FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

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

RECOMMENDED DECISION

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication
(September 16, 2022)

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ABBREVIATIONS

2010 Examination	Joint FDIC-TDOB examination that began on December 13, 2010
2012 Examination	Joint FDIC-TDOB examination that began on February 13, 2012
2013 Examination	Joint FDIC-TDOB examination that began on March 4, 2013
AHF	American Housing Foundation
ALJ	Administrative Law Judge
Amended Notice	Amended Notice of Intention to Remove from Office and Prohibit from Further Participation and Amended Notice of Civil Money Penalty, Findings of Fact and Conclusions of Law, Order to Pay, and Notice of Hearing
ARD	Assistant Regional Director
Bank	Herring Bank
Board	The Bank's Board of Directors
BSA	Bank Secrecy Act
CAMELS	Capital Adequacy, Asset Quality, Management, Earnings, Liquidity, and Sensitivity to Market Risk
CCIE	Combined Certified Index of Exhibits (filed by Judge Whang)
CEO	Chief Executive Officer
CFO	Chief Financial Officer
CIE	Certified List of Exhibits Admitted, Accepted as Proffers or Withdrawn including Joint Exhibits, FDIC Exhibits, and Respondent's Exhibits, filed on January 11, 2017 by Judge McNeil
CMP	Civil money penalty
CPA	Certified Public Accountant
CRC	Case Review Committee
DRO	Dallas Regional Office
Enforcement Counsel	Enforcement Counsel for the FDIC
EC FOF	Enforcement Counsel's Initial Findings of Fact
ECIB	Enforcement Counsel's Initial Post-Hearing Brief
ECRB	Enforcement Counsel's Responsive Post-Hearing Brief
EC SFOF	Enforcement Counsel's Supplemental Findings of Fact
EIC	Examiner-in-Charge
eMBA	Executive Masters of Business Administration
EX	Enforcement Counsel Exhibit
FDI Act	Federal Deposit Insurance Act
FDIC	Federal Deposit Insurance Corporation
FDIC Board	Federal Deposit Insurance Corporation Board of Directors
FDIC Board Decision	Decision and Order to Remove and Prohibit from Further Participation and Assessment of Civil Money Penalty
FHLBB	Federal Home Loan Bank Board
GAAP	Generally Accepted Accounting Principles
GL	General Ledger
HBI	Herring Bancorp, Inc.
IAP	Institution-Affiliated Party

IT	Information Technology
JX	Joint Exhibit
MBA	Masters of Business Administration
MOU	Memorandum of Understanding
Notice	Notice of Intention to Remove from Office and Prohibit from Further Participation and Notice of Assessment of Civil Money Penalty, Findings of Fact and Conclusions of Law, Order to Pay, and Notice of Hearing
OFIA	Office of Financial Institution Adjudication
Padgett or PSC	Padgett, Stratemann & Co.
Parties	Respondent and Enforcement Counsel
RD	Recommended Decision
R FOF	Respondent's Initial Findings of Fact
RIB	Respondent's Initial Post-Hearing Brief
RMS	Division of Risk Management Supervision
ROE	Report of Examination
RRB	Respondent's Responsive Post-Hearing Brief
R SFOF	Respondent's Supplemental Findings of Fact
Relevant Period	November 2009 through April 2012
Respondent	Cornelius Campbell Burgess
RX	Respondent's Exhibit
SARC	Supervisory Appeals Review Committee
SBC	Special Board Committee
SCIE	Supplemental Hearing Index of Exhibits (filed by Judge Whang)
SEC	Securities and Exchange Commission
Stipulation I	Stipulations of the Parties Set No. 1
Stipulation II	Stipulations of the Parties Set No. 2 (UNDER SEAL)
Supp. Tr.	Supplemental Hearing Transcript
Tr.	Transcript
TDOB	Texas Department of Banking
Uniform Rules	FDIC's Uniform Rules of Practice and Procedure

RECOMMENDED DECISION

I. Overview

The Federal Deposit Insurance Corporation ("FDIC") commenced this action against Cornelius Campbell Burgess ("Respondent") on November 21, 2014, alleging that Respondent had abused his position as President and Chief Executive Officer ("CEO") at Herring Bank (the "Bank"), Amarillo, Texas, from November 2009 through April 2012 (the "Relevant Period"). The FDIC seeks to remove Respondent from those positions, prohibit him from further participation in the banking industry, and assess against him a $200,000 civil money penalty ("CMP") pursuant to sections 8(e) and 8(i) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. §§ 1818(e), (i). The FDIC issued a "Notice of Intention to Remove from Office and Prohibit from Further Participation and Notice of Assessment of Civil Money Penalty, Findings of Fact and Conclusions of Law, Order to Pay, and Notice of Hearing" ("Notice"), which was subsequently amended, and the matter was referred to the Office of Financial Institution Adjudication ("OFIA").[1] The charges in the Amended Notice focused primarily on Respondent's improper expense account practices.

A seven-day hearing was held in the Northern District of Texas between September 13, 2016 and September 21, 2016 before Administrative Law Judge ("ALJ") Christopher B. McNeil. A three-day supplemental hearing was held virtually from January 25-27, 2022 before the undersigned. Now, on the strength of the full record in 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 initial post-hearing briefs and responsive briefs submitted by Respondent and

[1] The Notice of Charges were amended on February 4, 2016 to include additional allegations, including charges regarding certain MasterCard and Visa stock. *See* "Amended Notice of Intention to Remove from Office and Prohibit from Further Participation and Amended Notice of Civil Money Penalty, Findings of Fact and Conclusions of Law, Order to Pay, and Notice of Hearing" ("Amended Notice").

Enforcement Counsel for the FDIC ("Enforcement Counsel") (collectively the "Parties"), including their proposed findings of fact and conclusions of law, the undersigned makes the following findings of fact, conclusions of law, and recommended orders. The undersigned finds that Respondent used the Bank's cash, debit, and credit cards for personal expenses for himself and his girlfriend, Susan Taylor, and attempted to appropriate dividends for Bank stock that he knowingly kept off the Bank's books. Accordingly, the undersigned finds that the misconduct, effect, and culpability elements of Sections 1818(e) and 1818(i) have each been satisfied in at least one respect, and recommends that Respondent be subject to an order of prohibition and be assessed a civil money penalty in the amount of $200,000.

II. Procedural History and Background

This matter was originally assigned to Judge C. Richard Miserendino.[2] Subsequently, the case was reassigned to Judge Christopher B. McNeil.[3] As noted above, Judge McNeil held a hearing in Dallas, Texas from September 13-21, 2016.[4] During the course of the initial hearing, Judge McNeil heard testimony from 21 fact witnesses, including Respondent, and from the FDIC's hybrid fact-expert witness, Joseph Meade.[5] Judge McNeil issued "Findings of Fact, Conclusions of Law, Analysis, and Recommended Decision" ("RD") on January 11, 2017.[6] The RD recommended that Respondent be subject to an order of prohibition and be assessed a civil money

[2] *See* "Notice of Designation and Order Requiring Electronic Filing" issued on November 21, 2014.
[3] *See* "Order Reassigning Case" issued on July 20, 2016.
[4] In connection with the initial hearing, the Parties filed two sets of stipulations on January 19, 2016 entitled "Stipulations of the Parties Set No. 1" ("Stipulation I"), which was submitted as "Attachment F" to Enforcement Counsel's Pre-Hearing Statement and "Stipulations of the Parties Set No. 2 (UNDER SEAL)" ("Stipulation II").
[5] References to the initial hearing are noted as "Tr.," whereas references to the supplemental hearing are noted as "Supp. Tr." Mr. Meade's initial expert report was filed on January 19, 2016, and amended on September 12, 2016, and his supplemental report is referenced as EX-902 (Meade Supplemental Witness Statement).
[6] Along with the RD, Judge McNeil transmitted the certified index of the record of the proceeding. As the Board already has the complete record through January 11, 2017, the undersigned is only transmitting filings made after the record was previously certified, as detailed below.

penalty in the amount of $200,000. Both parties filed exceptions, and were permitted to file responses to exceptions.

On August 7, 2017, the FDIC Board of Directors ("FDIC Board") issued a "Decision and Order to Remove and Prohibit from Further Participation and Assessment of Civil Money Penalty" ("FDIC Board Decision") affirming the RD. The FDIC Board issued a removal and prohibition order and a $200,000 civil money penalty assessment against Respondent on the basis that he had "used the Bank's cash, debit, and credit cards for personal expenses for himself and his girlfriend and attempted to appropriate dividends for Bank stock that he knowingly kept off the Bank's books."[7] The FDIC Board concluded that, through this conduct, Respondent had breached his fiduciary duties to the Bank, engaged in unsafe or unsound banking practices actionable under 12 U.S.C. §§ 1818(e) and 1818(i), and committed a violation of Regulation O, 12 C.F.R. § 215.[8]

On August 21, 2017, Respondent filed a motion with the FDIC Board to stay the RD pending appeal to the United States Court of Appeals for the Fifth Circuit.[9] On August 24, 2017, the FDIC Board issued an order denying Respondent's motion.[10] On August 25, 2017, Respondent filed an "Emergency Motion for Stay Pending Final Decision on Petition for Review" along with a "Petition for Review of FDIC Board's Decision and Order to Remove and Prohibit from Further Participation and Assessment of Civil Money Penalty" with the Fifth Circuit. On September 7, 2017, the Fifth Circuit stayed the FDIC Board's decision in light of Respondent's contention that

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

[8] *See id.* at **16-24.

[9] *See* "Respondent C. Campbell Burgess's Emergency Motion to Stay Enforcement of the FDIC Board's Decision and Order to Remove and Prohibit from Further Participation and Assessment of Civil Money Penalty Pending Judicial Review" filed on August 21, 2017. The D.C. Circuit and the circuit in which the home office of the depository institution in question is located, here the Fifth Circuit, are the twin fora to which a respondent is entitled to appeal any final decision of the Board. *See* 12 U.S.C. § 1818(h)(2).

[10] *See* "Order on Respondent's Emergency Motion to Stay," issued on August 24, 2017.

the ALJ who had presided over his hearing was not constitutionally appointed.[11] On August 20, 2018, the Fifth Circuit granted Respondent's motion to remand the case to the FDIC following the Supreme Court's decision in *Lucia v. SEC*.[12]

On July 19, 2018, the FDIC Board issued a Resolution reappointing Judges McNeil and Miserendino as ALJs for the FDIC in light of the *Lucia* decision.[13] The FDIC Board then reassigned this matter from Judge McNeil to Judge Miserendino consistent with the Resolution's order that this matter be "reassigned to a different ALJ, for a new hearing and a fresh reconsideration of all prior actions, including summary dispositions, taken before the hearing."[14] On October 19, 2018, Judge Miserendino issued a "Notice of Case Reassignment and Opportunity to File Objections and Response" to the Parties as to any of Judge McNeil's prior orders.[15] Respondent filed objections to a number of Judge McNeil's rulings on November 30, 2018; however, Judge Miserendino subsequently retired from the agency without ruling on any of Respondent's objections.

On October 28, 2019, the FDIC Board issued a Resolution appointing the undersigned as an ALJ for the FDIC.[16] On November 26, 2019, the Executive Secretary of the FDIC issued an Order reassigning this matter to the undersigned. On January 8, 2020, the undersigned issued a "Notice of Case Reassignment and Order Requiring Joint Status Report." On February 7, 2020, the Parties filed a joint status report letter.

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[11] *See Burgess v. FDIC*, 871 F.3d 297, 304 (5th Cir. 2017).
[12] *Lucia v. SEC*, 138 S.Ct. 2044 (2018).
[13] *See* FDIC Board Resolutions bearing seal nos. 085152 and 085172, dated July 19, 2018.
[14] *See* FDIC Board Resolution bearing seal no. 085172 at 1.
[15] *See* "Notice of Case Reassignment and Opportunity to File Objection and Response," issued on October 19, 2018. This notice was clarified on November 13, 2018. *See* "Clarification of Notice of Case Reassignment and Opportunity to File Objection and Response," issued on November 13, 2018.
[16] *See* FDIC Board Resolution bearing seal no. 086176.

The undersigned reviewed the prior ALJs' orders, as detailed in the "Order Reviewing Prior Administrative Law Judge Pre-hearing Actions" and "Order Regarding Respondent's Objections on Remand to Pre-Hearing Actions," both dated March 2, 2020. In the first order, the undersigned found that the actions taken by the prior ALJs were consistent with the FDIC's Uniform Rules of Practice and Procedure ("Uniform Rules"), 12 C.F.R. Part 308, and with the provisions of the Administrative Procedure Act, 5 U.S.C. Part I, Ch. 5, Subch. II, and consequently adopted them. In the latter order, the undersigned held that 1) the FDIC's claims were not time-barred, 2) the so-called Horne Standard would apply to the determination of unsafe or unsound practices unadorned by the Fifth Circuit's later gloss in its *Gulf Federal v. FHLBB* decision,[17] and 3) the issue of bias could be raised in a new hearing.[18]

[17] John Horne, Chairman of the Federal Home Loan Bank Board ("FHLBB") during the passage of the 1966 legislation endowing banking agencies with cease-and-desist and removal-and-prohibition authority, submitted a memorandum to Congress that described such practices as encompassing "any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds." *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 E. Horne, Chairman of the FHLBB), 112 Cong. Rec. 26,474 (1966). Compare with *Gulf Federal Sav. & Loan Ass'n of Jefferson Parish v. FHLBB*, 651 F.2d 259, 264, 267 (5th Cir. 1981), which ostensibly augmented the Horne Standard with a requirement that the conduct also have "a reasonably direct effect on [the institution's] financial soundness" or "threaten the financial integrity of the [institution]" to be considered unsafe or unsound. *See In the Matter of Patrick Adams*, No. AA-EC-11-50, 2014 WL 8735096, at **8-24 (Sep. 30, 2014) (OCC final decision) (discussing Horne Standard in detail, surveying application of Horne Standard in various circuits, and rejecting *Gulf Federal* to the extent that it imposes additional requirements).

[18] As detailed in the undersigned's order, Judge Miserendino denied Enforcement Counsel's "Motion to Strike Respondent's Affirmative Defense of Bias, Prejudicial and Unprofessional Conduct, and Unfair Treatment or, in the Alternative, Motion in Limine to Exclude Respondent's Non-Relevant Exhibits, Witnesses, and Related Testimony," on April 8, 2016. At the hearing, Judge McNeil determined that the proposed evidence proffered on the issue of bias was not sufficiently probative as to render the evidence material and relevant. Respondent's claims of bias were also addressed in his exceptions to the RD, and the Board concluded that the objective evidence was more than sufficient to support a finding of misconduct irrespective of any claimed bias on the part of the FDIC examiners. *See* March 2, 2020 Order Regarding Respondent's Objections on Remand to Pre-Hearing Actions at 12. Respondent asserts that had the issue of bias been allowed at the initial hearing, he would have had an opportunity to fully develop his case, noting that FDIC examiner Richard Fritz and TDOB examiner Dennis Lebo have since passed away. RIB 26. Enforcement Counsel asserts that if Mr. Lebo were to testify in the supplemental hearing,

As required by the FDIC Board's original resolution for the cases which were remanded for a new hearing, the undersigned issued a "Notice of Intention to Conduct a Written Hearing" on March 5, 2020, giving the Parties until April 6, 2020 to state whether they had an objection to a hearing on the bias issue being conducted on the papers rather than in person. On April 6, 2020, the Parties filed a joint letter, and each party filed separate comments.[19] After reviewing the Parties' submissions, the undersigned held a scheduling conference on April 23, 2020, which set an initial hearing date of October 27-28, 2020.[20] Subsequent scheduling conferences were held, further postponing the hearing due to continued restrictions from the Covid-19 pandemic.[21] Although the supplemental hearing was scheduled to be held in-person in Dallas, the Parties requested that the undersigned hold the supplemental hearing virtually due to heightened coronavirus transmission rates from the Omicron variant.[22] Accordingly, a virtual supplemental hearing via zoom.gov was held from January 25-27, 2022. Eleven fact witnesses, including Respondent, and the FDIC's hybrid fact-expert witness, Joseph Meade, testified at the supplemental hearing. A transcript of the hearing was provided to the undersigned on March 4, 2022; however, the Parties requested that the transcript be resubmitted to allow for continuous

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his testimony would have revealed that he considered Respondent to be dishonest. ECRB 13 (citing RX-35 (May 2012 email chain) at 1).

[19] *See* Enforcement Counsel's "Comments of the FDIC on March 5, 2020 Notice of Intention to Conduct Written Hearing" and "Respondent C. Campbell Burgess's Objection to the Notice of Intention to Conduct a Written Hearing," both filed on April 6, 2020.

[20] *See* "Notice of Scheduling Conference," issued on April 17, 2020 and "Notice Regarding Telephone Conference and Order Setting Procedural Schedule," issued on April 24, 2020.

[21] *See* "Notice of Scheduling Conference," issued on August 17, 2020 and "Order Regarding August 25, 2020 Telephone Conference and Amending the Procedural Schedule," issued on August 28, 2020. *See also* "Order Regarding December 16, 2020 Telephone Conference and Amending the Procedural Schedule," issued on December 17, 2020, and "Order Regarding Conference on June 3, 2021 and Amending Procedural Schedule," issued on June 4, 2021, which set the hearing for August 4-6, 2021. *See also* "Order Rescheduling Hearing," issued on July 21, 2021, rescheduling the hearing for January 26-27, 2022.

[22] *See* "Order Regarding Telephonic Conference on January 18, 2022 and Granting Joint Request to Conduct a Virtual Hearing," issued on January 18, 2022.

page numbering from day-to-day. After reviewing the hearing transcript, the Parties filed proposed corrections on March 30, 2022, which the undersigned adopted by order, dated April 1, 2022. The corrected combined supplemental hearing transcript was submitted on May 11, 2022.

Exhibits

During the course of the initial hearing, numerous exhibits were introduced and admitted into evidence.[23] After the hearing, Judge McNeil reviewed the Parties' joint exhibits and issued an order directing them to correct redactions to such exhibits.[24] On December 6, 2016, Judge McNeil issued an "Order to Show Cause why Unreferenced Exhibits should be Included in the Certified Record and Directing Enforcement Counsel to Correct Redactions to Certain Exhibits." Specifically, Judge McNeil stated that while parties were free to refer to any exhibits that were admitted during the hearing in their post-hearing briefs, a number of exhibits were not specifically referenced by either party in either the hearing or in their post-hearing briefs.

Respondent filed a response on December 20, 2016, while Enforcement Counsel filed a response on December 21, 2016. Neither party objected to the withdrawal of exhibits that had not been cited. On December 22, 2016, Judge McNeil issued an "Order Regarding Response Period," allowing the parties until December 29, 2016 to file a response; however, neither party made any responsive filing. Accordingly, Judge McNeil only included in the administrative record exhibits either party sought to have included, either as substantive exhibits or proffers. Eventually, 348 exhibits were admitted, 260 exhibits were proffered, and 731 exhibits were withdrawn,[25] all of

[23] Tr. 8-9, 220-21 (9/13/16 McNeil).
[24] *See* "Order Directing Parties to Correct Redactions to Joint Exhibits," issued on September 26, 2016.
[25] A summary of Judge McNeil's certified index of exhibits is as follows:

	Admitted	Proffered	Withdrawn
Joint Exhibit	173	210	545
FDIC Exhibit	155	41	696
Respondent Exhibit	20	9	35
Total	348	260	1276

which are identified on the Certified List of Exhibits Admitted, Accepted as Proffers or Withdrawn ("CIE").[26]

At the supplemental hearing, many exhibits that were proffered during the initial hearing were offered and received into evidence. A total of 55 exhibits were introduced and admitted into evidence in connection with witness testimony, as identified in the document "Newly Admitted Exhibits During Depositions and Supplemental Hearing."[27] Note 1 to that filing states that certain exhibits that were presented during deposition testimony are awaiting ruling from the undersigned. Having reviewed the deposition transcripts in question,[28] and the associated exhibits thereto, the eighteen exhibits presented during these depositions that are awaiting ruling are hereby admitted.[29]

In addition, there are other exhibits in that filing that are noted as "reserve[d] ruling." As to JX-116, the undersigned reserved ruling on this exhibit during the hearing because there was no indication that it was ever discussed, other than being referenced on a demonstrative exhibit. The undersigned gave Enforcement Counsel an opportunity to show, after the hearing, when the transcript was received, whether JX-116 was discussed;[30] however, no such showing was made. Accordingly, JX-116 is hereby rejected. Similarly, when Enforcement Counsel requested JX-148 be admitted, the undersigned indicated that there was no indication that it was ever discussed and

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[26] *See* "Certified List of Exhibits Admitted, Accepted as Proffers or Withdrawn" including Joint Exhibits, FDIC Exhibits, and Respondent's Exhibits, filed on January 11, 2017 ("CIE"). For ease of reference, the undersigned refers to joint exhibits as "JX", FDIC exhibits as "EX" and Respondent's exhibits as "RX."

[27] *See* "Newly Admitted Exhibits During Depositions and Supplemental Hearing," filed on June 3, 2022 and the modifications made by the undersigned in the "Supplemental Hearing Certified Index of Exhibits."

[28] Namely, JX-939 (Skarda Dep.), JX-940 (Jeffers Dep.), JX-941 (Templeton Dep.), and JX-942 (Bacon Dep.). Corresponding videography of these depositions are entered into the record as JX-943 and JX-944 (Skarda), JX-945 (Jeffers), JX-946 (Templeton), and JX-947 (Bacon).

[29] Specifically, the following exhibits are hereby admitted: JX-140, JX-147, JX-278, JX-288, EX-411, EX-526, EX-899, EX-918, EX-921, EX-922, EX-923, EX-925, RX-31, RX-35, RX-60, RX-65, RX-66, and RX-70.

[30] Supp. Tr. 734 (1/27/22 Whang).

gave Enforcement Counsel an opportunity to show, after the hearing, when the transcript was received, whether JX-148 was discussed.[31] No such showing was made; accordingly, JX-148 is rejected as well. These additional evidentiary rulings are included on the undersigned's Supplemental Hearing Certified Index of Exhibits ("SCIE").[32]

On May 13, 2022, the Parties filed their post-hearing briefs.[33] At the undersigned's request, the post-hearing briefs were to be all-inclusive of the issues before the undersigned, rather than limited to the issues raised in the supplemental hearing. The Parties also filed supplemental proposed findings of fact and conclusions of law, while relying on the previously filed proposed findings of fact and conclusions of law filed after the initial hearing.[34]

On June 3, 2022, the Parties filed their responsive post-hearing briefs.[35] In lieu of filing objections to the other Party's findings of fact, the Parties informally requested that they be permitted to raise those objections in their briefs on exception to the undersigned's Recommended Decision. While this is not the undersigned's normal practice, the undersigned agreed to this modification as it was jointly requested by the Parties and was similar to the procedure used by the Parties after the initial hearing.

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[31] Supp. Tr. 737 (1/27/22 Whang).

[32] For ease of reference, the undersigned's SCIE only includes exhibits from the supplemental hearing. The Combined Certified Index of Exhibits ("CCIE") includes the information from both the initial CIE, which was submitted by Judge McNeil, and the SCIE.

[33] Enforcement Counsel's post-hearing brief will be abbreviated as "ECIB," while Respondent's post-hearing brief will be abbreviated as "RIB."

[34] The following abbreviations will be used for the findings of fact: Enforcement Counsel's initial findings of fact "EC FOF," Enforcement Counsel's supplemental findings of fact "EC SFOF," Respondent's initial findings of fact "R FOF," and Respondent's supplemental findings of fact will be abbreviated as "R SFOF."

[35] Enforcement Counsel's responsive post-hearing brief will be abbreviated as "ECRB," while Respondent's responsive post-hearing brief will be abbreviated as "RRB."

III. Factual Summary

A. Background

1. The Bank and the Holding Company

The Bank was founded in 1899, has been controlled by the Burgess/Herring family since inception, and is wholly-owned by its holding company, Herring Bancorp, Inc. ("HBI").[36] The Burgess family owns approximately 80% of HBI.[37] At all relevant times, Respondent's father, Charles Coney Burgess ("Coney Burgess"), was Chairman of the Board of HBI and the Bank.[38]

Respondent joined the Bank in 1992 and was appointed as the Bank's CEO in 2000, in which capacity he served until his resignation on June 19, 2012.[39] He was appointed as the Bank's President in 2002 and served until his resignation from that position on April 2, 2012.[40] Respondent remains a director on the Bank's Board of Directors ("Board") as Vice Chairman.[41] In addition, Respondent is HBI's Vice Chairman and President and remains an officer of HBI.[42]

Respondent testified that he is a sophisticated and knowledgeable businessman[43] and that he received an Executive Masters of Business Administration ("MBA" or "eMBA") from the University of Chicago.[44] Under his leadership, the Bank grew from approximately $350 million on December 31, 2008 to roughly $580 million on June 30, 2011 through the acquisition of two failed banks, namely Colorado National Bank in Colorado Springs, Colorado, in March 2009, and

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[36] Stipulation I ¶ 6; EC FOF ¶ 6 (citing JX-818 (Ghiglieri Management Study) at 10).
[37] *See* Amended Notice ¶ 7; Amended Answer ¶ 7; Tr. 1813 (9/20/16 Burgess).
[38] Stipulation I ¶ 7.
[39] *Id.* ¶¶ 9-10.
[40] *Id.* ¶ 11.
[41] *Id.* ¶ 12.
[42] *Id.* ¶ 8.
[43] Tr. 1863 (9/21/16 Burgess).
[44] Tr. 1859-60 (9/21/16 Burgess); *see also* Tr. 302 (9/14/16 Keegan) (where the Associate Dean of the executive MBA program at the University of Chicago Booth School of Business testified that Respondent was part of a cohort that started in June 2010 and graduated in March 2012).

First State Bank of Altus in Altus, Oklahoma, in August 2009.[45] In addition, Respondent diversified the Bank's income stream by creating new products and non-interest revenue streams, including making the Bank an agent bank in the MasterCard and Visa credit card programs.[46] The Bank has fourteen branches in Texas, Oklahoma, and Colorado.[47]

At all relevant times, the Bank has been a Texas state bank association, having its principal place of business in Amarillo, Texas.[48] At all relevant times, the Bank was an insured state nonmember bank with the FDIC serving as its primary federal regulator and is an insured depository institution pursuant to 12 U.S.C. § 1813(c)(2).[49] The FDIC brought this action against Respondent as an institution-affiliated party ("IAP") of a supervised financial institution for a prohibition order under 12 U.S.C. § 1818(e) and a second-tier civil money penalty under 12 U.S.C. § 1818(i). There is no dispute that Respondent is an IAP and that the FDIC has enforcement authority over Respondent.[50]

2. The 2010 Examination

The Texas Department of Banking ("TDOB") and the FDIC conducted a joint Bank examination starting on or about December 13, 2010 ("2010 Examination").[51] Joint FDIC-TDOB examinations go through multi-layered reviews at both agencies.[52] According to TDOB Deputy Commissioner Robert Bacon, the TDOB and FDIC were in agreement when it came to the Bank.[53]

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[45] JX-818 (Ghiglieri Management Study) at 10.
[46] Supp. Tr. 517-19 (1/26/22 Burgess); Tr. 1601 (9/20/16 Spears); Tr. 142-43, 210 (9/13/16 James).
[47] JX-818 (Ghiglieri Management Study) at 10. Respondent testified that the Bank had fifteen branches. Tr. 1756-57 (9/20/16 Burgess).
[48] Stipulation I ¶ 1.
[49] *Id.* ¶ 2.
[50] *Id.* ¶¶ 3-5.
[51] *Id.* ¶ 16.
[52] Supp. Tr. 164 (1/25/22 Neal), 752 (1/27/22 Filer); JX-942 (Bacon Dep.) 9-11.
[53] JX-942 (Bacon Dep.) 18, 33; *see also* Supp. Tr. 744, 752 (1/27/22 Filer).

It should be noted that before the 2010 Examination, the FDIC received a tip from a former contractor who performed work at Respondent's house, for which Respondent paid the contractor with a Bank check.[54] Various FDIC investigators were assigned to the matter,[55] and this red flag led FDIC examiners to begin looking at Respondent's expenses during the 2010 Examination.

During the 2010 Examination, the examiners discovered that the Bank allowed Respondent to approve his own expenses.[56] The examiners also discovered that Respondent had multiple Bank credit cards and could not provide receipts to substantiate the expenses as business expenses, which led to additional scrutiny and review of the Bank's expense records.[57] When Respondent was questioned about his expenses, Respondent represented to FDIC examiners that he could produce receipts for any charge on his bank credit cards; however, FDIC examiners received no receipts during their onsite examination and left before the review of Respondent's expenses was complete.[58]

As detailed further below, Respondent had a longstanding problem of not substantiating his expenses with vendor receipts, which the Board was cognizant of, but failed to take any action to address until it was flagged during the 2010 Examination. When internal auditor Brad Schriber[59] joined the Bank in July 2008, he learned that Respondent's expenses were not substantiated with vendor receipts and raised the issue with Chief Financial Officer ("CFO") Jack Hall, who told him

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[54] Tr. 849 (9/15/16 Ramsey).

[55] Namely, Tim Nowell, Angela Stewart, and Scott Baber. Tr. 849-852 (9/15/16 Ramsey).

[56] EX-429 (4/11/12 Recommendation for Enforcement Action) at 1; EX-4/EX-206 (12/13/10 ROE) at 5. According to Respondent, "the FDIC jumped at the chance to investigate Burgess after purportedly receiving a false tip that Burgess was financing a renovation of his home using Bank funds." R SFOF ¶ 4. Respondent contends that "the FDIC itself has internally conceded, there was no evidence to support this theory," R SFOF ¶ 4 citing to JX-537, which is not in evidence or proffered; therefore it is given no weight.

[57] EX-429 (4/11/12 Recommendation for Enforcement Action) at 1; EX-4/EX-206 (12/13/10 ROE) at 7.

[58] Supp. Tr. 76 (1/25/22 Kuhnert).

[59] The undersigned finds there is much ado about nothing regarding Mr. Schriber's declaration (EX-906) and amended declaration (EX-907) regarding a mounted bobcat and a $920.12 taxidermy charge. EX-873 (Spreadsheet) at line 448 (Trophy Taxidermy). *See* RRB 4. n. 18.

not to go there.[60] Mr. Schriber felt obligated to bring the matter to the Board's attention during a Board meeting, and Mr. Schriber recalled that Respondent's father announced at the Board meeting that everyone, including Respondent, needed to submit vendor receipts. Mr. Schriber also recalled that Respondent stated that he had all the receipts and would provide them if necessary.[61]

On or about April 25, 2011, the FDIC sent the Report of Examination ("ROE") from the 2010 Examination to the Bank, along with a proposed Memorandum of Understanding ("MOU") to determine what was going on with Respondent's expenses.[62] On or about June 13, 2011, the Bank agreed to conduct a management study to evaluate the roles of Respondent and the Board, and to have an independent auditor conduct a forensic audit of Respondent's expenses, both pursuant to the MOU.[63] The 2010 Examination resulted in a downgrade in the Bank's capital adequacy, asset quality, management, earnings, liquidity, and sensitivity to market risk ("CAMELS") rating for management, due in part to the Bank's lack of control over Respondent's expenses.[64]

July 28, 2011 Board Executive Session

On or about July 28, 2011, the Board met in executive session and discussed various expenses that had been charged to the Bank by Respondent in 2011.[65] Exhibit B, a spreadsheet prepared in part by Scarlette Blair, represented Respondent's expenses for the first half of the year with notations in different categories, including "personal." When Ms. Blair was asked for an explanation of these "personal" charges, she stated:

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[60] Tr. 648 (9/15/16 Schriber).
[61] Tr. 650-52 (9/15/16 Schriber). Enforcement Counsel asserts that after Mr. Schriber went to the Board, his access to the Board was subsequently cut off, that Mr. Thorne was hired as a co-auditor, and that Mr. Thorne eventually replaced Mr. Schriber. ECRB 18 citing Tr. 646-54, 666-67 (9/15/16 Schriber).
[62] Stipulation I ¶ 21; EX-4/EX-206 (12/13/10 ROE).
[63] Stipulation I ¶ 23; JX-217 (6/14/11 MOU).
[64] Amended Notice ¶ 69.
[65] Stipulation I ¶ 24.

> These are Campbell's personal charges he has charged to the bank credit card. He reimburses the bank for all personal expenses. Ms. Blair explained CEO Burgess likes to constantly test the Bank's payment card system. However, he earmarks his personal expenses as personal expenses. He reimburses the bank for those personal expenses.[66]

At that meeting, the Board determined that it would start reviewing Respondent's expenses and disapproved of Respondent making personal charges on his Bank-owned card.[67] At that same meeting, the Board approved of Respondent's budget of $127,100 for the remainder of the year,[68] and voted that the expenses in Exhibit B were "duly authorized bank-related expenses," including Respondent's educational expenses and the travel expenses of his assistant, Ms. Taylor.[69] This is the first of many Board ratifications of Respondent's expenses that were made without adequate supporting documentation.[70]

September 20, 2011 Board Executive Session

On or about September 20, 2011, the Board met in executive session and discussed Respondent's cash-out withdrawals for 2008, 2009, and 2010.[71] According to the minutes,

> it has been determined that certain business-related expenses advances relating to Mr. Campbell Burgess were not adequately documented and in some cases the Bank's files did not contain appropriate records and receipts supporting the business related use of such expense advances. The Board acknowledges that such expense advances were made exclusively for business-related purposes, however, because certain of these business-related expenditures were not adequately documented, Mr. Campbell Burgess has agreed to reimburse the Bank for such expense

[66] JX-17/EX-891 (7/28/11 Executive Session Minutes) at 3.
[67] *Id.* at 1, 3, 6.
[68] *Id.* at 29 (Exhibit D). *See also* Tr. 1026-27 (9/16/16 Thorne).
[69] JX-17/EX-891 (7/28/11 Executive Session Minutes) at 6, 9-14 (Exhibit B). *See also* Tr. 1023-27 (9/16/16 Thorne).
[70] Other Board ratifications were made on September 20, 2011 (*see* JX-31 (9/20/11 Executive Session Minutes)); February 1, 2012 (*see* JX-49 (2/1/12 Special Directors Meeting Minutes) and discussed at Section III.A.3, *infra*); and April 2, 2012 (*see* JX-59 (4/2/12 Special Directors Meeting Minutes) and JX-60 (4/2/12 Board Resolution) and discussed at Section III.A.3, *infra*).
[71] JX-31 (9/20/11 Executive Session Minutes) at 2.

> advances that were not adequately documented and remit the aggregate amount of $73,900 to the Bank by September 30, 2011.[72]

The minutes state that "[a]dditional detail regarding the calculation of these reimbursements is set forth on Exhibit B to these minutes"[73]; however, Exhibit B is little more than a listing of cash-out withdrawal amounts with a two to five word description of where Respondent traveled to without adequate documentation.[74]

a. Ghiglieri Management Study

The management study required by the MOU was performed by Catherine Ghiglieri, a former TDOB Commissioner.[75] As part of the management study, Ms. Ghiglieri, along with her subcontractor, Coy Lewis, performed a compensation study.[76] While much of the compensation study is redacted, the overall conclusion was that Respondent's cash compensation was low compared to the compensation survey data.[77] The study also stated that the deferred compensation plan for Respondent was not analyzed because

> There [was] much confusion regarding whether a deferred compensation plan for the CEO exists. At various times, we were told that there was a deferred comp plan for the CEO, that there were plan documents that could not be located, that this plan was at the holding company, that it was to be funded by an off-balance sheet asset of the bank (MasterCard stock), and then that there was no plan.[78]

The Board received a copy of the management study on August 22, 2011.[79] The management study found that the Bank's organizational structure, with every senior person

[72] *Id.* at 2-3.
[73] *Id.* at 3.
[74] *Id.* at 9-10 (Exhibit B).
[75] Tr. 32-33 (9/13/16 Ghiglieri).
[76] Tr. 47 (9/13/16 Ghiglieri), JX-152 (Compensation Study).
[77] JX-152 (Compensation Study) at 5.
[78] *Id.* at 5.
[79] Stipulation I ¶ 26; JX-818 (Ghiglieri Management Study).

reporting directly to Respondent, was "dysfunctional."[80] The management study found inadequate staffing and weaknesses in internal audit and deposit operations,[81] which were similar to concerns expressed in a prior management study.[82] The management study acknowledged Respondent as a "visionary" who was responsible for the Bank's growth during the recession,[83] but concluded that his management style was "frenetic"[84] and that he dominated the Board and management team.[85]

The management study found that Respondent overwhelmed the Board during meetings and would proceed with plans without adequate details or discussion; that there was a high turnover rate in critical control positions, such as the Bank Secrecy Act ("BSA") compliance officer and auditor; that three senior staff positions were filled by people with no prior banking experience; and that the Bank had inadequate staff in areas of concern with the regulators.[86] Ms. Ghiglieri testified that "all of the outside board members expressed concern about various issues regarding Campbell . . . how they wanted to be able to supervise him and the bank properly; they just felt like they were unable to. They felt like they were kind of being bulldozed over."[87] In addition, she testified that the management study found that "board supervision over management was ineffective," and that "[t]here were no performance evaluations of the CEO."[88]

The management study also detailed recommendations for immediate action, including that Respondent's position be bifurcated: namely, that Respondent be restricted to matters of strategy and that a President, with banking experience, be appointed to be in charge of day-to-day Bank

[80] JX-818 (Ghiglieri Management Study) at 42.
[81] *Id.* at 11-12, 49.
[82] ECIB 28. A prior management study was conducted in 2005 when the Bank entered into an agreement with the OCC. *See* EX-72 (2005 Management Study) at 4.
[83] JX-818 (Ghiglieri Management Study) at 23; Tr. 98-99 (9/13/16 Ghiglieri).
[84] JX-818 (Ghiglieri Management Study) at 23.
[85] *Id.* at 11.
[86] *Id.* at 11-12.
[87] Tr. 62 (9/13/16 Ghiglieri).
[88] Tr. 60-61 (9/13/16 Ghiglieri).

matters.[89] After the Board received the management study, Respondent continued to run the Bank for another eight months, until he resigned as the Bank's President on April 2, 2012.[90] That same day, Everett ("Ev") Covington was hired as the Bank's President.[91] HBI voted to add Mr. Covington to the Bank's Board, and he became a Board member on April 17, 2012.[92]

Ms. Ghiglieri testified that working with Respondent was similar to "wrassling an octopus" because she couldn't get to the bottom of some things, and could understand how the examiners were having trouble getting what they needed.[93] In fact, in August 2011 Ms. Ghiglieri predicted that Respondent could be subject to a removal proceeding.[94]

b. Padgett Forensic Audit

The forensic audit required by the MOU was performed by Padgett, Stratemann & Co. ("PSC" or "Padgett").[95] Padgett's engagement letter specified that it would:

> 1. Verify the business nature of each non-interest expense of $2,500 or more for any employee for 2008, 2009, and 2010 by tracing to supporting receipt or other supporting documentation;
>
> 2. Verify the business nature of each non-interest expense in any amount for Respondent for 2008, 2009, and 2010 by tracing to supporting receipt or other supporting documentation; and
>
> 3. Prepare a report identifying any non-bank related expenses.[96]

[89] JX-818 (Ghiglieri Management Study) at 11, 45-47.
[90] Stipulation I ¶ 11.
[91] Mr. Covington was the Bank's President from April 2013 through March 2014. Tr. 602 (9/14/16 Covington).
[92] Stipulation I ¶ 32.
[93] Tr. 90-91 (9/13/16 Ghiglieri); *see also* EX-576 (10/30/11 email chain from Ghiglieri to James); EX- 577 (12/1/11 email chain from Ghiglieri to James).
[94] Tr. 69 (9/13/16 Ghiglieri); EX-584 (8/5/11 email from Ghiglieri to James); EX-559 (August 2011 email chain between Ghiglieri and James).
[95] Stipulation I ¶ 25.
[96] EX-737 (Padgett Engagement Letter) at 5. Although Enforcement Counsel's brief references the Padgett Engagement Letter, it miscites the exhibit as JX-217, which is the 6/14/11 MOU. ECIB 28.

José Leo Muñoz was one of the forensic accountants that performed the Padgett audit.[97] In reference to the "supporting receipt or other supporting documentation" references in tasks one and two listed above, Mr. Muñoz testified that Padgett was referring to a "third-party vendor receipt, whether it come[s] from a restaurant, a hotel, airfare, so something that would allow us to identify the nature of the expense, location, amount, vendor in order to verify the nature of the expense, whether it be bank- or non-bank-related."[98] In Mr. Muñoz's opinion, a vendor receipt "gives us enough information typically to serve the nature of that transaction and then to verify whether it was bank- or non-bank-related."[99] Bank employees, including Brian Thorne, knew that Padgett wanted vendor receipts for the forensic audit; however, by the time the Bank entered into the MOU, Mr. Thorne knew that Respondent did not have vendor receipts for most of his expenses.[100]

On or about January 25, 2012, the Bank received a draft forensic audit report.[101] The draft report stated that from 2008 to 2010, Respondent had charged $364,114.71 in expenses on the Bank-owned credit and debit cards, of which $327,273.48 was unsupported by any vendor receipts.[102] Upon review, Padgett determined that $177,675.23 of the charges were likely Bank-related expenses, while the remaining $149,598.25 were "questionable" as Bank-related expenses

[97] Tr. 229 (9/13/16 Muñoz).
[98] Tr. 237 (9/13/16 Muñoz).
[99] Tr. 238 (9/13/16 Muñoz).
[100] Tr. 1037-38 (9/16/16 Thorne). Brian Thorne was the Bank's internal auditor from July 2010 until June 2016, when he was promoted CFO. Supp. Tr. 18-19 (1/25/22 Thorne).
[101] Stipulation I ¶ 29; EX-64 (Board Discussion Draft of Padgett Draft); EX-505 (Padgett Draft).
[102] ECIB 37. *See also* EX-64 (Board Discussion Draft of Padgett Draft) at 5, 11. The amounts are calculated as follows:

	Total (2008-2010)	Receipts (Bank)	Receipts (Non-Bank)	No Receipts
Respondent's Corporate Credit Cards	$330,855.31	$33,388.08	$3,453.15	$294,014.08
Respondent's Corporate Debit Cards	$ 33,259.40	$ 0	$ 0	$ 33,259.40
Total	$364,114.71	$33,388.08	$3,453.15	$327,273.48

because they were charged to Respondent's Bank-owned credit and debit cards for which no receipts were available, and the charges were made at vendors that are not typically not Bank-related.[103] On April 11, 2012, Padgett presented the Bank's board with a list of questionable charges that Respondent did not agree to reimburse.[104] The Board ended up "ratifying" many of these expenses as Bank-related, despite the lack of documentation to support this conclusion.[105] On April 11, 2012, Padgett issued its final forensic audit report, which identified the questionable charges, but resolved the matter by referencing the Board's ratification of the questionable charges as Bank-related business expenses.[106] The final report concluded that only $4,695.22 were non-Bank expenses, which Respondent reimbursed.[107]

Specifically, Padgett identified certain expenses on Respondent's corporate credit cards incurred in 2008 and 2009 totaling $952.98 that were not Bank-related (i.e. vendors including PetSmart, Silpidia Designs, and the department stores Dillard's and Nordstrom), and Respondent reimbursed the Bank for those expenses, plus interest, on February 2, 2012.[108] Padgett also identified certain expenses on Respondent's corporate debit card incurred in 2009 and 2010,

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[103] Tr. 272, 283-84 (9/13/16 Muñoz); EX-64 (Board Discussion Draft of Padgett Draft) at 6-7, 25-33. The questionable amounts are calculated as follows:

Questionable 2010 Expenses (page 6)	$ 53,188.15
Questionable 2009 Expenses (page 7)	$ 49,379.76
Questionable 2008 Expenses (page 7)	$ 32,244.95
Questionable Debit Card Expenses (page 12)	$ 14,785.39
Total	$149,598.25

[104] JX-151 (Padgett Final) at 7.

[105] *Id.*; *see* JX-49 (2/1/12 Special Directors Meeting Minutes) at 4-5; JX-59 (4/2/12 Special Directors Meeting Minutes); JX-60 (4/2/12 Board Resolution).

[106] Stipulation I ¶ 34; JX-151 (Padgett Final).

[107] RIB 19 citing JX-48 (1/23/12 FDIC letter to Board) at 162. *See also* JX-151 (Padgett Final). The undersigned found the following amounts listed in the Padgett report: $986.26 for credit card accounts with charges to Dillard's, PetSmart, Silpidia Designs, Nordstrom; $2,660.59 for debit # 3887 for charges to Famous Footwear, North Face, Nike Town, Diamond Creations; $671.29 for debit # 9566 for charges to The Home Depot, Walmart, CCB house expense, Lowe's, Amazon, Amarillo Veterinary, and $168.99 for textbooks.

[108] Tr. 323 (9/14/16 Muñoz); JX-151 (Padgett Final) at 9.

totaling $2,201.81 that were not Bank-related (i.e. vendors including Famous Footwear, North Face, Nike, and Diamond Creations), and Respondent reimbursed the Bank for those expenses, plus interest, on February 2, 2012.[109] There were also charges made on the Bank's corporate debit card for the benefit of Respondent that were not Bank-related in 2009 and 2010, totaling $658.95, and Respondent reimbursed the Bank for those expenses, plus interest, on February 2, 2012.[110]

c. Consultant Randall James

Randall James, former TDOB commissioner, was hired as a consultant in 2011 to "help the bank regain its credibility with the regulators."[111] He interfaced with the other consultants, including Ms. Ghiglieri and Mr. Lewis, about Respondent's deferred compensation plan.[112] He testified that Respondent had stated that the deferred compensation plan was at the holding company level.[113] He had concerns regarding the deferred compensation plan because when he

> sat down with the bank's controller, who, if I remember correctly, was also the holding company's controller, he was unaware of a deferred comp plan at the holding company level.
>
> If such a plan existed and was not showing up on the holding company's books, we would probably have some problem with the Federal Reserve with an unbooked liability.[114]

When looking into the deferred compensation plan, Mr. James became aware that the MasterCard stock was not booked on the books of the Bank or the holding company, something that was confirmed by the controller.[115] Mr. James further learned that the MasterCard stock was paying

[109] Tr. 323 (9/14/16 Muñoz); JX-151 (Padgett Final) at 14.
[110] JX-151 (Padgett Final) at 18.
[111] Tr. 126 (9/13/16 James); *see also* Tr. 119, 122, 124-25 (9/13/13 James); EX-763 (James Engagement Agreement).
[112] Tr. 128 (9/13/16 James).
[113] Tr. 133 (9/13/16 James).
[114] Tr. 137 (9/13/16 James).
[115] Tr. 141-42 (9/13/16 James).

dividends, which were deposited into Respondent's personal account.[116] Mr. James made recommendations regarding the MasterCard and Visa stock and dividends, discussed more fully below.[117]

3. The Board's Ratification of Respondent's Expenses

As noted above, the Board ended up "ratifying" many of the questionable expenses identified by Padgett as Bank-related, despite the lack of documentation that they were Bank-related.[118]

February 1, 2012 Special Directors' Meeting

On February 1, 2012, the Bank's Board held a special directors' meeting to discuss Respondent's expenses, including a memorandum entitled "CEO Expenses," which was prepared by Scarlette Blair, the Bank's then-Senior Vice President of Operations. Attached to the memorandum was a summary listing of expenses by Respondent that were paid by the Bank from 2008 to 2010.[119]

Also attached to the Board packet was a letter dated January 31, 2012 from Doug Conder, Certified Public Accountant ("CPA"), stating that while his office

> has witnessed a number of occasions where business expenses were supported with documentation, other than the original receipt . . . we do not advise that you continue this practice going forward. Rather, we advise that Herring Bank employees submit original receipts for charges incurred on the corporate credit cards and that Herring Bank maintain these records for a reasonable period of time.[120]

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[116] Tr. 143-44 (9/13/16 James).
[117] *See* Section III.C, *infra*.
[118] JX-151 (Padgett Final) at 7; JX-49 (2/1/12 Special Directors Meeting Minutes) at 4-5; JX-59 (4/2/12 Special Directors Meeting Minutes); JX-60 (4/2/12 Board Resolution).
[119] Stipulation I ¶ 30; *see also* RX-1 (2/1/12 Board Agenda) at 155-63; JX-60 (4/2/12 Board Resolution) at 8-30.
[120] RX-1 (2/1/12 Board Agenda) at 154. Mr. Conder subsequently joined the Bank's Board on August 7, 2012. Stipulation I ¶ 38.

Mr. Conder's letter also stated that "[r]egarding past business expenses without original receipts attached, because the practice was consistently applied, charges were consistent across time, and the practice complied with the policy in place at the time, my office would recommend that you ratify them as business expenses unless you have reason to believe otherwise."[121]

The minutes state that "[a]fter a lengthy discussion with all directors present with the exception of CEO Burgess, Dr. Couch made the motion to accept the recommendation by Doug Conder, CPA to ratify these charges as business expenses."[122] The Board also passed a motion that "regardless of any approved policy or procedure to the contrary, no expense will be approved as a business expense, if it is not accompanied by a valid receipt issued by the payee."[123] On or about February 2, 2012, Respondent paid the Bank $4,695.22, which represented $4,172.57 in personal expenses plus $522.62 in interest.[124]

Blair January 31, 2012 Memorandum

Scarlette Blair worked for the Bank from approximately 2004 to 2014 as Vice President of Operations, and later Senior Vice President of Operations.[125] Ms. Blair had prior experience in accounts payable, but had no prior banking experience.[126] She was described by another Bank employee as Respondent's "right-hand man."[127]

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[121] RX-1 (2/1/12 Board Agenda) at 154.
[122] JX-49 (2/1/12 Special Directors Meeting Minutes) at 5; *see also* RX-1 (2/1/12 Board Agenda) at 154 (1/31/12 Conder Letter).
[123] JX-49 (2/1/12 Special Directors Meeting Minutes) at 5.
[124] Stipulation I ¶ 31.
[125] JX-928 (Blair Dep.) at 9-12, 67.
[126] JX-818 (Ghiglieri Management Study) at 29. *See also* Tr. 54 (9/13/16 Ghiglieri), in which Ms. Ghiglieri testified that Ms. Blair "was one of them that had no prior bank experience, and I was shocked, is probably what I was. It sounds like a strong word, but she had a lot of responsibility for really critical functions in the bank, and she had no prior banking experience, and she was really learning on the job."
[127] Tr. at 770 (9/15/16 Bodey Crooks). Another Bank employee, Heather Shiplet, described Ms. Blair's working relationship with Respondent as "great," and stated that Ms. Blair characterized her relationship with Respondent as being his "bottom bitch," meaning that she would do whatever he needed to get done. Tr. 830 (9/15/16 Shiplet Elias).

Ms. Blair's memorandum referenced "advice" that Respondent "received from one of the bank's CPAs (the CPA no longer advises the bank)," which "specifically recommended not retaining expense receipts and, instead, noting the business nature of the charge on the month-end credit card statement."[128] According to the memorandum, the rationale behind this advice was that because CEOs have a very mobile nature, "receipts were likely to be misplaced and difficult to manage"; therefore, "it would be a stronger business practice to consistently note the business nature on the month-end card statement rather than pursue a business practice of maintaining receipts, and risk missing receipts."[129] Ms. Blair testified that she had heard that the CPA who gave this advice was Steve Sterquell.[130] There is no evidence in the record that Mr. Sterquell ever provided a written opinion to Respondent with this advice.[131] There is also testimony from Terry Spears, a Board member, that Mr. Sterquell was never hired as one of the Bank's CPAs.[132]

Steve Sterquell was a CPA who was involved with the entity American Housing Foundation ("AHF"). Mr. Sterquell committed suicide on April 1, 2009, after AHF declared bankruptcy.[133] Thereafter, Respondent, his family, and the Bank learned that Mr. Sterquell had defrauded them out of millions of dollars in a Ponzi scheme-like fraud.[134] In the FDIC's 2010 Examination, the Bank had approximately $3.4 million of AHF's loans and investments classified as substandard, and prior to the start of that examination, the Bank had already charged off $3.8

[128] RX-1 (2/1/12 Board Agenda) at 155 (emphasis in original).
[129] *Id.*
[130] JX-928 (Blair Dep.) at 21, 50-51. *See also* Tr. 1203 (9/16/16 Freeman) (testimony from William Freeman that during a February 3, 2012 meeting between Respondent, Coney Burgess, the TDOB and the FDIC, that Respondent said he received this "bad accounting advice" from Mr. Sterquell).
[131] Tr. 1205 (9/16/16 Freeman).
[132] Tr. 1719 (9/20/16 Spears).
[133] Tr. 252 (9/13/16 Muñoz); Tr. 946 (9/16/16 Hoy), 1100 (9/16/16 Templeton). *See also* ECIB 6.
[134] Tr. 1740-41 (9/20/16 Burgess); R SFOF ¶ 2.

million of loans to AHF and other Steve Sterquell-related companies.[135] The Burgess family was involved in a lawsuit against the Sterquell estate as part of the creditors' committee of AHF.[136]

In addition, at the time Mr. Sterquell purportedly gave Respondent his advice about expense documentation, Mr. Sterquell had personally benefitted from Respondent's expense practices, having received more than $5,000 in international airfare and hotel stays paid for by Respondent at the Bank's expense, which were later deemed to be personal expenses.[137] Also around that time, Mr. Sterquell owed the Bank a large sum of loans.[138]

April 2, 2012 Special Directors' Meeting

On April 2, 2012, a mere two months after the motion that was approved at the February 1, 2012 Special Directors' Meeting that no expenses would be approved as business expenses if not accompanied by a valid receipt, the Board members that were part of the Special Directors' Meeting once again "ratified" Respondent's previously determined $149,000+ in questionable expenses as legitimate business expenses of the Bank.[139] The Board resolution states that

> after due consideration and deliberation of the facts and circumstances described in these minutes and based, in part, upon the advice and counsel of Mr. Conder, Mr. Hoy and such other information provided to the Board in connection with its review and analysis, the Board hereby approves and ratifies the expenses listed on Exhibit C attached hereto, as valid and duly incurred business expenses of the Bank.[140]

[135] Tr. 1204 (9/16/16 Freeman); *see also* EX-4/EX-206 (12/13/10 ROE) at 9.
[136] Tr. 1156 (9/16/16 Templeton).
[137] JX-138 (12/28/12 Templeton letter) at 2-4, 22 ($3,070.21 British Air and $419.89 Grand Hotel Wein, $245.75 Expedia Travel, and $478.76 Grand Hotel Wein), 32 ($1,523.37 Argentina trip).
[138] Supp. Tr. 667 (1/27/22 Freeman).
[139] JX-59 (4/2/12 Special Directors Meeting Minutes); JX-60 (4/2/12 Board Resolution). *See also* EX-77 (4/12/12 letter from Gerrish McCreary Smith to FDIC).
[140] Stipulation I ¶ 33. *See also* JX-60 (4/2/12 Board Resolution) at 2 (emphasis in original).

In support, the Resolution included: 1) a March 1, 2012 letter by Mr. Conder,[141] 2) a February 29, 2012 letter from William Hoy, a tax attorney, addressing the documentation of business expenses for federal income tax purposes,[142] and 3) the January 31, 2012 memorandum prepared by Ms. Blair, noted above, along with an updated spreadsheet prepared by Mr. Thorne.[143]

Mr. Conder's March 1, 2012 letter stated that

> Generally Accepted Accounting Principles ["GAAP"] in the United States are financial accounting rules for recording and reporting business transactions. GAAP does not provide procedural and substantiation requirements for record keeping and documentation. GAAP does not require physical receipts to substantiate business expenses. According to GAAP, a business expense is any expenditure that is ordinary and necessary in the course of business. It is the responsibility of Management to determine what constitutes a reasonable and customary expense for each organization.[144]

He testified that his second letter was fairly easy to write because GAAP only comes into play when working on financial statements, which has nothing to do with documentation requirements for business expenses.[145]

While Mr. Hoy's February 29, 2012 letter stated "[b]ased on my review of the documents [Mr. Templeton] presented,"[146] he testified that he actually didn't review any documents. Rather, Mr. Templeton told Mr. Hoy about documents; therefore, the statement in the letter was a misstatement.[147] Mr. Hoy's letter also stated that "[t]he record keeping practices of the bank are sufficient for federal income tax purposes."[148] But he testified that the letter's purpose was more like a junior associate's "memorandum of law" to address the hypothetical question of whether it

[141] JX-60 (4/2/12 Board Resolution) at 6-7 (Exhibit B).
[142] *Id.* at 3-5 (Exhibit A).
[143] *Id.* at 8-30.
[144] *Id.* at 6.
[145] Tr. 1252-54 (9/19/16 Conder).
[146] JX-60 (4/2/12 Board Resolution) at 3.
[147] Tr. 986-87 (9/16/16 Hoy).
[148] JX-60 (4/2/12 Board Resolution) at 5.

was possible for certain kinds of expenses to be adequately substantiated for federal income tax purposes based solely on a credit card statement supplemented with personal testimony.[149] In Mr. Hoy's opinion, the Board elevated his letter to a "much higher level than what it was really – what it really does."[150]

April 12, 2012 Special Directors' Meeting

On or about April 12, 2012, the Bank's Board held another meeting and further discussed Respondent's 2008-2010 expenses, including the Padgett audit, the Hoy letter, and the Conder letter.[151] In the minutes, there is a discussion of a spreadsheet of Respondent's expenses, noting that a column that had originally been listed as "No Receipt Available" was replaced with "Other Supporting Documentation per Bank Policy."[152]

4. New Bank Directors and the Special Board Committee

As noted above, Respondent stepped down as President of the Bank on April 2, 2012,[153] and stepped down as CEO on June 19, 2012.[154] In July 2012, Mr. Covington approached the FDIC and TDOB to look for a way to resolve Respondent's expense issues;[155] however, the Burgess family purportedly disagreed with how Mr. Covington was handling the issue and subsequently prevented him from dealing with the FDIC and TDOB directly by creating a Special Board Committee, detailed below.[156]

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[149] Tr. 951-52, 982-83 (9/16/16 Hoy).
[150] Tr. 983 (9/16/16 Hoy).
[151] Stipulation I ¶ 35. *See also* JX-62 (4/12/12 Special Directors Meeting Minutes).
[152] JX-62 (4/12/12 Special Directors Meeting Minutes) at 1. *Compare* EX-505 (Padgett Draft) at 4 ("No Receipt Support") *with* JX-151 (Padgett Final) at 5 ("Other Documentation Per Bank Policy to Support Bank Expense").
[153] Stipulation I ¶ 11.
[154] *Id.* ¶¶ 9-10.
[155] JX-79 (7/17/12 Executive Session Minutes); EX-27 (7/27/12 letter from Covington to Padgett); Tr. 607-08 (9/14/16 Covington).
[156] JX-81 (8/7/12 Charter of the Special Committee) at 1-3, Tr. 1420-21 (9/19/16 McKinney). According to Respondent, the Special Committee was assembled to address the regulators' concerns in the Committee's July 20, 2012 letter to the Board. RIB 19-20.

On or about August 7, 2012, HBI, the sole shareholder of the Bank, voted to elect five new directors to the Bank's Board, including 1) Charlotte Burgess Griffiths, 2) J. Douglas Conder, 3) William McKinney Jr., 4) Robert Templeton, and 5) Robert Balliett. On the same day, the Bank's Board voted to form a Special Board Committee ("SBC"), which consisted of Messrs. Templeton and McKinney, to "manage all aspects of the ongoing investigation of the Bank's prior expense practices . . ."[157]

On October 30, 2012, the Bank's Board voted to authorize Robert Templeton and William McKinney to act as the Bank's sole points of contact with the FDIC and TDOB with respect to all matters related to the review of expenses incurred by Respondent. In addition, Messrs. Templeton and McKinney were to take the lead role in the evaluation of expenses incurred by Respondent from May 2005 through 2011.[158]

Based on their review of Respondent's expenses, Messrs. Templeton and McKinney found that approximately $180,000 were not legitimate Bank expenses (they did not "pass the smell test"[159]), but decided to add an additional $58,650 as an "X factor" to act as a buffer to satisfy the FDIC, bringing the total amount to be reimbursed to $238,650.[160] Their work consisted of a spreadsheet containing information from unidentified sources, but did not include meeting minutes, binders, folders, or other records of expenses.[161] According to Mr. Templeton, he

[157] Stipulation I ¶ 38; *see also* JX-81 (8/7/12 Charter of the Special Committee). Prior to this time, the primary Board members included Respondent, his father Coney, his mother Jane, his brother Carson, and four members of the business community, including Susan Couch, Curtis Johnson, James Pennington, and Terry Spears. ECIB 4.

[158] Stipulation I ¶ 39.

[159] Tr. 1433-34 (9/19/16 McKinney).

[160] RIB 20. *See also* JX-941 (Templeton Dep.) 23; JX-418 (12/27/12 email from Templeton to FDIC/TDOB) at 3.

[161] ECIB 44 (citing Tr. 1130-31 (9/16/16 Templeton), Tr. 1437-38 (9/19/16 McKinney)); *see also* JX-138 (12/28/12 Templeton letter).

evaluated Respondent's expenses under a standard that was "highly favorable to the bank."[162] On or about December 7, 2012, the Board allowed Respondent to pay a negotiated sum of $238,650 as reimbursement for a portion of the expenses that Respondent agreed were not Bank-related and to resolve any possible claim or cause of action regarding his expenses.[163]

The settlement agreement includes a statement that

> the Bank believes that Burgess's Expenses were legitimate expenses of the Bank, involved no personal profit or benefit, were expended in good faith and in the best interests of the Bank, were expended as a result of Burgess's duties, responsibilities and functions, and were conducted and documented in a manner with the reasonable belief and reliance on information and opinions received by Burgess from a public accountant who Burgess reasonably believed merited and warranted confidence.[164]

On that same day, Respondent paid the Bank $238,650 pursuant to the settlement agreement, bringing his total reimbursement to the Bank to $319,505.22.[165]

Mr. Templeton testified that the above settlement agreement was drafted entirely by Respondent's personal attorney who unilaterally included exculpatory language absolving Respondent from any wrongdoing and deeming the reimbursed expenses to be legitimate Bank expenses,[166] which was contrary to the findings by Messrs. Templeton and McKinney that at least

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[162] JX-941 (Templeton Dep.) 55. As noted by Enforcement Counsel, Mr. Templeton, as a member of the Bank's Board, had a fiduciary duty to do no less. ECRB 19-20 (citing Tr. 1108 (9/16/16 Templeton)) ("Your Honor, I know what a fiduciary is. I know what the obligations are. And I made that clear to Campbell Burgess."), 1146 (9/16/16 Templeton) ("I was a fiduciary. I was a director of that bank. I had a – and I know what that requires, and I knew what it required. And my loyalty was to the bank and to do what should be done for the bank, and that – I wasn't going to be influenced by anybody.").

[163] JX-207 (12/7/12 Settlement Agreement).

[164] Stipulation I ¶ 40; *see* JX-207 (12/7/12 Settlement Agreement) at 1.

[165] Stipulation I ¶ 41. The total reimbursement consists of the following:

Date	Amount	
10/12/11	$ 75,290.00	(Stipulation I ¶ 27)
10/20/11	$ 870.00	(Stipulation I ¶ 28)
2/2/12	$ 4,695.22	(Stipulation I ¶ 31)
12/7/12	$238,650.00	(Stipulation I ¶ 41)
Total	$319,505.22	

[166] JX-941 (Templeton Dep.) 40-41, 45.

$180,000 didn't meet their criteria as legitimate expenses, plus the "X" factor.[167] Mr. Templeton admitted that he signed the settlement agreement on behalf of the Bank without reading it.[168]

The FDIC and TDOB sent a letter to the Board on March 21, 2013 stating that the regulators still had serious concerns with Respondent's misconduct and were dissatisfied with the lack of clarity and completeness of the Bank's responses to their concerns and inquiries.[169]

5. The 2012 Examination

The TDOB and the FDIC conducted another joint Bank examination starting on or about February 13, 2012 ("2012 Examination").[170] On approximately May 7, 2012, the Bank's Board met the agencies at the TDOB office to discuss the findings of the Joint TDOB-FDIC 2012 Examination.[171] As a result of the 2012 Examination, the Bank's management component of its CAMELS rating was further downgraded due to the Bank's lack of control over Respondent's expenses.[172]

On or about July 20, 2012, the TDOB and FDIC jointly notified the Board that all non-Bank expenses paid on behalf of Respondent during his tenure at the Bank should be promptly reimbursed, which was required by the MOU.[173]

On or about November 6, 2012, Attorney Bruce Heitz submitted a letter to the FDIC and TDOB to address Respondent's expenses, which was deemed Respondent's "first real opportunity . . . to fully explain his 'side of the story.'"[174] The letter makes certain representations, including:

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[167] JX-941 (Templeton Dep.) 45.
[168] *See id.* ("I think I'm what I call a big-picture guy, and I don't like to read long documents. And I probably – probably all I did on this thing after they presented it to us was to sign it.").
[169] JX-140 (3/21/13 joint FDIC/TDOB letter to Bank Board).
[170] EX-16 (2/13/12 ROE).
[171] Stipulation I ¶ 36.
[172] Amended Notice ¶ 130; Amended Answer ¶ 130.
[173] Stipulation I ¶ 37; JX-80 (8/7/12 Special Directors Meeting Minutes) at 3.
[174] JX-132 (Heitz letter) at 1.

1) Respondent hired a new auditor for the Bank in 2008 and specifically requested that the new auditor audit the documentation practices that the Bank had historically used regarding business credit cards. The auditor prepared a report and it was presented to the Board's audit committee along with the Bank's management plan and policy proposal to strengthen controls.[175]

2) The auditor reviewed the practice of credit card statement annotations and made no further recommendations, so the matter was considered closed. In addition, the auditor agreed that the IRS accepted inscribing the business purpose of the transaction on the relevant credit card statement.[176]

3) Respondent believed in good faith that the credit card statement annotation process satisfied the requirement for appropriate documentation in accordance with the Board-approved policy and that it was in compliance with normal and customary standards regarding documentation for tax purposes as well as GAAP. Respondent asked the internal auditor to substantiate and verify his belief and to review the process and request that the Board create a policy to specifically authorize the practice.[177]

4) The internal auditor reviewed all of Respondent's credit card statements and personal charges on a routine basis. The internal auditor was aware of the process and was cognizant of the manner in which Respondent reconciled his charges. The auditor never criticized this process, never questioned the process, or raised the question to the Bank's audit committee after the Bank instituted its new policy.[178]

During his testimony, Mr. Schriber, the auditor referred to in Mr. Heitz's letter, testified that all of the above representations in Mr. Heitz's letter regarding the auditor were untrue.[179]

6. The 2013 Examination

The TDOB and the FDIC conducted another joint Bank examination starting on or about March 4, 2013 ("2013 Examination").[180] During this examination, TDOB commissioned examiner Larry Filer was the first to recommend a double-downgrade to the Bank's Information Technology ("IT") rating.[181]

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[175] *Id.* at 5.
[176] *Id.*
[177] *Id.* at 6.
[178] *Id.* at 6-7.
[179] Tr. 668-72 (9/15/16 Schriber).
[180] EX-49 (3/4/13 ROE).
[181] Supp. Tr. 751 (1/27/22 Filer).

Danny Skarda joined the Bank as President and CEO on May 1, 2013[182] and encouraged the Bank to appeal the corrective actions in the 2013 Examination findings based on examiner bias, among other things.[183] On September 13, 2013, the Bank appealed the findings of the March 2013 Examination to the FDIC's Division of Risk Management Supervision ("RMS").[184] When this appeal was denied, the Bank further appealed to the FDIC's Supervisory Appeals Review Committee ("SARC"), which held a hearing on May 8, 2014.[185] The SARC concluded that the March 2013 Examination ratings were well supported. In addition, the SARC determined that the voicemail transcribed at EX-893, discussed below, did not evidence bias.[186] The TDOB's ombudsman similarly concluded that the March 2013 Examination ratings were well supported.[187]

Charles Neal, FDIC IT supervisory examiner,[188] received a "star" award for his work on the 2013 Examination. In his opinion, he received the award because it was a difficult exam where he identified numerous previous unidentified weaknesses in IT, not because he assigned a particular rating to the Bank.[189] According to testimony from FDIC Assistant Regional Director ("ARD") Mark Taylor, it is not very common for an examiner to work on two successive exams of the same bank, particularly when a bank is rated less than satisfactory, because it is better to

[182] JX-939 (Skarda Dep.) 9-10. Mr. Skarda left the Bank in 2018 to become chairman of the board and CEO of another bank. *See id.* at 9.
[183] *Id.* at 22; Supp. Tr. 423-24 (1/26/22 Owens); *see also* EX-912 (11/22/13 Bank request for review of a material supervisory determination).
[184] RIB 23, n. 134; R SFOF ¶ 26 (citing EX-913). Respondent has made numerous citations in his supplemental findings of fact to EX-913, which the undersigned notes is the Declaration of Serena Owens. EX-913 was never offered or received into evidence and is noted in the Parties' "Certified Index of Exhibits," filed on June 3, 2022, as being "proffered." The undersigned has no record of this exhibit, or any other exhibit, being proffered at the supplemental hearing; however, the Declaration of Serena Owens, dated August 13, 2020, was submitted as Attachment 11 to Enforcement Counsel's Motion for Partial Summary Disposition, filed on August 14, 2020.
[185] EX-900 (6/20/14 SARC decision denying Bank's appeal) at 2-3.
[186] Supp. Tr. 424 (1/26/22 Owens); *see* EX-900 (6/20/14 SARC decision denying Bank's appeal) at 10.
[187] JX-942 (Bacon Dep.) 29-31; *see* EX-57 (10/28/13 TDOB letter).
[188] Supp. Tr. 101 (1/25/22 Neal); *see* EX-919 (Neal CV).
[189] Supp. Tr. 133-34 (1/25/22 Neal).

have an independent evaluation from a different examiner.[190] Mr. Taylor testified that Mr. Neal was not assigned to the Bank's October 2013 exam because at that time, the Bank had alleged bias by Mr. Neal and was planning on filing an appeal regarding the examination that Mr. Neal had just worked on; therefore, it would not make sense to send the same examiner back.[191] According to Mr. Taylor, there was no suggestion that Mr. Neal was reassigned from the Bank's next exam because Mr. Neal had engaged in misconduct or was found by the agency to be biased.[192]

The Bank also alleged bias by Marvin Klein, FDIC Examiner-in-Charge ("EIC"),[193] and the Board formally requested that he not be allowed to participate in any further examinations of the Bank.[194] Serena Owens, the FDIC's Deputy Regional Director for RMS,[195] testified that Mr. Klein was not assigned to the Bank's future examinations in order to accommodate the request from the Bank.[196]

7. The FDIC's Enforcement Action

The decision to file an enforcement action against Respondent went through an extensive, multi-layered review in the FDIC's Dallas Regional Office ("DRO") and Washington DC Office, which culminated in a final decision by the independent Case Review Committee ("CRC").[197] Although examiners recommended an enforcement action as early as September 2011, the DRO

[190] Supp. Tr. 510-11 (1/26/22 M. Taylor).
[191] Supp. Tr. 511-12 (1/26/22 M. Taylor).
[192] Supp. Tr. 511-12 (1/26/22 M. Taylor).
[193] Supp. Tr. 177 (1/25/22 Klein); *see also* EX-917 (Klein CV).
[194] JX-146 (8/14/13 Bank letter to FDIC/TDOB) at 2.
[195] Supp. Tr. 286 (1/26/22 Owens); *see also* EX-920 (Owens CV).
[196] Supp. Tr. 293 (1/26/22 Owens) ("I agreed to that because he asked for it and, you know, whether or not I agreed with his premise that Mr. Klein was biased, you know, it was an easy accommodation to make and – and that's typically what we will do. It's not often that we get those requests from a bank, but it happens from time to time and we typically grant them. You know, it's – it's also not a terribly good experience for the examiner going back if the Bank doesn't want them there. So it's a win-win for everybody to – to, you know, agree to withhold somebody from an exam like that."), 421 (1/26/22 Owens).
[197] Supp. Tr. 340, 374 (1/26/22 Owens), 783-84 (1/27/22 Meade).

concluded that the recommendation was premature and instructed staff to continue its investigation.[198]

A fifteen-day letter was sent to Respondent on or about July 1, 2013,[199] and the original Notice of Charges was filed on November 24, 2014, although the Notice was subsequently amended on February 4, 2016 to add allegations of misconduct relating to certain MasterCard and Visa stock. The TDOB concurred in full with the FDIC's enforcement action against Respondent.[200] TDOB Deputy Commissioner, Robert Bacon, testified that the TDOB concluded that the FDIC was not biased against the Bank.[201]

B. Respondent's Expenses

Pursuant to Bank policy, certain Bank employees were permitted to obtain Bank credit cards for use when traveling in the course of their duties, or purchasing goods and services for the Bank.[202] The Bank paid all charges to Bank credit cards through the cards' automatic payment features;[203] however, employees were required to adequately document their business expenses and reimburse the Bank for any personal expenses on the cards in a timely manner.[204] The 2006 Bank Employee Handbook stated that "[c]orporate credit card expenditures must be reconciled and submitted with original receipts to the accounting/finance department within ten business days of the statement."[205]

Reimbursement for certain expenses, including business travel, business entertainment, and meals, still required additional support such as a receipt or notation regarding the business

[198] JX-816 (9/22/11 Stewart Memorandum); Supp. Tr. 364-66 (1/26/22 Owens).
[199] EX-911 (7/1/13 15-day Letter).
[200] JX-942 (Bacon Dep.) 40-42; *see also* EX-925 (9/5/14 TDOB letter).
[201] JX-942 (Bacon Dep.) 27; *see also* JX-147 (9/6/13 joint FDIC/TDOB letter to Bank Board).
[202] JX-201 (2006 Bank Employee Handbook) at 48.
[203] JX-928 (Blair Dep.) 87.
[204] JX-201 (2006 Bank Employee Handbook) at 48.
[205] *Id.*

purpose of the travel or meal, and the names of those in attendance.[206] While this may have been the official Bank policy, the Bank lacked internal controls regarding Bank-owned credit and debit cards, as no one reviewed Respondent's expenses. Respondent also used multiple Bank-owned credit cards without providing receipts to substantiate the expenses as Bank-related.[207] Furthermore, Bank policy provided that "if an employee's spouse accompanies the employee on the business trip, the spouse's expenses will not be paid by [the Bank]."[208]

In response to Respondent's expense practice of routinely failing to provide receipts—which was substantiated by Ms. Blair's testimony[209]—the Bank's Board made a notable change to the Bank's corporate credit card policy. On October 30, 2008, the Board revised the policy to state that "[c]orporate credit card expenditures must be reconciled and submitted with original receipts (or other appropriate documentation if approved by management) to the Account Payable/Operations within fourteen business days of the statement."[210] This new policy was in effect throughout the Relevant Period.

Non-Bank Personal Assistant – Susan Taylor

Susan Taylor met Respondent sometime after 1998 and became romantically involved with him starting in 2005.[211] Ms. Taylor started working as Respondent's personal assistant sometime in 2008.[212] Respondent admits that Ms. Taylor was his personal assistant, not a Bank employee,

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[206] *See* JX-201 (2006 Bank Employee Handbook) at 45-46; JX-202 (2008 Bank Employee Handbook) at 44-45.

[207] EX-206 (12/13/10 ROE) at 7; *see also* EX-4 (12/13/10 ROE), which appears to be a similar copy of the same 12/13/10 ROE.

[208] JX-202 (2008 Bank Employee Handbook) at 44.

[209] Ms. Blair testified that her memorandum was written to make clear that the weakness in Respondent's lack of documentation for business expenses was known by everyone all along. JX-928 (Blair Dep.) 44.

[210] Stipulation I ¶ 15; *see also* JX-202 (2008 Bank Employee Handbook) at 47.

[211] Tr. 390-91 (9/14/16 S. Taylor).

[212] Tr. 386 (9/14/16 S. Taylor). While Enforcement Counsel takes some issue with whether Ms. Taylor was ever actually anything more than Respondent's girlfriend, the undersigned finds it unnecessary to delve into this issue. *See* ECRB 17, n. 116 ("Respondent did not seek to label Ms. Taylor as his 'assistant' until *after* the FDIC, TDOB, and Board began looking into his expenses.") (emphasis in original).

and that he paid her salary personally.[213] Ms. Taylor had a key fob to access the 9th floor of the Bank building where Respondent's office was located.[214] Ms. Taylor testified that her responsibilities as Respondent's personal assistant included getting him food, cooking, driving, arranging for travel, purchasing gifts, and running his personal errands.[215] She would frequently accompany him on his travel.[216] Ms. Taylor testified that Respondent never asked her to keep track of receipts as his personal assistant, because if he had asked her to do so, "we would have the receipts."[217]

Ms. Taylor often purchased items from department stores and retail stores, such as Dillard's, Target, and T.J. Maxx, using one of Respondent's Bank-owned credit cards. She testified that these items were purchased as "gifts" for Bank employees or Bank customers, but could not name who these gifts had been for, other than two individuals—Mike Arnold and Jim Van Pelt.[218]

At a certain point, Respondent directed Ms. Taylor to get a credit card from the Bank. At all relevant times, Ms. Taylor was not a Bank employee.[219] Bank policy stated that "[r]egular, full-time employees may apply for a corporate credit card but must obtain prior, written approval from their supervisor."[220] Respondent admits that he directed Ms. Taylor to get a credit card from the Bank, but states that he intended for her to receive a personal card, not a Bank-owned card. In support of this argument, Respondent asserts that he was "furious when he found out [Ms. Taylor] was issued a Bank-owned card."[221]

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[213] Amended Answer ¶ 105.
[214] Tr. 700 (9/15/16 Barnes).
[215] Tr. 397, 419, 424, 444 (9/14/16 S. Taylor).
[216] Tr. 416 (9/14/16 S. Taylor).
[217] Tr. 448 (9/14/16 S. Taylor).
[218] Tr. 424, 426-28 (9/14/16 S. Taylor).
[219] Stipulation I ¶ 19.
[220] *Id.*; *see also* JX-202 (2008 Bank Employee Handbook) at 47.
[221] RRB 14 (citing Tr. 432-33 (9/14/16 S. Taylor)).

Ms. Blair assisted Ms. Taylor with obtaining a Bank-owned credit card, not a personal card, on or about March 21, 2011.[222] The application for the corporate credit card listed her position as "Senior VP of Assistants," which was an "ongoing joke."[223] Subsequent to Ms. Taylor's receipt of her corporate credit card, Respondent became aware that Ms. Taylor's credit card was a corporate card, rather than a personal card, and, according to Ms. Blair, Respondent was unhappy that Ms. Taylor did not have a personal card.[224]

During the 2012 Examination, Ms. Blair spoke with FDIC commissioned examiner Daniel Kuhnert about the issuance of Ms. Taylor's Bank credit card, which Mr. Kuhnert documented in a memorandum.[225] After a May 7, 2012 Board meeting, Mr. Kuhnert sent an email to various FDIC and TDOB employees regarding Respondent's comment about Ms. Taylor having a personal credit card, which contradicted what Mr. Kuhnert recalled from Ms. Blair that Ms. Taylor was issued a Bank-owned credit card.[226]

Bank Personal Assistants

Respondent had various personal assistants over the course of his time at the Bank, including Linda Wakefield, Rebekah Hewitt, Bobbie Crooks née Bodey, Heather Elias née Shiplet, Sallye Barnes, and Alyssa White.[227] Three of these assistants—Ms. Barnes, Ms. Crooks, and Ms. Elias—testified at the initial hearing. A large part of Respondent's personal assistants' responsibilities included annotating Respondent's corporate card statements, getting cash from the tellers for Respondent's travel, and making his travel arrangements.[228]

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[222] JX-928 (Blair Dep.) 58-59.
[223] *Id.* at 59; *see also* EX-185 (Taylor Application for Corporate Credit Card).
[224] JX-928 (Blair Dep.) 60-61; EX-119 (email chain from Burgess to Blair).
[225] Supp. Tr. 86 (1/25/22 Kuhnert); *see also* EX-423 (Examiner call-in memo) at 5.
[226] Supp. Tr. 86-89 (1/25/22 Kuhnert); *see also* EX-508 (email chain).
[227] Tr. 408 (9/14/16 S. Taylor); Tr. 688 (9/15/16 Barnes).
[228] Tr. 688, 692-93, 696 (9/15/16 Barnes), 779-80 (9/15/16 Bodey Crooks).

Respondent's assistants rarely had personal knowledge of the charges on Respondent's credit card statements,[229] and "rarely had receipts from the charges that Campbell made."[230] If other employees (such as maintenance employees, Stan Errington and Julio [last name unknown]), made charges on Respondent's credit cards, however, receipts would often be provided.[231] For example, Ms. Barnes testified that Mr. Errington submitted a receipt from Walmart for dog food and hot dogs and from Amigos pharmacy for dog medications, made on behalf of Respondent.[232]

Without personal knowledge of the charges or actual vendor receipts, Respondent's assistants would frequently make determinations on how to annotate the credit card statements based on previous discussions with Respondent or Ms. Blair. Ms. Barnes testified that assistants "didn't go over the statements [with Respondent] each month or anything like that."[233] To Ms. Barnes's knowledge, Respondent did not review the annotations made on the credit card statements to make sure that they were accurate.[234]

Ms. Elias testified that she started working as one of Respondent's assistants from April 2006 through May 2010.[235] She testified that her work experience at the Bank was "tense" because "[s]ometimes people would be in a good mood, and sometimes they would not."[236]

Ms. Crooks testified that she started working as one of Respondent's assistants in November 2009, leaving in July 2010 because the Bank was a "very chaotic, kind of dysfunctional,

[229] Tr. 705-06 (9/15/16 Barnes).
[230] Tr. 707 (9/15/16 Barnes).
[231] Tr. 706, 715-16 (9/15/16 Barnes); *see also* JX-320 (9566 spreadsheet) at 24 (Glidden receipt for "Campbell's House"); JX-803 (Walmart receipt for "800 Avondale") at 1. Ms. Barnes testified that "800 Avondale" was Respondent's home address. Tr. 716 (9/15/16 Barnes).
[232] Tr. 709-10 (9/15/16 Barnes); *see also* JX-324 (9566 Statement December 2010) at 6.
[233] Tr. 704 (9/15/16 Barnes).
[234] Tr. 705-03 (9/15/16 Barnes).
[235] Tr. 822 (9/15/16 Shiplet Elias).
[236] Tr. 823-24 (9/15/16 Shiplet Elias).

unprofessional atmosphere."[237] When asked whether there were any business practices at the Bank that concerned her, she testified that there were a lot of purchases and charges made that were not for business purposes.[238]

Ms. Barnes worked at the Bank starting in 2008 and transitioned to serving as one of Respondent's personal assistants in 2010.[239] She left the Bank in 2011 when she was passed over for another position and felt that she did not have a good career path if she stayed at the Bank.[240]

Ms. Crooks testified that she had a Bank-owned credit card in her name, and that Respondent had several corporate cards assigned to him that were stacked at her desk, Respondent's other assistant's desk, or his own desk.[241] When asked how she chose which card to use, since there were so many, she answered that she didn't know which one to use, but that she would sometimes call operations to find out what the limit was on a card and how much credit remained on a card before using it.[242] Ms. Crooks testified that when she first started, she did not have to annotate the credit card statements, but that after she had been there a few months, "Heather brought me into the fold and showed me how to code the statements."[243]

At the hearing, Ms. Barnes was presented with the November 6, 2012 letter by attorney Bruce Heitz discussed above. She was asked whether she agreed with the representation in the letter that Respondent's assistants

> initially reviewed the statements and made notes on the respective credit card regarding transactions of which they had direct knowledge. Subsequently, Mr. Burgess would review the credit card statements, and supplement the record with his own identification of

[237] Tr. 766 (9/15/16 Bodey Crooks).
[238] Tr. 767 (9/15/16 Bodey Crooks).
[239] Tr. 682-83 (9/15/16 Barnes).
[240] Tr. 684 (9/15/16 Barnes).
[241] Tr. 774-75 (9/15/16 Bodey Crooks).
[242] Tr. 776 (9/15/16 Bodey Crooks).
[243] Tr. 778 (9/15/16 Bodey Crooks); *see also* Tr. 781-82 (9/15/16 Bodey Crooks) (testimony from Ms. Crooks that if she had a question, she would ask Scarlette Blair).

> business purposes. This process would then be followed up with the Operations Department reviewing the credit card statements and authorizing payment.[244]

Ms. Barnes testified that while "assistants did initiate and initially review the statements and made the notes," "Campbell did not review – when I was there, he did not review the statements and supplement. And once they left my desk, then they went directly to the operations department."[245] Ms. Barnes was also specifically asked whether she agreed with the representation in the letter that assistants had "direct knowledge" of the transactions reviewed, and she stated she did not agree.[246]

Ms. Crooks was presented with the same document presented to Ms. Barnes—the November 6, 2012 letter by Attorney Heitz—and asked whether she agreed with the representation in the letter. She testified that while she had direct knowledge of many of the charges, she did not have direct knowledge of all of the charges.[247] Ms. Crooks also testified that she thought Respondent supplemented the annotations on the statements with his own annotations.[248] Ms. Crooks did not agree, however, with the representation in the letter that there would be a brief note for each charge explaining the business purpose of the transaction.[249]

Ms. Elias was also presented with the November 6, 2012 letter by Attorney Heitz and asked whether she agreed with the letter's representations. She testified that she agreed with only portions of the representations and had no knowledge regarding other representations.[250]

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[244] JX-132 (Heitz letter) at 6.
[245] Tr. 737-38 (9/15/16 Barnes).
[246] Tr. 738 (9/15/16 Barnes).
[247] Tr. 802-03 (9/15/16 Bodey Crooks).
[248] Tr. 803 (9/15/16 Bodey Crooks).
[249] Tr. 803-04 (9/15/16 Bodey Crooks); *see also* JX-132 (Heitz letter) at 5.
[250] Tr. 836-37 (9/15/16 Shiplet Elias); *see also* JX-132 (Heitz letter) at 5-6.

Ms. Barnes testified that she was not aware that Respondent ever "test[ed] the system" regarding his expenses.[251] Ms. Crooks and Ms. Elias similarly testified that they were unaware that Respondent ever tested the system with regard to his expenses.[252] Although Ms. Barnes resigned from the Bank on April 18, 2011 and gave her Bank-owned credit card to Ms. Blair, there were charges made on her Bank-owned credit card well after her departure.[253] Likewise with Ms. Crooks, although she resigned from the Bank in July 2010 and gave her Bank-owned credit card to either Ms. Blair or Ms. Barnes, there were charges made on that card well after her departure.[254]

1. Credit and Debit Cards

The record contains numerous examples of personal charges made by Respondent using his own Bank-owned credit and debit cards, and by allowing Bank employees and non-Bank employees to use his Bank-owned credit and debit cards, as well as directing Bank employees to use their own Bank-owned credit cards for his personal expenses. Such personal expenses include personal travel for himself, personal travel for his girlfriend, personal travel and other expenses for his children, home maintenance, pet care products, alcohol, clothing, gym memberships for himself and his girlfriend, and jewelry, much of which is further detailed below. At some point, Respondent asked Ms. Blair to cancel four of his Bank-owned credit cards and directed her to write a letter informing the Board of this fact;[255] however, Ms. Blair's letter did not disclose that Ms. Taylor was issued a Bank-owned card the previous day.[256]

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[251] Tr. 740 (9/15/16 Barnes); *see also* JX-17/EX-891 (7/28/11 Executive Session Minutes) at 3 (statement by Ms. Blair that Respondent reimburses the Bank for all personal expenses and that Respondent "likes to constantly test the Bank's payment card system. However, he earmarks his personal expenses as personal expense. He reimburses the bank for those personal expenses.").
[252] Tr. 804 (9/15/16 Bodey Crooks), 837-38 (9/15/16 Shiplet Elias).
[253] Tr. 718-19 (9/15/16 Barnes); *see also* EX-873 (spreadsheet).
[254] Tr. 794 (9/15/16 Bodey Crooks); *see also* JX-404 (6441 Statement September 29, 2010).
[255] JX-928 (Blair Dep.) 106-07; *see also* EX-708 (3/22/11 Board Minutes) at 19.
[256] ECIB 13 (citing JX-928 (Blair Dep.) 108).

a. Personal Travel

Enforcement Counsel asserts that Respondent charged at least $8,654 during the Relevant Period for vacations for himself, Ms. Taylor, and their children.

1) MBA Program

Respondent repeatedly charged personal travel expenses to Bank-owned credit and debit cards, or had his personal assistants use their Bank-owned credit cards for such expenses, which were initially claimed as business travel until they were deemed personal. For example, personal charges were made in connection with Respondent's Executive MBA program at the University of Chicago, which he attended from June 2010 to March 2012.[257]

In connection with Respondent's Executive MBA program, he was required to attend programs in London and Singapore. Patricia Keegan, Associate Dean of the Executive MBA program at the University of Chicago, testified that the dates for Respondent's trip to Singapore were July 17-22, 2011, and to London from August 14-19, 2011.[258] Although the trips to London and Singapore were related to his Executive MBA program, the school did not require additional travel other than attendance at classes in those locations.[259]

Respondent traveled to Hanoi before his Singapore classes and to Paris before his London classes.[260] Ms. Taylor accompanied Respondent on both trips and testified that the trip to Hanoi was a "vacation."[261] Respondent testified that there was no business purpose for the side trips to Paris and Hanoi, other than to "enhance[] the intent of the program, of the MBA program."[262] The

[257] Tr. 302 (9/14/16 Keegan), 456-57 (9/14/16 S. Taylor); EX-152 (EMBA Program Calendar).
[258] Tr. 300, 305-09 (9/14/16 Keegan).
[259] Tr. 305-06 (9/14/16 Keegan); EX-152 (EMBA Program Calendar).
[260] Tr. 458-59 (9/14/16 S. Taylor).
[261] Tr. 459 (9/14/16 S. Taylor).
[262] Tr. 532 (9/14/16 Burgess).

amounts charged to the Bank for the trips to Paris and Hanoi were at least $1,306 and $2,375, respectively.[263]

The issue of Respondent's expenses for his trip to Singapore was discussed at the Board's meeting on July 28, 2011.[264] There was also discussion of the necessity of an "assistant" to travel with him to Singapore.[265] While a Board member testified that the Board was generally aware that Respondent was getting his MBA and that there was no question that the Bank was going to pay for Respondent's MBA-related expenses, that Board member acknowledged that the Board had not specifically approved paying for Respondent's MBA at any previous Board meeting.[266] In addition, at the July 28, 2011 Board meeting, Respondent did not disclose that he was taking an optional side trip to Hanoi in connection with his required travel to Singapore.

During his Executive MBA program, Respondent traveled to Chicago every other week from Thursday to Sunday, often with Ms. Taylor accompanying him. Ms. Barnes testified that she booked travel arrangements for Ms. Taylor to accompany Respondent, using her own Bank-owned credit card for the charges.[267] When annotating the credit card statements for purposes of

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[263] ECIB 15-16. *See also* EX-873 (spreadsheet) lines 304 ($5,268.94 charge to JAL Airline), 307 ($266.11 charge to Singapore Airlines), 340-44 ($987.54 charge to Sofitel Metropole Hotel; $50 charge to Hoa Ban le, $320.75 charge to Sofitel Legend Hotel; $166.19 charge to DBS, $320.75 charge to Sofitel Metropole Hotel), 360 ($248.32 charge to Air France), 363 (€11 charge to Taxi Parisiens), 365-379 ($28.07 charge to Terrasse Du; $48.83 charge to Gusto Italia; $18.43 charge to ETS Nicolas; €50 charge to Taxi Parisiens; $22.90 charge to Aux Ptt; $41.80 charge to Le Conti; $100.20 charge to Café Central; $11.37 charge to Starbucks, $62.13 charge to L'Ecole Militaire; $452.34 charge to Le Walt Hotel; $122.66 charge to Waitrose; $13.13 charge to TFL TOM; $83.13 charge to Bangalore Express; $53.52 charge to TFL TOM; $6.60 charge to RFL Cycle Hire).

[264] Tr. 1519-20 (9/20/16 Meade); *see also* JX-17/EX-891 (7/28/11 Executive Session Minutes) at 5.

[265] JX-17/EX-891 (7/28/11 Executive Session Minutes) at 5.

[266] Tr. 1614-15 (9/20/16 Spears); *see also* JX-17/EX-891 (7/28/11 Executive Session Minutes) at 4.

[267] Tr. 691, 731-734 (9/15/16 Barnes). *See also* EX-812 (Southwest receipt for Respondent and Susan Taylor) at 1; EX-813 (Southwest receipt for Respondent and Susan Taylor from Amarillo to Chicago) at 1; EX-816 (Southwest receipt for Respondent and Susan Taylor) at 1; EX-817 (Southwest receipt for Respondent and Susan Taylor) at 1; EX-820 (Southwest receipt for Respondent and Susan Taylor) at 1; JX-407 (6698 Statement October 31, 2010) at 1 (two charges for Southwest for Respondent and Susan Taylor), 10 (Southwest receipt for Susan Taylor); JX-621 (Southwest receipt for Susan Taylor); JX-623 (Southwest receipt for Susan Taylor) at 2; JX-624 (Southwest receipt for Susan Taylor) at 2; JX-626

classifying the business expenses, such items would be annotated "the same" as Respondent's travel.[268] Ms. Crooks also testified that she booked travel arrangements for Susan Taylor to accompany Respondent on his travel, using her own Bank-owned credit card for the charges.[269] Ms. Crooks testified that she was aware that Ms. Taylor frequently traveled with Respondent on his trips to Chicago for his Executive MBA program.[270]

2) Broadmoor Resort

Respondent charged more than $3,800 to Bank credit cards in connection with New Year's Eve trips to the Broadmoor Resort in Colorado Springs in 2009 and 2011, which included his children and/or Ms. Taylor's children.[271] Respondent claimed that he went to the Broadmoor to meet a potential Bank prospect, but he failed to identify the specific individual, or provide any details that support the business purpose of the trip.[272] Respondent testified that it was his belief "that if I have to be in a place on business and I have to take my kids with me, because that's my responsibility to be there and I can't be there and I've got to take them with me, then I think – I think that's a business expense."[273] Ms. Taylor testified that the trips were a vacation and that she did not pay for any expenses for herself or for her children when she took trips with Respondent.[274]

(Southwest receipt for Susan Taylor) at 3; JX-628 (Southwest receipt for Susan Taylor) at 1; and JX-656 (Southwest receipt for Susan Taylor) at 1.

[268] Tr. 693 (9/15/16 Barnes).

[269] Tr. 795-96 (9/15/16 Bodey Crooks).

[270] Tr. 796-98 (9/15/16 Bodey Crooks). *See also* JX-266 (6441 statements) at 5 (Southwest receipt for Respondent and Susan Taylor), 24 (Southwest receipt for Susan Taylor), 54 (Southwest receipt for Susan Taylor), 56 (Southwest receipt for Susan Taylor); EX-772 (Southwest receipt for Susan Taylor); and EX-777 (Southwest receipt for Susan Taylor).

[271] ECIB 16; Tr. 463 (9/14/16 S. Taylor); *see also* EX-873 (spreadsheet) lines 22-23 ($1,188.84 and $686.91 charges to the Broadmoor), 406-07 ($1,116.03 and $852.91 charges to the Broadmoor); JX-401 (6141 Statement 1/30/12).

[272] Tr. 1790 (9/20/16 Burgess).

[273] Tr. 1791 (9/20/16 Burgess).

[274] Tr. 465-66, 472 (9/14/16 S. Taylor).

Ms. Crooks testified regarding charges on Respondent's Bank-owned credit card to the Broadmoor Resort. She confirmed that charges were made for New Year's Eve (December 2009) for two guests—Respondent and Ms. Taylor—and that to her knowledge, it was not a Bank-related trip.[275] Ms. Barnes likewise testified regarding charges on Respondent's Bank-owned debit card to the Broadmoor. She confirmed that charges were made from December 29, 2010 through January 1, 2011 for two guests. She testified that Respondent did not tell her the business reason for this trip on New Year's Eve and that she did not ask, because she did not think it was her role to ask whether it was for business travel or not.[276]

3) Chattanooga

Respondent's son is named Cornelius Taylor Burgess ("Taylor Burgess"). During the Relevant Period, he attended boarding school in Chattanooga, Tennessee.[277] Respondent took trips to Chattanooga at times that his son attended school there and charged certain expenses related to the trips to the Bank.[278] Respondent asserts that he went to Tennessee to do research regarding Liberty Tax.[279] Ms. Taylor confirmed that she accompanied Respondent on trips to Tennessee, that the Bank did not have a branch in Tennessee, and that they would see Respondent's son when traveling to Tennessee.[280]

4) Phoenix

Ms. Crooks testified that she booked travel arrangements for Ms. Taylor to accompany Respondent on travel to Phoenix, Arizona and used her Bank-owned credit card for the charges.[281]

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[275] Tr. 792-93 (9/15/16 Bodey Crooks); *see also* JX-383 (4909 Statement 1/31/10) at 2-3.
[276] Tr. 720-23 (9/15/16 Barnes); *see also* JX-331 (3887 Statement 12/1/10-1/3/11) at 13-14.
[277] Tr. 725 (9/15/16 Barnes).
[278] Stipulation I ¶ 20.
[279] Tr. 470-71 (9/14/16 S. Taylor).
[280] Tr. 467 (9/14/16 S. Taylor).
[281] Tr. 795-96 (9/15/16 Bodey Crooks); *see also* JX-266 (6441 statements) at 11 (Southwest receipt for Susan Taylor); EX-769 (Southwest receipt for Susan Taylor).

When asked why Ms. Taylor would go to Phoenix with Respondent, Ms. Crooks responded that Ms. Taylor went as Respondent's travel companion for his annual physical at the Mayo Clinic.[282] The charges in Phoenix amounted to at least $895 for a three-night stay over the weekend at the Fairmont Hotel, before his Monday morning physical.[283]

b. Gym Memberships

Enforcement Counsel asserts that Respondent charged the Bank at least $5,313 during the Relevant Period for gym memberships for Ms. Taylor at Amarillo Athlete and the Downtown Athletic Club.[284] Respondent had a gym membership at Amarillo Athlete, which was a personal training facility. Ms. Taylor testified that she would accompany Respondent to his training sessions for free as part of the "buddy system," where a member could bring up to three other people to a session for the same price.[285] Ms. Taylor testified that she also had a membership at the Downtown Athletic Club, which was paid for by either Respondent or the Bank.[286] The Bank paid for Ms. Taylor's gym membership at Amarillo Athlete, which was more than $4,000 between 2009 and 2012.[287]

Ms. Barnes testified that there was an office on the 9th floor of the Bank building that had exercise equipment, but that not all employees had access to it and that it was not the Bank's practice to pay for gym memberships for employees.[288]

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[282] Tr. 796 (9/15/16 Bodey Crooks).
[283] ECIB 16.
[284] *Id.* at 17-18.
[285] Tr. 402-04 (9/14/16 S. Taylor).
[286] Tr. 404-05 (9/14/16 S. Taylor).
[287] *See* Tr. 402-06, 472-73 (9/14/16 S. Taylor); EX-429 (4/11/12 Recommendation for Enforcement Action) at 5; EX-873 (spreadsheet) at lines 238 ($420), 260 ($455), 279 ($315), 295 ($420), 333 ($560), 388 ($385), 400 ($490), 405 ($315), 414 ($455), 420 ($350), 424 ($315).
[288] Tr. 686-87 (9/15/16 Barnes).

c. Jewelry

Ms. Crooks testified about a credit card with a charge for $1,600 from "Diamond Creations" on December 28, 2009.[289] According to Ms. Crooks, the purchase was for a diamond bracelet for Ms. Taylor, which she knew because Ms. Taylor came to the office to show it off as she was proud of the gift she received from Respondent.[290] When annotating the credit card statements for purposes of classifying the business expenses, the bracelet was annotated as "business development."[291] Respondent did not reimburse the Bank for this personal expense until 2012, after his expenses were audited pursuant to the MOU.[292]

d. Pet Expenses

Enforcement Counsel asserts that Respondent charged the Bank at least $728 during the Relevant Period for expenses for his pet dog.[293] Ms. Barnes testified that Mr. Errington, a Bank employee who worked in maintenance, submitted receipts on behalf of Respondent from Walmart for dog food and from Amigos pharmacy for dog medications.[294]

e. Children's Expenses

Enforcement Counsel asserts that Respondent charged the Bank at least $2,900 during the Relevant Period for expenses for his children.[295] Mr. Burgess has three children, including his son Taylor,[296] while Ms. Taylor has two children named Kai and Madelyn.[297] Ms. Barnes testified that she was directed to purchase items such as school books, birthday party supplies, airline tickets,

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[289] Tr. 790 (9/15/16 Bodey Crooks); *see also* JX-868 (3887 statement 11/30/09-12/31/09) at 2.
[290] Tr. 790-91 (9/15/16 Bodey Crooks).
[291] Tr. 791-92 (9/15/16 Bodey Crooks). *See also* EX-79 (5/10/10 email from Duke to Blair/Barnes) at 1.
[292] Amended Answer ¶¶ 40-42.
[293] ECIB 18.
[294] Tr. 709-10 (9/15/16 Barnes); *see also* JX-324 (9566 Statement December 2010) at 6.
[295] ECIB 17, 20.
[296] Tr. 1902 (9/21/16 Burgess). Per Enforcement Counsel, Taylor was born in September 1995 and was therefore 14-17 years old when the expenses at issue were charged. ECIB 21.
[297] Tr. 389 (9/14/16 S. Taylor).

and ground transportation for Respondent's children with her Bank-owned credit card.[298] When annotating the credit card statements for purposes of classifying the business expenses, such items would often be annotated as "supplies," based on her understanding from "previous direction."[299] Ms. Crooks also testified that she was directed to purchase Christmas wrapping paper for presents for Respondent's children with her Bank-owned credit card.[300]

f. Home Maintenance

Enforcement Counsel asserts that Respondent admitted that he charged the Bank, or Bank affiliates, at least $1,000 during the Relevant Period for work or supplies to maintain and repair his personal residence.[301] Ms. Barnes testified that she used her Bank-owned credit card to pay for items at The Home Depot or Lowe's in connection with items for Respondent's house, with possibly some for the Bank.[302] When annotating the credit card statements for purposes of classifying the business expenses, such items would often be annotated as "supplies."[303]

g. Groceries and Alcohol

Enforcement Counsel asserts that Respondent charged the Bank at least $1,985 during the Relevant Period for expenses for groceries and alcohol.[304] Ms. Elias testified regarding charges on

[298] Tr. 707-10, 726-29 (9/15/16 Barnes); *see also* JX-335 (3887 credit card) at 9 (receipt from Hastings); JX-324 (9566 Statement December 2010) at 30-31 (AA receipt for Taylor Burgess from Chattanooga to Dallas); JX-405 (6698 statement August 30, 2010) at 3-4 (Charge for Direct Textbooks), 5 (charge for Groome Transport for Taylor Burgess), 9-10 (Southwest receipt for Taylor Burgess from Amarillo to Nashville); JX-251 (6698 statement January 30, 2011) at 2, 9 (charges for Groome Transport for Taylor Burgess); JX-667 (Southwest receipt for Taylor Burgess); JX-668 (Southwest receipt for Taylor Burgess).
[299] Tr. 708, 713, 724 (9/15/16 Barnes).
[300] Tr. 786 (9/15/16 Bodey Crooks).
[301] ECIB 16-17; Tr. 1866-67 (9/21/16 Burgess).
[302] Tr. 718-19 (9/15/16 Barnes); *see also* EX-873 (Spreadsheet).
[303] Tr. 717 (9/15/16 Barnes).
[304] ECIB 20.

her Bank credit card. She confirmed that purchases from Market Street were for alcohol, but were labeled as "supplies" based on direction from Respondent.[305]

When questioned regarding the alcohol purchases, Respondent testified that "strategic planning" consisted of others at the Bank walking into his office after hours to "talk about what just happened today and . . . talk about what's going to happen tomorrow," and that the Bank "purchase[s] a lot of alcohol because our customers and our employees cumulatively over time enjoy talking about bank business much more with a beer in their hand after hours than with a glass of water."[306]

h. Gifts

Enforcement Counsel asserts that Respondent charged the Bank at least $4,356 during the Relevant Period for expenses for clothing and other personal items.[307] Ms. Elias testified that she had a conversation with Jerry Woodard—the Clarendon branch's bank president—who was upset that there were so many charges on the Clarendon branch bank card by Ms. Taylor to places such as Sensei Med Spa, Dillard's, and Raffkind's.[308] Ms. Taylor testified that she shopped at Dillard's for customer and employee gifts because there were not that many stores in Amarillo to buy "nice" gifts.[309] Ms. Taylor testified that she also bought numerous gifts at Raffkind's, a clothing store, such as ties.[310]

Ms. Taylor testified that she was responsible for purchasing numerous gifts for Bank clients and Bank employees; however, she could not specify who the gifts were for, other than naming

[305] Tr. 827 (9/15/16 Shiplet Elias); *see also* EX-100 (6004 Statement 6/26/08) at 7.
[306] Tr. 1792-93 (9/20/16 Burgess).
[307] ECIB 18-19.
[308] Tr. 833-34 (9/15/16 Shiplet Elias).
[309] Tr. 424, 427 (9/14/16 S. Taylor).
[310] Tr. 429 (9/14/16 S. Taylor).

Mike Arnold and Jim Van Pelt.[311] Ms. Elias testified that she only purchased a wedding gift once from Bed Bath & Beyond for employees who were getting married.[312] Ms. Barnes testified that it was not the Bank's practice to give a lot of gifts to Bank employees, with the exception of gifts from Crane Data with the Bank's logo for the employees' first, fifth and tenth year anniversaries.[313] Ms. Barnes also testified that, during the time she was Respondent's assistant, she was not aware of him giving gifts to Bank customers.[314]

i. Meals

Ms. Barnes testified that she often bought lunch for Respondent with her Bank-owned credit card from nearby restaurants. When annotating the credit card statements for purposes of classifying the business expenses, such items would be annotated as "business development" or "strategic planning" without further detail, such as who was in attendance.[315] She testified that, in her previous banking experience, something that was charged to business development would include details regarding who was attending the lunch and what was discussed.[316]

Consistent with Ms. Barnes's testimony, Mr. Hoy—a tax attorney—also testified that it is essential that documentation with respect to meals show the name of the persons attending the meal, the nature of their business relationship, and the nature of what was discussed during the meal.[317]

[311] Tr. 426-28 (9/14/16 S. Taylor).
[312] Tr. 828-29 (9/15/16 Shiplet Elias).
[313] Tr. 687 (9/15/16 Barnes).
[314] Tr. 687-88 (9/15/16 Barnes).
[315] Tr. 701-02 (9/15/16 Barnes).
[316] Tr. 703 (9/15/16 Barnes).
[317] Tr. 964-65 (9/16/16 Hoy).

j. Speeding Tickets

Enforcement Counsel asserts that Respondent charged the Bank at least $800 during the Relevant Period for a speeding ticket.[318] Ms. Barnes testified that she used her Bank-owned credit card to pay attorney's fees for a speeding ticket that Respondent had received.[319] When annotating the credit card statements for purposes of classifying the business expense, she annotated it as "business development," based on a conversation with either Respondent or Ms. Blair.[320]

2. Cash-Out Withdrawals

Respondent would direct a Bank employee, usually one of his assistants, to withdraw a certain amount from the Bank's general ledger ("GL") cash account with a "cash-out ticket" before one of his trips. Respondent usually provided his assistants with two-to-five word descriptions of the purported use of the cash, which his assistants would write on the cash-out ticket, but which were generic and uninformative.[321] For example, Ms. Barnes testified that, at the direction of Respondent, she would go to a Bank teller, present that teller with a withdrawal slip showing the Bank's general ledger for auto and travel expenses, have the teller withdraw cash, and then give the cash to Respondent.[322] Ms. Barnes testified that Respondent's cash-out practices were "kind of scary."[323] She had previous experience working at other banks, and the manner in which Respondent received cash "wasn't a practice at any of the previous banks that I'd worked for."[324]

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[318] ECIB 20.
[319] Tr. 712 (9/15/16 Barnes); *see also* JX-406 (6698 statement November 29, 2010) at 3 (Ross Koplin charge); JX-324 (9566 Statement December 2010) at 32 (Denver County Court moving violation fine).
[320] Tr. 712 (9/15/16 Barnes).
[321] JX-435 (GL Debit) at 1, EX-151 (GL cash-out tickets) at 9.
[322] Tr. 696-97 (9/15/16 Barnes); *see also* JX-435 (GL Debit).
[323] Tr. 699 (9/15/16 Barnes).
[324] Tr. 699 (9/15/16 Barnes).

Likewise, Ms. Crooks testified that Respondent would call her into his office and tell her to create a cash-out ticket—normally for $1,200—which he would sign.[325] She would then go to the teller and request twelve $100 bills, and would return to his office and count out the money to him.[326] Ms. Crooks testified that she was uncomfortable with Respondent's cash-out practices because "it was just odd to me that the amount requested for the length of the trip of where he was going. But he was president and CEO; I didn't question it."[327]

Ms. Elias testified that "getting cash for travel" caused her tension because she was the only one signing it, it was in cash, and there was no record of what it was being used for.[328] Ms. Elias testified that she had worked for other banks and that Respondent's cash-out practices were not common at other banks.[329]

Ms. Ghiglieri testified that Respondent had "unfettered access to cash advances from the bank."[330] Ms. Ghiglieri testified that Respondent's cash-out practices were an improper banking practice, stating that "to just go up to the teller window and get cash for – with no documentation. I mean, in my experience, I would call that theft."[331]

Mr. James also testified that Respondent's cash-out practices were an "internal control issue[]."[332] In an email from Mr. James to Respondent, Mr. James stated that in regard to the cash outs in 2008 and 2009, such amounts should be considered a loan to be paid back with interest in line with loans to other directors in that time frame.[333]

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[325] On cross examination, Ms. Crooks clarified that Respondent did not, in fact, sign the cash-out tickets. Tr. 813-14 (9/15/16 Bodey Crooks).
[326] Tr. 798-99 (9/15/16 Bodey Crooks); *see also* EX-151 (GL cash-out tickets) at 3, 8-14.
[327] Tr. 800 (9/15/16 Bodey Crooks).
[328] Tr. 824 (9/15/16 Shiplet Elias).
[329] Tr. 824 (9/15/16 Shiplet Elias).
[330] Tr. 54-55 (9/13/16 Ghiglieri).
[331] Tr. 56 (9/13/16 Ghiglieri).
[332] Tr. 169 (9/13/16 James).
[333] EX-738 (8/22/11 email chain from James to Burgess) at 2.

When Respondent returned from his trip, he did not provide vendor receipts or other documentation reflecting how he used the cash in question.[334] He rarely returned any cash for redeposit;[335] however, on or about October 20, 2011, Respondent returned $870 in cash to the Bank.[336] According to Respondent, he spent the cash on meals, cab fare, and parking for himself and Ms. Taylor, and if he had any cash left over, he would use it on a subsequent trip.[337]

A summary of Respondent's cash-out tickets are as follows[338]:

Year	Amount
2008	$ 32,950
2009	$ 40,950
2010	$ 38,800
2011	$ 8,000
Total	$120,700

Therefore, during the Relevant Period, Respondent's cash-out withdrawals in 2010 and 2011 totaled $46,800.

Respondent stopped taking cash-out tickets on or about February 22, 2011. He provided receipts for some of the cash withdrawals for 2011. Many of the receipts were for restaurants and taxi services, but other receipts showed that the expenses were neither travel-related nor Bank-related (i.e. Walmart receipt for dog bowls and dog food), were for credit card purchases, and were dated well after February 22, 2011.[339]

After the Bank determined that Respondent's cash-out practices could not be substantiated, Respondent reimbursed the Bank $75,290 for the 2008 and 2009 cash-out advances in October

[334] Amended Answer ¶ 27 (Respondent admits that he "did not routinely include receipt for specific items and services"), *see also* Tr. 799 (9/15/16 Bodey Crooks).
[335] Tr. 698 (9/15/16 Barnes), 799 (9/15/16 Bodey Crooks).
[336] Stipulation I ¶ 28.
[337] RIB 9 (citing Tr. 1736 (9/20/16 Burgess)).
[338] EX-429 (4/11/12 Recommendation for Enforcement Action) at 2; *see also* EX-64 (Board Discussion Draft of Padgett Draft) at 15.
[339] EX-429 (4/11/12 Recommendation for Enforcement Action) at 12.

2011 and adjusted his 2010 W-2 to record the 2010 advances of $38,800 as additional compensation.[340]

C. MasterCard and Visa Stock and Dividends

Before 2005, the Bank was an agent bank in the MasterCard and Visa credit card programs. The Bank obtained MasterCard and Visa stock in 2005 when those companies converted to publicly traded companies. Financial institutions who were primary members of the MasterCard and Visa networks were given stock based on the number and volume of their debit card activity. The Bank's cost basis in the stock, when issued, was $0 due to restrictions associated with the stock. In June 2010, the MasterCard stock restrictions fell off (while the Visa stock restrictions remained) and under GAAP, the cost basis would need to be reevaluated.[341]

When the Bank received the MasterCard and Visa stock in 2005, the stocks were not booked on the Bank's balance sheet and were not placed on the Bank's balance sheet until June 2010.[342] When asked why the stocks were not booked on the Bank's books, Respondent could not give a definite answer.[343]

Ms. Ghiglieri performed a compensation study, along with her management study, as part of the requirements of the Bank's MOU.[344] In the course of conducting her studies, Ms. Ghiglieri discovered that the MasterCard and Visa stock was not recorded on the Bank's books.[345] The MasterCard stock was valued at approximately $3 million, whereas the Visa stock was only valued at approximately $200,000 because it still carried restrictions.[346] According to Ms. Ghiglieri,

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[340] Stipulation I ¶ 27; *see also* EX-64 (Board Discussion Draft of Padgett Draft) at 15; EX-429 (4/11/12 Recommendation for Enforcement Action) at 2; EX-708 (3/22/11 Board Minutes) at 19.
[341] JX-25 (8/26/11 Board Minutes) at 6.
[342] Tr. 1888 (9/21/16 Burgess); *see also* JX-25 (8/26/11 Board Minutes) at 6.
[343] Tr. 1883-88 (9/21/16 Burgess).
[344] Tr. 71 (9/13/16 Ghiglieri); JX-217 (6/14/11 MOU).
[345] Tr. 76-78 (9/13/16 Ghiglieri).
[346] Tr. 150 (9/13/16 James).

Respondent initially told her that the stock was part of his deferred compensation plan,[347] but he could not produce any official Bank document detailing such a plan,[348] and later conceded that the plan did not exist.[349] Respondent even denied that he had ever stated that there was a deferred compensation plan, even though he had produced a spreadsheet purporting to show his deferred compensation plan, which included the MasterCard and Visa stock.[350]

Mr. James, who was hired as a Bank consultant in March 2011,[351] discovered that $5,786.40 in MasterCard dividends were deposited into Respondent's personal bank account over a period of eight months.[352] Ms. Barnes testified that she deposited a MasterCard dividend check of $1,446.60 into Respondent's personal account.[353] Ms. Barnes testified that there were several checks with Respondent's name on them and that someone told her to deposit them to his personal account, but she could not recall if it was Respondent who specifically gave that instruction.[354] Respondent testified that he never gave the dividend checks to Bank employees to be deposited into his personal account and that any such deposits were made by his assistants in error because he would leave the checks on his desk.[355] Once Mr. James became aware of the dividend deposits, he informed Respondent and Coney Burgess that the dividends needed to be returned to the Bank, and approximately $7,500 in dividends were then returned.[356]

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[347] Tr. 76-77 (9/13/16 Ghiglieri); *see also* EX-566 (8/1/11 email chain from Burgess to Lewis) at 1-2.
[348] EX-736 (Holding Company Spreadsheet); EX-762 (8/3/11 email chain from Burgess to Lewis).
[349] Tr. 81 (9/13/16 Ghiglieri).
[350] Tr. 83-85 (9/13/16 Ghiglieri); *see also* EX-568 (8/15/11 email from Ghiglieri to James), EX-566 (8/1/11 email chain from Burgess to Lewis); EX-736 (Holding Company Spreadsheet).
[351] Tr. 124-25 (9/13/16 James); *see also* EX-763 (James Engagement Agreement).
[352] Tr. 143-44 (9/13/16 James).
[353] Tr. 735-36 (9/15/16 Barnes); *see also* JX-897 (8/3/11 MOU Minutes) at 58.
[354] Tr. 756-57 (9/15/16 Barnes).
[355] Tr. 1894 (9/21/16 Burgess).
[356] Tr. 145-46 (9/13/16 James); *see also* JX-897 (8/3/11 MOU Minutes) 64.

Mr. James advised Respondent that the MasterCard and Visa stock needed to be booked on the Bank's balance sheet and that the Board needed to be informed about it.[357] According to Mr. James, Respondent resisted implementing such advice and blamed the Bank's CFO, Jack Hall, for failing to include the stocks on the Bank's balance sheet.[358] Respondent eventually disclosed the MasterCard and Visa stock, along with the MasterCard dividend checks, to the Board at a meeting on August 26, 2011.[359] While Respondent disclosed that there were valuation issues, he failed to disclose that the stock should have been placed on the Bank's books over five years prior. Respondent also disclosed that his secretary had "inadvertently been depositing the quarterly MasterCard dividends into Burgess's personal account without his knowledge" and that upon discovering the mistake, he "immediately made a full reimbursement to the bank."[360] At that same meeting, the Board passed a resolution that approved the "manner in which CEO Burgess has handled the process to date regarding the MasterCard and Visa stock matter."[361]

D. Bias

1. March 19, 2013 Voicemail

On March 19, 2013, a conversation between FDIC and TDOB examiners was inadvertently left on Brian Thorne's voicemail at the Bank.[362] The voicemail itself is in the record,[363] along with a demonstrative exhibit that includes a written transcript of the conversation for ease of reference.[364] There is no dispute that the conversation was mainly between FDIC and TDOB bank

[357] Tr. 147-71 (9/13/16 James); *see also* EX-738 (August 2011 email chain between James, Respondent, and Coney Burgess).
[358] Tr. 150 (9/13/16 James).
[359] JX-25 (8/26/11 Board Minutes) at 6.
[360] *Id.*
[361] *Id.* at 9.
[362] Supp. Tr. 28 (1/25/22 Thorne).
[363] RX-25 (3/19/13 voicemail).
[364] EX-893 (3/19/13 transcript).

examiners, including Messrs. Klein and Neal, and that other unidentified individuals were also in the room during the conversation.[365]

In the voicemail, Mr. Klein joked with Mr. Neal that no matter what CAMELS rating Mr. Neal assigned to the Bank's IT function, Mr. Klein would assign the Bank a rating one less than Mr. Neal's because they were putting the Bank through a "real exam this time."[366] There is no dispute that no portion of the voicemail referred to Respondent, Respondent's expense practices, or to the enforcement proceeding against Respondent.[367]

Mr. Thorne brought the voicemail to Keevin Clark's attention the same evening he heard the voicemail, and to then-President and CEO Danny Skarda a few weeks after Mr. Skarda joined the Bank.[368] It was Mr. Thorne's understanding that Mr. Skarda played the voicemail to people at the FDIC around the time the Bank was preparing its appeal of the 2013 Report of Examination.[369] Mr. Skarda played the voicemail to Ms. Owens on or about August 6, 2013, when he flew to Dallas for a meeting with her.[370] Mr. Skarda refused Ms. Owens's request for a copy of the voicemail at that time, based upon the advice of the Bank's attorneys, but subsequently sent her a copy by email.[371] Mr. Skarda testified that he requested that Mr. Klein never be allowed to come to the Bank again.[372] On August 14, 2013, the Bank sent a letter to the FDIC and TDOB regarding the March 2013 Report of Examination, alleging bias.[373]

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[365] EX-893 (3/19/13 transcript); *see also* JX-939 (Skarda Dep.) 20.
[366] EX-893 (3/19/13 transcript).
[367] Supp. Tr. 543-45 (1/26/22 Burgess); JX-939 (Skarda Dep.) 80-81.
[368] Supp. Tr. 29-30 (1/25/22 Thorne); RX-44 (email chain dated 7/18/13 from Thorne to Skarda).
[369] Supp. Tr. 29-30 (1/25/22 Thorne).
[370] JX-939 (Skarda Dep.) 22-24; Supp. Tr. 290-91 (1/26/22 Owens).
[371] JX-969 (Skarda Dep.) 24. Subsequently, Mr. Skarda emailed a copy of the voicemail to Ms. Owens on August 12, 2013. RX-44 (email chain dated 8/12/13 from Skarda to Owens).
[372] JX-969 (Skarda Dep.) 24.
[373] JX-146 (8/14/13 Bank letter to FDIC/TDOB).

FDIC ARD Mark Taylor received a copy of the voicemail on or about September 4, 2013.[374] Mr. Taylor testified that after listening to the voicemail, he emailed the supervisors of Messrs. Neal and Klein to have them counseled to be more careful when discussing exam ratings.[375] According to Mr. Taylor, he understood that the two examiners were good friends and that it was just banter amongst colleagues.[376] Mr. Taylor testified that both examiners had good reputations and were hard workers and that he had never seen a disciplinary matter for either examiner.[377] According to Mr. Taylor, he did not think the voicemail showed that either examiner was biased against the Bank.[378] Furthermore, he testified that if he thought that an examiner in the field were biased, he would take some sort of action, as bias is a significant concern.[379]

2. Emails

Numerous emails between FDIC and TDOB examiners were addressed at the supplemental hearing, with Respondent alleging that such emails support his bias claim. Excerpted portions of these concerning emails were summarized in one of Respondent's demonstrative exhibits, and are summarized below.[380]

"Interrogate"

RX-33 includes an email from Scott Baber, FDIC Investigations Specialist, to Sonya Ramsey, FDIC case manager for special activities, dated February 22, 2012, in which Mr. Baber writes, in regards to Respondent's personal versus business expenses, that he "intended to interrogate [Respondent] because I think he's lying to us."[381] Ms. Ramsey's response to Mr. Baber

[374] RX-44 (email chain dated 9/4/13 from Elmquist to Taylor).
[375] Supp. Tr. 503-06 (1/26/22 M. Taylor); *see also* RX-44 (email chain).
[376] Supp. Tr. 506 (1/26/22 M. Taylor).
[377] Supp. Tr. 507-08 (1/26/22 M. Taylor).
[378] Supp. Tr. 509 (1/26/22 M. Taylor).
[379] Supp. Tr. 508-09 (1/26/22 M. Taylor).
[380] RDX-2 (email demonstrative).
[381] RX-33 (February 2012 email chain) at 2.

on that same day stated that the FDIC does not do "interrogations," further stating that management was uncomfortable with interviewing someone without a witness present. Mr. Baber's email response was that he "should've chosen another word instead of interrogation," because it communicated "a totally different idea than what I actually meant."[382]

When asked about this email chain, Ms. Owens noted that Mr. Baber is an investigator, not an examiner, and that an investigator is a more specialized position than an examiner because investigators are sent to a Bank when there is a problem or potential misconduct to interview people, gather evidence, and make a recommendation as to whether an enforcement action is appropriate.[383] According to Ms. Owens, the FDIC does not perform interrogations; rather, an FDIC attorney, not an investigator, will issue a subpoena and will take a witness's testimony under oath, referred to as a 10(c) sworn statement.[384]

"Terminate Campbell or Remove Him from the Board"

EX-21 is an email chain including an email from William Freeman, FDIC case manager, to Mr. Meade, Teresa Rodriguez, FDIC ARD, and Dennis Lebo, TDOB examiner, dated May 11, 2012. In that email, Mr. Freeman states that the Bank president, Mr. Covington, informed him that the main message Mr. Covington took from the regulators was that "the Board should terminate Campbell Burgess as CEO or that Campbell should resign as CEO," to which Ms. Rodriguez replied, "we cannot tell the bank to terminate Campbell or remove him from the Board."[385]

Mr. Freeman was asked about this email and testified that he "never told the board [that they should force out Campbell as CEO]."[386] Mr. Freeman recalled that the statement was made

[382] RX-33 (February 2012 email chain) at 1.
[383] Supp. Tr. 321-22, 325-26 (1/26/22 Owens).
[384] Supp. Tr. 327 (1/26/22 Owens).
[385] EX-21 (5/11/12 email chain) at 1.
[386] Supp. Tr. 691 (1/27/22 Freeman).

in reference to a statement from Bob Bacon, from the TDOB, that the Board needed to make a determination as to whether Respondent should remain CEO of the Bank in light of his continuing misconduct, which was the cause of the Bank's safety and soundness violations along with violations of Bank policies.[387] He also testified that, while Mr. Bacon made the statement, the FDIC was on the same page as the TDOB that the Board needed to review whether Respondent should remain as CEO.[388] Furthermore, Mr. Freeman testified that he already knew that the FDIC could not tell the Bank to terminate Respondent or remove him from the Board.[389]

Ms. Owens was also asked about this email and agreed that it would be inappropriate for regulators to tell the Board that they should terminate Respondent as CEO.[390] Likewise, Mr. Meade testified that he did not authorize Mr. Freeman to tell Mr. Covington that Respondent could not be CEO of the Bank.[391] In addition, he testified that he was in agreement with Ms. Rodriguez's statement that the FDIC could not tell the Bank to terminate Respondent or remove him from the Board.[392]

"Pain in the Ass"

JX-285 is an email from B. Gordon Beene, Supervisory Examiner, to Ricke Bassett dated July 5, 2012, where he states that "Herring is still a pain in the ass."[393] Upon seeing this statement, Ms. Owen testified that the language was unprofessional.[394]

[387] Supp. Tr. 691-92 (1/27/22 Freeman).
[388] Supp. Tr. 692 (1/27/22 Freeman).
[389] Supp. Tr. 698-99 (1/27/22 Freeman).
[390] Supp. Tr. 333-34 (1/26/22 Owens).
[391] Supp. Tr. 457-59, 462 (1/26/22 Meade).
[392] Supp. Tr. 464 (1/26/22 Meade).
[393] The undersigned notes that JX-285 was proffered during the initial hearing and, although referenced in RDX-2, was never offered into evidence at the supplemental hearing.
[394] Supp. Tr. 313-14 (1/26/22 Owens).

"Soap Opera"

RX-40 is an email chain in April 2013 between Mr. Klein and Laura Rapp, FDIC RMS Field Supervisor, where Mr. Klein states that the "Herring job is a soap opera."[395] When asked about this email chain, Ms. Owens testified she was rather in agreement with the statement, because nine years after the fact, the case was still active.[396]

"Tell Herring Bank to F Themselves!"

JX-284 is an email chain between FDIC commissioned examiner, Steven Jeffers, and Mr. Klein on September 10, 2013. In that email chain, Mr. Jeffers states "[t]ell Herring Bank to F themselves!" When asked about what Mr. Jeffers meant by "F" in the email during his deposition, he clarified that the "F" stands for "[f]uck."[397] Mr. Jeffers testified that there was a lot of stress in his life at the time that email was written, that the email was "a very stupid thing to do," and that he "paid the price for it."[398]

When asked about this email chain, Mr. Taylor testified that the comment was inappropriate and that the FDIC issued a letter warning in Mr. Jeffers' file.[399] Ms. Owens was also asked about the email chain and stated that an examiner suggesting that a bank they are overseeing should "F themselves" is not appropriate.[400] In addition, Mr. Freeman was also asked about the email and testified that the email was inappropriate, but did not necessarily show bias.[401] It should be noted that after this email was sent, Mr. Jeffers gave the Bank the highest possible composite

[395] RX-40 (April 2013 email chain).
[396] Supp. Tr. 329 (1/26/22 Owens).
[397] JX-940 (Jeffers Dep.) 22.
[398] JX-940 (Jeffers Dep.) 21.
[399] Supp. Tr. 494 (1/26/22 M. Taylor).
[400] Supp. Tr. 297-98 (1/26/22 Owens).
[401] Supp. Tr. 711-12 (1/27/22 Freeman).

rating and favorably rated the Bank's Board, which included Respondent, for the examination that began on June 1, 2015.[402]

"Greeting"

JX-277 and RX-59 are similar email chains dated September to October 2013, where JX-277 has certain language redacted that is unredacted in RX-59.[403] In the emails, C. Enrique Rodriguez, FDIC IT Examiner, and Mr. Neal are discussing Mr. Rodriguez going to Herring, while Mr. Neal would be going to two other examinations. In back and forth emails, Mr. Neal tells Mr. Rodriguez to "just be professional," and Mr. Rodriguez writes back that he's wondering "if I haven't been professional since you recommend that I do that," to which Mr. Neal responds that his current greeting for the Bank "might not meet professional standards."[404] In the final email, Mr. Rodriguez tells Mr. Neal that he will give the Bank a "good 'ol chorizo greeting."[405]

Mr. Neal was also asked what he meant by "[m]y current greeting for them might not meet professional standards" and he testified that he

> was not happy with the bank. I'd been wrongly accused of being unfair to them. And no one during that exam said we were unfair, no one ever bothered to tell us if they felt we weren't treating them fairly. And then they say we're treating them unfairly and they're challenging the ratings and the conclusions of the exam.[406]

Mr. Neal was asked about the email and testified that he did not know what Mr. Rodriguez meant by "the good 'ol chorizo greeting."[407]

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[402] JX-940 (Jeffers Dep.) 50-52; EX-918 (6/1/15 ROE) at 1, 4.
[403] JX-277 (9/18/13 & 10/15/13 email chain); RX-59 (9/18/13 & 10/15/13 email chain).
[404] RX-59 (10/15/13 email chain) at 1-3.
[405] RX-59 (10/15/13 email from Rodriguez to Neal) at 1.
[406] Supp. Tr. 128 (1/25/22 Neal).
[407] Supp. Tr. 131 (1/25/22 Neal).

"Gear up for War"

JX-286 is an email chain from Mr. Jeffers to Mr. Freeman dated November 5, 2013 regarding the Bank's May 21, 2013 board packet. Mr. Jeffers summarizes the board packet and then writes to "[g]ear up for war. They are mad as hell, and we may not get any cooperation regarding the answers to your list of questions. Skarda wants a meeting with Serena [Owens], and he is threating to 'go public' with the recorded phone message."[408] Mr. Freeman was asked about this email and testified that Bank management, Mr. Skarda in particular, was very angry with the FDIC at that time.[409]

"Take a break from attacking Herring"

RX-48 is a single email from Joe Conejo to Mr. Freeman dated November 13, 2014 to "[t]ake a break from attacking Herring."[410] Mr. Freeman testified that he recalled that email and that Mr. Conejo was "trying to make a joke about – about the – about Herring Bank. It was right after the Notice of Charges were issued against Herring Bank. . . . he was being sarcastic."[411]

"Witch Hunt"

RX-30 is an email chain dated August 10, 2011 between Mr. Beene and Ricke Bassett, FDIC Supervisory Examiner. In the initial email, Mr. Beene states that "personally I would give up the home remodel expenses. I think we have made our point on this and it is turning into a witch hunt."[412] When asked about this email, Mr. Beene stated that the reference to "witch hunt" was "directed solely at the issue of home remodeling. . . I did not mean that Mr. Fritz or anyone had been doing anything improper in the investigation or doing or not doing things out of disagreement

[408] JX-286 (11/5/13 email chain) at 2.
[409] Supp. Tr. 686-87, 712-13 (1/27/22 Freeman).
[410] RX-48 (11/23/14 email chain).
[411] Supp. Tr. 688 (1/27/22 Freeman).
[412] RX-30 (8/10/11 email chain).

with Bank business plans or personal animus toward [Respondent]."[413] Ms. Owens testified that the email merely relayed examiners discussing the topics that were going to be included during the Bank's examination.[414]

Although not mentioned on RDX-2, another email to note is contained in JX-289 and JX-290, which were also discussed at the supplemental hearing. JX-289 is a February 27, 2013 email chain between Michael Voelcker, TDOB Commissioned Examiner, and Mr. Klein, which was forwarded on to Mr. Meade and Ms. Rapp. In an email from Mr. Voelcker to Mr. Klein, Mr. Voelcker states, in reference to the subject "Herring Bank Assignments," "[w]e aren't on some weird witch hunt are we?" to which Mr. Klein responded that he doesn't "go on witch hunts. I just call it as it is."[415] When asked about this email during his testimony, Mr. Klein testified that his email response clearly stated that he did not go on witch hunts.[416]

JX-290 is a more complete email chain of the emails referenced in JX-289 and includes an email from Mr. Voelcker to Mr. Klein that "I just know that some of your [Headquarters] staff and yall's [Regional Office] staff are a little too obsessed with this bank and may have hypothesized some scenarios that may or may not be factual."[417] When asked about this email during his testimony, Mr. Klein testified that he didn't give the email any credence because the FDIC "conducts itself professionally."[418] In addressing this same email, Mr. Meade testified that he never spoke with Mr. Voelcker about the email and was not concerned the statement made by Mr. Voelcker, because Mr. Voelcker would not have knowledge of what was going on at FDIC

[413] ECRB 7 (citing Declaration of B. Gordon Beene at ¶ 16, filed with Enforcement Counsel's Motion for Partial Summary Disposition on August 14, 2020).
[414] Supp. Tr. 318-20 (1/26/22 Owens).
[415] JX-289 (2/27/13 email chain).
[416] Supp. Tr. 186-87, 229-30 (1/25/22 Klein).
[417] JX-290 (2/27/13 email from Voelcker to Klein) at 1.
[418] Supp. Tr. 187-89, 192 (1/25/22 Klein).

headquarters or the Dallas Regional Office.[419] This email was also shown to Mr. Freeman, who testified that he was aware of it, and that his understanding was that the TDOB did not want the examination to drag out.[420]

In reference to the "witch hunt" emails, Ms. Owens testified that the people who made such statements did not have any decision-making authority over whether the FDIC pursued an investigation or not; therefore, she did not find those statements to support evidence of bias.[421]

IV. Relevant Law

The FDIC brings this action against Respondent as an institution-affiliated party ("IAP") of the Bank for a prohibition order under 12 U.S.C. § 1818(e) and a second-tier civil money penalty under 12 U.S.C. § 1818(i).[422] To merit a prohibition order against an IAP under Section 1818(e), an agency must prove the separate elements of misconduct, effect, and culpability. The misconduct element may be satisfied, among other ways, by a showing that the IAP has (1) "directly or indirectly violated any law or regulation," (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."[423] The effect element may be satisfied, in turn, by showing either that the institution at issue thereby "has suffered or probably will probably 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."[424] And the culpability element may

[419] Supp. Tr. 452-54 (1/26/22 Meade).
[420] Supp. Tr. 704-05 (1/27/22 Freeman).
[421] Supp. Tr. 298-300 (1/26/22 Owens).
[422] The undersigned finds that Respondent is an IAP of the Bank as that term is defined in 12 U.S.C. § 1818(u).
[423] 12 U.S.C. § 1818(e)(1)(A).
[424] *Id.* § 1818(e)(1)(B).

be satisfied if 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."[425]

The assessment of civil money penalties under Section 1818(i) also contains an "effect" element of a sort, at least with respect to the criteria necessary for the imposition of the second-tier penalty sought by the FDIC.[426] The statute authorizes different levels of money penalties contingent on an increasingly stringent showing by the agency regarding the nature and consequences of the alleged misconduct. The lowest level, a first-tier penalty, may be assessed solely upon a showing of misconduct: specifically, that an IAP has violated some law, regulation, order, or written condition or agreement with a federal banking agency.[427] For a second-tier penalty to be assessed, by contrast, the agency must show not only misconduct,[428] but also some external consequence or characteristic of the misconduct: (1) that it "is part of a pattern of misconduct"; (2) that it "causes or is likely to cause more than a minimal loss to such depository institution"; or (3) that it "results in pecuniary gain or other benefit to such party."[429] As with Section 1818(e), fulfillment of this prong for the assessment of a second-tier money penalty does not require satisfaction of all three conditions; a second-tier penalty may be assessed (assuming misconduct has been shown) if the misconduct is part of a pattern even if it has not caused more than a minimal loss to the institution, and so forth.

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[425] *Id.* § 1818(e)(1)(C).

[426] *See id.* § 1818(i)(2)(B). The assessment of a third-tier civil money penalty similarly requires a showing of "effect," but the OCC does not seek such a penalty here, and it is accordingly unnecessary for the undersigned to discuss. *See id.* § 1818(i)(2)(C).

[427] *Id.* § 1818(i)(2)(A).

[428] In addition to the violations described in Section 1818(i)(2)(A), a second-tier showing of misconduct can be made as to a breach of a fiduciary duty or the reckless engagement in unsafe or unsound practices while conducting the institution's affairs. *Id.* § 1818(i)(2)(B)(i).

[429] *Id.* § 1818(i)(2)(B)(ii).

Although the misconduct prongs of both Sections 1818(e) and (i) may be satisfied by an IAP's engagement or participation in an "unsafe or unsound practice" related to the depository institution with whom he is affiliated, that phrase is nowhere defined in the FDI Act or its subsequent amendments. John Horne, Chairman of the Federal Home Loan Bank Board ("FHLBB") during the passage of the Financial Institutions Supervisory Act of 1966, submitted a memorandum to Congress that described such practices as encompassing "any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds."[430] This so-called Horne Standard has long guided federal banking agencies, including the FDIC, in bringing and resolving enforcement actions.[431] It has also been recognized as "the authoritative definition of an unsafe or unsound practice" by federal appellate courts.[432]

As stated previously, the undersigned adopts the Horne Standard when evaluating allegations of unsafe or unsound practices under the relevant statutes, because she is bound by Board precedent when determining the appropriate contours of Section 1818.[433] If Respondent wishes for the Board to revisit its numerous previous decisions on the matter, he must ask the Board to do so directly at some later stage of these proceedings.

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[430] *Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before the House Comm. on Banking and Currency*, 89th Cong., 2d Sess. 49 (1966) (statement of John H. Horne, Chairman of the FHLBB), 112 Cong. Rec. 26,474 (1966).

[431] *See*, *e.g.*, *Patrick Adams*, 2014 WL 8735096 (discussing Horne Standard in detail). *See also In the Matter of Bank of Louisiana*, Nos. FDIC-12-489b & FDIC-12-479k, 2016 WL 9050999, at *15 (Nov. 15, 2016) (FDIC final decision) (holding that Fifth Circuit precedent does not "restrict[] agency authority to violations of law that affect a bank's financial stability").

[432] *Gulf Federal,* 651 F.2d at 264; *see also Patrick Adams*, 2014 WL 8735096, at **14-17 (surveying application of Horne Standard by various circuits).

[433] S*ee* "Order Regarding Respondent's Objections on Remand to Pre-Hearing Actions," filed on March 2, 2020, at 4-11.

While acknowledging that the undersigned has adopted the Horne Standard, Respondent asserts that Enforcement Counsel is distorting that standard by incorrectly stating that an IAP can be removed and prohibited based on unsafe or unsound practices that caused "no bank loss whatsoever."[434] According to Respondent, his alleged misconduct accounted for merely 0.01% of the Bank's total asset base in June 2012 and that, even assuming everything the FDIC alleges is true, his conduct did not threaten the financial integrity of the Bank and thus cannot constitute an unsafe or unsound practice or a breach of fiduciary duty.[435]

Enforcement Counsel counters that self-dealing is never an acceptable practice, because to hold that self-dealing must be measured against a bank's financial ability to sustain associated losses would unjustly insulate IAPs who engage in self-dealing at financially sound banks.[436] The undersigned agrees with Enforcement Counsel that allowing an IAP to inappropriately personally benefit from a financially sound bank that can sustain such losses would be nonsensical, and that even if this was a requirement, it would only be applicable to an analysis of whether Respondent's actions were unsafe or unsound, and not to whether he breached any of his fiduciary duties.[437]

Furthermore, while Respondent contends that conduct may not be deemed "unsafe or unsound" for purposes of Sections 1818(e) and 1818(i) unless it poses an abnormal risk of harm to the financial integrity of the institution, this is not the law. The banking agencies have repeatedly and expressly declined to impose a requirement that risky, imprudent conduct must directly affect an institution's financial soundness or stability in order to be considered "unsafe or unsound,"

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[434] RRB 7.
[435] RIB 4, 37, 41.
[436] ECRB 27, 29.
[437] Respondent also asserts that there is a materiality threshold for breaches of fiduciary duty, such as the duty of candor which requires corporate fiduciaries to disclose "material information relevant to corporate decisions from which they may derive a personal benefit." RIB 45 (citing *Seidman v. OTS*, 37 F.3d 911, 935 n.34 (3rd Cir. 1994)).

adhering instead to the plain meaning of the Horne Standard. In its *Smith & Kiolbasa* decision in March 2021, for example, the Federal Reserve Board of Governors observed that it "has found [actionably imprudent] practices unsafe or unsound if they could be expected to create a risk of harm or damage to a bank, without necessarily attempting to measure their impact on the bank's overall financial stability."[438] The Board of Governors further explained that "[a] construction of 'unsafe or unsound' conduct that focuses on the nature of the act rather than any 'direct effect' of such act on the institution's financial stability is consistent with the structure of [S]ection 1818."[439] The undersigned agrees.

V. Procedural and Due Process Arguments

Before addressing the statutory elements of the claims against him, Respondent moves for disposition of this action based on various asserted procedural and due process rights, which will be addressed in turn.

A. Statute of Limitations

The Supreme Court's *Lucia* decision held that ALJs at the Securities and Exchange Commission ("SEC") were "inferior officers of the United States" subject to the strictures of the Appointments Clause of the United States Constitution.[440] On November 30, 2018, Respondent filed objections on remand to pre-hearing actions, including asserting that the FDIC's claims were time-barred because at the time this matter was initiated, it was brought before an

[438] *In the Matter of Frank E. Smith and Mark A. Kiolbasa*, No. 18-036-E-I, 2021 WL 1590337, at *21 (Mar. 24, 2021) (FRB final decision); *see also*, *e.g.*, *Patrick Adams*, 2014 WL 8735096, at **3-4 (rejecting an unsafe or unsound practices standard that "requires that a practice produce specific effects that threaten an institution's financial stability"); *In the Matter of Marine Bank & Trust Co.*, No. 10-825b, 2013 WL 2456822, at *4-5 (Mar. 19, 2013) (FDIC final decision) (declining to apply more restrictive standard).

[439] *Smith and Kiolbasa*, 2021 WL 1590337, at *22; *accord Patrick Adams*, 2014 WL 8735096, at *16 (noting that the standard suggested here by Respondent "conflicts with the fundamental structure of the FDI Act by introducing an effects element, textually reserved as a predicate for more severe remedies, into the definition of an element of misconduct").

[440] *See* 138 S. Ct. at 2053-55.

unconstitutionally appointed ALJ, which in turn voided the original Notice. On March 2, 2020, the undersigned issued an order addressing each of Respondent's arguments in detail and denying his motion. Respondent now makes arguments that are substantively identical to those he made years ago.[441] Enforcement Counsel once again asserts that this proceeding is not time-barred.[442] The undersigned rejects Respondent's arguments again, for the same reasons, and the arguments are preserved for the FDIC Board's review.[443]

B. Fair Notice

1. Standard for Business versus Personal Expense

Respondent asserts that the FDIC never provided fair notice of the "standard" for determining whether an expense is business-related versus personal; it is his contention, therefore, that his procedural and constitutional rights have been violated due to lack of fair notice.[444] Respondent takes issue that there is no written standard at the FDIC for determining whether an expense is personal or business in nature,[445] and that the standard the FDIC eventually provided was "whether the expense provides a direct or indirect benefit to the bank."[446] Respondent also

[441] RIB 76-78.
[442] ECRB 31.
[443] The undersigned is aware that, on May 18, 2022, the Fifth Circuit Court of Appeals issued a decision regarding the constitutionality of the removal process for ALJs and the constitutional requirement for a trial by jury in certain agency proceedings. *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022). The undersigned notes that Respondent has never requested a jury trial in this proceeding and, therefore, considers that issue moot. Furthermore, with respect to the constitutionality of the ALJ removal process in particular, the undersigned notes that the holding in *Jarkesy* "is in tension, if not direct conflict" with a recent decision of the Ninth Circuit. *Id.* at 478 (Davis, J., dissenting); *see Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1133 (9th Cir. 2021) (finding that ALJs who perform "a purely adjudicatory function" may be insulated from direct presidential removal). The undersigned will leave the determination of which circuit's reasoning is more persuasive and more consistent with precedent to the FDIC upon its review of the instant case.
[444] RIB 21, 74-76.
[445] Tr. 886 (9/15/16 Ramsey).
[446] RIB 20-22 (citing Tr. 885-86 (9/15/16 Ramsey)).

asserts that the true standard used by the FDIC in evaluating Respondent's expenses was to "assume, not ask."[447]

The undersigned finds no merit to these arguments. The undersigned finds that regulators repeatedly asked Respondent to substantiate his business expenses with vendor receipts or detailed descriptions of the charges so the business purpose of the expense could be verified. Because no such documentation was maintained by Respondent, the regulators made reasonable judgments whether certain expenses were business-related versus personal based on the information given, which was generally just the vendor name on a credit card statement. Respondent conceded that many of the charges made on his Bank-owned credit and debit cards, which were originally annotated as business-related, were actually personal expenses that Respondent was required to reimburse. Furthermore, no such "standard" was provided by Padgett in its forensic audit, yet Respondent takes no issue with how Padgett was able to "verify the business nature of the expense," as required.[448] The undersigned agrees with Enforcement Counsel that a person of ordinary intelligence is able to make the distinction between business and personal expenses, and therefore no procedural or constitutional rights have been violated.[449]

Respondent also makes the assertion that Enforcement Counsel has confused the burden of proof throughout the proceeding.[450] According to Respondent, it is untenable for the burden to be

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[447] *Id.* at 22.

[448] JX-151 (Padgett Final) at 3. In fact, Mr. Muñoz was questioned about what standard he applied in determining whether a purchase was a personal or business expense, to which he replied "[s]tandard of the best evidence of documentation that was available to me to review." Tr. 376 (9/14/16 Muñoz). According to Respondent, the FDIC should have provided this standard to Padgett (RIB 75); however, Padgett did not note having any concerns conducting its audit, but for the fact that there was little documentation to support the expenses they were tasked to review. Tr. 265 (9/13/16 Muñoz) (stating that there were no receipts for 85 percent of Respondent's charges on Bank-owned cards).

[449] ECRB 25. *See also* Tr. 275-76 (9/13/16 Muñoz) (testifying that the $149,000 of expenses in the Padgett audit were originally deemed "questionable" because "the vendor type maybe was more retailer or what we would deem to be of a personal nature, personal shopping").

[450] RIB 50.

on the person making the expense when the FDIC never articulated a clear standard for determining what constitutes a bank expense.[451] For the same reasons Respondent's arguments were rejected above, they are also rejected here. Furthermore, Respondent's failure to maintain vendor receipts or other appropriate documentation that could substantiate the business purpose of an expense is the main reason there is a lack of evidence that the expenses were personal.

The FDIC requested that Respondent substantiate the expenses made on his Bank-owned credit and debit cards. Respondent did not provide vendor receipts for all the transactions under review and could only provide annotated credit card statements and Board ratifications to justify that the expenses were Bank-related. The undersigned has reviewed the annotated credit card statements and finds that they are inadequate to support that multiple charges were Bank-related. Likewise, the undersigned has reviewed the Board ratifications and finds that they were meaningless, as the ratifications were made without adequate supporting documentation and because the Board relied upon misrepresentations. Accordingly, Enforcement Counsel has done more than enough to meet its burden here and has shown, by a preponderance of the evidence, that Respondent has failed to substantiate that the charges made on his Bank-owned cards were all business related.

Respondent asserts that "the FDIC has had to lower its estimate of alleged personal expenses charged to the Bank substantially every time more evidence has been introduced," which "undermines the FDIC's credibility."[452] The undersigned disagrees. Rather, while the FDIC's estimate of Respondent's personal expenses has changed somewhat, this shows that the FDIC classified certain expenses as personal because there was no substantiation for being a business expense based on the information the FDIC had at the time. Then, when Respondent produced

[451] *Id.* at 51.
[452] RRB 11.

evidence that the expense had a business purpose, the FDIC appropriately lowered its estimate of personal expenses.

2. Affiliate Transactions – Section 23A and Section 23B Violations

Enforcement Counsel initially asserted that Respondent charged approximately $31,000 to the Bank in affiliate transactions. Respondent argues that Enforcement Counsel failed to raise these allegations in its Amended Notice and that this issue is therefore not properly before this Tribunal.[453] Respondent has maintained that he never received fair notice of the FDIC's claims regarding violations of Sections 23A and 23B.[454] Enforcement Counsel now concedes that it did not plead any 23A or 23B violations in the Amended Notice and has withdrawn this as an issue in the interests of judicial economy.[455] Accordingly, no such ruling will be made regarding affiliate transactions.

C. Presumption of Regularity

Enforcement Counsel asserts that the FDIC thoroughly investigated Respondent's expenses abuses from 2010 through 2013, and that this investigation was conducted with the FDIC's regular policies and procedures; therefore, the FDIC is legally entitled to a presumption of regularity.[456] Regarding Respondent's claims of bias, Enforcement Counsel asserts that Messrs. Klein and Neal, whose voices were heard on the March 19, 2013 voicemail, played no role in the decision to bring this enforcement action against Respondent, while Messrs. Kuhnert and Jeffers

[453] RRB 17.
[454] RIB 78-80, RRB 17.
[455] ECRB 33.
[456] ECIB 45 (citing *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) (explaining that, "in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties")); *see also Latif v. Obama*, 666 F.3d 746, 748 (D.C. Cir. 2011).

(who wrote the email in JX-284 that the Bank should "F themselves") played only a limited role early in the investigation.[457]

Respondent asserts that the presumption of regularity is rebuttable in nature.[458] In addition, Respondent argues that the "presumption of regularity is typically invoked to establish that 'ministerial, routine, and non-discretionary' acts, such as the mailing of legally required notices, were performed according to accepted standards."[459] According to Respondent, Enforcement Counsel has not cited a single case in which the presumption of regularity was applied in an enforcement action, and therefore, it should not be applied here.[460] Respondent further asserts that he has presented "clear and overwhelming evidence that the FDIC's investigation and decision to seek a removal and prohibition order were irregular and tainted by bias."[461]

Specifically, Respondent asserts that the following actions by the FDIC show irregularity:[462]

> (1) Mr. Freeman's message to the Bank's President that the FDIC and TDOB thought "the Board should terminate Campbell Burgess as CEO";[463]
>
> (2) investigators assuming that all expenses incurred at both restaurants after bank hours and grocery stores must be personal;
>
> (3) investigators assuming that expenses incurred for travel to state near Tennessee, where Respondent's son attended boarding school, must be personal; and
>
> (4) an email chain where Mr. Jeffers tells Mr. Klein to tell "Herring Bank to F themselves!"[464]

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[457] ECRB 13-14.
[458] RIB 30-31.
[459] RRB at 1 (citing *Mathis v. McDonald*, 643 F. App'x 968, 974 (Fed. Cir. 2016); *Miley v. Principi*, 366 F.3d 1343, 1347 (Fed. Cir. 2004)).
[460] *Id.*
[461] *Id.* at 2.
[462] *Id.*
[463] EX-21 (5/11/12 email chain).
[464] JX-284 (email chain).

As to Respondent's first claim of irregularity above, when looking at the full context of Ms. Owens's testimony regarding the May 11, 2012 email chain from Ms. Rodriguez to Mr. Meade, which discusses an email chain from Mr. Freeman to Mr. Meade, Ms. Rodriguez, and Mr. Lebo on that same day, it is clear that Ms. Rodriguez had already advised Mr. Freeman that the FDIC "cannot tell the bank to terminate Campbell or remove him from the Board."[465]

As to the Respondent's second and third claims of irregularity above, the undersigned finds that, given the circumstances of Respondent failing to provide vendor receipts for the expenses in question, it was more than reasonable for the investigators to make certain assumptions about credit card charges made at restaurants, grocery stores, and out-of-state locations where the Bank had no current bank branch. Regulators were not given any details of potential business development in locations beyond the Bank's fourteen branches, which were located in Texas (namely, in Amarillo, Vernon, Grand Prairie, Weatherford, Clarendon, Seymour, Wichita Falls), Oklahoma (Altus), and Colorado (Colorado Springs);[466] therefore, it was reasonable for investigators to make an initial assumption that travel near Respondent's son's school in Tennessee could be personal in nature. Although Respondent testified that his travel to Chattanooga was related to the Bank's relationship with Liberty Tax, the business purpose of Respondent's multiple trips to Chattanooga is still unclear.[467]

As to Respondent's last claim of irregularity above, there is no doubt that language between examiners for a bank to "F themselves" is clearly unprofessional, and Ms. Owens, a supervisor to those examiners, agreed that such language "is not appropriate."[468] While such language shows a degree of unprofessionalism, the email exchange was between examiners and was never directed

[465] Supp. Tr. 334-36 (1/26/22 Owens); EX-21 (5/11/12 email chain) at 1.
[466] Tr. 414-15 (9/14/16 S. Taylor); JX-818 (Ghiglieri Management Study) at 10.
[467] Tr. 1795 (9/20/16 Burgess).
[468] Supp. Tr. 297-98 (1/26/22 Owens).

toward Respondent or the Bank itself and did not affect the outcome of the Report of Examination or this enforcement action. Further, as Ms. Owens testified, none of the examiners in the multiple emails highlighted by Respondent in RDX-2 that used unprofessional language "had any decision-making authority over whether we pursued an investigation or not."[469] In reference to the emails referenced in RDX-2, Ms. Owens testified that

> there's a couple of places where people are using profanity and that's – that's not – they know, not to do that, so I have issues with that. With the other e-mails, you know, it all – it all depends on the context of what is going on here. You know, I – I have to – our examiners, they're – they're human beings, they're not robots. And they will react and they do develop personal opinions based on, you know, what they observed and how they're treated. But at the end of the day, they – they have to follow the evidence and the facts as to what they've been asked to look at and investigate. And so if – if they're a little informal behind the scenes, I'm – I'm not immediately concerned by that.[470]

An enforcement action such as this certainly puts regulators on notice that all emails exchanged amongst themselves could one day be out in the open and that they should take caution when venting their frustrations with each other. Venting and using profanity, however, does not on its own show bias. Here, there is more than enough evidence that Respondent engaged in misconduct to justify bringing an enforcement action.

Respondent also takes issue with the FDIC's reliance on its multi-layer review process.[471] Respondent notes that the FDIC's review failed to address (1) multiple FDIC and TDOB emails questioning whether the FDIC was on a "witch hunt" based on its "obsessions" with Burgess, (2) that Messrs. Kuhnert and Freeman were "suspicious" of Burgess prior to investigating his expenses, (3) that the FDIC was supposedly out to get Burgess, and (4) that the FDIC was treating

[469] Supp. Tr. 298 (1/26/22 Owens).
[470] Supp. Tr. 313 (1/26/22 Owens).
[471] RIB 31-32; RRB 3.

Burgess as guilty until proven innocent.[472] As noted above, FDIC supervisors agreed that the language in the voicemail and emails was unprofessional and inappropriate, which led to employees being counseled regarding their unprofessionalism. The FDIC accommodated the Bank's request that Mr. Klein not return to the Bank's next examination, as a win-win for all involved.[473] Because there was no indication that the unprofessional voicemail and emails affected the outcome of the examination, and because no one who had used unprofessional language had any decision-making authority regarding the investigation and enforcement action, the undersigned finds it reasonable that the FDIC did not undertake any additional review.

While there is some merit to Respondent's argument that the presumption of regularity is generally applied to more ministerial and routine acts, the undersigned finds that Enforcement Counsel has shown that the FDIC thoroughly investigated Respondent's expenses abuses from 2010 through 2013, which was conducted with the FDIC's regular policies and procedures, including a multi-layer review process. While the initial tip that Respondent was renovating or repairing his house with Bank funds did not pan out, it did raise a red flag regarding Respondent's expense practices, which ultimately led to Respondent reimbursing the Bank over $319,000 for inappropriately charged personal expenses.[474]

The TDOB concurred with the FDIC's recommendation for an enforcement action, independently concluding that Respondent's expense practices constituted actionable

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[472] RRB 4.

[473] *See* n. 196, *supra*.

[474] *See* Stipulation I ¶ 41. The investigation into Respondent's home expenses found that Respondent charged at least $1,051.04 to the Bank for home repairs, which included a pool tarp and billiard supplies. ECRB 3 citing Tr. 564 (9/14/16 Baber), Tr. 1866-67 (9/21/16 Burgess); *see also* EX-873 (spreadsheet) at lines 158 (Bell – Lemley Bill $300) and 173 (Blankenship Canvas $380); JX-323 (9566 spreadsheet) at 20; JX-480 (4891 Statement September 29, 2010) at 3. There was also much discussion from Respondent that he took issue with allegations that he was renovating his home, when he was actually only having repairs done to his home. Tr. 1865-67 (9/21/16 Burgess). Regardless, Respondent conceded that he used Bank funds for home repairs.

misconduct,[475] and that the FDIC's actions were not based on bias.[476] Furthermore, the Bank's independent consultant, Ms. Ghiglieri, a former TDOB commissioner, surmised that Respondent's actions could subject him to an enforcement action.[477] The Bank's independent auditor determined that at least $149,000 of expenses charged by Respondent on his Bank-owned credit and debit cards was "questionable."[478] And the Bank's own Board members who were part of the Special Board Committee to investigate Respondent's expenses determined that at least $180,000 of expenses charged by Respondent on his Bank-owned credit and debit cards did not "pass the smell test."[479] Given all of the above, the undersigned disagrees with Respondent that he has shown, by clear and overwhelming evidence, that the FDIC's investigation was tainted by bias and that the presumption of regularity is inapplicable. Rather, the objective evidence has shown that there was more than enough support to bring forth an enforcement action despite Respondent's allegations of bias.

VI. Analysis

With respect to the misconduct element of Section 1818(e) and as applicable for Section 1818(i), the FDIC alleges in the Amended Notice that Respondent breached his fiduciary duties, violated Regulation O, and engaged in unsafe or unsound practices in conducting the affairs of the Bank.[480] With respect to the effect element of Section 1818(e), the FDIC alleges that as a result of Respondent's conduct, the Bank suffered financial loss and Respondent received financial gain.[481] With respect to the culpability element of Section 1818(e), the FDIC alleges that Respondent's

[475] JX-942 (Bacon Dep.) 40-42; *see also* EX-925 (9/5/14 TDOB letter).
[476] JX-942 (Bacon Dep.) 27; *see also* JX-147 (9/6/13 joint FDIC/TDOB letter to Bank Board).
[477] Tr. 69 (9/13/16 Ghiglieri); EX-584 (8/5/11 email from Ghiglieri to James); EX-559 (August 2011 email chain between Ghiglieri and James).
[478] Tr. 272, 283-84 (9/13/16 Munoz); EX-64 (Board Discussion Draft of Padgett Draft) at 6-7, 25-33.
[479] Tr. 1433-34 (9/19/16 McKinney).
[480] Amended Notice ¶¶ 14-16, 152.
[481] *Id.* ¶ 156.

conduct involved personal dishonesty and/or demonstrated a willful or continuing disregard for the safety and soundness of the Bank.[482] And with respect to the remaining element required for the assessment of a second-tier civil money penalty under Section 1818(i), the FDIC alleges that Respondent's violations and/or practices were part of a pattern of misconduct that resulted in pecuniary gain or other benefit to him and more than a minimal loss to the Bank, and that Respondent's unsafe and unsound practices were committed recklessly.[483]

As detailed below, the undersigned finds that a preponderance of the evidence shows that Respondent engaged in misconduct, the effect of which was to cause the Bank to suffer financial loss or damage, or to provide financial gain or other benefit to Respondent, and that Respondent acted with personal dishonesty and willful and continuing disregard for the safety and soundness of the Bank during the Relevant Period. Accordingly, removal and prohibition is warranted.

A. Misconduct

Enforcement Counsel asserts that Respondent knowingly and improperly took over $80,000 in Bank assets for personal use during the Relevant Period, which has been well documented and corroborated by two outside consultants and the Bank's own Board via the Special Board Committee to review Respondent's expenses.[484] According to Enforcement Counsel, Respondent's misconduct caused financial loss to the Bank and financial gain to himself, which was part of a pattern that shows personal dishonesty and a willful and continuing disregard for the safety and soundness of the Bank.[485]

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[482] *Id.* ¶ 157.
[483] *Id.* ¶¶ 162, 167.
[484] ECIB 1. Specifically, Enforcement Counsel asserts that the amount consists of at least $28,154 in personal charges to Bank-owned credit and debit cards, $46,800 in cash-out withdrawals, and $5,786 of the Bank's MasterCard dividends during the Relevant Period.
[485] *Id.* at 2-3.

Specifically, Enforcement Counsel asserts that Respondent breached his fiduciary duties of loyalty, candor, and care.[486] Respondent owed the Bank a fiduciary duty of loyalty, requiring him to "put the interests of the bank before [his] own, and not use their positions at the bank for [his] own personal gain."[487] One aspect of this duty of loyalty is the duty of candor, which in turn requires fiduciaries to "disclose all material information relevant to corporate decisions from which they may derive a personal benefit."[488] Respondent also owed the Bank a fiduciary duty of care, which at all times required him "to act in good faith and in a manner reasonably believed to be in the [institution's] best interest."[489] In furtherance of this duty, fiduciaries must "act diligently, prudently, honestly, and carefully in carrying out [their] responsibilities and must ensure their bank's compliance with state and federal banking laws and regulations."[490]

Respondent asserts that the FDIC has never provided him or the Bank with a "standard for judging personal expenses,"[491] and that the Board endeavored to comply with the FDIC's demands, but could not keep up because "the FDIC kept moving the goal posts."[492] Respondent concedes that "some of the expenses were admittedly personal in nature," but asserts that such expenses were "*mistakenly charged* to the Bank and *reimbursed* when [he] became aware of the mistake."[493] Enforcement Counsel counters that Respondent never intended to reimburse the Bank

[486] *Id.* at 48-50.
[487] *Smith and Kiolbasa*, 2021 WL 1590337, at *15.
[488] *Id.* (internal quotation marks and citation omitted) (also noting that "[o]missions are sufficient to trigger a violation of this duty").
[489] *In the Matter of Steven J. Ellsworth,* No. AA-EC-11-41 and -42, 2016 WL 11597958, at *15 (Mar. 23, 2016) (OCC Final Decision) (emphasis added).
[490] *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).
[491] RIB 5, 20-22.
[492] *Id.* at 5, 17-20.
[493] RRB 9 (emphasis in original) (specifying mistaken expenses to include the bracelet, house expenses, pet care and food, and personal care products).

for these personal expenses and that the only reason Respondent reimbursed the Bank for his personal charges was because the regulators began scrutinizing his expense practices.[494]

The undersigned agrees with Enforcement Counsel. As detailed below, a preponderance of the evidence of record shows that Respondent breached his fiduciary duties of loyalty, care, and candor, based on his expense practices, including the use of multiple Bank-owned credit and debit cards and cash-out withdrawals. Respondent's expense practices also constituted actionably unsafe or unsound practices in connection with an insured depository institution, meeting a separate statutory misconduct prong.

Also detailed below, a preponderance of the evidence of record shows that Respondent breached his fiduciary duties of loyalty, care, and candor based on his conduct regarding the MasterCard and Visa stock and dividends. Respondent's conduct as to the MasterCard and Visa stock and dividends also constituted actionably unsafe or unsound practices in connection with an insured depository institution, meeting another separate statutory misconduct prong.

1. Credit and Debit Card Expenses

a. Breach of Fiduciary Duties

Respondent asserts that he did not breach any of his fiduciary duties and that Enforcement Counsel has not met its burden because they failed to call any of the pre-2012 Directors to the stand and that reliance on minutes of Board meetings is insufficient.[495] Respondent asserts that he did not use others to mislead the Bank's Board, such as Ms. Blair, and Messrs. Conder, Hoy, and Heitz.[496] Respondent asserts that he did not breach any fiduciary duty by failing to disclose that

[494] ECIB 21.
[495] RIB 64.
[496] *Id.* at 64-65.

the CPA who gave him the purported advice to throw away his receipts was Steve Sterquell, because he maintains that Ms. Blair confirmed that the advice came from Mr. Sterquell.[497]

The undersigned does not find Respondent's arguments to be persuasive. As President, CEO, and a member of the Board, Respondent owed a duty of loyalty to the Bank, which includes an obligation to act in good faith and in the best interests of the Bank.[498] "Self-dealing . . . [is] inconsistent with fiduciary responsibilities,"[499] and when directors and officers place their personal interests above the corporation, or utilize corporate resources for personal gain, they have committed a serious breach of their common law fiduciary duty.[500] Respondent breached his fiduciary duty of loyalty by using Bank resources for personal gain when he regularly used Bank-owned credit and debit cards to pay for personal expenses, which were only repaid years after Respondent was questioned about his expenses.

The duty of loyalty encompasses a duty of candor, which requires corporate fiduciaries to "disclose all material information relevant to corporate decisions from which they may derive a personal benefit."[501] A bank fiduciary must disclose everything they know about transactions in which they hold a personal financial interest, even if they are not asked.[502] In this instance, Respondent breached his fiduciary duty of candor when he had his assistants annotate his credit and debit card statements without any supporting documentation or personal knowledge of the expenses, and then misled the Bank's Board, outside consultants, and regulators regarding his expense practices by repeatedly stating that he could substantiate the expenses as Bank-related,

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[497] *Id.* at 65-66.
[498] *Seidman*, 37 F.3d at 933.
[499] *Michael v. FDIC*, 687 F.3d 337, 351 (7th Cir. 2012) (internal quotation marks and citation omitted).
[500] *Pepper v. Litton*, 308 U.S. 295, 311 (1939); *see also In the Matter of Michael D. Landry and Alton B. Lewis*, No. 95-65e, 1999 WL 440608, at *16 (May 25, 1999) (FDIC final decision).
[501] *Seidman*, 37 F.3d at 935, n. 34 (internal quotation marks and citation omitted).
[502] *See In the Matter of Michael Sapp*, Nos. 13-477e & 13-478k, 2019 WL 5823871, at *14 (Sep. 17, 2019) (FDIC final decision); *De La Fuente v. FDIC*, 332 F.3d 1208, 1222 (9th Cir. 2003).

and that he regularly reimbursed the Bank for any personal expenses charged on the Bank-owned cards. Respondent's failure to adequately document his business expenses was also a breach of his fiduciary duty of care.

Respondent used multiple[503] Bank-owned credit and debit cards to charge hundreds of thousands of dollars in expenses, many of which were later deemed personal. Respondent routinely allowed the Bank to pay for these expenses without adequate documentation, such as vendor receipts. Respondent would have one of his assistants annotate the credit card statements with generic general ledger expense categories, such as supplies, travel, business development, or strategic planning, based on the vendor's name on the credit card statement and past practices. The assistants would frequently annotate the credit card statements without having any personal knowledge of the transactions and would submit the annotated statements to the Operations Department, often without further review by anyone else, including Respondent.[504]

While representations were made to the Board and regulators that Respondent would routinely reimburse the Bank for personal expenses, which were reviewed monthly, no such system was actually in place. For example, as noted above, Mr. Heitz's letter to the regulators included many statements that Mr. Schriber, an internal auditor at the Bank, testified were untrue.[505] In further support of the fact that Respondent had no system in place to ensure that personal expenses were reimbursed, Respondent concedes that the $1,600 diamond bracelet for Ms. Taylor, which was originally classified as "business development,"[506] was a "mistake."[507] While Respondent testified that the charge was "supposed to be reimbursed" but "did not get

[503] Respondent used seven cards in 2008, twelve cards in 2009 and seven cards in 2010. EX-64 (Board Discussion Draft of Padgett Draft) at 5.
[504] JX-928 (Blair Dep.) 25-27.
[505] *See* Section III.A.5; *see also* n. 179, *supra*.
[506] JX-208 (3887 spreadsheet) at 1.
[507] Supp. Tr. 534 (1/26/22 Burgess).

reimbursed,"[508] the undersigned finds Respondent's recollection of his intentions to be unconvincing in light of the fact that no one ever reviewed Respondent's expenses to ascertain whether the expenses were Bank-related. During his testimony, Respondent conceded that he did not have a system set up to reimburse personal expenses:

> Q. Now, you did not set up a system with your assistants to regularly check to see whether personal expense had been made on the credit card; isn't that correct?
>
> A. I did at times.
>
> Q. That's not a regular procedure. Did you say to your assistants: You guys have to review each month the credit card statements, find any personal expenses, and bring them to my attention so I can reimburse for them?
>
> A. I thought they understood if there were inadvertent personal expenses, they should bring those to my attention.
>
> Q. My question was: Did you instruct the assistants to undertake a regular review and to bring them to you so that you could reimburse them?
>
> A. I guess my quarrel –
>
> Q. "Yes" or "no," please.
>
> A. No.[509]

Respondent did in fact reimburse the Bank for personal expenses, but only years later, and only after the regulators required that the Bank address the issue of Respondent's expenses. As detailed above, while the Padgett audit showed over $149,000 of questionable expenses, the Bank's Board "ratified" those expenses as business-related without adequate documentation and based on the misrepresentation that Respondent's expenses were regularly reviewed. Subsequently, the Board reversed itself when the two Board members that comprised the Special Board Committee determined that at least $180,000 of expenses did not "pass the smell test."[510]

[508] Supp. Tr. 534 (1/26/22 Burgess).
[509] Tr. 1845 (9/20/16 Burgess).
[510] *See* n. 159, *supra*.

While Respondent asserts that Board's ratification complied with Bank policy, which allowed "other appropriate documentation,"[511] the undersigned finds this to be unpersuasive—an annotation on a credit card statement, with nothing else, is insufficient.

Can documentation other than vendor receipts support an expense as being business-related? Yes, certainly. Other documentation, such as a detailed expense or travel voucher containing an itemization of expenses incurred, the date, place, and business purpose for the expense, and the names of those present and their business relationship to the business, would be acceptable, as detailed in the Bank's employee handbook.[512] Respondent, however, failed to produce anything close to this type of documentation and instead relied upon annotated credit card statements, which he did not personally annotate and did not consistently review for accuracy. Furthermore, there was no system in place to flag personal expenses charged on the Bank-owned cards for reimbursement.

Can annotated credit card statements, by themselves, constitute "other appropriate documentation"?[513] Again, yes, the undersigned can fathom an instance where an annotated credit card statement to a particular vendor, which is made on a frequent or recurring basis, would be enough to substantiate an expense as business-related. But that is not the case here when the only documentation is the credit card statement, and the charges are made with vendors that are more typically associated with personal expenses than Bank-related expenses.

According to Enforcement Counsel, Respondent bought what he wanted and the Bank paid for it, usually without the Board's knowledge that he was doing so.[514] Enforcement Counsel asserts

[511] RIB 59.
[512] JX-202 (2008 Bank Employee Handbook) at 45.
[513] *Id.* at 47.
[514] ECIB 10-11.

that when the Board started to scrutinize his expenses in July 2011, many of the types of expenses on Respondent's Bank-owned credit cards shifted to his personal debit card.[515]

Respondent contends in turn that he used multiple Bank-owned credit cards as part of a system to use the different cards for each of Bank's branch or profit centers.[516] The undersigned takes no issue with the use of multiple cards by Respondent for such a purpose; however, the use of multiple cards without keeping appropriate documentation to substantiate the expenses for that particular branch or profit center does little to justify an otherwise inadequate system to keep track of Bank-related expenses. In addition, when Respondent directed Ms. Blair to cancel four of his cards,[517] it is not clear how the expenses for those four profit centers were then tracked, or if Respondent replaced his previous system with something else.

Respondent's Unique Position at the Bank

Respondent argues that the FDIC fails to consider Respondent's "unique" position at the Bank when evaluating his conduct.[518] Respondent asserts that the Bank's growth strategy to increase non-interest income required nationwide outreach and frequent travel, resulting in higher business expenses than the average CEO and President of a community bank that focused solely on interest income.[519] As an example, Respondent asserts that while a charge at the Broadmoor Resort in Colorado Springs may be a personal expense for the president of a bank with no business in Colorado, it would not be a personal expense for the president of a bank with a branch in Colorado Springs, as was the case for Respondent.[520]

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[515] ECIB 18.
[516] RX-1 (2/1/12 Board Agenda) at 155.
[517] EX-708 (3/22/11 Board Minutes) at 19 (noting that the four cards that were cancelled included the IT department card, Asset Management card, Vernon card, and HB Trust department card).
[518] RIB 38-40; RRB 5-6.
[519] RIB 7-8, 38 (citing Supp. Tr. 518-20 (1/26/22 Burgess)).
[520] RRB 6.

The undersigned acknowledges that Respondent traveled frequently to increase the Bank's non-interest income growth opportunities and that he had higher business expenses than the average President/CEO of a community bank that focused solely on interest income. This does not, however, absolve Respondent from properly documenting his business expenses. For instance, as to Respondent's argument regarding the charges at the Broadmoor, the undersigned finds that while it is reasonable for Respondent to expense charges at the Broadmoor, as the Bank had a branch in Colorado Springs, specific factors weigh against a finding that all the charges were Bank-related. First, the timing of the hotel stay over the New Year's Eve holiday calls into question whether such travel was for business. Second, the charge of multiple rooms, not just a single room, calls into question whether travel for accompanying family was pre-authorized by the Bank, as Bank policy specifically stated it would not pay the travel expenses for accompanying spouses, let alone a girlfriend who was a non-Bank personal assistant, and children.[521] Finally, Respondent provided no detail regarding the business purpose of the travel and the names of the people in attendance, as required by Bank policy.[522] As such, Respondent's arguments fail.

Bank Policy

As detailed above, longstanding Bank policy required employees with Bank-owned credit cards who used those cards when traveling in the course of their duties or purchasing goods and services for the Bank to adequately document their business expenses and reimburse the Bank for any personal expenses in a timely manner.[523] As noted above, the 2006 Bank Employee Handbook

[521] During the hearing, Respondent testified that "my belief is that if I have to be in a place on business and I have to take my kids with me, because that's my responsibility to be there and I can't be there and I've got to take them with me, then I think – I think that's a business expense." Tr. 1791 (9/20/16 Burgess).

[522] On this issue, Respondent testified at the hearing that "we had one specific prospect that we were pursuing that has the Broadmoor – liked to hang out at the Broadmoor bar, and he really liked to talk to Susan about who shot John. And he would meet us at the Broadmoor. He would not meet us outside." Tr. 1790 (9/20/16 Burgess).

[523] JX-201 (2006 Bank Employee Handbook) at 48.

stated that "[c]orporate credit card expenditures must be reconciled and submitted with *original receipts* to the accounting/finance department within ten business days of the statement,"[524] but on October 30, 2008, the Board made a notable change to the Bank's corporate credit card policy, which stated "[c]orporate credit card expenditures must be reconciled and submitted with original receipts (or other appropriate documentation if approved by management) to the Account Payable/Operations within fourteen business days of the statement."[525] Reimbursement for certain expenses, including business travel, business entertainment, and meal reimbursement, still required additional support such as a receipt or notation regarding the business purpose of the travel or meal, *and the names of those in attendance*, none of which Respondent provided.[526]

Board member Terry Spears testified that the Board never authorized Respondent to not comply with the Bank's expenses policies.[527] Yet Respondent constantly failed to comply with either the Bank's 2006 policy or the revised policy in 2008 regarding documentation of business expenses. The evidence shows that Respondent's habit of not substantiating his business expenses with vendor receipts was a longstanding problem that Bank employees and the Board were cognizant of,[528] but the Board refused to take action to rein in Respondent's expenses until the issue was flagged during the 2010 Examination.

The Board's minutes from July 28, 2011 specifically stated that the Board

> has had no written policy regarding the CEO's individual expenses and therefore has had no direct role in the approval or reimbursement of expenses prior to 2011. Rather, these expenses have been approved, monthly, as part of the regular monthly financial review. Regardless, the board acknowledges the need to

[524] JX-201 (2006 Bank Employee Handbook) at 48 (emphasis added).
[525] Stipulation I ¶ 15; *see also* JX-202 (2008 Bank Employee Handbook) at 47.
[526] JX-201 (2006 Bank Employee Handbook) at 45-46 (emphasis added); JX-202 (2008 Bank Employee Handbook) at 44-45 (emphasis added).
[527] Tr. 1666 (9/20/16 Spears).
[528] *See* n. 60-61, *supra*.

> strengthen its corporate governance and the associated oversight of CEO expenses as a normal course of review.[529]

The fact that Respondent, as President and CEO of the Bank, was not required to submit vendor receipts like other Bank officers and employees, shows how problematic the Bank's internal controls and Board oversight were.[530]

As the Board itself acknowledged, it had no role in the approval of Respondent's expenses until 2011. The "regular monthly financial review" referred to in the July 28, 2011 Board minutes proved to be false, as no one, not even Respondent, ever reviewed the annotated credit card statements consistently for accuracy or to earmark personal expenses for reimbursement.[531] Because the Board had no role in approving Respondent's expenses, the Board's supervision over management, including Respondent, was ineffective.[532]

Mr. James testified that one Board member was overheard saying "[w]ell, it's their bank."[533] Although the Burgess family are majority shareholders in the Bank, the undersigned finds it disheartening that the outside Board members did little to combat Respondent's abusive expense practices, given their own fiduciary duties as Board members of the Bank. The FDIC protects the money that depositors place in insured banks in the unlikely event of an insured bank's failure. To maintain that insurance, banks are subject to FDIC examinations to ensure public

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[529] JX-17/EX-891 (7/28/11 Executive Session Minutes) at 1.

[530] There is evidence in the record that, in October 2017, the Bank terminated at least one other Bank officer—the Vice President of Corporate Trust—for "improperly using Bank assets, property, and employees for [her] personal business ventures." ECIB 2-3, ECRB 1, Supp. Tr. 578-83 (1/26/22 Burgess); EX-928 (Employee Termination). This individual was later prohibited from working in the banking industry. ECRB 1, n. 3. Respondent notes that the former employee was terminated for conduct completely unrelated to the type of misconduct alleged here, namely, that she had been conducting business through the Bank's Corporate Trust Department for her own personal benefit. RIB 48, n. 205.

[531] *See* n. 66, 179, 509, *supra*.

[532] Tr. 60-61 (9/13/16 Ghiglieri); *see also* JX-818 (Ghiglieri Management Study) at 55-56.

[533] Tr. 189 (9/13/16 James) (noting that because the Burgesses owned the majority of the Bank's stock, the remaining Board members would be agreeable to whatever the Burgesses wanted to do).

confidence in the banking system and to protect the Deposit Insurance Fund.[534] Therefore, although the non-Burgess Board members may have signed off on matters favorable to Respondent because it was "their bank," they did not consider how such abusive expense practices could undermine public confidence in the Bank.

Respondent asserts that he genuinely believed the annotated credit card statements were adequate under the Bank's "other appropriate documentation" policy. This argument fails, as there are numerous instances where Respondent's supposed review did not identify personal charges that were initially labeled as business expenses, including "business development," "customer gift," and "supplies."[535]

Board Ratifications

The undersigned agrees with Enforcement Counsel that the numerous ratifications made by the Board to legitimize Respondent's business expenses without appropriate supporting documentation were meaningless.[536] When the Board members ratified Respondent's expenses numerous times, they did so based on misrepresentations and without adequate documentation.

For example, when Ms. Blair informed the Board on July 28, 2011 that Respondent "likes to constantly test the Bank's payment card system" and "reimburses the bank for . . . personal expenses,"[537] such characterizations were misleading at best, as there is no supporting evidence that Respondent ever tested the Bank's payment card system, had any process in place to flag and

[534] *See* https://www.fdic.gov/about/what-we-do/ (last visited September 8, 2022).
[535] *See* EX-79 (5/10/10 email from Duke to Blair\Barnes) at 1 [diamond bracelet]; JX-406 (6698 statement November 29, 2010) at 3, 8 [legal fee for speeding ticket]; EX-230 (spreadsheet) at 1, 14 (rental of three DVDs, namely *Karate Kid*, *Ramona and Beezus*, and *Despicable Me*); JX-899 (December 2009 Account Statements) at 9 and JX-60 (4/2/12 Board Resolution) at 13 (spa charges).
[536] ECIB 34-41; ECRB 24.
[537] JX-17/EX-891 (7/28/11 Executive Session Minutes) at 3.

reimburse personal expenses made on Bank-owned cards, or that there was even a regular review of the annotations on the credit card statements.

The Board also relied on letters from a CPA and a tax attorney. At the hearing, Mr. Conder testified that the scope of the letter he wrote on January 31, 2012 was not to express an opinion on the adequacy of expenses documentation.[538] He further testified that in all of his years as a CPA, he has never advised a client that it was a good practice to throw away all vendor receipts, and that he could not conceive of any legitimate business reason to do so.[539]

Mr. Conder's January 31, 2012 letter to the Board is a general letter that merely states that his office has "witnessed a number of occasions where business expenses were supported with documentation, other than the original receipt."[540] The letter advises the Bank to have its employees submit original receipts to substantiate business expenses going forward. With regard to past business expenses without original receipts, the letter advises that the Board may ratify the expenses as business expenses if the charges are consistent with past practice and the Board does not have reason to believe that they were not Bank-related.[541] The recommendation to ratify was based on a cursory review of some of Respondent's annotated credit card statements without any significant review of any vendor receipts and was based on the misleading assumption that Respondent's practices complied with Bank policy.

Mr. Conder's subsequent letter does not specifically recommend that the Board approve any of Respondent's expenses as Bank-related either. Rather, it is a general letter addressing

[538] Tr. 1235 (9/19/16 Conder).
[539] Tr. 1243-44 (9/19/16 Conder).
[540] RX-1 (2/1/12 Board Agenda) at 154.
[541] *Id.*

generally accepted accounting principles and opines that GAAP does not provide procedural or substantiation requirements for record keeping and documentation.[542]

Mr. Hoy testified that the Board minutes that discuss his letter mischaracterize the letter's contents. He stated specifically that his letter, which states "[b]ased on my review of the documents you presented," was a misstatement, because he was presented with no documents.[543] Mr. Hoy provided further testimony that, with respect to gifts, there must be documentation to identify the name of the person for whom the gift was purchased and that for tax purposes, only the first $25 is deductible.[544]

Mr. Hoy testified that the "heart and core" of substantiating the business relatedness of charged expenses is the presence of some independent, third-party verification of the amount of the expense and the relationship of the expenses to the business of the taxpayer.[545] According to Mr. Hoy, throwing away vendor receipts is not a good practice and there is no legitimate business reason for doing so.[546]

The Bank's comptroller, Mr. Thorne, testified that without vendor receipts, it can be hard to determine the nature of the expense; therefore, he would never recommend that anyone throw away their vendor receipts.[547] Mr. Thorne testified that he and Jack Hall discussed their mutual concern about Respondent's expense practices—namely, that they could affect the Bank's CAMELS ratings negatively.[548]

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[542] JX-60 (4/2/12 Board Resolution) at 6-7.
[543] Tr. 982-83, 986 (9/16/16 Hoy); *see also* JX-62 (4/12/12 Special Directors Meeting Minutes) at 3; JX-309 (2/29/12 Hoy letter) at 1.
[544] Tr. 965 (9/16/16 Hoy).
[545] Tr. 976 (9/16/16 Hoy).
[546] Tr. 975-78 (9/16/16 Hoy).
[547] Tr. 1017 (9/16/16 Thorne).
[548] Tr. 1032 (9/16/16 Thorne).

While the undersigned agrees that the Board has the authority to make ratifications, regulatory agencies are not obligated to accept those ratifications if they are based on misrepresentations and lack documentary support.[549] The most egregious ratification was when the Board reversed Padgett's determination that over $149,000 of expenses were questionable—when these same expenses were later reviewed by the Bank's Special Board Committee, they did not "pass the smell test."[550]

Numerous individuals who were hired by the Bank, including the Bank's own internal auditor, outside accountants, and tax attorneys, gave testimony that they would never recommend that anyone throw away vendor receipts, because without them, it can be hard to determine the business nature of an expense. The undersigned finds that the annotated credit card statements were insufficient for the Board to make an informed decision regarding the appropriateness of these charges as business expenses. That the Bank's Board ratified expenses after the fact without supporting documentation renders such ratifications meaningless.

Steve Sterquell and the American Housing Foundation

Respondent asserts that the FDIC has wanted to remove him from banking for over a decade based on an unsubstantiated belief that he was to blame for losses sustained by the Bank as a result of a Ponzi scheme orchestrated by Mr. Sterquell through AHF and that in 2010, the FDIC was given the excuse it was looking for, by launching an investigation into Respondent's expense practices following a false tip that he was using Bank funds to renovate his home.[551] Respondent further asserts that when the tip did not turn out as expected, the FDIC "tried to concoct

[549] Tr. 1546-50 (9/20/16 Meade); Supp. Tr. 684 (1/27/22 Freeman).
[550] *See* n. 159, *supra*.
[551] RIB 1, 12-15 (citing *In re Am. Hous. Found.*, 785 F.3d 143, 148, 160-61 (5th Cir. 2015), *as revised* June 8, 2015).

new evidence to support removal" and has relentlessly pursued Respondent despite a lack of evidence.[552]

Based on the record, the undersigned finds that nothing could be further from the truth. The undersigned disagrees that there is evidence that the FDIC has wanted to remove Respondent from banking based on losses related to Mr. Sterquell and AHF. Enforcement Counsel asserts, and the undersigned agrees, that the Sterquell-AHF relationship with Respondent, his family, and the Bank would be wholly irrelevant to this proceeding if it were not for Respondent's claim to have relied upon Mr. Sterquell's advice that it was acceptable for Respondent to throw away vendor receipts, which has been rejected by countless others. As to Respondent's characterization that the FDIC received a "false" tip about home renovations, the undersigned cannot agree, as Respondent conceded that he did use Bank funds to "repair" his home.[553] And there is no basis for Respondent's assertion that the FDIC tried to concoct evidence to support his removal. Rather, it is Respondent's poor recordkeeping and the Bank's lack of internal controls that have more than adequately shown Respondent's misconduct.

Enforcement Counsel asserts that Respondent's claim—that he relied on Mr. Sterquell's advice to throw away vendor receipts—is problematic for various reasons, including that there is no documentary evidence that such advice was given; that there is no evidence that Mr. Sterquell was ever hired as a CPA for the Bank; that Mr. Sterquell's advice is contrary to the Bank's own policies; and that other CPAs, who were hired by the Bank, found that the lack of vendor receipts resulted in documentation that was insufficient to discern whether or not a particular charge was a Bank-related expense.[554] The undersigned agrees with Enforcement Counsel and gives no weight

[552] RIB 1.
[553] *See* n. 474, *supra*.
[554] ECIB 7-8 (citing Tr. 248 (9/13/16 Muñoz)).

to Respondent's testimony that he reasonably relied upon the advice from Mr. Sterquell when he purportedly suggested that it was acceptable for Respondent to throw away vendor receipts. Mr. Sterquell was never hired by the Bank to offer an opinion regarding the appropriate documentation for business expenses and, in fact, was never hired by the Bank for any purpose at all.[555] From the record, it appears that Respondent was a business associate of Mr. Sterquell, having invested in Mr. Sterquell's AHF, and may have informally asked for Mr. Sterquell's advice, as there is no evidence that Mr. Sterquell ever provided a written opinion.[556] If so, Respondent—a sophisticated and knowledgeable businessman by his own admission[557]—upon hearing this too good to be true advice, ignored the Bank's own policy, the advice of outside consultants, and the Bank's regulators in continuing to hide behind the façade of not needing to maintain appropriate documentation for his business expenses.

On the other hand, the undersigned does not find Enforcement Counsel's argument regarding Respondent, his family, and Mr. Templeton being members of the same Creditor Committee in an adversarial proceeding against AHF to be relevant.[558] Enforcement Counsel also asserts that Mr. Sterquell could not have rendered independent advice to Respondent due to the large sums of money he owed to the Bank and because he was personally benefitting by receiving over $5,000 in travel benefits, initially paid for by the Bank.[559] The undersigned likewise does not find this argument regarding Mr. Sterquell's impartiality to be relevant. Rather, the only evidence relating to Mr. Sterquell that is relevant is the $5,000 in travel expenses, which was originally

[555] Tr. 1719 (9/20/16 Spears).
[556] Tr. 1205 (9/16/16 Freeman).
[557] Tr. 1863 (9/21/16 Burgess).
[558] *See* ECIB 7.
[559] *Id.* at 8.

charged as Bank-related expenses, then later deemed by the Board to be Respondent's personal expenses, and that Respondent was required to reimburse the Bank for such expenses.[560]

Susan Taylor's Travel and Expenses

Respondent has repeatedly asserted that it was appropriate for the Bank to pay for Ms. Taylor to accompany him on his travel because she was his personal assistant and because Bank policy permitted reimbursement for spousal travel.[561] There is no dispute that: 1) Ms. Taylor was never a Bank employee, as Respondent admits that he paid Ms. Taylor's salary personally and 2) she was never Respondent's spouse during the Relevant Period at issue.[562] Further, Bank policy provided that "if any employee's spouse accompanies the employee on the business trip, the spouse's expenses will not be paid by [the Bank]."[563] Although Respondent repeatedly asserted to FDIC employees that the Bank had a written policy to allow spouses to travel at the Bank's expense, Respondent could never produce such a policy, because no such policy existed during the Relevant Period.[564] Respondent's argument is therefore rejected, as it was clearly against Bank policy to pay for Ms. Taylor's travel and because the Board did not pre-approve any such reimbursement for Ms. Taylor's travel expenses.[565]

Respondent contends that having Ms. Taylor work as his personal assistant does not constitute any misconduct and asserts that she did not have access to any confidential

[560] *Id.* at 8.
[561] Amended Answer ¶¶ 105, 109.
[562] *Id.* ¶ 105.
[563] JX-202 (2008 Bank Employee Handbook) at 44.
[564] Tr. 561-62 (9/14/16 Baber); Tr. 1206 (9/16/16 Freeman).
[565] There is some evidence that the Board may have approved of Ms. Taylor's travel expenses to accompany Respondent when he traveled for his MBA; however, the Board never provided a reason why such expenses were being allowed in light of the Bank's policy that spousal expenses will not be paid by the Bank. *See* n. 69, *supra*. In addition, Respondent never disclosed that he was taking additional side trips to Hanoi and Paris, which were not required by his MBA program. *See* Section III.B.1.a.1, *supra*.

information.[566] The undersigned agrees that there has been no evidence that Ms. Taylor had access to any confidential information. The undersigned has no issue with Respondent having hired his girlfriend as his personal assistant. What the undersigned does have issue with is that Respondent never asked Ms. Taylor, his non-bank personal assistant who traveled with him frequently, to ever maintain his vendor receipts and to keep documentation that could be submitted in accordance with Bank policy. Ms. Taylor testified that if Respondent had asked her to keep track of receipts as his personal assistant, "we would have the receipts."[567] Respondent's assertion that he did not ever ask Ms. Taylor to keep track of his expenses because he was relying upon Mr. Sterquell's advice is equally unpersuasive.

Bank policy was also violated with the issuance of a Bank corporate credit card for Ms. Taylor. Bank policy stated that "[r]egular, full-time employees may apply for a corporate credit card but must obtain prior, written approval from their supervisor."[568] The application that Ms. Taylor filled out for a Bank corporate credit card listed her title as "Senior VP of Assistants," which Ms. Blair testified was an "ongoing joke."[569] There is no dispute that Ms. Taylor was never an employee of the Bank and was improperly issued a Bank corporate credit card.

Respondent asserts that he cannot be held liable for a breach of fiduciary duty because he never intended for Ms. Taylor to get a Bank-owned card.[570] While Respondent asserts that he did not intend for Ms. Taylor to get a Bank-owned card, Enforcement Counsel asserts that he was well aware that she was issued a Bank-owned card, as the card was issued in the name of the Bank, the statements were sent to the Bank, and the Bank automatically paid the charges.[571] In support,

[566] RIB 62-63.
[567] Tr. 448 (9/14/16 S. Taylor).
[568] Stipulation I ¶ 19; *see also* JX-202 (2008 Bank Employee Handbook) at 47.
[569] JX-928 (Blair Dep.) 59; *see also* EX-185 (Taylor Application for Corporate Credit Card).
[570] RIB 72-73; RRB 14.
[571] ECIB 14.

Enforcement Counsel points to Mr. Kuhnert's contemporaneous memo regarding Ms. Taylor's credit card when he discussed the matter with Ms. Blair.[572] In further support, Enforcement Counsel cites to the testimony of Mr. Covington, who wrote three separate letters, which were reviewed by Respondent and his father before they were sent to the regulators, and did not have issue with the statement that "[t]he corporate credit card that was issued to Susan Taylor was deactivated on April 17, 2012. Going forward, the Bank will not issue a corporate credit card to a non-bank employee."[573]

The undersigned finds that the more plausible finding, and the finding supported by the weight of the evidence, is that Respondent directed Ms. Taylor to get a Bank-owned card after he asked Ms. Blair to cancel four of his own Bank-owned cards, which was reported to the Board on March 22, 2011.[574] The undersigned finds it curious that there was no testimony that Respondent ever had any discussion on how Ms. Taylor would be reimbursed for Bank-related charges made on her personal card, which Ms. Blair stated was part of Respondent's budget.[575] Instead, Ms. Taylor's Bank-owned credit card, like all Bank-owned credit cards, were automatically paid with the card's automatic payment features.[576] It is unreasonable for Respondent to have never asked Ms. Taylor if she needed to get reimbursed for any Bank-related expenses made on what he thought was a personal credit card if she was, in fact, making Bank-related charges on behalf of Respondent, as reflected in his budget.

[572] ECRB 18-19 (citing EX-423 (Examiner call-in memo) at 5).
[573] EX-44 (2/28/13 Covington letter) at 12, Tr. 612-13 (9/14/16 Covington); JX-125 (7/16/12 Covington letter) at 5, Tr. 613-15 (9/14/16 Covington); JX-131 (10/31/12 Covington letter) at 13, Tr. 616-17 (9/14/16 Covington).
[574] EX-708 (3/22/11 Board Minutes) at 19.
[575] EX-423 (Examiner call-in memo) at 5.
[576] JX-928 (Blair Dep.) 87.

Enforcement Counsel asserts that Respondent misrepresented to the Board about whether Ms. Taylor had a Bank-owned credit card, which Respondent denies, based on a failure to show his intent that she receive a Bank-owned credit card.[577] This argument also fails, as Respondent has already conceded that he was the one who directed Ms. Taylor receive a new credit card and did not follow through with ensuring that the card that was issued was a non-Bank-owned credit card, if that is in fact what he intended. He could have easily asked Ms. Taylor what type of card she received or could have looked at her card to see if both her name and the Bank's name were embossed, as a personal credit card would not have the Bank's name embossed on it.[578] Respondent continually fails to take responsibility for his actions by deflecting blame onto other Bank employees, when it was clear that he made "virtually all of the decisions in the bank."[579]

Dependent Care

Respondent asserts that Enforcement Counsel has failed to show that Respondent exhausted his dependent care allowance.[580] The undersigned finds Respondent's argument to be unpersuasive. First, there is no evidence that the Bank had such a dependent care reimbursement program or that Respondent participated in it. Second, there is no evidence that the expenses associated with his children—including airfare, ground transportation, and textbooks—qualified as dependent care expenses. As asserted by Enforcement Counsel, there are strict guidelines for expenses to qualify as dependent care expenses, including that the expenses must be made for a child under the age of thirteen when the care was provided—which his son Taylor was not during

[577] RIB 72-73; RRB 14.
[578] Tr. 775 (9/15/16 Bodey Crooks) (testimony that for a Bank-owned card, both the employee's name and the Bank's name or branch would be on the card).
[579] JX-818 (Ghiglieri Management Study) at 11.
[580] RRB 12-13.

the Relevant Period.[581] Accordingly, Respondent's argument that he was entitled to use Bank-owned credit and debit cards for charges in connection with his children is rejected.

b. Unsafe and Unsound

Enforcement Counsel argues that Respondent's misconduct regarding his Bank-owned credit and debit cards constitutes an unsafe and unsound practice because his actions were contrary to generally accepted standards of prudent operation and because the consequences of his actions caused abnormal Bank losses.[582] Enforcement Counsel further asserts that a possible consequence would have been a more negative impact on the Bank's CAMELS rating.[583]

As noted above, Respondent maintains that there should be no finding of unsafe or unsound practices because his conduct did not pose an abnormal risk to the financial stability of the Bank.[584] Enforcement Counsel asserts that the undersigned has already rejected the *Gulf Federal* standard and that Respondent's reliance on *Gulf Federal* is misplaced.[585] Furthermore, Enforcement Counsel asserts that *Gulf Federal* actually referenced the "careless control of expenses" as a classic unsafe or unsound practice, so that even under the *Gulf Federal* standard, Respondent's expense practices would meet the definition of unsafe or unsound.[586] And Enforcement Counsel observes that even if *Gulf Federal* were applicable, the FDIC Board is not bound by it.

While Respondent maintains that there should be no finding of unsafe or unsound practices because his conduct did not pose an abnormal risk to the financial stability of the Bank, as noted

[581] ECIB 21 (citing EX-555 (IRS Publication 503, Child and Dependent Care Expenses 2009), EX-556 (IRS Publication 503, Child and Dependent Care Expenses 2010), and EX-557 (IRS Publication 503, Child and Dependent Care Expenses 2011)).
[582] *Id.* at 52-53 (citing *Gulf Federal*, 651 F.2d at 264).
[583] ECIB 53.
[584] RIB 4, 37-38.
[585] ECIB 54-58.
[586] *Id.* at 54 (citing *Gulf Federal*, 651 F.2d at 264).

above, that is not the standard.[587] Accordingly, Respondent's argument must fail. The Horne Standard requires only that the imprudent practices "could be expected to create a risk of harm or damage" to the Bank, a threshold that is easily cleared for the reasons detailed above.[588] Although Respondent argues that his alleged misconduct accounted for merely 0.01% of the Bank's total asset base in June 2012,[589] the undersigned finds it would be nonsensical to allow the Bank's President and CEO to improperly appropriate Bank funds because the Bank is financially stable enough to absorb such losses. It would also create a disconnect between large banks and small banks, where a bank employee could steal millions from a large bank, but only a few thousand from a small bank, without being subject to an enforcement action. It stands to reason that the Bank discourages such behavior, as evidenced by the fact that the Bank terminated another employee for improperly using bank assets for personal business ventures, who was subsequently prohibited from working in the banking industry.[590]

Because of their inherent danger, breaches of fiduciary duty also constitute unsafe and unsound practices.[591] Self-dealing is considered both a breach of fiduciary duty and an actionably unsafe or unsound practice "because of the conflict it creates between the interests of the institution and the interest of an individual."[592] For the same reasons that Respondent's misconduct regarding his Bank-owned cards constituted a breach of his fiduciary duties owed to the Bank, then, the undersigned finds that Respondent's conduct also constituted unsafe and unsound practices. Based

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[587] *See* Section IV, *supra*; *see also Smith and Kiolbasa*, 2021 WL 1590337, at *22 (finding that "[a] construction of 'unsafe or unsound' conduct that focuses on the nature of the act rather than any 'direct effect' of such act on the institution's financial stability is consistent with the structure of Section 1818"), *23 ("The Horne definition contains a number of elements that are inconsistent with a requirement that a particular act directly impact an institution's overall financial stability.").
[588] *Smith and Kiolbasa*, 2021 WL 1590337, at *21.
[589] RIB 4, 41.
[590] *See* n. 530, *supra*.
[591] *Hoffman v. FDIC*, 912 F.2d 1172, 1174 (9th Cir. 1990).
[592] *Id*. (citing *First National Bank of Lamarque v. Smith*, 610 F.2d 1258, 1265 (5th Cir. 1980)).

on this, the undersigned concludes that Respondent engaged in actionably unsafe or unsound practices in connection with an "insured depository institution or business institution,"[593] which is a separate and independently sufficient method of satisfying the statutory misconduct prong.[594]

c. Regulation O

Regulation O sets forth various requirements and limits for extensions of credit made by a bank to certain insiders.[595] Among other things, Regulation O excludes up to $15,000 in charges to a bank-owned card from the definition of an extension of credit.[596] The Federal Reserve Board has therefore found that an extension of credit occurs once "the amount of outstanding personal charges made to [a bank-owned] card, when aggregated with all other indebtedness of the insider that qualifies for the credit card exception[,] exceeds $15,000."[597] A permissible extension of credit subject to Regulation O must be made on substantially the same terms as those prevailing at the time for comparable transactions by a bank with non-insiders.[598]

Enforcement Counsel asserts that once Respondent incurred over $15,000 in personal expenses on Bank-owned credit and debit cards, the total charges became an extension of credit subject to Regulation O, which was violated because non-insiders were not permitted to make charges on Bank-owned cards for years without making a reimbursement or paying interest.[599] Respondent asserts in return that there has been no violation of Regulation O because there has

[593] As stated in Section III.A.1, *supra*, the Bank is an "insured depository institution."
[594] With respect to an assessment of a second-tier civil money penalty under Section 1818(i), unsafe or unsound practices are only actionable if they are done "recklessly," a determination that the undersigned addresses in Section VI.E, *infra*. *See* 12 U.S.C. § 1818(i)(2)(B)(i).
[595] 12 C.F.R., pt. 215. Regulation O was made applicable to state nonmember banks by statute. 12 U.S.C. § 1828(j)(2).
[596] 12 C.F.R. § 215.3(b)(5).
[597] FRB Interpretive Letter, 2006 WL 4509657, at *1 (May 22, 2006).
[598] 12 C.F.R. § 215.4(a)(1)(i).
[599] ECIB 50-51.

never been more than $15,000 outstanding at one time.[600] Enforcement Counsel counters that even if that were true, Respondent is not entitled to the credit card exception because he had more favorable terms offered to him than the general public.[601]

Respondent also argues that Regulation O is inapplicable here because the Bank never intended to treat Respondent's personal charges as a loan, relying on the FDIC case *In re Westering*.[602] Enforcement Counsel counters that *In re Westering* is distinguishable because it does not deal with personal charges to a bank-owned card under the credit card exception.[603]

While there are various spreadsheets and statements summarizing Respondent's expenses that are sufficient to find that he breached his fiduciary duties and engaged in unsafe and unsound practices, the undersigned finds that Enforcement Counsel has not pinpointed any particular exhibits to showcase that Respondent had more than $15,000 in personal expenses on Bank-owned credit and debit cards charged at a single point in time during the Relevant Period to constitute a violation of Regulation O. As such, the undersigned finds that Enforcement Counsel has not met its burden to prove that Respondent violated Regulation O.

2. Cash-Out Withdrawals

The Bank's policy permitted employees to obtain a cash advance for approved business travel by submitting a request to the cashier.[604] The guidelines in the Bank's policy provided that "[c]ash advance requests should contain appropriate detail of purpose of the expense and be approved by the requesting employee's supervisor," and that "[a]fter completion of the . . . travel

[600] RIB 55, 57, n. 233.
[601] ECIB 51.
[602] RIB 56-57 (citing *In the Matter of John H. Westering Cmty. First State Bank, (formerly the Abbott Bank) Alliance, Neb. (Insured State Nonmember Bank)*, Nos. 94-167e, 95-187k, 2000 WL 1131918 (May 10, 2000) (FDIC final decision)). *See also* RRB 19-20.
[603] ECRB 25-26.
[604] JX-202 (2008 Bank Employee Handbook) at 45.

. . . the employee must submit an expense voucher or travel voucher. The results of the voucher may require the employee to return cash to Herring or be given additional cash."[605]

Respondent made regular cash withdrawals from the Bank between 2008 and 2011, but did not comply with the Bank's policy because he failed to submit an expense voucher or travel voucher.[606] Respondent's practice of cash-out withdrawals was a "red flag" for the FDIC during their investigation of Respondent's expenses.[607] While Respondent initially asserted that he could produce receipts for the purchases made with the cash-out withdrawals,[608] he ultimately could not produce the receipts and agreed to file an amended W-2 form to declare the cash-out withdrawals as additional salary or income.[609]

As stated above, Respondent's Bank personal assistants testified that they were uncomfortable withdrawing cash for Respondent's trips. Ms. Elias testified that "getting cash for travel" caused her tension because she was the only one signing it, it was in cash, and there was no record of what it was being used for.[610] In addition, both Bank consultants, Ms. Ghiglieri and Mr. James, testified that Respondent's cash-out withdrawals were problematic. Ms. Ghiglieri testified that "to just go up to the teller window and get cash for – with no documentation. I mean, in my experience, I would call that theft."[611] The undersigned agrees.

Based on the evidence, the undersigned finds that Respondent breached his fiduciary duties of loyalty, care, and candor when he had his assistants make cash-out withdrawals for his trips without any supporting documentation, and then misled the Bank's Board, outside consultants,

[605] JX-202 (2008 Bank Employee Handbook) at 45.
[606] EX-429 (4/11/12 Recommendation for Enforcement Action) at 2.
[607] Supp. Tr. 793-94 (1/27/22 Meade).
[608] Tr. 1181-82 (9/16/16 Freeman); *see also* EX-4/EX-206 (12/13/10 ROE) at 7.
[609] Tr. 1182-83 (9/16/16 Freeman); *see also* n. 340, *supra*.
[610] Tr. 824 (9/15/16 Shiplet Elias).
[611] Tr. 56 (9/13/16 Ghiglieri).

and regulators regarding these expenses. As noted above, breaches of fiduciary duty also constitute unsafe and unsound practices.[612] Thus, for the same reasons that Respondent's misconduct regarding cash-out withdrawals constituted a breach of his fiduciary duties owed to the Bank, the undersigned finds that Respondent's conduct also constituted unsafe and unsound practices.

3. MasterCard and Visa Stocks and Dividends

Respondent breached his fiduciary duty of loyalty by failing to have the MasterCard and Visa stock properly accounted for on the Bank's books and for categorizing such stocks as part of his deferred compensation plan. This was also a breach of his fiduciary duties of care and candor. Respondent also breached his fiduciary duty of loyalty by having the MasterCard dividend checks deposited into his personal account. As noted above, breaches of fiduciary duty also constitute unsafe and unsound practices.[613] Thus, for the same reasons that Respondent's misconduct regarding the MasterCard and Visa stocks and dividends constituted a breach of his fiduciary duties owed to the Bank, the undersigned finds that Respondent's conduct also constituted unsafe and unsound practices.

Respondent asserts that there is no evidence that Respondent ever tried to take the MasterCard and Visa stock. According to Respondent, the testimony from Ms. Ghiglieri and Mr. James's notes were "muddled" and fail to prove anything.[614] The undersigned disagrees. The evidence shows that the Bank's outside consultants, Ms. Ghiglieri and Mr. James, were tasked with performing a management study, which included a compensation study, and were simply trying to get information and documentation for their engagements. The back and forth regarding whether Respondent actually had a deferred compensation plan was based on Respondent's own

[612] *Hoffman*, 912 F.2d at 1174.
[613] *Id.*
[614] RRB 11-12.

misrepresentations to these outside consultants, which is well documented by their emails.[615] The two former TDOB commissioners who were hired as consultants for the Bank found it shocking that the Bank would fund deferred compensation through an unbooked asset.[616] Furthermore, Respondent resisted booking the stock on the Bank's books, and only did so after much back and forth with Mr. James and Respondent's father.[617]

The undersigned also finds Respondent's attempt to deflect blame onto his personal assistants for depositing the MasterCard dividends into his personal account to be unconvincing. Even though Ms. Barnes, who deposited the dividends into Respondent's personal account, could not recall whether Respondent specifically directed her to do so,[618] Respondent's constant commingling of business and personal finances, without any system in place to separate the two, shows Respondent's cavalier attitude regarding what belonged to him versus what belonged to the Bank. Respondent could have easily had Ms. Taylor, his non-bank personal assistant, take care of his personal finances, while having his bank personal assistants take care of his bank finances so that there would be no risk of commingling. That Respondent agreed to re-deposit the MasterCard dividends into the Bank's accounts without intervention from the regulators does little to absolve his responsibility to ensure that he properly accounted for his business versus personal finances to begin with.[619]

In sum, the undersigned finds that the preponderance of evidence shows that Respondent knowingly and improperly took over $80,000 in Bank assets for personal use during the Relevant Period, based on his Bank-owned credit and debit card use, cash-out withdrawals, and deposit of

[615] ECRB 22-23.
[616] Tr. 78 (9/13/16 Ghiglieri).
[617] Tr. 147-49 (9/13/16 James); EX-738 (August 2011 email chain between James, Respondent, and Coney Burgess).
[618] Tr. 756-57 (9/15/16 Barnes).
[619] Tr. 145-46 (9/13/16 James); *see also* JX-897 (8/3/11 MOU Minutes) at 64.

MasterCard dividends in his personal account, by failing to provide timely documentation and detail about such expenses and failing to make timely reimbursements of such personal expenses. Respondent's misconduct was a breach of his fiduciary duties and constitutes actionably unsafe and unsound practices, both of which independently satisfy the misconduct prong of 12 U.S.C. § 1818(e).

B. Effect

Enforcement Counsel asserts that Respondent's misconduct caused him financial gain and the Bank a financial loss at a minimum of $28,154.58 in personal charges to Bank-owned cards, $46,800 in cash through cash-out withdrawals, and $5,786.40 of Bank-owned dividends, as well as the MasterCard and Visa stock valued at over $3 million.[620] Enforcement Counsel argues that the actual financial loss to the Bank and the financial gain to Respondent could be much higher, based on the Padgett audit noting $149,000 in questionable expenses, and the Special Board Committee's finding that $180,000 in expenses did not "pass the smell test."[621] Enforcement Counsel further asserts that additional Bank losses resulted from the charges paid to Padgett for the forensic audit, which totaled $130,721.13.[622]

In return, Respondent asserts that Enforcement Counsel has not shown that he misappropriated Bank assets for personal use and that there has been no showing of an adverse effect on the Bank or benefit to himself because he has made restitution for the personal expenses on his Bank-owned credit and debit cards, which has cured the effects prong.[623] As to credit card expenses, Respondent admits that certain charges were mistakenly charged on his Bank card.[624]

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[620] ECIB 58.
[621] *Id.* at 59.
[622] *Id.* at 59-60 (citing EX-71 (Padgett invoice) at 13).
[623] RIB 49-50.
[624] RRB 16.

As to the cash withdrawals, Respondent asserts that there is no evidence that these cash withdrawals were used for personal expenses.[625] As for the MasterCard dividends, Respondent asserts that they were mistakenly placed in his account and that he reimbursed the Bank "of his own accord and without the intervention of the FDIC."[626] Regarding the MasterCard and Visa stock, Respondent asserts that the Bank never lost possession or ownership of the stock and that the FDIC's claims that Respondent tried to keep the stock are based on hearsay.[627]

It is well settled that making restitution does not negate a finding of personal gain nor nullify a finding of bank loss.[628] To find otherwise would permit someone who is found to be misappropriating funds to maintain their position of trust simply by paying back the misappropriated funds once their misappropriation comes to light. As noted above, Respondent consistently used Bank-owned cards to pay for personal expenses, did not have a system in place to review the charges and to earmark personal expenses for reimbursement, and did not make reimbursements until years later. The Bank Board also had no system in place to review Respondent's expenses until the regulators scrutinized Respondent's expense practices, and even when the Board "reviewed" such expenses, they did so without adequate supporting documentation. Even though Respondent has admitted that certain obvious charges for jewelry, pet expenses, and home "repairs" were "mistakes," this does not negate the financial loss to the Bank and the financial gain to Respondent. The same is true for the MasterCard dividends, which Respondent had commingled on his desk with other checks, and did not have a system in place to ensure that his personal versus business finances were kept separate.

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[625] RRB 16.
[626] RIB 49; *see also* RRB 15.
[627] RRB 16-17.
[628] ECIB 59 (citing *In the Matter of Robert Michael and George Michael*, Nos. 03-106e & -107k, 2010 WL 3849537, at *10 (Aug. 10, 2010) (FDIC final decision), *aff'd sub nom. Michael v. FDIC*, 687 F.3d 337 (7th Cir. 2012)).

Regarding the cash-out withdrawals, it was already noted above that Respondent's practices were in violation of Bank policy because he failed to submit an expense voucher or travel voucher upon his return.[629] Such vouchers were required but never produced, and therefore it is reasonable to assume that the expenses on such trips were not Bank-related as they could not be substantiated otherwise.

Regarding the MasterCard and Visa stock, the undersigned agrees that Respondent's intent was to keep the stock for himself, either because he was the one that "positioned" the Bank to receive the stock by setting the Bank up as an agent bank, or as part of his deferred compensation, which ultimately failed.[630] That Respondent ultimately agreed to have the stock booked on the Bank's books does not absolve him of responsibility to ensure that the stock was properly placed on the Bank's books when it was received back in 2005. It is hard to pin the blame on the Bank's controller for failing to properly record the stock on the Bank's books when he had no idea it even existed.[631]

The undersigned agrees that the expense of the Padgett audit contributed an additional amount to the Bank losses, beyond the personal charges made on the Bank-owned cards, the cash-out withdrawals, and the MasterCard dividend deposits. Accordingly, a preponderance of the evidence shows that Respondent received financial gain from his misconduct while the Bank suffered financial loss, which satisfies the effects prong of 12 U.S.C. § 1818(e).

C. Culpability

Enforcement Counsel argues that Respondent's misconduct exhibits personal dishonesty, willful disregard, and continuing disregard.[632] Specifically, Enforcement Counsel asserts that

[629] EX-429 (4/11/12 Recommendation for Enforcement Action) at 2.
[630] Tr. 1758 (9/20/16 Burgess), 1875 (9/21/16 Burgess); *see* Section III.C, *supra*.
[631] *See* Section III.A.2.c, *supra*.
[632] ECIB 60; ECRB 31-33.

Respondent's habitual use of Bank-owned cards and cash for personal use clearly shows personal dishonesty. Furthermore, Enforcement Counsel states that when Respondent's expenses were being scrutinized, he misled the Board, outside consultants, and the regulators with misstatements that he had receipts, which he could not produce, or that he had a deferred compensation plan funded with an off-book asset, which he later retracted, and even denied.[633] Enforcement Counsel asserts that Respondent acted with requisite intent for a sufficient duration, which demonstrates both willful and continuing disregard.[634]

Respondent contends that Enforcement Counsel has failed to establish that he acted with personal dishonesty or willful or continuing disregard.[635] According to Respondent, if Enforcement Counsel has shown anything, it would only be negligence.[636] Respondent asserts that Enforcement Counsel has failed to show his intent and that multiple Bank employees testified that it was their opinion that Respondent did not have any intent to steal from the Bank. Furthermore, as the Bank is primarily owned by Respondent's family, he asserts that he has no reason to steal.[637] In addition, Respondent asserts that he cannot be held culpable for the Board's change in policy to allow "other appropriate documentation" to substantiate expenses.[638] As for the MasterCard and Visa dividends, Respondent asserts that there is no evidence that he intended to have the dividends deposited into his personal account.[639] And with respect to the MasterCard and Visa stocks, Respondent asserts that the testimony that "SC" told Mr. James that Respondent "was hoping to get the MasterCard [stock] & lost" is unreliable hearsay, and that although he initially disagreed

[633] ECIB 60-61.
[634] *Id.* at 62.
[635] RIB 66; RRB 17-18.
[636] RIB 66.
[637] *Id.* at 67-68.
[638] *Id.* at 69.
[639] RIB 70; RRB 17-18.

with Mr. James about the stock, that he ultimately adopted Mr. James's recommendation.[640] Finally, Respondent asserts that with respect to the Bank-owned card issue to Ms. Taylor, he never intended for her to get a Bank-owned card and therefore did not make any misrepresentations at the July 28, 2011 Board meeting.[641]

"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."[642] 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,"[643] only that the unsafe or unsound banking practice engaged in by the individual was done intentionally and was not "technical or inadvertent."[644] Continuing disregard, in turn, requires evidence of "a mental state akin to recklessness"[645] 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."[646]

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[640] RIB 71-72. *See* Tr. 172-73 (9/13/16 James), EX-76 (James handwritten notes) at 5. Mr. James testified that these were his notes and that the SC he was referring to was Susan Couch, not Steve Causey. Tr. 172, 194 (9/13/16 James).

[641] RIB 72-73.

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

[643] *In the Matter of Charles R. Vickery, Jr.*, No. AA-EC-96-95, 1997 WL 269105, 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).

[644] *In the Matter of Douglas V. Conover*, Nos. 13-214e & -217k, 2016 WL 10822038, at *26 (Dec. 14, 2016) (FDIC final decision) (internal quotation marks and citation omitted).

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

[646] *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 Watts*, No. 98-046e, 98-044k, 2002 WL 31259465, at *8 (Aug. 6, 2002) (FDIC final decision) (continuing disregard is "conduct which is voluntarily engaged in over time").

Personal dishonesty under Section 1818(e) "encompasses a broad range of conduct, 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 and straight forwardness."[647] This element "is satisfied when a person disguises wrongdoing from the institution's board and regulators or fails to disclose material information."[648] As with willful or continuing disregard, a finding of personal dishonesty requires evidence that an individual acted with scienter, or some knowledge of the wrongfulness of their actions.[649]

The preponderance of evidence shows that Respondent engaged in personal dishonesty and both continuing and willful disregard sufficient to meet the culpability prong of 12 U.S.C. § 1818(e). As noted above, during the Relevant Period, Respondent intentionally and deliberately used his Bank-owned cards to make personal charges. Respondent also knowingly had others, including Bank employees and non-Bank employees, make personal charges for him with their Bank-owned credit cards or with his Bank-owned cards. Respondent knowingly had his Bank personal assistants annotate credit card statements with general ledger expense categories, without supporting documentation, such as vendor receipts or expense vouchers, as required by Bank policy. These Bank personal assistants frequently had no personal knowledge of the charges made on the credit card statements they were annotating, and Respondent rarely reviewed the annotations, as they went straight to the Bank's operations department.

While Respondent contends that the charges were Bank-related, such assertions are not credible in light of the nature of the items purchased, the vendors from which items were purchased, the frequency with which purchases were made, and the fact that Respondent only

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[647] *Smith and Kiolbasa*, 2021 WL 1590337, at *28 (internal quotation marks, citation, and alterations omitted).
[648] *Dodge v. Comptroller of the Currency*, 744 F.3d 148, 160 (D.C. Cir. 2014) (internal citation omitted).
[649] *See id.* at 160; *see also*, *e.g.*, *Michael*, 687 F.3d at 351.

reimbursed the Bank for these charges after his expense practices were scrutinized years after the charges were made. Respondent's failure to produce vendor receipts to support the business nature of his expenses or to provide sufficient detail regarding expenses when they were charged, more than adequately demonstrates his intent. Respondent's behavior shows a lack of integrity and a willful and continuing disregard for prudent bank practices over the Relevant Period.

Respondent knowingly made representations to the Board, either himself or through other Bank employees, that his credit card statements were reviewed so that any personal charges would be reimbursed, which was untrue. Respondent knowingly withheld information from the Board that he was taking side trips to Hanoi and Paris in connection with the international component of his MBA program when questioned about the business purpose of his trips to Singapore and London. Respondent knowingly had his Bank personal assistants withdraw cash for his trips with little to no detail about what the cash was for, rarely brought cash back after a trip, and did not provide any expense vouchers after he returned from his trips. These practices were the norm for years before Respondent was held accountable for the personal charges made on Bank-owned credit and debit cards, and were corrected only following the intervention of the regulators seeking accountability for Respondent's expense practices.[650]

Respondent also acted with personal dishonesty regarding the MasterCard and Visa stock and dividends. He knowingly kept the stock off of the Bank's books when it was received in 2005, and knowingly represented to outside consultants that the stock was not booked because it was part of his deferred compensation plan, which did not exist. And because the stock was not on the Bank's books, the dividends were not deposited into the Bank's accounts until the issue was

[650] *See* Section VI.A, *supra*.

brought to the attention of Mr. James, who insisted that the dividends needed to be redirected to the Bank.[651]

D. Bias

Respondent asserts that the FDIC was determined to find evidence of wrongdoing against him as early as the 2010 Examination. According to Respondent, Daniel Kuhnert had been telling others in the FDIC that Respondent could not be trusted and that he scheduled a meeting with Respondent under false pretenses; however, Respondent's citations do not support such findings and they are rejected.[652] Respondent also alleges that FDIC investigator Scott Baber was seeking to interrogate Respondent and tried to interview Respondent with an "indirect method approach."[653] When Mr. Baber made reference to an interrogation, Ms. Ramsey made clear that the FDIC does not do interrogations, to which Mr. Baber clarified that he "should've chosen another word instead of interrogation."[654] Enforcement Counsel asserts that there is nothing wrong with using an "indirect method," and the undersigned agrees.

Respondent asserts that by March 2013, Mr. Thorne began compiling comments made by FDIC examiners to Bank staff during the March 2013 Examination that "demonstrated the FDIC's bias toward Burgess and the Bank."[655] According to Respondent, the Bank's concerns were well-founded when the inadvertent voicemail was left on Mr. Thorne's work phone.[656]

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[651] *See* Section VI.A.3, *supra*.
[652] RIB 13 (citing Supp. Tr. 59-60 (1/25/22 Kuhnert) (when Mr. Kuhnert was asked whether he was distrustful of Respondent prior to assisting on the 2010 Examination, he clearly stated he was "[s]uspicious maybe, but not distrustful"); EX-6 (January 2011 email chain)).
[653] RIB 14-15 (citing RX-33 (February 2012 email chain) at 2-3).
[654] ECRB 3; RX-33 (February 2012 email chain) at 1.
[655] RIB 16 (citing Supp. Tr. 22-23, 39-40 (1/25/22 Thorne); JX-146 (8/14/13 Bank letter to FDIC/TDOB) at 19-20).
[656] RIB 16-17.

Enforcement Counsel asserts that the best evidence of the so-called FDIC bias consists of 1) the March 19, 2013 voicemail that does not mention Respondent, his misconduct, or the FDIC's enforcement proceeding at all, and 2) a series of selectively quoted emails authored by FDIC personnel after the FDIC notified Respondent of a potential enforcement action, many of which do not mention Respondent, his misconduct, or the FDIC's enforcement proceeding.[657] Enforcement Counsel asserts that when Respondent was asked to give an example exhibiting the FDIC's bias against him, the best thing Respondent could recall was when examiners questioned him about transactions related to rental income from one of his properties. Respondent, however, testified that the examiners listened to his answers regarding these transactions, "closed their folders up, filed out, and we didn't talk about that anymore."[658]

Enforcement Counsel asserts that the voicemail was an innocuous conversation between examiners about *potential* IT and management ratings, as no ratings were actually finalized at the time the voicemail was recorded, which was during the March 2013 Examination. Furthermore, Enforcement Counsel asserts that the voicemail did not mention Respondent or Respondent's expenses in any way.[659] In addition, the March 2013 Examination was once again, a joint FDIC-TDOB examination, in which the TDOB examiner, Mr. Filer, was the first to suggest a double IT downgrade.[660]

Respondent asserts that the FDIC blames Respondent for the Bank's AHF losses and began a "witch hunt" to justify Respondent's removal.[661] Enforcement Counsel counters that the dealings between Respondent, the Bank, Mr. Sterquell, and AHF are wholly irrelevant to this proceeding,

[657] ECIB 2.
[658] ECRB 5 (citing Supp. Tr. 521-22 (1/26/22 Burgess)).
[659] *Id.* at 10-11.
[660] Supp. Tr. 740, 745, 751 (1/27/22 Filer).
[661] RIB 13.

if it were not for Respondent bringing these issues into this proceeding.[662] Enforcement Counsel asserts that it is implausible that Respondent relied on Mr. Sterquell's purported advice that it was acceptable for Respondent to throw away receipts after learning that Mr. Sterquell had defrauded Respondent, the Bank, and Respondent's family of millions of dollars. Enforcement Counsel also asserts that the FDIC's concerns regarding AHF are well documented in the record in multiple reports of examination.[663]

Respondent takes issue with the fact that, after the voicemail and emails surfaced, Ms. Owens did not conduct any investigation into the bias claims.[664] While Respondent acknowledges that Ms. Owens delegated the investigation of the Bank's bias claims to Mr. Taylor, Respondent asserts that Mr. Taylor did not do anything to investigate those claims, other than listen to the voicemail and speak with the supervisors of Messrs. Klein and Neal.[665]

As discussed above,[666] the March 19, 2013 voicemail and the various emails highlighted in RDX-2 included inappropriate language, which showed a degree of unprofessionalism. The evidence shows that some examiners were subsequently counseled not to overstep their authority.[667] The voicemail and emails, however, were never directed toward Respondent or the Bank itself and did not affect the outcome of the Report of Examination or this enforcement action as none of the examiners involved in the unprofessional conduct had any decision-making

[662] ECRB 8-9.
[663] *Id.* at 9.
[664] RIB 24.
[665] *Id.* (citing Supp. Tr. 485-86, 488 (1/26/22 M. Taylor)).
[666] *See* Section V.C, *supra*.
[667] *See* JX-284 (email chain); Supp. Tr. 305 (1/26/22 Owens) (testifying that Mr. Klein was counseled by the FDIC for his participation in the voicemail); JX-286 (11/5/13 email chain); Supp. Tr. 306-07 (1/26/22 Owens) (testifying that FDIC employees had been verbally counseled by their supervisors in connection with the language on the voicemail); RX-33 (February 2012 email chain) at 1 ("mgmt is very uncomfortable with interviewing without a witness of some sort present"); EX-21 (5/11/12 email chain) at 1 ("[W]e cannot tell the bank to terminate Campbell or remove him from the Board.").

authority in those spheres. In addition, many of the emails highlighted by Respondent that purportedly show bias were sent after the March 2013 Examination of the Bank was complete, after the Bank appealed the March 2013 Examination, after the Bank made allegations of misconduct against the FDIC examiners, and after the Dallas Regional Office issued a 15-day letter to Respondent notifying him of a potential enforcement action based on his expense practices.[668] Accordingly, Respondent has failed to show that the FDIC was biased in bringing forth this enforcement action.

E. Civil Money Penalty

Based on the foregoing, the undersigned has concluded that the applicable elements have been met for the imposition of a prohibition order under 12 U.S.C. § 1818(e). Enforcement Counsel further argues that the undisputed material facts establish the basis for the assessment of a second-tier civil money penalty, and offers its own analysis of the mitigating factors in support of its requested $200,000 penalty amount.[669] Respondent's only argument regarding the civil money penalty is that because Enforcement Counsel has not shown misconduct, loss to the Bank, or pecuniary gain to Respondent, civil money penalties are not warranted.[670] The undersigned agrees with Enforcement Counsel that the elements of a second-tier civil money penalty have been met based on Respondent's breaches of fiduciary duty and the fact that Respondent's unsafe and unsound practices were committed recklessly throughout the Relevant Period. Respondent's misconduct was intentional, deliberate, and longstanding, and is more than sufficient to justify the $200,000 civil money penalty.

[668] EC SFOF ¶ 13.
[669] ECIB 62-63.
[670] RIB 73.

The purpose of a civil money penalty is "to deprive the violators of any financial benefit derived as a result of the violations, provide a sufficient degree of punishment, and [act as] an adequate deterrent to the respondents and others from future violations of banking laws and regulations."[671] 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."[672] Rather, "[t]he penalty amount should reflect a remedial purpose and should provide a deterrent to future misconduct."[673] 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.

Statutory Mitigating Factors

Before assessing a civil money penalty, 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."[674]

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[671] *In the Matter of Richard D. Donohoo and Craig R. Mathies*, Nos. 92-249c & b *et seq.*, 1995 WL 618673, at *27 (Jul. 5, 1995) (FDIC final decision); *see also Long v. Bd. of Gov. of the Fed. Res. Sys.*, 117 F.3d 1145, 1154 (10th Cir. 1997) (civil money penalties provide banking agencies with "the flexibility [they] need[] to secure compliance" with the relevant banking laws and to "serve as deterrents to violations of laws, rules, regulations, and orders of the agencies") (internal quotation marks and citation omitted).

[672] 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").

[673] *Id.*

[674] 12 U.S.C. § 1818(i)(2)(G); *see also In re Sealed Case (Admin. Subpoena)*, 42 F.3d 1412, 1416 (D.C. Cir. 1994) ("In assessing money penalties, Congress requires [banking] agencies to consider several mitigating factors.").

Enforcement Counsel asserts that a $200,000 civil money penalty is appropriate here when evaluating the statutory and interagency factors.[675] Considering the Parties' submissions, assessing the relevant factors, and for the reasons given below, the undersigned agrees with Enforcement Counsel and recommends to the FDIC Board that $200,000 is an appropriate monetary penalty for Respondent's misconduct in this case.

1. Respondent's Financial Resources

Respondent declined to submit a personal financial statement when asked to do so as part of his response to the FDIC's initial letter regarding its investigation. The undersigned 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.

2. Respondent's Good Faith

The undersigned has found that Respondent did not operate in good faith with respect to his use of Bank-owned credit and debit cards, cash-out withdrawals, and the MasterCard and Visa stock and dividends. Therefore, good faith does not mitigate the assessment of a $200,000 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 years-long habit of failing to maintain business receipts for his own personal gain and Bank loss, including the significant fees incurred in conducting a forensic audit and management study. In addition, his misconduct foreseeably could have caused the Bank to suffer harm, including a lowered CAMELS

[675] ECIB 63.

rating. 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 fails to present evidence that Respondent had a history of violations. 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 thus finds that there are no "other matters as justice may require" that should mitigate the amount of the agency's civil money penalty assessment.

VII. Conclusion and Recommended Order

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 constituted a breach of Respondent's fiduciary duties of loyalty, care, and candor and were actionably unsafe or unsound banking practices; 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; that the Bank suffered loss as a result; that Respondent's misconduct was part of a pattern of misconduct during the Relevant Period that caused more than a minimal loss to the institution and resulted in pecuniary gain to Respondent; and that Respondent recklessly engaged in an unsafe or unsound practice.

In accordance with 12 C.F.R. § 19.38, the undersigned therefore recommends that the FDIC Board enter a prohibition order against Respondent permanently barring him from the

banking industry, including holding any office of a bank holding company,[676] and assess a second-tier civil money penalty in the amount of $200,000 in consequence of Respondent's misconduct.

The record of this proceeding will be transmitted to the FDIC Board in conjunction with this Recommended Decision, as well as a Combined Certified Index of Exhibits.[677]

SO ORDERED.

Issued: September 16, 2022

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication

[676] As noted above, Respondent remains a member of the Board of HBI, the Bank's holding company, and the FDIC is not the primary federal regulator for bank holding companies.

[677] Due to the exhaustive filings in this case, the undersigned is only transmitting the administrative record since January 11, 2017, the date of Judge McNeil's previous certification of the record. If previous filings are needed by the FDIC Board, such request should be directed to jcohen@fdic.gov or ofia@fdic.gov.