Sapp*, Nos. 13-477e & 13-478k, 2019 WL 5823871, at *14 (Sep. 17, 2019) (FDIC final decision) (duty of candor requires bank personnel to disclose such information "even if not asked") (internal quotation marks and citation omitted).

[221] MSD Order at 22.

[222] *Id.* at 20 (quoting Respondent's February 25, 2021 Memorandum of Law in Opposition to Enforcement Counsel's Motion for Partial Summary Disposition at 14).

with state and federal banking laws and regulations."[223] The undersigned concurs with Enforcement Counsel that by engaging in a secret, off-book arrangement with his subordinate in "egregious violation[] of multiple Bank policies,"[224] Respondent undeniably "failed to act diligently, prudently, honestly, or with the care an ordinary prudent person in the same circumstances would exercise."[225] The evidence demonstrates that Respondent knew or should have known that he was not permitted to continue to personally originate loans as Area Manager, yet he continued to try to do so.[226] Respondent also knew or should have known that he could not receive any personal commission in the Area Manager role, particularly outside of the Bank's payroll system and without the Bank's knowledge, but he disregarded that as well.[227]

Further, by Respondent's own account, he expended significant energy on this arrangement "completely in addition to everything [he was] doing as an Area Manager" at a time when his superiors expected him to be using his newly expanded supervisory responsibilities to develop the members of his team.[228] Ace Watanasuparp testified that "it takes away the value that you'll have for team members" for an Area Manager to be focused on personal production, as Respondent clearly was.[229] Chace Gundlach likewise stated that the "main responsibility" of Area Managers "is to support the people on your team, help them grow their production."[230] Any time spent on

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[223] *In the Matter of Tonya Williams*, No. 11-553e, 2015 WL 3644010, at *9 (Apr. 21, 2015) (FDIC final decision) (internal quotation marks and citation omitted).

[224] RX 2 (Follow-Up Report) at 1.

[225] EC Br. at 34; *see also id.* (ordinary prudent person "would have ensured that any financial arrangement with another employee regarding Bank business was 'well documented, disclosed to, and approved by the Bank'") (quoting JX 15 (Ouellette Expert Report) ¶ 19).

[226] *See* Part IV *supra* at 9-12.

[227] *See id.* at 12-18.

[228] Maffettone Tr. 504:22-505:2; *see id.* 441:11-14 ("The off-the-book arrangement between Matt and myself was a partnership. I was pretty much doing the same exact things I was doing with the loans when I was a loan officer."), 485:7-8 ("I had hundreds of calls with the clients and realtors [on the off-book arrangement loans].").

[229] Watanasuparp Tr. 34:16-19.

[230] Gundlach Tr. 54:22-25; *see also* Barras Tr. 630:1-5 (noting that if Jablonski received all of Respondent's referrals from his valuable Douglas Elliman sources, it would be "to the detriment of other loan officers").

maximizing his financial interest from the arrangement with Jablonski was time spent away from Respondent's Area Manager responsibilities.

In all, there is no indication, in the fullness of the record, that Respondent "reasonably believed [himself] to be acting in the bank's best interest" in carrying out the arrangement, as the fiduciary duty of care requires, rather than for his own personal purposes.[231] Respondent was more concerned with remaining "intimately involved with [his] clients and book of business" in the event that he returned to a producing role in the future than he was with representing the Bank's present interests.[232]

There is also scant evidence of Respondent's good faith. Respondent exploited a superior-subordinate relationship for his own financial gain and his own personal concerns. He endeavored to keep the resulting arrangement secret from the Bank. Upon being promoted to a non-producing position, he was expected to use his existing referral network for the benefit of the Bank and those beneath him,[233] but instead repeatedly stated his willingness to withhold leads generated by referral sources from the Bank entirely if he was not being compensated outside the Bank's payroll system for providing them.[234] The undersigned now therefore concludes, with ease, that Respondent breached his fiduciary duty of care.

B. Effect

The effect prongs of 12 U.S.C. §§ 1818(e) and 1818(i) are satisfied by a showing that the subject of the enforcement action "has received financial gain or other benefit" or "pecuniary gain

[231] *Ellsworth*, 2016 WL 11597958, at *15.

[232] Maffettone Tr. 452:25-453:3; *see also* Resp. Br. at 33 ("Mr. Maffettone's actions were motivated by his desire to preserve his relationships with certain realtors, his other business partners, and his entire book of business built over almost twenty years to safeguard his future prospects of returning to work as a loan officer should the circumstances require it.").

[233] *See* Barras 607:25-608:2 ("[A]bsolutely we would expect our non-producing managers to refer business to their subordinate employees. That's one of the main job functions that our managers have.").

[234] *See* Maffettone Tr. 430:7-16; 464:21-465:13.

or other benefit," respectively, as a result of the charged conduct.[235] As found in this Tribunal's April 5, 2021 Order and corroborated by evidence presented at the hearing, Respondent indisputably gained a minimum of $52,023 in cash payments in connection with the off-book arrangement.[236] These statutory elements are therefore fulfilled.

In the alternative, the effect element of Section 1818(i) in this action is also satisfied if Enforcement Counsel can demonstrate that Respondent's charged conduct was part of a "pattern of misconduct" within the meaning of that statute.[237] By Respondent's admission, the off-book arrangement that constituted actionable misconduct spanned repeated cash payments over the course of a number of months.[238] This is a pattern of misconduct sufficient to establish an independent basis for the Section 1818(i) effect prong.[239]

C. Culpability

An agency seeking a Section 1818(e) order of prohibition against an IAP must demonstrate culpability as well as misconduct and effect: proof that the IAP's conduct involves either "personal dishonesty" or a "willful or continuing disregard" of the safety or soundness of the institution in question.[240] Both of these criteria "require some showing of scienter"—that is, evidence of an intentionality or recklessness to the charged conduct that goes beyond mere negligence.[241] Now that the undersigned as factfinder has had the opportunity to weigh the evidence "through a fuller accounting of Respondent's conduct in hearing testimony,"[242] Enforcement Counsel argues that

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[235] 12 U.S.C. §§ 1818(e)(1)(B), 1818(i)(2)(B)(ii)(III).

[236] *See* MSD Order at 23; Part IV *supra* at 22-24.

[237] 12 U.S.C. § 1818(i)(2)(B)(ii)(I).

[238] *See* Part IV *supra* at 18-19.

[239] *See Blanton*, 909 F.3d at 1171-72 (pattern of misconduct where respondent repeatedly honored overdrafts without adequate risk controls); *Dodge v. OCC*, 744 F.3d 148, 161-62 (D.C. Cir. 2014) (pattern of misconduct where respondent violated regulatory reporting requirements over multiple reporting periods).

[240] 12 U.S.C. § 1818(e)(1)(C).

[241] *Dodge*, 744 F.3d at 160 (internal quotation marks and citation omitted).

[242] MSD Order at 26 (denying motion for partial summary disposition on issue of personal dishonesty).

the standards for personal dishonesty and for willful or continuing disregard have been satisfied in this case.[243] The undersigned agrees.

1. Respondent Has Demonstrated Personal Dishonesty

Personal dishonesty within the meaning of Section 1818(e) encompasses "a range of behavior, including a disposition to lie, cheat, or defraud; untrustworthiness; lack of integrity; misrepresentation of facts and deliberate deception by pretense and stealth; or want of fairness or straightforwardness."[244] The personal dishonesty standard is also "satisfied when a person disguises wrongdoing . . . or fails to disclose material information" with the requisite knowledge of the wrongfulness of their actions.[245]

Respondent exhibited personal dishonesty in several respects during the pendency of the off-book arrangement. His actions throughout his time as Area Manager were plainly "motivated by his desire to preserve his relationships," as he himself admits, and keep tight watch and control over his existing book of business despite no longer being permitted to personally produce loans.[246] In service of this desire, there is a preponderance of evidence that Respondent initiated an unapproved, for-profit arrangement with a subordinate in which he improperly acted as gatekeeper of his referral sources; took affirmative steps to conceal this arrangement from others at the Bank,

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[243] *See* EC Br. at 37-40 (personal dishonesty), 40-41 (willful or continuing disregard).

[244] *Williams*, 2015 WL 3644010, at *10 (internal quotation marks and citation omitted); *accord*, *e.g.*, *Michael v. FDIC*, 687 F.3d 337, 351 (7th Cir. 2012).

[245] *Dodge*, 744 F.3d at 160; *accord*, *e.g.*, *In the Matter of Frank Smith and Mark Kiolbasa*, No. 18-036-E-I, 2021 WL 1590337, at *28 (Mar. 24, 2021) (FRB final decision); *In the Matter of Donald Watkins, Sr.*, Nos. 17-0154e & -0155k, 2019 WL 6700075, at *8 (Oct. 15, 2019) (FDIC final decision) ("[W]ithholding material information from either the Bank or the Bank's directors is evidence of personal dishonesty.").

[246] Resp. Reply at 33; *see also*, *e.g.*, Maffettone Tr. 452:25-453:3 ("I was strongly considering going back to an origination role. And I felt it very necessary to be intimately involved with my clients and my book of business."), 453:11-13 ("Q: You wanted to be able to reclaim those referral sources from Matt Jablonski, correct? A: I would not have to reclaim; they were mine."), 455:10-14 ("Q: You had no worries at all about losing these referral sources? A: As long as I kept in contact with them and continued to service them, no, I had no reason to believe that."); JX 2 (Maffettone Dep.) 33:14-19 ("[W]hen I took on the Area Manager role I gave up soliciting for new realtors and new business at any of my preexisting relationships that, as I mentioned, I had over 17 years . . . in the business. *Those were mine.*") (emphasis added).

including by directing that all payments be made surreptitiously in cash, taking care not to memorialize the arrangement except on disposable slips of paper, and never discussing the arrangement except when alone with Jablonski; and then abruptly resigning his position at the Bank rather than speak with investigators about the arrangement, which at that point had continued for at least a year. All of these things, taken together with the evident gravitational pull exerted on Respondent by his need to maintain his referral network even as Area Manager, strongly suggest that Respondent acted with knowing dishonesty and lack of straightforwardness throughout, and that his state of mind was actionably culpable.[247]

2. Respondent Has Demonstrated Willful and Continuing Disregard

"Willful disregard is deliberate conduct that exposes the bank to abnormal risk of loss or harm contrary to prudent banking practices, while continuing disregard is conduct that has been voluntarily engaged in over a period of time with heedless indifference to the prospective consequences."[248] For conduct to constitute willful disregard, it is not necessary to find that an IAP "deliberately exposed the Bank to abnormal risk of loss or harm,"[249] only that the unsafe or unsound banking practice engaged in by the individual was done intentionally and was not

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[247] The undersigned also finds that Respondent's repeated invocation of the Fifth Amendment in response to questions about his 2018 tax returns, as well as his failure to produce any returns or related documentation from the period of the arrangement despite being subpoenaed to do so, *see supra* n.90, suggests that he intentionally did not pay taxes on his proceeds from the arrangement, which is a further indication of personal dishonesty. *See MacKay v. DEA*, 664 F.3d 808, 820 (10th Cir. 2011) ("The Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them. . . . This rule applies with equal force to administrative proceedings.") (internal quotation marks and citation omitted); *accord In the Matter of Richard Salmon*, No. AA-EC-95-05, 1998 WL 609758, at *3 n.2 (Sep. 1, 1998) (FRB final decision on OCC prohibition action). The undersigned notes further that Respondent's insistence that the payments did not begin until January 2018 despite significant documentary evidence to the contrary raises similar questions, not suitable for disposition by this Tribunal, about his level of compliance on his 2017 tax returns as well.

[248] *Ellsworth*, 2016 11597958, at *17 (internal quotation marks and citation omitted).

[249] *In the Matter of Charles R. Vickery, Jr.*, No. AA-EC-96-95, 1997 WL 269106, at *8 (Apr. 14, 1997) (OCC final decision); *see also Smith and Kiolbasa*, 2021 WL 1590337, at *29 (noting that "[a]n officer acts willfully when he is aware of his conduct; willfulness does not require a showing that Respondent was aware of the law") (internal quotation marks and citation omitted).

"technical or inadvertent."[250] Continuing disregard, in turn, requires evidence of "a mental state akin to recklessness"[251] that has manifested through, for example, the "voluntary and repeated inattention to" unsafe and unsound practices, or the "knowledge of and failure to correct clearly imprudent and abnormal practices that have been ongoing."[252]

The undersigned finds that Respondent demonstrated both willful and continuing disregard for the Bank's safety and soundness over the course of the off-book arrangement. There is no question that Respondent's participation in the arrangement was not "technical or inadvertent"—even under his own telling, which the undersigned does not credit, he was a knowing and willing participant in the scheme.[253] And that scheme, in turn, was contrary to prudent banking practices and exposed the Bank to abnormal risk of loss or harm for the reasons enumerated in Part V.A.3 above. Respondent therefore acted with willful disregard.

As for continuing disregard, the off-book arrangement took place over a matter of many months, during which time Respondent continued to willingly accept cash payments in an unauthorized arrangement with a subordinate. Had the arrangement not been discovered due to Jablonski's growing unhappiness, there is every indication that Respondent would have been content for it to go on indefinitely, or at least until he decided to move back to a producing position. Although there is no programmatic minimum length of time that an individual must voluntarily engage in the complained-of conduct in order for their demonstrated disregard for an institution's

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[250] *In the Matter of Douglas V. Conover*, Nos. 13-214e & -217k, 2016 WL 10822038, at *28 (Dec. 14, 2016) (FDIC final decision) (internal quotation marks and citation omitted).

[251] *Smith and Kiolbasa*, 2021 WL 1590337, at *29 (internal quotation marks and citation omitted).

[252] *In the Matter of Lawrence A. Swanson, Jr.*, No. AP-ATL-93-7, 1995 WL 329616, at *5 (Apr. 4, 1995) (OTS final decision on reconsideration); *see also In the Matter of Charles F. Watts*, Nos. 98-046e & -044k, 2002 WL 31259465, at *8 (Aug. 6, 2002) (FDIC final decision) (continuing disregard is "conduct which is voluntarily engaged in over time").

[253] *See* Part IV *supra* at 15.

safety and soundness to be "continuing" for purposes of culpability, the length of the off-book arrangement surely meets that threshold.[254] Continuing disregard is established as well.

D. Civil Money Penalty

The undersigned has therefore concluded that the applicable elements have been met for the imposition of a prohibition order under 12 U.S.C. § 1818(e) and the assessment of a second-tier civil money penalty under 12 U.S.C. § 1818(i). Before assessing a civil money penalty, however, the agency is bound to consider the appropriateness of the amount being assessed in light of five mitigating factors: (1) the size of the respondent's financial resources; (2) the respondent's good faith; (3) the gravity of the respondent's violation; (4) the history of any previous violations; and (5) "such other matters as justice may require."[255] With respect to the $150,000 civil money penalty sought by Enforcement Counsel in this matter, the Parties have made submissions adverting to these factors and to the thirteen interagency factors that financial institution regulatory agencies must also weigh in conjunction when determining a civil money penalty amount.[256] Considering the Parties' submissions, assessing the relevant factors, and for the reasons given below, this Tribunal recommends to the Comptroller that $150,000 is an appropriate monetary penalty for Respondent's misconduct in this case.

The purpose of a civil money penalty "is to deprive the violators of any financial benefit derived as a result of the violations, provide a sufficient degree of punishment, and [act as] an adequate deterrent to the respondents and others from future violations of banking laws and

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[254] *See*, *e.g.*, *Vickery*, 1997 WL 269105, at *8 (finding that "conduct reflecting recklessness or indifference with respect to an institution's safety" was continuing disregard when "made over a period of some months"); *Dodge*, 744 F.3d at 161 (continuing disregard where conduct took place "on multiple occasions over six reporting periods").

[255] 12 U.S.C. § 1818(i)(2)(B)(ii).

[256] *See* EC Br. at 43-48; EC Reply at 23-27 (in support of the $150,000 CMP assessment); Resp. Br. at 20-22; Resp. Reply at 36-41 (opposing the $150,000 CMP assessment).

regulations."[257] The interagency guidance regarding the assessment of civil money penalties further states that "in cases where the violation, practice, or breach causes quantifiable, economic benefit or loss," a civil money penalty amount that merely recompenses the loss or strips the violator of their benefit will be insufficient "to promote compliance with statutory and regulatory requirements."[258] Rather, "[t]he penalty amount should reflect a remedial purpose and should provide a deterrent to future misconduct."[259] The undersigned will address each of the five mitigating factors in turn, bearing in mind the punitive, deterrent, and remedial goals that civil money penalties are intended to achieve.

1. Respondent's Financial Resources

In his December 2020 deposition, Respondent represented unequivocally that he had sufficient financial resources to be able to pay a $150,000 civil money penalty.[260] While Respondent later testified at the hearing that "the past two years have been a financial drain for me and my family," he nevertheless reaffirmed that "if I need to pay it, I will find a way to pay it."[261] Respondent also confirmed that he never provided restitution to the Bank for the $52,000 or more that he gained from the off-bank arrangement,[262] although he has testified that the cash proceeds of the arrangement themselves were never deposited in a bank and were spent towards "[h]ome

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[257] *In the Matter of Richard D. Donohoo and Craig R. Mathies*, Nos. 92-249c & b *et seq.*, 1995 WL 618673, at *27 (FDIC final decision); *see also Long v. Bd. of Gov. of the Fed. Res. Sys.*, 117 F.3d 1145, 1154 (10th Cir. 1997) (civil money penalties provide banking agencies with "the flexibility [they] need[] to secure compliance" with the relevant banking laws and to "serve as deterrents to violations of laws, rules, regulations, and orders of the agencies") (internal quotation marks and citation omitted).

[258] Civil Money Penalties Interagency Statement, OCC Bulletin No. 98-32, 1998 WL 434432, at *2 (adopting Federal Financial Institutions Examination Council's Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies (June 3, 1998)) ("Interagency CMP Policy").

[259] *Id.*

[260] *See* JX 2 (Maffettone Dep.) at 141:25-142:3 ("Q: [D]o you have the ability to pay the $150,000 civil money penalty that the OCC is seeking in this matter? A: I do.").

[261] Maffettone Tr. 524:6-10.

[262] *Id.* 523:22-524:3.

improvement, kids, vacation, dinners, manicures."[263] Respondent also declined to submit a personal financial statement when asked to do so as part of his response to the OCC's initial letter regarding its investigation.[264] Overall, the undersigned takes Respondent at his word that he has sufficient financial resources to pay a $150,000 penalty, and therefore finds that the size of Respondent's financial resources is not a mitigating factor to the appropriateness of the penalty amount Enforcement Counsel seeks to assess.[265]

2. Respondent's Good Faith

Respondent says that he regrets not being candid with the Bank.[266] The undersigned finds that he has not been overly candid with this Tribunal. Respondent's testimony has been by turns evasive, contradictory, and lacking genuine remorse or awareness as to why his conduct was improper. Respondent states now that the off-book arrangement "was a grave error of judgment on his part," but never says why, other than perhaps that he got in trouble over it.[267] During his deposition, Respondent was given multiple opportunities to demonstrate a good faith understanding of why what he did was wrong, and each time he failed to do so:

> Q: You write that under industry best practices you should have disclosed the continuation of your arrangement with Mr. Jablonski after becoming the Area Manager. . . . Why is it under industry best practice that it should have been disclosed?

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[263] *Id.* 541:21-542:1.

[264] *See id.* 525:10-20; *see also* EX 13 (OCC 15-Day Letter) at 2 ("[P]lease complete the enclosed financial statement and return it with your response to this letter.").

[265] In his post-hearing briefing, Respondent characterizes himself as "a family man . . . of modest means" and states that a $150,000 penalty "is obviously a substantial amount of money and a staggering financial burden for an individual," but he does not contradict his prior testimony that he has the resources to pay that amount. Resp. Reply at 37; *see also* Resp. Br. at 21.

[266] *See*, *e.g.*, Maffettone Tr. 423:16-19; JX 2 (Maffettone Dep.) at 62:20-22.

[267] Resp. Br. at 21; *see also* Answer ¶ 64 (stating that not disclosing "the continuation of his arrangement with [Jablonski] . . . was poor judgment on Mr. Maffettone's part—and he knows it"); Maffettone Tr. 423:18-19 ("I wish I had been [candid] because I wouldn't be sitting here today, obviously.").

> A: Again, I wish I had been more candid about my arrangement, partnership with Matt. There was no harm to the Bank so there was no reason not to be candid with them about it and I wish I had been.[268]
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> ***
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> Q: So, you know, we all know that hindsight is 20/20 and that looking back, you know, we might do things differently. And I wanted to ask if you had to do it all over again what would you do differently, if anything?
>
> A: I would have been candid with the Bank about the arrangement. I would have asked them to continue it on book.
>
> Q: Is there anything else that you would do differently?
>
> A: Not really.[269]
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> ***
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> Q: Okay, so starting first with where you say that you deeply regret continuing your arrangement with Mr. Jablonski and that in retrospect it was a serious lapse in judgment and you take full responsibility for it. . . . [W]hat does it mean for you to say that you're taking responsibility? What does that mean for you?
>
> A: That, again, going back to what I said previously, I wish in retrospect that I had been more candid with the Bank about the split arrangement and asked for it to be done vis-à-vis the payroll system.
>
> Q: Okay. Anything else?
>
> A: No.[270]

Again and again Respondent has stated that he wished he had been more candid, as if these are the magic words that will absolve him of further consequences for his misconduct, while rarely conveying an air of candor to this Tribunal.[271] Respondent's flatly inconsistent testimony about his direction that Anderson track Jablonski's referrals is likewise suggestive of a lack of good

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[268] JX 2 (Maffettone Dep.) at 64:20-65:2.

[269] *Id.* 105:16-106:1.

[270] *Id.* 122:18-123:6.

[271] When first speaking to the OCC, Respondent also was not candid about not being candid. *See* JX 1 (Maffettone S.S.) 94:10-17 ("Q: Was there any particular reason that you didn't tell Ace or any of the people above you about the [off-book arrangement]? A: I don't recall telling them about the 50/50 split. Could I have? I don't recall.").

faith,[272] as is the seemingly impossible timeline that he presents for the scope and duration of the payments under the off-book arrangement.[273] And, as Enforcement Counsel observes, Respondent has offered a number of different stories regarding his tabulation of the payments received from Jablonski and whether such a tabulation was ever in the possession of his accountant.[274] The undersigned has already concluded that Respondent did not operate in good faith during the course of the arrangement for purposes of fulfilling his fiduciary duty of care;[275] she now finds that he has shown no good faith generally that might mitigate the assessment of a $150,000 civil money penalty in consideration of the statutory factors.

3. Gravity of the Violation

While there is no indication that Respondent's conduct directly harmed Bank consumers or threatened the overall safety or soundness of the Bank, he nevertheless engaged in a year-long scheme for his own personal gain whereby he solicited and received secret cash payments from a subordinate in a way that foreseeably could have caused, and did cause, the Bank to suffer actual reputational harm in its recruiting and its ongoing relationship with one of its most valuable sources of loan referrals. There is nothing about the gravity of Respondent's violation that would therefore mitigate the amount of civil money penalty that Enforcement Counsel seeks to assess.

4. History of Violations

Enforcement Counsel presents some evidence that Respondent previously approached a subordinate and directed that he be paid a portion of that subordinate's commission in cash on a loan that Respondent had referred and for which he believed he was entitled to compensation.[276]

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[272] *See* Part IV *supra* at 31-32.
[273] *See id.* at 23-24.
[274] *See* EC Br. at 14-15; *see also* Part IV *supra* at 22 n.90.
[275] *See* Part V.A.4 *supra* at 52.
[276] *See* Part IV *supra* at 34-35.

As discussed, however, the undersigned will not give that account significant evidentiary weight due to the lack of a developed factual record.[277] The undersigned also credits Respondent's representation that "[u]ntil the instant action, he has never been subject of any supervisory criticism or enforcement action related to his performance or conduct."[278] Consequently, the history of violations by Respondent as a potential mitigating factor weighs neither for nor against Enforcement Counsel's desired civil money penalty assessment amount.

5. Such Other Matters as Justice May Require

The undersigned agrees with Enforcement Counsel that because Respondent indisputably gained at least $50,000 as a result of his misconduct, "a penalty significantly higher than $50,000 is necessary to achieve a remedial purpose and deter future misconduct."[279] For his part, Respondent asserts that several of the thirteen interagency factors that the agency considers when assessing a civil money penalty militate in favor of a lower penalty amount, specifically factors 1 (evidence of intent), 2 (duration and frequency of misconduct), 3 (continuation of misconduct after notification), 5 (evidence of concealment), 8 (evidence of restitution paid), and 12 (tendency to engage in violations).[280] Rather than retrace well-trodden ground, the undersigned will simply note that many of the factors relied upon by Respondent as an indication that a smaller penalty is appropriate are more persuasively cited by Enforcement Counsel in support of a $150,000 assessment.[281] Respondent's statements that he "did not engage in this unreported payment arrangement intentionally" and that he "made almost no effort to hide the arrangement," in particular, are contradicted by voluminous record evidence.[282] The undersigned thus finds that

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[277] *See id.* at 36.
[278] Resp. Br. at 22; *accord* EC Br. at 47.
[279] EC Br. at 48.
[280] *See* Resp. Reply at 39-41.
[281] *See* EC Br. at 44-46.
[282] Resp. Reply at 40.

there are no "other matters as justice may require" that should mitigate the amount of the agency's civil money penalty assessment.

VI. Conclusion

For all of the reasons given above, the undersigned finds that the statutory elements of 12 U.S.C. §§ 1818(e) and 1818(i) have been met in this action. Specifically, the undersigned finds that Respondent's actions in connection with the off-book arrangement constituted a violation of 12 U.S.C. § 2607(a), actionably unsafe or unsound banking practices, and a breach of Respondent's fiduciary duties of loyalty and care; that Respondent's misconduct demonstrated personal dishonesty and willful and continuing disregard for the safety and soundness of the Bank; that Respondent received personal economic benefit as a result; and that Respondent's misconduct was part of an actionable pattern. In accordance with 12 C.F.R. § 19.38, the undersigned therefore recommends that the Comptroller enter a prohibition order against Respondent and assess a second-tier civil money penalty in the amount of $150,000 in consequence of Respondent's misconduct. The record of this proceeding will be transmitted to the Comptroller in conjunction with this Recommended Decision, as well as a certified index of the administrative record and an index of exhibits.

SO ORDERED.

Issued: January 31, 2022

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication