FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

In the Matter of: **FRANK WILLIAM BONAN II**, individually and as an institution-affiliated party of Grand Rivers Community Bank Grand Chain, Illinois (Insured State Nonmember Bank)	Docket Nos.: FDIC-16-0254e FDIC-16-0256k

ORDER NO. 30: REGARDING CROSS MOTIONS FOR SUMMARY DISPOSITION

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication
(December 6, 2022)

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

Following discovery and in advance of the upcoming hearing,[3] Enforcement Counsel for the FDIC ("Enforcement Counsel") and Respondent (collectively "the Parties") have now filed cross-motions for summary disposition, each contending that there are no material facts in dispute that would preclude a resolution of all or part of this matter in their favor as a matter of law. Specifically, Enforcement Counsel seeks a determination that the FDIC has jurisdiction over Respondent and that each of the elements required for a Section 1818(e) prohibition order are

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[1] *See* Notice ¶ 10.

[2] *See id.* ¶¶ 49-82 (618 Holdings), 83-115 (Rig 23). The Notice also makes allegations regarding Respondent's involvement in prospective Bank loans to Evergreen Drilling vice president Abbey Evans and her company Bentley Operating LLC, *see id.* ¶¶ 29-48, but neither party adverts to these allegations in their summary disposition motions in anything other than a passing manner, and the undersigned consequently does not address them here.

[3] *See* July 1, 2022 Order No. 21 Modifying Procedural Schedule at 2.

present as to the issue of the 618 Holdings loan.[4] For his part, Respondent contends that he is entitled to summary disposition on both the 618 Holdings loan allegations and those pertaining to the Rig 23 collateral, and asserts in addition that this proceeding violates his rights under the United States Constitution in various ways, including through the inherent structure of administrative enforcement actions before administrative law judges ("ALJs") of the Office of Financial Institution Adjudication ("OFIA").[5] For the reasons set forth below, the undersigned rejects Respondent's threshold constitutional arguments and recommends the partial grant of Enforcement Counsel's motion with respect to the question of jurisdiction and (to the extent detailed) the issue of whether the alleged conduct with respect to the 618 Holdings loan caused an actionable loss for purposes of Section 1818. The undersigned finds in all other respects that there remain genuine issues of disputed material fact that preclude summary disposition for either party.

I. <u>Summary Disposition Standard</u>

The FDIC's Uniform Rules of Practice and Procedure ("Uniform Rules") provide that summary disposition on a given claim is appropriate when the "undisputed pleaded facts" and other evidence properly before this tribunal demonstrates that (1) "[t]here is no genuine issue as to any material fact," and (2) "[t]he moving party is entitled to a decision in its favor as a matter of law."[6] A genuine issue of material fact is one that, if the subject of dispute, "might affect the outcome of the suit under the governing law."[7] The summary disposition standard "is similar to

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[4] *See* July 29, 2022 Motion for and Memorandum in Support of Partial Summary Disposition ("EC Mot.") at 1. Thus, as noted further in Part IV *infra*, Enforcement Counsel does not presently seek summary disposition as to its allegation that Respondent breached his fiduciary duties to the Bank, any allegations regarding the Rig 23 collateral, or the satisfaction of statutory elements for the assessment of a second-tier civil money penalty under Section 1818(i).

[5] *See* August 15, 2022 Motion for Summary Judgment and Memorandum in Support ("Resp. Mot.") at 2. The Parties' respective oppositions to these motions are styled "EC Opp." and "Resp. Opp."

[6] 12 C.F.R. § 308.29(a).

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

that of the summary judgment standard under Rule 56 of the Federal Rules of Civil Procedure."[8] Thus, when determining the existence of a genuine factual dispute, all evidence must be evaluated "in the light most favorable to the non-moving party."[9] That means that this Tribunal must "draw 'all justifiable inferences' in the non-moving party's favor and accept the non-moving party's evidence as true," although "mere allegations or denials" will not suffice.[10]

Any party moving for summary disposition of all or part of the proceeding must submit, along with such motion, "a statement of the material facts as to which the moving party contends there is no genuine issue."[11] A party that opposes summary disposition, moreover, must likewise "file a statement setting forth those material facts as to which he or she contends a genuine dispute exists."[12] In both cases, the enumeration of material facts "must be supported by documentary evidence [in] the form of admissions in pleadings, stipulations, depositions, transcripts, affidavits, [or] any other evidentiary materials that the . . . party contends support [its] position."[13]

Where, as here, the parties have filed cross-motions for summary disposition, "the underlying facts and inferences in each party's motion" are to be considered in the light most favorable to the opposing party,[14] and summary disposition will be granted "only if one of the moving parties is entitled to judgment as a matter of law upon material facts that are not genuinely disputed."[15] Furthermore, "in granting a motion for summary of disposition, a trier of fact is not obliged to credit the non-moving party's factual assertions when they are not supported on the

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

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

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

[11] 12 C.F.R. § 308.29(b)(2).

[12] *Id.*

[13] *Id.*

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

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

record," and the Tribunal "is not required to move a case past the summary [disposition] stage when inferences drawn from the evidence and upon which the non-moving party relies are implausible."[16] If this Tribunal determines that summary disposition is merited only on certain of a party's claims, it may recommend a grant of partial summary disposition and proceed to a hearing on the remaining disputed material issues.[17]

II. <u>Jurisdiction</u>

The Parties agree that "[t]he Bank was, at all times pertinent to this proceeding, an insured state nonmember bank, subject to the [Federal Deposit Insurance] Act, 12 U.S.C. §§ 1811-1831aa, the Rules and Regulations of the FDIC, 12 C.F.R. Chapter III, and the laws of the State of Illinois."[18] There is likewise no dispute that Respondent is an institution-affiliated party ("IAP") of the Bank within the meaning of 12 U.S.C. § 1818(u).[19] And OFIA ALJs are empowered to hear actions against IAPs of covered institutions brought by the constituent federal banking agencies.[20] The undersigned therefore finds that the FDIC has jurisdiction to bring this enforcement action against Respondent before this Tribunal.

III. <u>Background and Summary of Facts</u>

The following is drawn from the Parties' pleadings, their respective statements of material fact and responses thereto, and the exhibits submitted in support thereof.[21] Where the Parties

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

[17] *See* 12 C.F.R. § 308.30.

[18] Notice ¶ 2; *see* May 26, 2021 Answer and Request for Hearing ("Answer") at 2.

[19] *See* Notice ¶ 5; Answer at 3.

[20] *See* 12 U.S.C. § 1818(e)(4) (providing for administrative hearings to resolve federal banking agency notices of intention to prohibit from participation in the affairs of insured depository institutions); 12 U.S.C. § 1818(i)(2)(H) (providing for administrative hearings to resolve civil money penalties assessed by a federal banking agency); 12 C.F.R. § 308.5(a), (b) (empowering OFIA ALJs to conduct administrative proceedings in matters brought by the FDIC).

[21] Both Enforcement Counsel and Respondent submitted Statements of Material Facts in support of their respective motions ("ESOF" and "RSOF") as well as in response to the other side's statements ("EC Opp. SOF" and "Resp. Opp. SOF"). Exhibits submitted by Enforcement Counsel in support of its motion and in opposition to Respondent's

appear to be in some genuine factual dispute, both accounts are noted as well as the evidence that each side has marshaled in support. The undersigned will then address where appropriate in this Order the extent to which these disputes implicate facts that are material to the resolution of some aspect of the instant action.

A. Respondent's Dominant Authority at the Bank

Respondent served as Chairman of the Bank's Board of Directors and as a member of the Bank's Executive Committee, which was responsible for approving all loan requests, from at least September 2014.[22] On October 20, 2015, Respondent resigned from the boards of the Bank and its holding company, stating that he would only return to his positions if the current boards resigned and he was permitted to choose his own board members.[23] The boards acceded to Respondent's demands, and Respondent selected himself, Chief Executive Officer ("CEO") Whitney Stringer, Chief Financial Officer ("CFO") Grady Gaskins, Jake Campbell, and Lucas Phelps to serve as the sole members of the Bank's board.[24] Respondent then remained in his role as Chairman until his departure from the Bank on April 20, 2016.[25]

According to the 2016 Joint Report of Examination ("ROE") conducted by the FDIC and the State of Illinois Department of Financial and Professional Regulation ("IDFPR"), all members of this newly constituted board "were either personal or business associates of [Respondent] and appear[ed] to operate under his dominant influence."[26] The 2016 ROE went on to note that

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motion are styled "EC-PSD" and "EC-OPP," respectively. Likewise, exhibits submitted by Respondent in support of his motion and in opposition to Enforcement Counsel's motion are styled "R-MSD" and "R-OPP," respectively.

[22] *See* ESOF ¶ 3; Resp. Opp. SOF at 2.

[23] *See* ESOF ¶ 5; Resp. Opp. SOF at 2-3; EC-OPP-17A (email chain including October 21, 2015 email from W. Stringer to K. Botsch) (outlining "[B]ill's demands").

[24] *See* ESOF ¶ 5 n.2; Resp. Opp. SOF at 2-3.

[25] *See* ESOF ¶ 5; Resp. Opp. SOF at 3.

[26] EC-PSD-2 (2016 ROE) at FDICPROD0064108 (further asserting that Respondent's "influence impedes the directors' ability to effectively oversee the affairs of the bank and fulfill their fiduciary duties"). For ease of reference, the undersigned will henceforth omit the "FDICPROD" identifier when citing to exhibit page numbers.

Respondent was "actively involved in daily operations [of the Bank], particularly loan production" and "major credit decisions," and that he displayed "considerable control over the staffing decisions of the bank since [he] hired the majority of the employees added to the bank's staff in 2015 without input from CEO Stringer or the Board."[27] The ROE further stated that "[s]ome employees and directors have, at times, been subjected to pressure through the dominant influence of [Respondent], making it difficult for them to objectively evaluate loans."[28] For his part, Respondent denies that he "was in fact the dominant policy and decision maker" at the Bank,[29] and this is a genuine issue of disputed fact for resolution at the upcoming hearing.

B. Peoples National Bank

In addition to his roles at the Bank, Respondent served as president of the Southern Illinois Division for Peoples National Bank, National Association, McLeansboro, Illinois ("PNB"), as well as being a member of PNB's Board of Directors and Executive Loan Committee.[30] Respondent's father, Frank William Bonan, Sr. ("Bonan Sr."), was PNB's President, General Counsel, and Chairman of the Board during the relevant period.[31] Among the other board members for PNB was Keith Botsch, who was also the accountant for Evergreen Drilling.[32] Mr. Botsch additionally served as President of the Bank and as a member of the Bank's Board of Directors until his resignation from those positions in October 2015.[33]

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[27] *Id.* at 0064109 (stating that "[t]he total number of employees increased from six at the prior examination to approximately 30"); *see* ESOF ¶ 6; Resp. Opp. SOF at 3.

[28] EC-PSD-2 (2016 ROE) at 0064109; *see also id.* at 0064108 ("The dominance of Mr. Bonan, along with weak oversight, contributed to the overall decline in the bank's financial condition since the prior examination"), 0064110 ("As a result of the critically deficient oversight, Mr. Bonan has been permitted to exercise his authority seemingly unchecked."); EC-PSD-1 (2014 ROE) at 0061255 (stating that "Chairman Bonan owns 25% of all holding company stock and is considered a dominant manager and policymaker"); ESOF ¶¶ 4, 6; Resp. Opp. SOF at 2-3.

[29] Resp. Opp. SOF at 28.

[30] *See* ESOF ¶ 10; Resp. Opp. SOF at 4.

[31] *See* ESOF ¶ 21; Resp. Opp. SOF at 7.

[32] *See* ESOF ¶ 16; Resp. Opp. SOF at 6.

[33] *See* ESOF ¶ 16 n.4; EC Opp. SOF ¶ 24.

C. <u>The Evergreen Entities and the Carmi Warehouse</u>

The Evergreen Entities (including Evergreen Drilling and Evergreen Properties) were controlled by Gary Evans, whose daughter Abbey served as Vice President of Evergreen Drilling as of September 2015.[34] At the time, Evergreen Drilling and Evergreen Properties had outstanding loans with the Bank of approximately $1.2 million, and the Evergreen Entities in total owed PNB approximately $10.5 million (the Bank's loans and PNB's loans are together denoted "the Evergreen Loan Relationship").[35] It is undisputed that "[b]oth Evergreen Drilling and Evergreen Properties had pledged certain collateral to the Bank and to PNB to secure loans."[36]

Evergreen Drilling's oil drilling business faced financial difficulties during 2015, which Respondent asserts "were well and widely known throughout the Southern Illinois oil industry and banking industry, including by the Bank," by August of that year.[37] In January and February 2015, Evergreen Drilling's loans with PNB were renewed and placed on an interest-only basis for six months, and the company given an increased line of credit at that bank, due to concerns by Gary and Abbey Evans "that winter weather had precluded consistent work days" for the company.[38] In return, "Evergreen Drilling was to reduce its debt to PNB by $1 million by August 2015" by selling $1 million of non-critical assets,[39] which it ultimately did not do.[40]

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[34] *See* ESOF ¶¶ 11-12; Resp. Opp. SOF at 5. Abbey Evans (now Bonan) and Respondent later married, although Ms. Bonan represents that they were not romantically involved at the time of the allegations set forth in the Notice. *See* July 30, 2020 Sworn Statement Transcript of Abbey Bonan ("A. Bonan Dep.") at 17:20-21, 18:22-19:4. The undersigned notes that Enforcement Counsel did not use exhibit numbers to identify this and the other sworn statements that it submitted in connection with its motion for partial summary disposition, and furthermore provided each sworn statement and its associated exhibits in a single, continuous .pdf document, making it difficult to quickly find and reference specific exhibits when needed. Enforcement Counsel is requested in the future to employ a more comprehensive exhibit numbering system and to submit all exhibits on which it relies in separate .pdf files.

[35] *See* ESOF ¶¶ 11, 13; Resp. Opp. SOF at 5.

[36] ESOF ¶ 14; *see* Resp. Opp. SOF at 5.

[37] Answer at 7; *see also* Resp. Opp. SOF at 7.

[38] ESOF ¶ 16; *see id.* ¶ 18; Resp. Opp. SOF at 6.

[39] ESOF ¶¶ 17-18; *see* Resp. Opp. SOF at 6.

[40] *See* ESOF ¶ 19; Resp. Opp. SOF at 7.

Throughout August 2015, Respondent and others at PNB—including Bonan Sr., Botsch, and the PNB loan officer for the Evergreen Drilling loans—"continued to express concerns about the significant financial difficulties facing Evergreen Drilling and its ability to service its debt with PNB."[41] In particular, Enforcement Counsel identifies an email colloquy between Respondent and Botsch in mid-August 2015 in which Respondent states that Evergreen Drilling's financial situation was "dire" given the persistently low price of oil, that Gary Evans was unwilling to liquidate equipment to pay off PNB, and that Evans "literally needs to close shop and [sell] everything" because "[e]very day he is open with employees he gets deeper and deeper in the whole [sic]."[42] Respondent now further asserts, albeit without documentary or testimonial evidence, that Botsch, as then-President of the Bank, "communicated the financial difficulties Evergreen Drilling was having to other officers at the Bank, including the senior lender, CEO, and other Bank board members."[43]

On September 30, 2015, PNB classified $5.9 million of its loans to Evergreen Drilling as substandard and placed them on nonaccrual status.[44] The PNB Executive Loan Committee then voted one month later to approve an extension of the maturity dates on Evergreen Drilling's total indebtedness to PNB, in exchange for a pledge of new collateral and a promise by Evergreen Drilling to liquidate assets to pay down its PNB loans.[45]

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[41] ESOF ¶ 21; *see id.* ¶ 20; Resp. Opp. SOF at 7.

[42] ESOF ¶¶ 22-23 (citing exhibits); *see* Resp. Opp. SOF at 7-8.

[43] Answer at 8; *see also* Resp. Opp. SOF at 7.

[44] *See* ESOF ¶ 24; Resp. Opp. SOF at 8. Broadly speaking, nonaccrual loans are those for which a lending institution should not accrue interest income because the loans are delinquent or there is reasonable doubt regarding their ultimate collectability. The 2016 ROE states that a substandard asset is one that "is inadequately protected by the current sound worth and paying capacity of the obligor or of the collateral pledged, if any. Assets so classified must have a well-defined weakness or weaknesses that jeopardize the liquidation of the debt. They are characterized by the distinct possibility that the institution will sustain some loss if the deficiencies are not corrected." EC-PSD-2 (2016 ROE) at 0064150.

[45] *See* Notice ¶¶ 99, 101; Answer at 30-31; ESOF ¶¶ 26-27; Resp. Opp. SOF at 9. Among the new collateral pledged to PNB "free and clear of all liens and encumbrances" was Rig 23, which is discussed in much greater detail in Part III.E *infra*. Notice ¶ 101; Answer at 30-31.

Also in September 2015, Respondent prepared a handwritten document entitled "Plan for Evergreen," which proposed that the Evergreen Entities sell collateral and refinance their loans in order to repay approximately $5.4 million of their debt to PNB and the Bank.[46] One of the pieces of collateral mentioned was a commercial warehouse in Carmi, Illinois ("the Carmi Warehouse"), which was the subject of mortgage liens on loans to Evergreen Properties by both the Bank and PNB.[47] Evergreen Properties was the Carmi Warehouse's sole tenant.[48] At the time, the mortgage loans secured by the Carmi Warehouse totaled $638,000 and $358,000 to the Bank and PNB, respectively.[49]

Following the preparation of this plan, Respondent told individuals at PNB and the Bank that he intended to buy the Carmi Warehouse from Evergreen Properties and lease it back to them using his own company, FWBII-Holdings ("FWBII-H").[50] Respondent envisioned a deal in which he purchased the warehouse for $1.25 million, of which total Evergreen Properties would give him $150,000 back at closing to cover the company's first two years of rent.[51] Respondent could then use the $150,000 as part of the down payment on the mortgage loan to purchase the property.[52] Respondent directed Gaskins to find a bank that would do this transaction.[53] Respondent also arranged for the Bank's attorney, Patrick Hunn, to prepare a Purchase and Sale Agreement for this transaction as well as a lease agreement between Evergreen Properties and FWBII-H.[54]

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[46] *See* ESOF ¶¶ 28-29; Resp. Opp. SOF at 9.
[47] *See* ESOF ¶¶ 15, 29; Resp. Opp. SOF at 5, 9.
[48] *See* ESOF ¶ 39; Resp. Opp. SOF at 12.
[49] *See* ESOF ¶ 30; Resp. Opp. SOF at 10.
[50] *See* ESOF ¶ 31; Resp. Opp. SOF at 10.
[51] *See id.*
[52] *See id.*
[53] *See id.*
[54] *See* ESOF ¶¶ 34-35; Resp. Opp. SOF at 11.

On or around October 16, 2015, Respondent requested a loan from Carrollton Bank (or "Carrollton") to finance the sale and leaseback of the Carmi Warehouse between FWBII-H and Evergreen Properties.[55] On November 4, 2015, Respondent emailed Carrollton loan officer Chris Dickey, thanking him for his "hard work and dedication on this glorious project" and telling him that the proposed Carmi Warehouse acquisition "really adds nicely to my portfolio."[56]

On November 15, 2015, Respondent and Carrollton Bank agreed on loan terms for the Carmi Warehouse transaction.[57] The loan was for $1.15 million of the warehouse's $1.25 million purchase price, with Respondent putting up the remaining $100,000 himself as a down payment.[58] $150,000 of the loan would be held by Carrollton Bank as a 24-month payment reserve on Respondent's loan payments, after which time the reserve "would be used to pay down the loan or be released to [Respondent]."[59] Although the loan was made to FWBII-H, Respondent also provided an unlimited personal guaranty.[60]

On December 5, 2015, Respondent emailed the Carrollton loan officer to express a preference that the loan to FWBII-H close on January 5 or 6, 2016.[61] When the loan officer returned from vacation on January 4, 2016, however, he learned that Respondent would no longer be purchasing the Carmi Warehouse through Carrollton Bank.[62] In an email in response to the loan

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[55] *See* ESOF ¶¶ 36-37; Resp. Opp. SOF at 11.

[56] EC-PSD-3B (email chain including November 4, 2015 email from F. Bonan II to C. Dickey) at 1; *see also* ESOF ¶ 40; Resp. Opp. SOF at 12.

[57] *See* ESOF ¶¶ 41-42; Resp. Opp. SOF at 13.

[58] *See* ESOF ¶ 43; Resp. Opp. SOF at 13-14.

[59] *Id.*; *see also* EC-PSD-3 (June 10, 2022 Declaration of Chris Dickey ("Dickey Decl.")) ¶ 5(i) (outlining loan terms).

[60] *See* ESOF ¶ 41; Resp. Opp. SOF at 13.

[61] *See* ESOF ¶ 46; Resp. Opp. SOF at 14.

[62] *See* ESOF ¶ 50; Resp. Opp. SOF at 15.

officer's inquiry later that day, Respondent told the loan officer that "[t]he property owner and I can't get along" and "[t]hat it would be better because of that not to do the deal."[63]

D. The 618 Holdings Loan

Respondent thus abandoned his plan to purchase the Carmi Warehouse himself through FWBII-H via a loan from Carrollton Bank. Instead, the undisputed evidence indicates that while the Carrollton loan was awaiting finalization in December 2015, Respondent was exploring an alternate route—namely, facilitating the purchase and leaseback of the Carmi Warehouse by a new company to be formed by Jason Harbison and Adam Tate, two of his employees.[64]

Jason Harbison and Adam Tate

At this time, Tate and Harbison worked for Respondent—Harbison provided property management services for FWBII-H, while Tate was a contract employee—and lived in housing that Respondent owned.[65] Neither Tate nor Harbison had significant financial assets: Tate had a net worth of $20,000 and an adjusted gross income of $27,000, according to a contemporaneous personal financial statement and his 2014 tax return, respectively, while Harbison had a negative net worth of $190,000 and an adjusted gross income of $62,000.[66] Respondent admits that these

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[63] EC-PSD-3M (email chain including January 4, 2016 email from C. Dickey to F. Bonan II); *see also* ESOF ¶ 50; Resp. Opp. SOF at 15; EC-PSD-3 (Dickey Decl.) ¶ 5(r). Presuming that Respondent's reference to "the property owner" in this email is to Gary Evans and Evergreen Properties, the undersigned notes that Respondent's subsequent marriage to Abbey Evans casts at least some doubt as to whether Respondent was being entirely forthcoming to the Carrollton loan officer. *See* note 34 *supra*.

[64] *See* ESOF ¶ 51; Resp. Opp. SOF at 15-16.

[65] *See* ESOF ¶ 52; Resp. Opp. SOF at 16.

[66] *See* ESOF ¶ 75; Resp. Opp. SOF at 23. Updated personal financial statements completed by Tate and Harbison in March 2016 reflected a negative net worth for *both* individuals, with Harbison's having increased from negative $190,000 to around negative $244,000 without taking into account his liability as guarantor for the 618 Holdings loan. *See* EC-PSD-4 (July 5, 2022 Declaration of Matthias (Matt) Floersch ("Floersch Decl.")) ¶ 10; EC-PSD-4D (March 17, 2016 personal financial statement of Adam Tate); EC-PSD-4E (March 1, 2016 personal financial statement of Jason Harbison). Harbison's updated personal financial statement reported a total annual income of approximately $110,000, which examiners observed derived exclusively from a contract between FWBII-H and Harbison's company Roundfire Solutions, LLC ("Roundfire Solutions"). *See* EC-PSD-2 (2016 ROE) at 0064156-0064157; EC-PSD-4E (March 1, 2016 personal financial statement of Jason Harbison). Examiners further noted that because "the level of operating expense for Roundfire Solutions was not provided[,] . . . the amount of income

totals are reflective of the documents cited, but denies that he was ever provided with Tate and Harbison's personal financial statements or tax returns by any Bank employee.[67]

Respondent also contends that Kassie Winters, the Bank's Head of Loan Operations, did not provide him with accurate information regarding Tate and Harbison's creditworthiness.[68] On December 22, 2015, Respondent emailed Winters in connection with their preparation of the 618 Holdings loan request for Harbison and Tate (discussed further *infra*) and asked if "these two have good credit scores."[69] Winters responded that they did, further stating that "Adam has a 771 and Jason has a 664."[70] According to a credit report contemporaneously received by Winters, however, Harbison's credit score at the time was reflected variously as 533, 560, or 520, and had a classification of "serious delinquency."[71] The undersigned finds that the extent to which Respondent had reason to believe that Tate and Harbison were creditworthy at the time of the 618 Holdings loan—and the extent of Respondent's knowledge generally regarding the state of Tate and Harbison's finances in December 2015—is a material fact that remains in dispute.

Harbison and Tate have stated that, in December 2015, Respondent asked them "to do him a favor and enter into a deal with Abbey Evans and Gary Evans to purchase the Carmi Warehouse and lease it back to Evergreen Properties."[72] According to Harbison, he believed at the time that

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from the company available to service debt obligations of Mr. Harbison could not be calculated." EC-PSD-2 (2016 ROE) at 0064156; *see* ESOF ¶ 96.

[67] *See* Resp. Opp. SOF at 23. The undersigned notes that this denial does not amount to an affirmative assertion that Respondent was unaware of Tate and Harbison's incomes or their general financial situations.

[68] *See id.*; *see also id.* at 32 (Respondent denying "that he received an accurate assessment of Tate and Harbison's financial condition as he requested from [Winters]").

[69] R-MSD-H (email chain including December 22, 2015 email from F. Bonan II to K. Winters); *see* RSOF ¶ 11.

[70] R-MSD-H (email chain including December 22, 2015 email from K. Winters to F. Bonan II); *see* RSOF ¶ 11.

[71] *See* R-MSD-L (December 17, 2015 Infile Credit Report for Jason Harbison) at 1; RSOF ¶ 12; Resp. Opp. at 15.

[72] ESOF ¶ 51; *see* Resp. Opp. SOF at 16 (admitting that "Harbison and Tate have both testified that [Respondent] asked them to enter into a deal to purchase the Carmi Warehouse and lease it back to Evergreen Properties"); EC-PSD-6 (June 27, 2022 Declaration of Jason Harbison ("Harbison Decl.")) ¶ 7(b); EC-PSD-6A (Transcript of July 30, 2018 Interview of Jason Harbison by the FDIC Office of the Inspector General ("Harbison Tr.")) at 0047862-0047863, 0047869-0047870, 0047873-0047874.

if he had not entered into the Carmi Warehouse deal, Respondent would have fired him.[73] Consequently, Harbison stated that he "felt a little coerced into" applying for a loan at the Bank in order to finance this transaction.[74] Respondent denies coercing Harbison and Tate.[75] The role that Respondent played in pressuring or influencing these two employees of his into applying for the Carmi Warehouse loan is therefore also a disputed material fact.

The 618 Holdings Loan Request

In any event, on or before December 17, 2015, Respondent directed CFO Gaskins to prepare a loan request on behalf of Harbison and Tate to purchase the Carmi Warehouse from Evergreen Properties for $1.25 million.[76] Harbison stated that Respondent assured them beforehand that this would be "a good deal for everybody" and that the Bank would not "screw [them] over" on the loan because Respondent was "in charge of the Bank."[77]

The loan request was made in the name of 618 Holdings, a newly formed LLC to be owned by Harbison and Tate.[78] Bank attorney Hunn testified that Respondent directed him, through Winters and Gaskins, to prepare documents for the formation of 618 Holdings.[79] On December 18, 2015, Winters emailed Gaskins to ask him to review and revise the loan write-up for the 618

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[73] *See* ESOF ¶ 53; EC-PSD-6A (Harbison Tr.) at 0047874 (also stating that "[h]e's a petty vindictive human being. I mean I've watched it just in other, in other areas. You know there are people that get fired, other people that cross him on a business deal.").

[74] EC-PSD-6A (Harbison Tr.) at 0047874; *see* ESOF ¶ 53.

[75] *See* Resp. Opp. SOF at 16.

[76] *See* ESOF ¶ 54; Resp. Opp. SOF at 16-17.

[77] EC-PSD-6A (Harbison Tr.) at 0047862; *see* ESOF ¶ 53.

[78] *See* ESOF ¶ 57; Resp. Opp. SOF at 17. Enforcement Counsel notes without dispute that "[t]he appraisal used to support the loan request was addressed to Carrollton Bank instead of the Bank," ESOF ¶ 70; Resp. Opp. SOF at 21, suggesting that it had been repurposed from Respondent's prior plan to purchase the Carmi Warehouse himself via FWBII-H.

[79] *See* ESOF ¶ 57; August 13, 2020 Sworn Statement of Patrick Hunn ("Hunn Dep.") at 34:11-35:9; EC-PSD-8F (email chain including December 18, 2015 email from K. Winters to P. Hunn) ("[Tate and Harbison] are creating a new LLC and I think they want you to draw up their documents and I will get them an EIN number. Can you do this for me asap? They are the ones who are buying evergreen now (don't ask).").

Holdings loan, stating: "I am not sure what [Respondent] wants it to say so I figured you may have a better idea. Also he wants these sent out today so no pressure or anything LOL."[80] After receiving revisions from Gaskins, Winters emailed Respondent and asked him to "[p]lease review the write up for Adam and Jason to purchase Evergreen. Please let me know if I need to make any changes."[81]

Later that day on December 18, 2015, Winters sent the Bank's directors a $1.25 million loan request on behalf of Harbison and Tate's yet-to-be-formed company, with Harbison and Tate serving as sole guarantors.[82] The terms of the loan and the associated purchase and leaseback of the Carmi Warehouse were as follows:

- approximately $1 million in loan proceeds would be used towards the balance of Evergreen Properties' first and second mortgage loans on the Carmi Warehouse to PNB and the Bank, respectively;[83]
- $150,000 would be placed into an escrow account at the Bank and applied to the first 18 months of lease payments made by Evergreen Properties (in other words, monthly payments of $7,753 would be taken from this reserve account and paid to 618 Holdings, which would then apply that money to its own monthly loan payments of the same amount owed to the Bank);[84] and
- $100,000 would be given to Evergreen Properties to be used for operational expenses.[85]

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[80] EC-PSD-8G (email chain including December 18, 2015 email from K. Winters to G. Gaskins); *see* ESOF ¶ 58; Resp. Opp. SOF at 18.

[81] EC-PSD-8I (December 18, 2015 email from K. Winters to F. Bonan II); *see* ESOF ¶ 59; Resp. Opp. SOF at 18.

[82] *See* ESOF ¶¶ 57, 60; Resp. Opp. SOF at 17, 18.

[83] Specifically, PNB would receive $358,309.12 to pay the first mortgage loan on the property, and the Bank would receive $637,681.88 to pay the second mortgage loan. *See* ESOF ¶ 74; Resp. Opp. SOF at 23.

[84] *See* ESOF ¶ 74; Resp. Opp. SOF at 23; *see also* EC-PSD-4H (618 Holdings loan amortization schedule).

[85] *See* ESOF ¶ 74; Resp. Opp. SOF at 23.

It is undisputed that neither 618 Holdings (which had no assets of its own) nor Harbison and Tate would provide any down payment towards the purchase of the Carmi Warehouse.[86] Furthermore, "[a]ll the funds to close came from the Bank."[87]

There can be no real doubt that Respondent played a significant role in conceiving and effectuating the 618 Holdings loan request, although the precise extent is disputed. In addition to Harbison's account and the other evidence adduced above, the 2016 ROE relayed that "[p]er CFO Gaskins, these loans [the 618 Holdings loan and a separate loan to Harbison around the same time] and their terms were made at the direction of Mr. Bonan."[88] Respondent, however, has denied that he arranged for Tate and Harbison "to purchase the Carmi Warehouse[] and obtain financing from the Bank" in lieu of his own contemplated transaction with FWBII-H,[89] and he further "denies that he set all of the terms of the Carmi Warehouse purchase and leaseback."[90] Overall, then, the scope of Respondent's involvement in the conception of the 618 Holding loan and its terms is a disputed material fact to be resolved as necessary at the upcoming hearing.[91]

Approval of the 618 Holdings Loan

On December 23, 2015, the Bank's Board of Directors approved the 618 Holdings loan, even though 618 Holdings still did not yet exist as a legal entity.[92] Respondent initially voted to approve the loan, but then informed Winters that he would abstain from the vote because Harbison

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[86] *See id.*

[87] *Id.*

[88] EC-PSD-2 (2016 ROE) at 0064155; *see* ESOF ¶ 7.

[89] Answer at 20.

[90] Resp. Opp. SOF at 17.

[91] *See also* Resp. Opp. SOF at 28-29 (Respondent "denies that he was the decision maker with respect to the loan to 618 Holdings"), 29 (Respondent "denies that he did in fact use any purported 'dominant influence' to direct the terms of the 618 Holdings loan").

[92] *See* ESOF ¶ 70; Resp. Opp. SOF at 21.

and Tate were his employees.[93] Of the other four board members, Gaskins and Lucas Phelps voted yes, as did Jake Campbell after expressing some reservations.[94] The sole board member not to approve the loan was CEO Whitney Stringer, who told Campbell that she was "not comfortable with it" in a contemporaneous email exchange.[95] Stringer submitted a sworn declaration in connection with the instant briefing stating that she did not vote on the 618 Holdings loan request because she "did not believe the loan was in the best interest of the Bank," and believed that Respondent would have fired her if she had voted against the loan.[96]

The Purchase and Leaseback of the Carmi Warehouse

On January 7, 2016, the purchase and sale agreement and lease agreement for the Carmi Warehouse were executed between Evergreen Properties and 618 Holdings.[97] Harbison and Tate were not involved in negotiating the terms of the purchase, and Harbison stated that the closing date for these agreements was the first time that he had seen the details of the lease.[98] Harbison further averred that he and Tate requested at closing that the lease "be revised to provide for escalating rent payments after the escrow money ran out," out of a concern that otherwise the two of them "would not make money on the deal."[99]

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[93] *See* ESOF ¶ 61; Resp. Opp. SOF at 18.

[94] *See* EC-PSD-8K (materials re approval of 618 Holdings loan including December 23, 2015 email from L. Phelps to K. Winters et al., December 23, 2015 email from J. Campbell to K. Winters et al., and December 23, 2015 email from G. Gaskins to K. Winters et al.) ("618 Holdings loan approvals"); EC-PSD-8M (email chain including December 22, 2015 email from J. Campbell) ("With all the issues with shareholders and the fdic coming in, I am hesitant to vote yes on these other loans without some questions answered. . . . Will [618 Holdings] throw up problems for the FDIC since there is nothing in the paperwork showing sufficient, or any cash flow to pay for this? . . . That lease is only as good as the company leasing it and the oil business as a whole is not looking good at all.").

[95] EC-PSD-8N (email chain including December 22, 2015 email from W. Stringer to J. Campbell); *see* ESOF ¶ 64; Resp. Opp. SOF at 19.

[96] EC-PSD-8 (July 11, 2022 Declaration of Whitney Stringer ("Stringer Decl.")) ¶ 21; *see* ESOF ¶ 65. In response, Respondent "denies that he ever threatened to fire Stringer if she voted against the loan." Resp. Opp. SOF at 20.

[97] *See* ESOF ¶ 72; Resp. Opp. SOF at 22. The same day, the Bank funded the 618 Holdings loan in the amount of $1,262,109.75, which was $12,109.75 more than the Board had previously authorized. *See* ESOF ¶ 74; Resp. Opp. SOF at 22-23. It is unclear how these additional funds were used or to whom they were ultimately given.

[98] *See* EC-PSD-6 (Harbison Decl.) ¶ 7(d); ESOF ¶ 73; Resp. Opp. SOF at 22

[99] ESOF ¶ 73; *see* EC-PSD-6 (Harbison Decl.) ¶ 7(d).

The undisputed evidence reflects that Harbison and Tate's ability to pay 618 Holdings' monthly loan payment of $7,753 was entirely dependent on Evergreen Properties making its rent payments after the initial eighteen-month period in which payments would be made from the Bank's loan proceeds through the $150,000 escrow account.[100] Evergreen Properties, in turn, depended upon income from Evergreen Drilling's operations in order to make its lease payments to 618 Holdings. Ultimately, then, the repayment of the 618 Holdings debt to the Bank hinged on Evergreen Drilling's financial health after the eighteen-month lease reserve was exhausted.[101]

According to Respondent, the transaction was consciously structured in this way "to provide Evergreen Drilling and its associated companies the opportunity to become more financially stable, while at the same time protecting the Bank by having 18 months of loan payments in escrow."[102] Respondent further represents that the transaction "was designed so that, if Evergreen Drilling and its associated companies did not become more financially stable within 18 months, 618 Holdings could sell the Carmi property to pay off the loan from the Bank."[103] Thus, Respondent asserts, the sale and leaseback was structured such "that at all times, regardless of Tate and Harbison's personal ability to pay the loan, [the Bank] had a means of securing payment on the loan given the significant value of the Carmi Warehouse, which had been valued at $1,245,000 at the time the loan was made."[104] Respondent also generally "denies that he failed

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[100] *See* ESOF ¶ 74; Resp. Opp. SOF at 23; EC-PSD-2 (2016 ROE) at 0064156 ("The first 18 months of lease payments from Evergreen Properties to 618 Holding[s] will be paid with funds in the lease payment reserve account. . . . [M]oney is taken from the lease payment reserve account monthly and deposited into 618 Holdings account. The loan payment is then debited from that account. . . . [T]he loan proceeds used to fund the lease payment reserve account are currently making loan payments.").

[101] *See* EC-PSD-2 (2016 ROE) at 0064156 ("The repayment of the 618 Holdings debt is dependent upon the ability of Evergreen Properties to make monthly lease payments, and Evergreen Properties is dependent upon income generated from Evergreen Drilling's operations.").

[102] Answer at 23; *see also* ESOF ¶ 114; Resp. Opp. SOF at 39.

[103] Answer at 23.

[104] Resp. Opp. at 9.

to determine or consider the financial ability of the Evergreen Entities to support and make lease payments to 618 Holdings."[105]

Relying on a declaration from FDIC examiner Reuben Cash, who was responsible for reviewing the Bank's loan relationship with Evergreen during the January 2016 examination, Enforcement Counsel asserts that this description of the purpose of the 618 Holdings loan "is inconsistent with the presentation of the Evergreen and 618 Holdings loans to [Cash] and other examiners at the time of the . . . examination."[106] In support of this statement, Enforcement Counsel contends, *inter alia*, that the Bank's contemporaneous files lacked certain information and documentation regarding both the Evergreen Entities and 618 Holdings that one would expect if the purpose of the loan "was to allow Evergreen to begin to generate cash through operations or allow 618 Holdings to sell the Carmi Warehouse without a loss to the Bank."[107]

The undersigned finds that disputed questions of material fact remain regarding the structure of the 618 Holdings loan and the sale/leaseback transaction between 618 Holdings and Evergreen Properties, including: (1) whether the transaction was structured as it was for the reasons Respondent now provides (and the extent to which the Board members understood this to be true); (2) the extent to which Board members were aware of Evergreen Drilling's financial difficulties at the time they approved this transaction, including the negative credit relationship of the Evergreen Entities with PNB;[108] (3) the extent to which Respondent and Board members

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[105] Resp. Opp. SOF at 34.

[106] ESOF ¶ 115; *see id.* ¶ 80; EC-PSD-9 (July 5, 2022 Declaration of Reuben Cash ("Cash Decl.")) ¶¶ 12-14.

[107] ESOF ¶ 117; *see id.* ¶ 118 (stating that the loan files lacked "current financial information" and evidence of some "consideration of how the Bank's position would be improved by advancing $250,000 of 'new money' despite the absence of a clear plan for repayment, and substituting or introducing new borrowers . . . who lacked the financial capacity to repay a $1.25 million loan," among other things); EC-PSD-9 (Cash Decl.) ¶¶ 15-16. The 2016 ROE noted that "[c]urrent income information [for Evergreen Drilling] was not located in the loan files" and that the lack of financial information for Evergreen Properties left examiners "unable to determine if the company has the financial capacity to pay the lease payments to 618 Holdings." EC-PSD-2 (2016 ROE) at 0064155, 0064156.

[108] *See* EC-OPP-18 (September 6, 2022 Declaration of Whitney Stringer ("2nd Stringer Decl.")) ¶¶ 3-4 (lack of knowledge of Evergreen's negative credit relationship with PNB). Enforcement Counsel has submitted a document

recognized, at the time the 618 Holdings loan was conceived and approved, that the collectability of the loan beyond the initial eighteen-month escrow period depended on cash flow from Evergreen Drilling's operations;[109] (4) whether the Bank's files for the Evergreen Entities and the 618 Holdings loan contained the necessary information and documentation to justify the structure of the transaction and align with "prudent workout practices";[110] and (5) whether the transaction, as structured, could reasonably be said to be in the Bank's best interest, including whether Respondent's "structure for managing the Evergreen relationship for 18 months lacked appropriate consideration of the Bank's interests to receive repayment in full from 618 Holdings."[111]

The 2016 Examination and its Aftermath

As part of the January 2016 examination by the FDIC and IDFPR, Examiner Cash reviewed the Bank's loan file for its May 8, 2014 loan to Evergreen Drilling, which carried an outstanding balance of $536,000.[112] Cash noted that Evergreen Drilling's balance sheet reflected a negative capital position as of September 30, 2014, and that CFO Gaskins had relayed "that [Gary] Evans and his related oil companies were experiencing financial difficulty and were selling assets to pay down debt."[113] Cash also concluded that the lease payment reserve account set up through the 618

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purporting to be a sworn declaration of Jakob Campbell similarly averring, among other things, that Campbell was unaware, at the time that he voted to approve the 618 Holdings loan, that PNB had classified $5.9 million of Evergreen's debt as substandard and placed it on nonaccrual. *See* EC-OPP-17 (Declaration of Jakob Campbell ("Campbell Decl.")) ¶ 19. This document is unsigned and undated, however, and the undersigned accords it minimal evidentiary weight as a result. *See id.* at 8.

[109] This includes the extent to which Board members were contemporaneously aware of Harbison and Tate's financial situation and their likely inability to repay the loan as guarantors in the event that Evergreen Properties was unable to make lease payments.

[110] ESOF ¶ 118; *see also id.* ¶ 117 (stating that "there was no documentation showing how Evergreen could achieve positive cash flow and 618 Holdings could repay the Bank (such as pro forma financial statements forecasting how Evergreen proposed to achieve positive cash flow within 18 months) . . . [or] forecasting how [the warehouse] could be sold after 18 months without a loss to the Bank"). This includes Respondent's scope of responsibility or authority, whether on paper or in practice, for ensuring that these files contained such information.

[111] *Id.* ¶ 118.

[112] *See id.* ¶¶ 80-81, 83; Resp. Opp. SOF at 24-26.

[113] ESOF ¶ 82; *see* Resp. Opp. SOF at 25; EC-PSD-2 (2016 ROE) at 0064154-0064155.

Holdings loan "cast further doubt on Evergreen Drilling's ability to meet debt obligations with operating cash flows."[114] After analyzing all of the information in the Evergreen Drilling loan file, Cash assigned a substandard classification to the outstanding balance of the loan "due to the weakened ability of the borrower to generate sufficient cash flow to pay the debt, the decline in collateral protection, and the questioned ability of the guarantor to service the debt."[115]

The FDIC examiner in charge ("EIC") asked CEO Stringer during the examination "if there were any loans that had not been reviewed that [she] was uncomfortable with."[116] Stringer identified the 618 Holdings loan as one that made her uncomfortable, which prompted the EIC to have that loan file pulled for review by examiners.[117] Examiner Matt Floersch was the principal individual assigned to review the 618 Holdings loan.[118]

On February 9, 2016, Examiners Floersch and Cash participated in a discussion with Gaskins, Stringer, and senior loan officer Mike Williams about the 618 Holdings loan.[119] In this discussion, the Bank personnel repeatedly named Respondent as the one who originated the 618 Holdings loan and conceived of the idea to establish the $150,000 lease reserve account from which payments would be made for the first eighteen months of Evergreen Properties' rent.[120] According to Cash's notes of the meeting, Gaskins acknowledged that Evergreen Drilling's

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[114] ESOF ¶ 82; *see* EC-PSD-2 (2016 ROE) at 0064154-0064155. Respondent "denies that the lease payment reserve 'cast doubt' on Evergreen Drilling's ability to meet debt obligation," Resp. Opp. SOF at 25, and this is a disputed question of fact that can be resolved if necessary at the hearing.

[115] EC-PSD-2 (2016 ROE) at 0064155; *see* ESOF ¶¶ 83-84. Cash further noted that Bank management did not disagree with the substandard classification. *See* EC-PSD-2 (2016 ROE) at 0064155; ESOF ¶ 84; Resp. Opp. SOF at 26.

[116] EC-PSD-8 (Stringer Decl.) ¶ 25; *see* ESOF ¶ 85; Resp. Opp. SOF at 26-27.

[117] *See id.*

[118] *See* EC-PSD-4 (Floersch Decl.) ¶ 2; ESOF ¶ 86; Resp. Opp. SOF at 27.

[119] *See* ESOF ¶ 87; Resp. Opp. SOF at 27; EC-PSD-9 (Cash Decl.) ¶ 6; EC-PSD-9B (notes of Reuben Cash summarizing February 9, 2016 loan discussion) ("2/9/16 meeting notes").

[120] *See* ESOF ¶¶ 87-88; Resp. Opp. SOF at 27-28.

operations would be "the source of repayment" for the 618 Holdings loan, stating further that he was not aware of any other loans that funded lease payments in reserve in this manner.[121]

Following the February 9, 2016 meeting, Examiner Floersch classified the outstanding balance of the 618 Holdings loan—at that time, $1,262,000—as substandard and recommended that the Bank place the loan on nonaccrual status until full repayment could be reasonably assured.[122] Floersch stated in the 2016 ROE that this classification was "due to the lack of financial capacity of the debtors, the inappropriate structuring of the 618 Holdings credit in which an indirect [principal and interest] reserve account was establish[ed] to make loan payments, the lack of collateral protection, and the questionable ability of Evergreen Properties to generate sufficient income to pay lease payments."[123]

Upon hearing the examiners' reasons for the substandard classification of the 618 Holdings loan,[124] Respondent directed Stringer to disagree with the classification on behalf of the Bank.[125] Stringer then signed a certification to examiners stating that Respondent personally—and not the Bank as a whole—disagreed with the 618 Holdings classification as well as the adverse classifications of seven other loans (including a separate personal loan to Harbison), adding that

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[121] EC-PSD-9B (2/9/16 meeting notes) at 0047349-0047350; *see* ESOF ¶ 93.

[122] *See* ESOF ¶ 89; Resp. Opp. SOF at 28; EC-PSD-2 (2016 ROE) at 0064157.

[123] EC-PSD-2 (2016 ROE) at 0064157; *see* ESOF ¶ 89; Resp. Opp. SOF at 28.

[124] *See* ESOF ¶ 100; Resp. Opp. SOF at 34-35; EC-PSD-8R (email chain including February 18, 2016 email from W. Stringer to F. Bonan II) (stating that examiners "[s]aid we financed 1st 18 months of lease payments, a structure that they have not seen before. 2 borrowers that cannot support the debt if lease payments aren't made, and the ability for the lease payments is questionable. Questioned collateral value. Borrowers did not have a down payment and didn't bring anything to the table on this deal.").

[125] *See* ESOF ¶¶101-103; Resp. Opp. SOF at 35-36. After receiving this direction, Stringer asked Respondent whether he wanted her "to put any reason on there that we disagree or just that we disagree?" EC-PSD-8R (email chain including February 18, 2016 email from W. Stringer to F. Bonan II). When Respondent asked if they "have to have a reason," Stringer replied that "[y]es, we have to have a reason. I have just spoken with examiners regarding this, and it has to be found in financial analyses and collateral valuations." *Id.* (February 18, 2016 email from F. Bonan II to W. Stringer; February 19, 2016 email from W. Stringer to F. Bonan II). There is no evidence that Respondent ever responded to Stringer or otherwise offered a justification to her or others, prior to this action, for his disagreement with the 618 Holdings loan classification.

"[n]o reasons have been provided by [Respondent] at this time" for those disagreements.[126] Respondent now contends that Stringer's certification reflected only that she herself agreed with the classification of the 618 Holdings loan, pointing to the 2016 ROE and its general statement that "[m]anagement disagreed with the adverse classification."[127] To the extent that there is a genuine factual dispute regarding whether Bank board members other than Stringer agreed with the 618 Holdings loan classification, it cannot be resolved on the present record.[128]

On April 7, 2016, the Bank placed the 618 Holdings loan on nonaccrual status and made a loan impairment allocation that it later adjusted following a September 2016 visit by FDIC and IDFPR examiners.[129] On April 20, 2016, Respondent resigned from his positions at the Bank and the holding company.[130]

In January 2017, the Bank applied the remaining funds in the lease payment reserve account to the outstanding balance of the 618 Holdings loan.[131] It then charged off $500,000 of the loan amount.[132] Following the charge-off, "618 Holdings defaulted on its $1.25 million loan and acquiesced to the use of a deed-in-lieu to avoid foreclosure, conveying the Carmi Warehouse to the Bank."[133] After this, the Bank wrote down the value of the warehouse, which it continues to

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[126] EC-PSD-8S ("Management List" listing adverse loan classifications and containing February 19, 2016 certification by W. Stringer) at 0057369.

[127] EC-PSD-2 (2016 ROE) at 0064157; *see* Resp. Opp. SOF at 36 ("[Respondent] admits that Stringer reviewed the examiner list of adverse loan classifications and signed a certification that *she* agreed with the adverse classifications. . . . [Respondent] further admits that [Bank] management disagreed with the adverse classification, as reflected in [the 2016 ROE].") (emphasis in original).

[128] The undersigned notes that Stringer refers to the 618 Holdings loan as "one of the loans being disputed" in her February 24, 2016 email to the Bank Board, perhaps lending credence to the notion that Board members other than Respondent also disagreed with the loan's adverse classification. *See* EC-PSD-8T (email chain including February 24, 2016 email from W. Stringer to G. Gaskins et al.) at 0105628.

[129] *See* ESOF ¶ 106; Resp. Opp. SOF at 37.

[130] *See* ESOF ¶ 107; Resp. Opp. SOF at 37. Gaskins resigned as CFO and director of the Bank on the same day. *Id.*

[131] *See* ESOF ¶ 110; Resp. Opp. SOF at 38.

[132] *See* ESOF ¶ 111; Resp. Opp. SOF at 38.

[133] Notice ¶ 82; *see* Answer at 25; ESOF ¶ 112; Resp. Opp. SOF at 38.

own, by an additional $13,760.[134] Stringer avers that all of these actions were taken by the Bank with the approval of the Bank's Board of Directors, and not at the direction of the FDIC.[135] Respondent, for his part, disputes this averment "until such time as he has had an opportunity to cross-examine the relevant parties regarding the truth of these statements."[136]

E. The Rig 23 Collateral

Certain of Enforcement Counsel's allegations relate to a Cabot 900 self-propelled oil drilling rig owned by Evergreen Drilling, which the Parties refer to as Rig 23.[137] The rig included a one-man cab area from which the rig could be driven, and the rig had features consistent with use as a roadway vehicle, including rear view mirrors and a seat belt.[138] It is apparently undisputed that Rig 23 also bore a license plate similar to vehicles bearing a certificate of title.[139] However, as discussed further *infra*, the record is unclear as to whether Rig 23 was in fact titled, and, if so, in what state or states.

The Bank Issues Loans to Evergreen Secured by Rig 23

In December 2012, Respondent directed the Bank's then-CEO, James Stroud, to secure a loan to Evergreen Drilling with a purchase money security interest ("PMSI") in Rig 23.[140] Stroud understood Respondent's instruction to secure the loan with a PMSI to mean that Rig 23 was not

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[134] *See* ESOF ¶ 112; Resp. Opp. SOF at 38.

[135] *See* ESOF ¶ 113.

[136] Resp. Opp. SOF at 39.

[137] *See* Notice ¶¶ 14-15; RSOF ¶ 35.

[138] *See* R-MSD-EE (description of Rig 23) at 2.

[139] *See* RSOF ¶ 35; R-MSD-EE (description of Rig 23). In support of this claim, Respondent offers a photograph of a Cabot 900 drilling rig with an Oklahoma license plate. *See* R-MSD-FF. Although Enforcement Counsel does not contest Respondent's claim that Rig 23 had a license plate, it notes that Respondent has not provided any supporting declaration or additional details regarding this photograph, such as "when it was taken, who took it, where it was taken, or even that the Cabot 900 depicted in the photograph is Rig 23." *See* EC Opp. at 15. The undersigned agrees and finds that these issues may be explored as relevant at the upcoming hearing. *See* Part VI.B.1 *infra* at 66.

[140] EC Opp. SOF ¶ 12; EC-OPP-11 (August 22, 2022 Declaration of James Stroud) ("Stroud Decl.")) ¶ 4.

a titled motor vehicle, for which the Bank's lien would need to be noted on a certificate of title.[141] Stroud also avers that Abbey Evans of Evergreen Drilling represented to him that Rig 23 "would be transported from jobsite to jobsite by a third-party transportation company."[142]

On January 9, 2013, Evergreen Drilling signed a promissory note for $490,000 and a commercial security agreement to provide the Bank with a PMSI in Rig 23.[143] The Bank filed Uniform Commercial Code ("UCC")-1 financing statements reflecting this interest with the Illinois and Indiana Secretaries of State on January 8, 2013 and January 9, 2013, respectively.[144] (It bears noting that the file number for the Illinois UCC-1 statement was 17906194.)[145] The fact that the Bank held a PMSI in Rig 23 at this time is thus undisputed.[146] PNB likewise had a security interest in Rig 23 through a "prior blanket UCC lien securing all its loans to Evergreen Drilling," although this security interest was "subject to the Bank's $490,000 PMSI."[147]

In June 2013, Stroud prepared an additional $89,000 loan to Evergreen Drilling that was also secured by a PMSI in Rig 23.[148] In May 2014, Respondent directed the Bank's credit analyst Donald Nave to consolidate the two loans.[149] The Bank's executive loan committee approved this consolidation, which advanced a further $126,000 to Evergreen Drilling per the terms of

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[141] EC Opp. SOF ¶ 15; EC-OPP-11 (Stroud Decl.) ¶ 6.

[142] EC-OPP-11 (Stroud Decl.) ¶ 6; *see also* EC Opp. SOF ¶¶ 15, 18. Stroud further represents that Evergreen Drilling provided the Bank with proof that Rig 23 was covered under the liability insurance of the third-party transportation company while it was being transported. *See* EC Opp. SOF ¶¶ 18-19; EC-OPP-11 (Stroud Decl.) ¶¶ 10-11.

[143] *See* EC Opp. SOF ¶ 16; ECC-OPP-11 (Stroud Decl.) ¶ 7; EC-OPP-11B (January 9, 2013 Commercial Security Agreement).

[144] *See* EC Opp. SOF ¶ 16; RSOF ¶¶ 33-34; *see also* EC-OPP-11C (Illinois UCC-1 financing statement); EC-OPP-11D (Indiana UCC-1 financing statement).

[145] *See* RSOF ¶ 32 (noting that "[t]he Illinois financing statement was statement number 17906194"); EC-OPP-11C (Illinois UCC-1 financing statement reflecting this file number).

[146] *See* Answer at 6 (admitting that "[i]n 2013, the Bank acquired its PMSI in Rig 23 by advancing $490,000 to the equipment seller, which enabled Evergreen Drilling to purchase the carrier portion of the Rig").

[147] Notice ¶ 15; Answer at 6.

[148] *See* EC Opp. SOF ¶ 28; RSOF ¶ 3.

[149] EC Opp. SOF ¶ 29; EC-OPP-13 (August 29, 2022 Declaration of Donald Nave ("Nave Decl.")) ¶ 7.

Respondent's loan request, and the consolidated loan was issued on May 8, 2014.[150] Although Respondent now contends that this consolidation "extinguished any obligations under" the previous two loans and terminated the Bank's security interest in Rig 23,[151] the consolidated loan reflected that it was secured by a "Cabot 900 series self-propelled Drilling Rig," specifically identifying the file number of Bank's Illinois UCC-1 statement for Rig 23.[152]

PNB Seeks Release of the Rig 23 Collateral

In or about September 2015, Scott Collins, a loan officer at PNB who had previously assisted Respondent with loans to Evergreen Drilling, contacted Nave to request that the Bank release its PMSI in Rig 23.[153] Collins asserted that the Bank's PMSI was invalid, but was not able to explain to Nave why this was the case.[154] On September 1, 2015, Nave provided the January 9, 2013 Promissory Note and Commercial Security Agreement to Collins by email as evidence of the PMSI.[155] Nave then refused to release the Bank's PMSI in Rig 23 unless the Bank "was paid the full amount of its lien pursuant to the UCC-1 on file with the Illinois and Indiana Secretaries of State,"[156] a decision for which he believes he was terminated from his employment with the Bank on October 1, 2015.[157] Nave expressed to Collins that if he wished for the Bank to release the PMSI in Rig 23, he should contact Respondent.[158] It is unclear whether Collins ever did so,

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[150] *See* EC Opp. SOF ¶ 29; RSOF ¶ 4; *see also* R-MSD-D (GRCB Commercial Loan Application and May 8, 2014 Promissory Note).

[151] Resp. Mot. at 15.

[152] *See* R-MSD-D at 0069449 ("Collateral #1: Cabot 900 series self propelled Drilling Rig"), 0016651 ("Collateral: Borrower acknowledges this Note is secured by Commercial Security Agreement dated January 9, 2013, and securing UCC file #17906194.").

[153] *See* EC Opp. SOF ¶¶ 31-32; EC-OPP-13 (Nave Decl.) ¶¶ 9-10.

[154] *See* EC Opp. SOF ¶ 32; EC-OPP-13 (Nave Decl.) ¶¶ 10, 15 (averring that "[a]t no time did Collins ever give [Nave] an explanation why he thought [the Bank's] PMSI in Evergreen Drilling's Cabot 900 was invalid").

[155] *See* EC Opp. SOF ¶ 33; EC-OPP-13A (September 1, 2015 email from D. Nave to S. Collins attaching Promissory Note and Commercial Security Agreement regarding Rig 23).

[156] EC-OPP-13 (Nave Decl.) ¶ 16; *see* EC Opp. SOF ¶ 33

[157] EC-OPP-13 (Nave Decl.) ¶¶ 17-18.

[158] *See* EC Opp. SOF ¶ 34; EC-OPP-13 (Nave Decl.) ¶ 16.

although the undersigned notes that PNB ultimately obtained its own "free and clear" interest in Rig 23 on November 3, 2015[159]—two weeks ***before*** Rig 23 was released as collateral by the Bank, ostensibly by accident, as described further below.[160]

The Sale of Rig 24

In late 2015, facing financial pressures as a result of the falling price of oil, Evergreen Drilling began arranging for the sale of another drilling rig it owned, which the Parties refer to as Rig 24.[161] It appears undisputed that the Bank did not hold any security interest in Rig 24, as the only loan that Evergreen Drilling had with the Bank at this time was the consolidated loan issued in May 2014 and secured by Rig 23.[162]

On October 9, 2015, Evergreen Drilling reached an agreement to sell Rig 24 to U.S. Energy Expl. Corp. ("U.S. Energy").[163] As part of the transaction, Evergreen Drilling agreed to provide U.S. Energy "with a list of all liens and encumbrances to [Rig 24] with proof of satisfaction of the indebtedness and/or release of security interest in [Rig 24] prior to closing," so that "good and marketable title" to the rig could be conveyed.[164] Exhibit C to the agreement, which purported to list all such liens and encumbrances to Rig 24's title, identified two security interests: one held by PNB ("filed with the Indiana Secretary of State at Filing No. 201100005563790"), and a second

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[159] *See* note 45 *supra*; Notice ¶ 101; Answer at 30-31.

[160] The relationship between these events—PNB asking for release of the Rig 23 collateral, Nave refusing and telling Collins to talk to Respondent, and the Bank then "accidentally" releasing its Rig 23 interest after PNB had obtained its own security interest in the collateral—is as yet unestablished.

[161] *See* RSOF ¶¶ 5, 36; EC Opp. SOF ¶ 38.

[162] *See* EC Opp. SOF ¶ 36; EC-OPP-14A (October 7, 2015 email exchange between G. Gaskins and K. Winters).

[163] *See* EC Opp. SOF ¶ 35; RSOF ¶ 36; R-MSJ-GG (Rig 24 Purchase Agreement).

[164] R-MSJ-GG (Rig 24 Purchase Agreement) § 3.1(c) at 0016977; *see also id.* § 1.2(a) at 0016975.

held by the Bank ("filed with the Illinois Secretary of State at File No. 017906194").[165] This latter reference, of course, is to the Bank's recorded Illinois UCC-1 interest in Rig 23.[166]

The record does not explain why the Bank's Rig 23 security interest would be identified as a lien and encumbrance in documents pertaining to Rig 24. Indeed, correspondence about the proposed transaction indicates that the most likely explanation is simple error: after the agreement between Evergreen Drilling and U.S. Energy was signed, Abbey Evans emailed Respondent stating that Evergreen needed "a UCC-1 release *from Grand Rivers* and [PNB] *on Rig 24* to attach to the purchase agreement as Exhibit C."[167] Respondent then emailed Collins (at PNB) and Grady Gaskins (at the Bank), instructing them to "[g]et these releases to Gary [Evans]."[168] In turn, Gaskins forwarded this email to Kassie Winters, stating: "Not sure we had this as collateral but he wants it released if we do. They are selling it. I'll find out more do we just file a ucc release?"[169] While an exchange between Gaskins and Winters two days earlier had confirmed that the only Evergreen Drilling rig being held as collateral by the Bank was not the same model as Rig 24,[170] there is no evidence that they ever relayed this to Respondent.

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[165] *Id.* at 0016993 (Exhibit C); *see also* RSOF ¶ 36;

[166] The Indiana UCC-1 financing statement for Rig 23, with a file number of 201300000357930, is not referenced. *See* RSOF ¶ 36 ("The Purchase and Sale Agreement did not include any requirement that Grand Rivers release any security interest filed in Indiana."); EC-OPP-11D (Indiana UCC-1 financing statement).

[167] R-MSD-HH (email chain including October 9, 2015 email from A. Evans to F. Bonan II) (emphases added); *see* RSOF ¶ 39.

[168] R-MSD-HH (email chain including October 9, 2015 email from F. Bonan II to S. Collins and G. Gaskins); *see* RSOF ¶ 39; EC Opp. SOF ¶ 37.

[169] R-MSD-HH (email chain including October 9, 2015 email from G. Gaskins to K. Winters).

[170] *See* EC-OPP-14A (October 7, 2015 email exchange between G. Gaskins and K. Winters in which Gaskins asks Winters to "check to see if we have Rig 24 as current collateral," and Winters responds that the only rig is a Cabot 900 series). The evidence reflects that Rig 24 was not a Cabot 900, but a Service King 775. *See* EC Opp. SOF ¶ 38; R-MSJ-GG (Rig 24 Purchase Agreement) at 0016988 (Appendix A) (identifying Rig 24 as a "2010 Service King – SK 775 Series"). The level of knowledge possessed by Gaskins and Winters regarding the differences between Rig 23 and Rig 24, and whether and when they understood that the Bank was not holding Rig 24 as collateral, are disputed facts to be resolved as necessary at hearing.

Instead, on October 16, 2015, Winters emailed Respondent copies of unrecorded UCC-3 termination statements that would, if filed, terminate the Bank's security interests in Rig 23 in Illinois and Indiana.[171] In her sworn declaration, Winters stated that she sent these documents at the direction of Respondent, and included Abbey Evans and April Riecken of Evergreen Drilling as recipients of the Illinois UCC-3 termination statement also at Respondent's request.[172]

Later on that same day, Evans emailed representatives of U.S. Energy and the escrow agent for the agreement, Old National Wealth Management, stating that she was providing "all the required documents per the escrow and purchase agreement" and expressing hope that the funds from the Rig 24 sale could be released from escrow.[173] The documents attached to this email included the Bank's unrecorded UCC-3 Indiana and Illinois termination statements for Rig 23.[174] Respondent was copied on Evans's email, but whether and to what extent he reviewed its contents and attachments—and understood that the Bank was proposing to release its security interest on Rig 23 in connection with the sale of Rig 24—cannot be resolved on the present record.

In any event, and for some undetermined reason, it appears that the UCC-3 termination statements attached to Evans's October 16, 2015 email were never recorded, the Bank's interest in Rig 23 not released at that time, and the Rig 24 sale not yet consummated.

The Bank Releases Rig 23 as Collateral for the Evergreen Drilling Loan

On November 12, 2015, Respondent emailed Winters to inquire about "the loans and

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[171] *See* EC-OPP-14C (October 16, 2015 email from K. Winters to F. Bonan II attaching Indiana UCC-3 termination statement); EC-OPP-14D (October 16, 2015 email from K. Winters to F. Bonan II, A. Evans, and A. Riecken attaching Illinois UCC-3 termination statement).

[172] *See* EC-OPP-14 (August 30, 2022 Declaration of Kassie Ledbetter née Winters ("Winters Decl.")) ¶ 4.

[173] EC-OPP-15B (email chain including October 16, 2015 email from A. Evans to G. Evans, F. Bonan II, et al.) at 0016803. The escrow agreement in connection with the sale stated that all funds would be held in escrow until the parties provided certain documentation, including "[f]rom Grand Rivers Community Bank, proof of UCC release." EC-OPP-15D (Escrow Instructions) at 0003948; *see* EC Opp. SOF ¶ 40.

[174] *See* EC-OPP-15B (email chain including attachments to October 16, 2015 email) at 0016810-0016811.

balances associated with Gary Evans and Evergreen Drilling."[175] Winters responded that the Evergreen Entities had two loans with the Bank, one by Evergreen Properties that was secured by the Carmi Warehouse (discussed in detail *supra*) and one by Evergreen Drilling that was "secured by a UCC on a drilling rig and equipment."[176] Winters then confirmed to Respondent that the Bank had "a pmsi [sic] on one rig," further identifying it as "a Cabot 900 series drilling rig"[177]—in other words, Rig 23.

The following morning, Dennis Boyer at U.S. Energy emailed April Riecken at Evergreen Drilling, with Respondent and others copied as recipients, requesting that Riecken "get Grand Rivers Bank UCC Release" to complete the Rig 24 transaction, although Rig 24 itself is not named in the email.[178] Earlier emails in the chain indicate that U.S. Energy had already obtained the Indiana UCC-1 Release by PNB—presumably of PNB's interest in Rig 24, although that has not been conclusively established by the record—that was required by the escrow agreement.[179] Respondent forwarded Boyer's email to Kassie Winters without comment.[180]

Winters avers that, when Respondent forwarded this email to her, she understood it to mean "that he wanted to me record, as quickly as possible, the Indiana and Illinois Form UCC3 terminations that I forwarded to him in October."[181] Winters adds that Respondent "was very aggressive and intimidating," and that she was concerned that he "would become angry with me"

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[175] EC-OPP-14F (email chain including November 12, 2015 email from F. Bonan II to K. Winters) at 0047958.

[176] *Id.* (November 12, 2015 email from K. Winters to F. Bonan II) at 0047958.

[177] *Id.* (November 12, 2015 emails between K.Winters and F. Bonan II) at 0047957.

[178] *See* RSOF ¶ 41; EC Opp. SOF ¶ 46; EC-OPP-14G (email chain including November 13, 2015 email from D. Boyer to A. Riecken et al.) at 0046473 (stating that "[i]f we can get Grand Rivers Bank UCC release we should be finished").

[179] *See* EC-OPP-14G (email chain including November 12, 2015 email from A. Riecken to D. Boyer et al.). Although this exhibit does not contain any attachments, the chain of emails reflects that Riecken attached "the recorded UCC-1 that . . . People's National [sic] filed with the State of Indiana." *Id.*

[180] *See* RSOF ¶ 41; EC Opp. SOF ¶ 46; EC-OPP-14G (email chain including November 13, 2015 email from F. Bonan II to K. Winters) at 0046473.

[181] EC-OPP-14 (Winters Decl.) ¶ 9.

if she did not process the termination statements in question.[182] Winters replied to Respondent that she would "process the release this morning and send it to Denny and to April."[183] Winters's state of mind during this exchange, and the extent to which she accurately understood Respondent to be directing her to release the Bank's interest in the Rig 23 collateral, are disputed questions of fact that are central to the resolution of this aspect of the instant action.[184]

In a separate response to Boyer's email seeking the "Grand Rivers Bank UCC Release," April Riecken emailed Respondent on the morning of November 13, 2015, expressing confusion as to how to complete the task Boyer had requested:

> Bill –
> Gary wants to know how we handle the UCC-1 from Grand Rivers. ***Even though there is no collateral for rig 24 at Grand Rivers*** Denny still wants a recorded UCC-1, does someone at Grand Rivers have this to send to me? I don't have anyone's information there to contact regarding this.[185]

Respondent replied to Riecken two minutes later, copying Winters and Gaskins and expressing the need to address Boyer's request in no uncertain terms: "Kassie/Grady ***Get this bulkshit [sic] done this morning.*** Do both of you understand me."[186] The undisputed facts, then, reflect that Respondent—with the knowledge of Riecken's statement that "there is no collateral for [R]ig 24 at Grand Rivers"—nevertheless directed Gaskins and Winters to procure for Boyer a UCC-1 release from the Bank in order to complete the Rig 24 transaction. Respondent also knew or should have known, based on his colloquy with Winters one day earlier, that the only UCC-1 release that

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[182] *Id.*

[183] EC-OPP-14H (November 13, 2015 email from K. Winters to F. Bonan II).

[184] *See* Resp. Mot. at 10 (contending that "the evidence establishes that [Winters] terminated the Grand Rivers UCC filings with respect to Rig 23 by mistake"); EC Opp. at 13 (arguing that the evidence "corroborates Winters' statement that the Bank's Termination was done at the request and direction of [Respondent]").

[185] EC-OPP-14I (email chain including November 13, 2015 email from A. Riecken to F. Bonan II and S. Collins) (emphasis added).

[186] *Id.* (November 13, 2015 email from F. Bonan II to G. Gaskins, K. Winters, and A. Riecken) (emphasis added).

the Bank could conceivably provide was that of "a Cabot 900 series drilling rig," which Rig 24 was not.[187] In short, Respondent should have understood that, to the extent that Boyer was asking for a UCC-1 release from the Bank relating to Rig 24, such a release did not and could not exist. Yet Winters avers that Respondent never indicated to her that the UCC-3 termination statements she had provided in October 2015 concerning the Bank's security interest in Rig 23 were inapplicable to Boyer's request or should otherwise be corrected or changed.[188]

After receiving Respondent's email, Winters emailed Riecken and Boyer, attaching what she identified as "the recorded copy of the UCC termination in Indiana" and "the working copy" of "the UCC termination for IL."[189] Attached to Winters' email were UCC forms terminating the Bank's Indiana and Illinois interests in Rig 23.[190] Respondent, who was copied on Winters' email, sent a reply that was directed to Riecken: "April. ***This is what you need.*** Let me know if you need anything else from me."[191] When Riecken thanked Respondent for "working so fast to get this to us," Respondent replied "No problem. Just so you know these docs are bullshit."[192] The UCC forms terminating the Bank's Illinois and Indiana interests in Rig 23 were filed and recorded on

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[187] EC-OPP-14F (November 12, 2015 email from K.Winters to F. Bonan II); *see also* RSOF ¶ 38 (stating that "Rig 23 and Rig 24 were both owned by Evergreen Drilling prior to the sale of Rig 24 in the Fall of 2015, and *[Respondent] understood that there was a difference between the two rigs*") (emphasis added).

[188] *See* EC-OPP-14 (Winters Decl.) ¶¶ 6, 10.

[189] R-MSD-MM (email chain including November 13, 2015 email from K. Winters to A. Riecken, D. Boyer, F. Bonan II, and G. Gaskins) (stating that "as soon as it is received I will forward the [UCC-3 Illinois termination] to you"); *see* RSOF ¶ 43; EC Opp. SOF ¶ 49.

[190] *See* R-MSD-MM (email chain including November 13, 2015 email from K. Winters to A. Riecken, D. Boyer, F. Bonan II, and G. Gaskins) at 0051491 (Indiana UCC-3), 0051492 (Illinois UCC-3). As noted previously, it is undisputed that the purchase agreement for Rig 24 did not identify the Bank's Indiana PMSI in Rig 23 as a lien or encumbrance, nor did Respondent specifically request at any time that the Bank's Indiana UCC-1 be terminated. *See* RSOF ¶ 42 (asserting that Respondent "did not instruct Kassie Winters or Grady Gaskins to file any Indiana UCC termination statement for Rig 23").

[191] EC-OPP-14J (email chain including November 13, 2015 email from Respondent to A. Riecken et al.) at 0053076 (emphasis added); *see* EC Opp. SOF ¶ 49.

[192] EC-OPP-14J (November 13, 2015 emails between Respondent and A. Riecken) at 0053076. The Parties do not adduce further evidence that might illuminate this latter phrase.

November 13, 2015.[193] The Notice alleges that this left the Evergreen Drilling consolidated loan unsecured, and that the Bank ultimately charged off that loan in the amount of $489,268.[194]

The Parties disagree as to whether Respondent or Winters bears ultimate responsibility for the Bank's termination of its security interests in Rig 23. In her sworn declaration, Winters states that she "was working under [Respondent's] direction in handling [the Bank's] UCC terminations regarding Evergreen Drilling" and that she would not have terminated the Bank's Rig 23 security interests had Respondent not told her to do so.[195] Respondent, on the other hand, presents an email exchange among Bank board members on June 6, 2016 in which reference is made to Winters having admitted to accidentally terminating the Rig 23 interests of her own accord.[196] In this same exchange, however, multiple board members expressed their personal beliefs that, notwithstanding this admission, Winters released the Rig 23 security interests at Respondent's direction, either directly or through Gaskins.[197] Respondent now asserts that the Bank's board members had personal biases against Respondent or "a financial interest in claiming that [Respondent] ordered Kassie Winters to file UCC termination statements related to Rig 23 rather than admitting that [Winters] had filed the statements by mistake,"[198] but does not otherwise support these assertions, which may be developed further as appropriate at the upcoming hearing.

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[193] *See* EC Opp. SOF ¶¶ 50-51; EC-OPP-14K (Indiana termination); EC-OPP-14L (Illinois termination).

[194] *See* Notice ¶ 115; EC-OPP-14F (November 12, 2015 email chain between F. Bonan II and K. Winters) (noting that the Bank's Evergreen Drilling loan was only secured by Rig 23).

[195] EC-OPP-14 (Winters Decl.) ¶ 14 (stating that "I would not have terminated GRCB's UCCs securing the Cabot 900 without Bonan II's direction").

[196] *See* R-MSD-OO (email chain including June 6, 2016 email from M. Williams to K. Botsch, W. Stringer, and B. Clark) ("When Kassie released (accidentally, she said) our lien on the $2 million drilling unit, instead of remaining unsecured, she/Grady filed a blanket UCC on Inventory, Equipment, and Accounts. PNB (of course) has a prior lien."); *id.* (June 6, 2016 email from W. Stringer to M. Williams, K. Botsch, and B. Clark) ("I need to have a sit down with [Winters] to get the full story. Originally, she said it was her accident, but it may be that she was instructed to by [Respondent] or Grady, who would both be covered under the D&O policy."); RSOF ¶ 46.

[197] *See* R-MSD-OO (email chain including June 6, 2016 email from B. Clark to K. Botsch, W. Stringer, and M. Williams) ("I would bet that she was told to release the lien by [Respondent] or [Gaskins]."); *id.* (June 6, 2016 email from W. Stringer to M. Williams, K. Botsch, and B. Clark) ("I think it's very likely.").

[198] RSOF ¶ 48; *see id.* ¶¶ 46-50.

Overall, and as set forth in more detail above, the undersigned finds that numerous disputed questions of material fact remain regarding the Rig 23 collateral issue, including (1) whether Respondent was aware that the agreement for the sale of Rig 24 required Evergreen Drilling to obtain release of the Bank's UCC interest in Rig 23; (2) whether, and to what extent, Respondent was aware that the Bank had no security interest in Rig 24; (3) whether, and to what extent, Respondent understood that release of the Rig 23 collateral would render the Evergreen Drilling loans unsecured; (4) whether Respondent understood when he received the unrecorded UCC termination statements in October and November 2015 that their filing would eliminate the Bank's interest in Rig 23; and (5) whether Respondent intended, in pressuring Winters and Gaskin to "[g]et this bulkshit done," for the two of them to terminate the Bank's interest in Rig 23.

Additional disputed questions of fact pertinent to Respondent's arguments in support of summary disposition also exist, most notably (6) whether (and where) Rig 23 was titled, (7) whether the Bank's loan(s) to Evergreen Drilling were recorded on any certificate of title for Rig 23, and (8) whether the nature of Evergreen Drilling's use of Rig 23 was sufficient to subject that rig to state vehicle codes.[199]

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

To merit the entry of a prohibition order against an IAP—an institution-affiliated party—under 12 U.S.C. § 1818(e),[200] as the FDIC seeks here, an agency must prove the separate elements of misconduct, effect, and culpability. The misconduct element may be satisfied, among other ways, by a showing that the IAP has (1) "violated any law or regulation," (2) "engaged or participated in any unsafe or unsound practice in connection with any insured depository institution

[199] *See also* Part VI.B.1 *infra* at 64-67.

[200] As discussed in Part II *supra*, Respondent concedes that he is an IAP of the Bank as that term is defined in 12 U.S.C. § 1818(u). *See* Notice ¶ 5; Answer at 3.

or business institution," or (3) "committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty."[201] The effect element may be satisfied, in turn, by showing either that the institution at issue thereby "has suffered or probably will suffer financial loss or other damage," that the institution's depositors' interests "have been or could be prejudiced," or that the charged party "has received financial gain or other benefit."[202] And the culpability element may be satisfied when the alleged violation, practice, or breach either "involves personal dishonesty" by the IAP or "demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution."[203]

The imposition of a second-tier civil money penalty under 12 U.S.C. § 1818(i) also requires the satisfaction of multiple elements. First, the agency must show misconduct, which can take the form of a violation of "any law or regulation,"[204] the breach of "any fiduciary duty," or the reckless engagement "in an unsafe or unsound practice in conducting the affairs" of the institution in question.[205] Second, the agency must show some external consequence or characteristic of the IAP's alleged misconduct, likewise generally termed "effect" in past decisions issued by the FDIC Board of Directors ("FDIC Board") and the other federal banking agencies: (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."[206]

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[201] 12 U.S.C. § 1818(e)(1)(A).

[202] *Id.* § 1818(e)(1)(B).

[203] *Id.* § 1818(e)(1)(C).

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

[205] *Id.* § 1818(i)(2)(B)(i).

[206] *Id.* § 1818(i)(2)(B)(ii). *See Blanton*, 2017 WL 4510840, at *16 (referring to this as the statute's "effect" prong); *accord In the Matter of Douglas V. Conover*, Nos. 13-214e & -217k, 2016 WL 10822038, at *27 (Dec. 14, 2016) (FDIC final decision).

Moreover, before any civil money penalty can be assessed upon satisfaction of these elements, the agency must take into account the appropriateness of the amount of penalty sought when considered in light of certain potentially mitigating factors, including the "good faith of the . . . person charged" and "the gravity of the violation."[207]

Although the misconduct prongs of both Sections 1818(e) and (i) may be satisfied by an IAP's engagement or participation in an "unsafe or unsound practice" related to the depository institution with which he or she is affiliated, that phrase is nowhere defined in the Federal Deposit Insurance 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."[208] This so-called Horne Standard has long guided federal banking agencies, including the FDIC Board, in bringing and resolving enforcement actions.[209] It has also been recognized as "the authoritative definition of an unsafe or unsound practice" by federal appellate courts.[210] The undersigned accordingly adopts the Horne Standard when evaluating charges of unsafe or unsound practices.

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[207] 12 U.S.C. § 1818(i)(2)(G); *see also In re Sealed Case (Administrative Subpoena)*, 42 F.3d 1412, 1416 (D.C. Cir. 1994) ("In assessing money penalties, Congress requires [banking] agencies to consider several mitigating factors."); *accord*, *e.g.*, *Blanton*, 2017 WL 4510840, at *27.

[208] *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).

[209] *See*, *e.g.*, *In the Matter of Patrick Adams*, No. AA-EC-11-50, 2014 WL 8735096 (Sep. 30, 2014) (OCC final decision) at **8-24 (discussing Horne Standard in detail); *In the Matter of Donald V. Watkins, Sr.*, Nos. 17-154e & -155k, 2019 WL 6700075, at *7 (Oct. 15, 2019) (FDIC final decision) (applying Horne Standard).

[210] *Gulf Federal Sav. & Loan Ass'n of Jefferson Parish v. FHLBB*, 651 F.2d 259, 264 (5th Cir. 1981); *see also Patrick Adams*, 2014 WL 8735096, at **14-17 (surveying application of Horne Standard by various circuits).

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

Here, the Notice alleges that Respondent recklessly engaged in unsafe or unsound banking practices and breached his fiduciary duty to the Bank in connection with the 618 Holdings loan and the Rig 23 collateral, thus satisfying the statutory misconduct elements;[211] that this misconduct resulted in financial loss to the Bank and (for purposes of 12 U.S.C. § 1818(i)) was part of a pattern of misconduct, thus satisfying the effect elements;[212] and that Respondent's actions demonstrated personal dishonesty and willful or continuing disregard for the safety and soundness of the Bank, thus satisfying culpability under 12 U.S.C. § 1818(e).[213]

Of these, Enforcement Counsel does *not* now seek summary disposition as to whether the elements of a Section 1818(i) civil money penalty have been satisfied, whether Respondent breached his fiduciary duty, or the satisfaction of any of the statutory elements as to the Rig 23 collateral. Rather, Enforcement Counsel's summary disposition motion concerns only the elements

[211] *See* Notice ¶¶ 119-120.

[212] *See id.* ¶¶ 121, 124.

[213] *See id.* ¶¶ 122-123.

for a Section 1818(e) prohibition order, relating only to the allegations regarding the 618 Holdings loan—and, with respect to misconduct, addressing only whether Respondent engaged in unsafe or unsound banking practices.[214]

V. Respondent's Threshold Arguments

In addition to addressing the merits of the allegations against him, Respondent raises a number of threshold constitutional arguments regarding various ways in which this proceeding violates his rights or is otherwise constitutionally defective.[215] The undersigned considers each argument in turn and concludes that they are deficient as a matter of law.

A. This Proceeding Does Not Violate Respondent's Due Process Rights

The undersigned first addresses Respondent's arguments that these proceedings violate his Fifth Amendment right to due process. According to Respondent, his rights have been violated because (1) the FDIC both adjudicates and prosecutes when pursuing enforcement actions such as his; (2) the FDIC's discovery rules permit the FDIC to take depositions while denying Respondent the same opportunity; and (3) the FDIC failed to properly serve Respondent with the Notice of Charges.[216] Each of these arguments must fail.

1. The FDIC's Adjudication Structure Does Not Impermissibly Permit the FDIC to Act as Both Prosecutor and Judge

Respondent argues that the FDIC's procedure for bringing and hearing administrative enforcement actions violates his due process rights by putting the agency in the position of "impermissibly acting as prosecutor and judge."[217] Respondent argues that having claims brought by Enforcement Counsel and adjudicated by the FDIC Board creates so great a risk of bias as to

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[214] *See* EC Mot. at 6.

[215] *See* Resp. Mot. at 28-37.

[216] *See id.* at 28-33.

[217] *Id.* at 30.

violate the Fifth Amendment.[218] Although Respondent acknowledges that the Supreme Court rejected such a due process challenge in *Withrow v. Larkin*,[219] he asserts that "more recent jurisprudence," such as *Williams v. Pennsylvania*,[220] "suggests that the Fifth Amendment is violated when liberty and property are at stake in an action that is investigated and adjudicated by the same administrative body."[221]

In response, Enforcement Counsel states that courts have consistently held that an administrative agency may perform investigative, prosecutorial, and adjudicative functions without violating due process.[222] Enforcement Counsel further argues that the *Withrow* decision definitively resolves this issue and that Respondent's attempts to cast doubt on that decision are unavailing.[223] The undersigned agrees with Enforcement Counsel.

The Seventh Circuit has observed that "[a]lthough biased decision-making does violate due process, the combination of investigative and adjudicative functions into a single administrator does not, in itself, demonstrate such bias."[224] Courts have recognized a presumption that agency adjudicators are unbiased, which may only be rebutted by a "showing of conflict of interest or some other specific reason for disqualification."[225] To establish a violation of due process, "the party claiming bias must lay a specific foundation of prejudice or prejudgment, such that the

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[218] *See id.* at 28-29.

[219] 421 U.S. 35 (1975).

[220] 579 U.S. 1 (2016).

[221] *See* Resp. Mot. at 29.

[222] *See* EC Opp. at 22-23.

[223] *See id.* at 23.

[224] *Hess v. Bd. of Trustees of S. Illinois Univ.*, 839 F.3d 668, 675 (7th Cir. 2016) (internal citation omitted). Where the Supreme Court and the FDIC Board have not squarely addressed an issue, the undersigned gives deference to the law of the D.C. Circuit and the circuit in which the home office of the depository institution in question is located—here, the Seventh Circuit—as the twin fora to which a respondent is entitled to appeal any final decision of the FDIC Board. *See* 12 U.S.C. § 1818(h)(2).

[225] *Schweiker v. McClure*, 456 U.S. 188, 195 (1982).

probability of actual bias is too high to be constitutionally tolerable."[226] According to the Seventh Circuit, this bar may be met by a showing that "the adjudicator had 'a pecuniary interest in the outcome'" or had "been the target of personal abuse or criticism from the party before him."[227]

Respondent has failed to adduce any facts suggesting that the members of the FDIC Board hold any bias that would disqualify them from performing their adjudicative function in this matter. In fact, Respondent does not single out any particular member of the FDIC Board as harboring bias, let alone identify any of the interests that might be animating this purported bias. Respondent relies solely on the fact that the FDIC as an agency is structured to perform both prosecutorial and adjudicative functions. Under *Withrow* and its progeny, however, this is insufficient to establish a violation of due process.[228]

Respondent argues that *Williams v. Pennsylvania* supports his challenge to the FDIC's administrative adjudication procedure, but that decision bears little resemblance to the instant matter. In *Williams*, the Supreme Court held that a prosecutor who made the decision to pursue the death penalty against a criminal defendant could not later serve on a panel of judges adjudicating that defendant's application to set aside his death sentence.[229] *Williams* reasoned that there was a risk that the prosecutor-turned-judge, who had "participate[d] in a major adversary decision" against the defendant while a prosecutor, "'would be so psychologically wedded' to his previous

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[226] *Id.* at 675; *see also Withrow*, 421 U.S. at 58 (claim of agency bias requires "special facts and circumstances").

[227] *Amundsen v. Chicago Park Dist.*, 218 F.3d 712, 716 (7th Cir. 2000) (quoting *Withrow*, 421 U.S. at 47) (alteration in original).

[228] *See*, *e.g.*, *Hess*, 839 F.3d at 675; *Serafinn v. Loc. 722, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 597 F.3d 908, 919 (7th Cir. 2010) ("mere commingling of prosecutorial and adjudicatory functions are insufficient to show bias"); *Wildberger v. Am. Fed'n of Gov't Emps., AFL-CIO*, 86 F.3d 1188, 1195 (D.C. Cir. 1996) ("a single body investigating, initiating proceedings, and adjudicating does not necessarily violate due process"); *Bakalis v. Golembeski*, 35 F.3d 318, 326 (7th Cir. 1994); *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1106 (D.C. Cir. 1988); *Hastings v. Jud. Conf. of U.S.*, 829 F.2d 91, 104 (D.C. Cir. 1987) ("The combination of investigative and adjudicative powers in an administrative body, the Supreme Court has held, does not, without more, violate the Due Process Clause.").

[229] *Williams*, 579 U.S. at 9.

position as a prosecutor that the judge 'would consciously or unconsciously avoid the appearance of having erred or changed position.'"[230] However, even assuming that *Williams* applies with equal force in the context of agency adjudication (which Respondent has not shown), there is no evidence that any member of the FDIC Board played "a direct, personal role"[231] in bringing charges against Respondent, such that there would be an appreciable risk of bias. Respondent has alleged nothing more than that the FDIC's structure mirrors that of countless other administrative agencies at both the state and federal level. Because courts have consistently upheld agency structures that permit leadership to perform both investigatory and adjudicative functions, Respondent's argument is without merit.

2. The FDIC's Discovery Rules Do Not Work a Violation of Respondent's Due Process Rights

Respondent next argues that the instant action denies him the ability to mount a meaningful defense because parties to FDIC enforcement proceedings are not permitted to take depositions.[232] Respondent contends that if Enforcement Counsel has the ability to take depositions prior to the initiation of the proceedings, then due process requires that Respondent himself enjoy that same ability once the proceedings have commenced.[233] Respondent maintains that, due to this inequity, the enforcement action against him should be dismissed.[234]

Enforcement Counsel responds that, although Respondent cannot conduct pre-hearing depositions, the fact that "[t]he FDIC's procedures afford an opportunity for cross-examination at the hearing" is more than adequate for due process purposes.[235] The undersigned agrees.

[230] *Id.* (quoting *Withrow*, 421 U.S. at 57).
[231] *Id.* at 10.
[232] *See* Resp. Mot. at 31.
[233] *See id.*
[234] *See id.* at 31-32.
[235] EC Opp. at 25 (citing 12 C.F.R. § 308.52).

Courts have consistently held that "there is no constitutional right to pretrial discovery in administrative proceedings."[236] Indeed, as Enforcement Counsel notes, the Seventh Circuit has rejected due process challenges to administrative decisions even where a party was denied the opportunity to ever cross-examine a witness against them.[237] And while administrative discovery procedures cannot deny discovery "if in the particular situation a refusal to do so would so prejudice a party as to deny him due process,"[238] Respondent does not argue that he was actually deprived of access to any particular discovery; instead, he merely challenges the FDIC's discovery rules on their face.

While the FDIC's Uniform Rules do not provide generally for pre-hearing witness depositions,[239] they do permit the questioning and cross-examining of witnesses at a hearing.[240] Further, if a witness is not available to appear at a hearing, they may be deposed.[241] Accordingly, the Uniform Rules do not and could not deny a party from ever questioning a witness and obtaining their testimony; at most, they only delay such an opportunity until a hearing is held. And given that the Uniform Rules provide for post-hearing submissions before an ALJ issues a recommended decision,[242] and that parties have a further opportunity to advance arguments before the FDIC

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[236] *Kelly v. EPA*, 203 F.3d 519, 523 (7th Cir. 2000); *see Fulkerson v. Sessions*, No. 17-5874, 2018 WL 3726278, at *4 (6th Cir. Mar. 23, 2018) (observing that courts have "rejected the notion that pre-trial discovery in administrative proceedings is a constitutional requirement"); *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 857-58 (2d Cir. 1970) ("It is well settled that parties to judicial or quasi-judicial proceedings are not entitled to pre-trial discovery as a matter of constitutional right.").

[237] EC Opp. at 25 (citing *Papapetropoulous v. Milwaukee Transp. Servs., Inc.*, 795 F.2d 591, 598 (7th Cir. 1986); *Green v. Board of School Commissioners of the City of Indianapolis*, 716 F.2d 1191 (7th Cir. 1983)).

[238] *McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979); *see Mister Disc. Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (citing *McClelland*); *accord Sw. Airlines Co. v. TSA*, 554 F.3d 1065, 1074 (D.C. Cir. 2009) ("In some circumstances due process will entitle a party to discovery in an agency proceeding").

[239] *See* 12 C.F.R. § 308.107 (providing for "discovery only through the production of documents" and stating that "[n]o other form of discovery shall be allowed").

[240] *Id.* § 308.35(a).

[241] *See id.* § 308.27.

[242] *Id.* § 308.37.

Board before a final order is entered,[243] the undersigned concludes that the inability to conduct a pre-hearing deposition does not meaningfully impede a respondent from mounting a forceful defense to Enforcement Counsel's charges against them.

Perhaps unsurprisingly given the precedent cited above, Respondent does not identify any decision holding that it constitutes a violation of due process for a party to an administrative proceeding to be denied the opportunity to hold pre-hearing depositions. Instead, Respondent only cites generally to the principle that due process requires "fair play" and the ability to question witnesses against oneself.[244] Invocation of this broader principle does not supersede the fact that no tribunal has held that administrative adjudication procedures violate due process by failing to provide for pre-hearing depositions, however, and the undersigned declines Respondent's invitation to be the first to do so. The undersigned therefore concludes that the Uniform Rules do not violate the due process rights of participants in FDIC administrative proceedings.

3. Respondent was Properly Served

Next, Respondent argues that the FDIC did not adequately serve him with the Notice of Charges.[245] Respondent contends that the FDIC improperly requested that his attorney waive service before pursuing service on Respondent by traditional methods.[246] Although Respondent does not deny that the FDIC's manner of service put him on actual notice of the charges, he suggests that the FDIC's service left him uncertain of the deadline for his response.[247] Without elaboration, Respondent asserts that this uncertainty amounts to a violation of his due process

[243] *Id.* § 308.40.
[244] *See* Resp. Mot. at 31.
[245] *See id.* at 32.
[246] *See id.*
[247] *See id.* at 33.

rights.[248] In response, Enforcement Counsel argues that it properly served Respondent and that Respondent waived any argument relating to service of process by participating in this proceeding.[249]

The Uniform Rules state that "[e]xcept as otherwise provided, a party filing papers shall serve a copy upon the counsel of record for all other parties to the proceeding so represented, and upon any party not so represented."[250] For a party that has not yet appeared in a proceeding, service may be made in one of five ways:

> (i) By personal service;
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> (ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;
>
> (iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;
>
> (iv) By registered or certified mail addressed to the party's last known address; or
>
> (v) By any other method reasonably calculated to give actual notice.[251]

Respondent represents without apparent dispute that Enforcement Counsel asked his counsel to accept service via email, but that his counsel refused.[252] Enforcement Counsel claims that, thereafter, they served Respondent directly "via overnight courier at his residence," and maintains that this service satisfied the "any other method reasonably calculated to give actual notice" prong for service under the Uniform Rules.[253] Respondent has not made any argument that

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[248] *See id.*

[249] *See* EC Opp. at 26.

[250] 12 C.F.R. § 308.11(a).

[251] *Id.* § 308.11(c)(2)(i)-(v).

[252] *See* Resp. Mot. at 32.

[253] *See* EC Opp. at 26.

Enforcement Counsel's manner of service was not reasonably calculated to give actual notice, nor indeed that actual notice was not given. Because the undersigned concludes that Enforcement Counsel effected service in a manner reasonably calculated to provide Respondent with actual notice, Respondent's arguments regarding service of process are without merit.

Moreover, the undersigned finds that Respondent has waived his claim regarding service of process. A party waives a personal jurisdiction defense by giving the plaintiff "a reasonable expectation that it will defend the suit on the merits," or by "caus[ing] the court to go to some effort that would be wasted if personal jurisdiction is later found lacking."[254] Here, even if there were some defect in Enforcement Counsel's manner of service, Respondent has waived any due process argument relating to the way in which he was served. Respondent filed an answer, litigated this matter for well over a year, and participated in discovery. Each of these acts would reasonably have given Enforcement Counsel the expectation that Respondent would defend this action on the merits.[255] Moreover, this Tribunal has exerted efforts to move these proceedings along, including overseeing discovery and adjudicating multiple discovery motions, as a result of Respondent's active participation in this action—efforts that would be wasted if personal jurisdiction was found lacking at this stage. Accordingly, were there any merit to Respondent's arguments that his due process rights were violated by inadequate service of process, that claim would have been waived by Respondent's conduct over the course of this action.[256]

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[254] *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Assocs. of Houston Metroplex, P.A.*, 623 F.3d 440, 443 (7th Cir. 2010); *accord*, *e.g.*, *H-D Michigan, LLC v. Hellenic Duty Free Shops S.A.*, 694 F.3d 827, 848 (7th Cir. 2012).

[255] *See Continental Bank, N.A. v. Meyer*, 10 F.3d 1293, 1297 (7th Cir. 1993) (noting that where a party "fully participate[s] in litigation of the merits [of claims against them] . . . without actively contesting personal jurisdiction," a tribunal may "properly conclude that the [party's] delay in urging this threshold issue manifests an intent to submit to the [tribunal's] jurisdiction").

[256] As Enforcement Counsel notes, it has not challenged the timeliness of Respondent's Answer, and so it is unclear how Respondent's due process rights could have been violated by any uncertainty regarding the deadline for his Answer in any event. *See* EC Opp. at 26.

B. This Proceeding Does Not Violate Respondent's Seventh Amendment Rights

Next, Respondent argues that this action should be dismissed because the Seventh Amendment entitles him to a jury trial on Enforcement Counsel's claims, which these proceedings do not provide.[257] Respondent's argument relies, in principal part, on the Fifth Circuit's recent panel decision in *Jarkesy v. SEC*,[258] which held that the Seventh Amendment right to a jury trial extended to securities fraud claims brought in Securities and Exchange Commission ("SEC") administrative proceedings. Respondent asserts that the claims at issue here are derived from common law fraud and malpractice claims, which *Jarkesy* holds must be adjudicated before a jury.[259] Enforcement Counsel responds that *Jarkesy* was wrongly decided and is, in any event, distinguishable.[260] Enforcement Counsel further argues that the FDIC's claims under Section 1818 are "public rights" claims, to which the Seventh Amendment does not attach.[261]

Although Respondent has not argued that *Jarkesy* is binding on this Tribunal,[262] that question is ultimately of no moment, as *Jarkesy* does not extend the right to a jury trial to the FDIC's claims. *Jarkesy* applied a familiar two-part analysis to determine whether the right to a jury trial attaches to an action: "First, a court must determine whether an action's claims arise 'at common law' under the Seventh Amendment. Second, if the action involves common-law claims, a court must determine whether the Supreme Court's public rights cases nonetheless permit Congress to assign it to agency adjudication without a jury trial."[263]

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[257] *See* Resp. Mot. at 33.

[258] 34 F.4th 446 (5th Cir. 2022).

[259] *See* Resp. Mot. at 34.

[260] *See* EC Opp. at 27.

[261] *See id.*

[262] As the depository institution in this matter is located within the Seventh Circuit rather than the Fifth Circuit, this Tribunal would not accord *Jarkesy* any controlling weight even were it not contradicted by Supreme Court and agency precedent, as discussed further below. *See also* note 224 *supra*.

[263] *Jarkesy*, 34 F.4th at 453 (internal citations omitted); *see Tull v. United States*, 481 U.S. 412, 417-18 (1987).

The FDIC's Section 1818(e) and 1818(i) claims do not arise at common law for purposes of the Seventh Amendment. The assessment of whether a claim triggers a litigant's right to a jury trial begins with a comparison of "the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity."[264] "[T]he inquiry is to determine whether a modern legal right has a sufficient analogy to a right enforced by common law courts in the eighteenth century to be enforceable by 'a suit at common law' within the meaning of the Seventh Amendment."[265] Respondent attempts to draw parallels between Section 1818 claims and common law claims for fraud and professional malpractice, but claims brought under Sections 1818(e) and 1818(i) are not analogous to such common law claims either in their elements or in their remedies. The statutory framework of 12 U.S.C. § 1818 was created to ensure the safety and soundness of the banking industry and is linked to that purpose in both the elements inherent in enforcement actions under that chapter—such as the requirement the sanctioned individual be affiliated with an insured depository institution[266]—and their remedies—such as the prohibition from participation in the affairs of an insured depository institution.[267] These regulatory purposes, and the unique conduct that renders one susceptible for sanction under these provisions, sets 12 U.S.C. § 1818 claims apart from common law tort claims for the recovery of damages.[268]

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[264] *Wooddell v. International Bhd. of Elec. Workers*, 502 U.S. 93, 97 (1991); *accord Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 745 (D.C. Cir. 1995).

[265] *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 299 F.3d 643, 649 (7th Cir. 2002).

[266] *See* 12 U.S.C. § 1818(e)(1)(A), (i)(2)(A).

[267] *See id.* § 1818(e)(3)(A).

[268] Respondent cites *Michael v. FDIC*, 687 F.3d 337, 351 (7th Cir. 2012), for the proposition that "personal dishonesty" for purposes of 12 U.S.C. § 1818 has been defined to include "a disposition to lie, cheat, defraud, misrepresent, or deceive," or "a lack of straightforwardness and a lack of integrity" and therefore sounds in common law fraud. *See* Resp. Mot. at 34. However, even assuming that "personal dishonesty" and "fraud" are interchangeable and coextensive for these purposes—a proposition for which Respondent provides no support beyond bare assertion—*Michael* itself demonstrates the differences between a Section 1818 claim and a common law fraud claim, noting that personal dishonesty is not a required component of a Section 1818 claim given the independently sufficient element of "willful or continuing disregard." *See* 687 F.3d at 352.

Moreover, even if Section 1818 claims had a sufficient analogue at common law to meet *Jarkesy*'s first requirement, actions under Section 1818 are firmly and unquestionably situated as vindicating public rights to which the Seventh Amendment's right to a jury trial does not apply in administrative proceedings. Congress may provide for non-jury, agency adjudication of public rights claims even where those claims "are closely analogous to common-law claims."[269] The term "public right" encompasses all "cases that 'arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.'"[270] Where Congress provides for the adjudication of such claims "in a non-Article III tribunal, the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder."[271]

Here, the FDIC is an agency tasked with effectuating a "specific and limited federal regulatory scheme"[272]—that is, "supervising and regulating commercial banks that are neither federally chartered nor members of the Federal Reserve System" and "detect[ing] and remedy[ing] 'unsafe or unsound' banking practices in its supervised banks."[273] The claims before this Tribunal, relating as they do to the safety and soundness of an IAP's actions, are "so closely integrated into [that] public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."[274] Accordingly, this action concerns the adjudication of

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[269] *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989).

[270] *Id.* at 51 n.8 (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)).

[271] *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) (internal quotation marks and citation omitted).

[272] *CFTC v. Schor*, 478 U.S. 833, 855 (1986); *see also Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 589, (1985) (holding that Congress may "authorize an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program without providing an Article III adjudication").

[273] *Frontier State Bank Oklahoma City, Okla. v. FDIC*, 702 F.3d 588, 591-92 (10th Cir. 2012); *see also Michael*, 687 at 348-49; 12 U.S.C. § 1818(b).

[274] *Thomas*, 473 U.S. at 593-94.

public rights, for which the Seventh Amendment does not guarantee a jury trial.[275] Even if the undersigned accepted *Jarkesy*'s reasoning that SEC securities fraud claims are sufficiently analogous to common law fraud claims as to render them not public rights, which she does not,[276] the same reasoning would not compel the same conclusion as to claims under Sections 1818(e) and 1818(i).[277]

C. The FDIC's Board Structure is Constitutional

Respondent also argues that this proceeding should be dismissed because for-cause protections in place for members of the FDIC Board and OFIA ALJs impermissibly abridge the President's removal power under the Constitution's "Take Care" clause.[278] Respondent claims that the five-year terms for members of the FDIC Board and the six-year term for the FDIC Chairman unconstitutionally insulate those Board members from removal by the President.[279] Furthermore, Respondent argues that the undersigned and other OFIA ALJs are similarly unconstitutionally insulated from presidential removal power by two layers of statutory for-cause removal protection.[280] Neither of these arguments succeed.

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[275] *Compare Stern v. Marshall*, 564 U.S. 462, 493 (2011) (no public rights exception where the party's "claimed right to relief does not flow from a federal statutory scheme . . . [and] is not completely dependent upon adjudication of a claim created by federal law") *with Schor*, 478 U.S. at 855 (public rights exception where non-Article III jurisdiction over a claim "mak[es] effective a specific and limited federal regulatory scheme" as to which the agency possesses "obvious expertise").

[276] *See Jarkesy*, 34 F.4th at 467-473 (Davis, J., dissenting) (noting the manifold ways in which the *Jarkesy* majority's "public rights" analysis does not comport with Supreme Court precedent or the decisions of other federal courts of appeal, which "routinely hold that an enforcement action by the Government for violations of a federal statute or regulation is a 'public right' that Congress may assign to an agency for adjudication without offending the Seventh Amendment") (citing cases).

[277] The undersigned notes that another of OFIA's constituent agencies, the Board of Governors for the Federal Reserve System, has held that respondents in Section 1818 enforcement proceedings are not entitled to a jury trial under the Seventh Amendment. *See* Determination on Request for Interlocutory Appeal, *In the Matter of Fang Fang*, Nos. 17-006-E-I & -CMP-I, 2018 WL 3006183, at *3 (FRB Jan. 30, 2018) (finding that the public rights exception applies to OFIA proceedings).

[278] *See* Resp. Mot. at 35-37; U.S. Const. art II, § 1, cl. 1 (conferring to the President the power to "take Care that the Laws be faithfully executed").

[279] *See* Resp. Mot. at 36.

[280] *See id.* at 36-37.

1. Removal Protections for the FDIC Board Do Not Warrant Dismissal

This Tribunal first considers Respondent's argument that the five- and six-year terms for members of the FDIC Board violates the Constitution's Take Care clause by impeding the President's removal power. It is unnecessary to address the merits of this argument, because Respondent has not shown that he has been harmed by any restriction on the removal of FDIC Board members. In *Collins v. Yellen*, the Supreme Court held that to obtain relief from agency action attributable to an otherwise properly-appointed officer on the basis of an assertedly unconstitutional restriction on the officer's removal, an individual must show that the removal restriction itself, rather than other agency action, "inflict[ed] compensable harm."[281] Respondent does not argue that the Board members have been improperly appointed, only that they cannot be removed as easily as his interpretation of the Constitution demands.[282] Nor does Respondent identify a specific harm that has been done to him as a result of the fixed terms of FDIC Board members.[283] Accordingly, this argument must fall at the first hurdle.[284]

2. The FDIC's ALJs are Not Unconstitutionally Protected from Removal

Respondent likewise argues that the statutory removal protections for OFIA ALJs are unconstitutional, again relying on the Fifth Circuit's *Jarkesy* decision as well as the Supreme Court's decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[285]

[281] *Collins v. Yellen*, 141 S. Ct. 1761, 1789 (2021).

[282] *See* Resp. Mot. at 36 (arguing only that "the FDIC board members' tenure protections violate the President's removal power").

[283] *See id.*

[284] *See Calcutt v. FDIC*, 37 F.4th 293, 314-15 (6th Cir. 2022) ("*Collins* instructs that relief from agency proceedings is predicated on a showing of harm, a requirement that forecloses Calcutt from receiving the relief he seeks"); *accord Kaufmann v. Kijakazi*, 32 F.4th 843, 849 (9th Cir. 2022) (explaining that "[a] party challenging an agency's past actions must ... show how the unconstitutional removal provision actually harmed the party"); *Bhatti v. Fed. Housing Fin. Agency*, 15 F.4th 848, 854 (8th Cir. 2021) (identifying issue under *Collins* as whether unconstitutional removal restriction "caused compensable harm").

[285] 561 U.S. 477 (2010); *see* Resp. Mot. at 36-37.

Respondent asserts that OFIA ALJs are subject to two layers of for-cause protection, undermining the President's removal power and obligation to take care that the laws of the United States are faithfully executed. The first layer of such protection is that ALJs may only be removed for cause as determined by the Merit Systems Protection Board (MSPB).[286] The second layer of protection is that the MSPB members themselves are subject to removal only for cause.[287]

The undersigned finds no constitutional infirmity in the removal protections for OFIA ALJs. While two-layer removal protections have been held unconstitutional in the context of the board members of a government agency, *Free Enterprise Fund* made it clear that its reasoning did not require the same conclusion as to other officials, such as administrative law judges.[288] The decision specifically distinguished ALJs from agency heads, noting that "unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, or possess purely recommendatory powers."[289] Of these attributes identified for potentially alleviating concerns regarding removal protection, OFIA ALJs possess two, as they perform adjudicative functions only as the Board's designee and are empowered to

[286] 5 U.S.C. § 7521(a) (providing that ALJs may be removed by their appointing agency "only for good cause established and determined by the Merit Systems Protection Board.").

[287] 5 U.S.C. § 1202(d).

[288] *Free Enter. Fund*, 561 U.S. at 507 n.10 (2010) ("[O]ur holding also does not address that subset of independent agency employees who serve as administrative law judges").

[289] *Id.* (internal citation omitted). In *Collins*, which was decided after *Free Enterprise Fund*, the Court further acknowledged past precedent upholding removal restrictions held by members of a non-Article III adjudicatory body. *See Collins*, 141 S. Ct. at 1783 n.18 (citing *Wiener v. United States*, 357 U.S. 349 (1958), and noting that the Court there "read a removal restriction into the War Claims Act of 1948 . . . on the rationale that the War Claims Commission was an adjudicatory body, and as such, it had a unique need for 'absolute freedom from Executive interference'").

issue only recommended decisions, not final orders.[290] Courts have cited this analysis in *Free Enterprise Fund* to uphold two-layer removal protections for ALJs, including OFIA ALJs.[291]

The undersigned concludes that the two layers of removal protection for OFIA ALJs do not unconstitutionally encroach on executive authority. Although Respondent asks that this Tribunal apply the somewhat aberrant result reached in *Jarkesy*, that decision fails to provide a persuasive reason for disregarding *Free Enterprise Fund*'s carve-out of officers engaged in recommendatory and adjudicatory functions from its holding. In any event, as already noted, *Jarkesy* is not binding on this Tribunal.[292] Moreover, even if the undersigned were inclined to apply *Jarkesy*, which she is not, *Jarkesy* itself declined to hold that the unconstitutionality of an ALJ's protections from removal would entitle a party appearing before that ALJ to any particular form of relief.[293] As with Respondent's claims regarding removal protections for FDIC Board members, Respondent has failed to articulate any such compensable harm here. Accordingly, this argument fails as well in multiple respects.

D. <u>This Action is Not Barred by the Statute of Limitations</u>

Respondent also argues that the FDIC's Notice was filed after the expiration of the applicable statute of limitations.[294] Respondent concedes that the Parties entered into several

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[290] *See* 12 C.F.R. § 308.5(b)(7) ("only the Board of Directors shall have the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding"); Financial Institution Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, title IX, § 916, 103 Stat. 486, 12 U.S.C. § 1818 note (1989) (Improved Administrative Hearings and Procedures) (requiring financial regulatory agencies to establish the "pool of administrative law judges" that later became OFIA).

[291] *See Calcutt*, 37 F.4th at 319 (upholding removal protections for OFIA ALJs and noting that *Free Enterprise Fund* "took care to omit ALJs from the scope of its holding"); *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).

[292] *See* note 262 *supra*.

[293] *See Jarkesy*, 34 F.4th at 463 n.17 ("[W]e do not decide whether vacating would be the appropriate remedy based on this error alone."). As support for this view, and without further elaboration, *Jarkesy* cited *Collins*, apparently recognizing the holding of that case that unconstitutional removal protection does not give rise to relief absent a showing of compensable harm. *See id.*

[294] *See* Resp. Mot. at 27-28.

agreements to toll the statute of limitations as to Enforcement Counsel's prospective claims, which, if valid, would render this action timely.[295] He contends, however, that the relevant statute of limitations is jurisdictional, such that courts must dismiss untimely claims notwithstanding any tolling agreement.[296] Respondent further acknowledges that his argument is contrary to a recent Second Circuit decision,[297] and fails to identify any corresponding precedent in support of his statute of limitations argument.[298]

Certain statutes establish jurisdictional procedural requirements for bringing suit, that is, rules for which noncompliance "deprives a court of all authority to hear a case."[299] Failure to comply with a jurisdictional rule requires dismissal of a claim "even if the other party has waived any timeliness objection," and "even if equitable considerations would support extending the prescribed time period."[300] To determine whether a statute of limitations is jurisdictional, courts look to whether Congress has "clearly state[d]" that the time bar is jurisdictional.[301] For a statute of limitations to be jurisdictional, the language of the statute must include "something special, beyond setting an exception-free deadline."[302] Filing deadlines are consistently regarded as "quintessential claim-processing rules, which seek to promote the orderly progress of litigation, but do not deprive a court of authority to hear a case;"[303] nevertheless, Congress is empowered to

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[295] *See id.* at 27.

[296] *See id.* at 27-28.

[297] *See SEC v. Fowler*, 6 F.4th 255 (2d Cir.), *cert. denied*, 142 S. Ct. 590 (2021).

[298] *See* Resp. Mot. at 28.

[299] *United States v. Wong*, 575 U.S. 402, 408-09 (2015)

[300] *Id.* at 409.

[301] *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013).

[302] *Wong*, 575 U.S. at 410; *see Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006) ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.").

[303] *Wong*, 575 U.S. at 408-09 (2015) (internal quotation marks and citation omitted); *see also Arbaugh*, 546 U.S. at 510 (clarifying that "time prescriptions, however emphatic, are not properly typed 'jurisdictional'") (internal quotation marks and citation omitted).

render any rule jurisdictional—including rules that appear merely procedural—so long as it uses clear language.[304]

FDIC enforcement actions are governed by 28 U.S.C. § 2462, the general federal statute of limitations for enforcement actions, which provides that "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued."[305] In *SEC v. Fowler*, the Second Circuit rejected the argument that Section 2462 constituted a jurisdictional requirement.[306] *Fowler* reviewed the legislative history of Section 2462, noting that it was a recodification of an earlier statute which provided that "[n]o suit or prosecution . . . shall be maintained" if not brought within five years.[307] Applying the axiom that a statutory amendment "is 'presume[d]' not to 'work[] a change in the underlying substantive law unless an intent to make such a change is clearly expressed,'"[308] the court reasoned that there was no indication Congress intended for the change from "shall be maintained" to "shall not be entertained" "to give the statute jurisdictional teeth."[309] This accords with the D.C. Circuit's holding that the adoption of Section 2462 did not substantively modify the original statute of limitations,[310] as well as decisions by other circuit courts that have assumed, without elaboration, that Section 2462 is non-jurisdictional and subject to tolling.[311]

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[304] *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)

[305] 28 U.S.C. § 2462; *see de la Fuente v. FDIC*, 332 F.3d 1208, 1219 (9th Cir. 2003).

[306] *Fowler*, 6 F.4th at 261.

[307] *Id.*

[308] *Id.* (quoting *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136 (2008)).

[309] *Id.*

[310] *3M Co. (Minnesota Min. & Mfg.) v. Browner*, 17 F.3d 1453, 1458 (D.C. Cir. 1994) (reviewing 28 U.S.C. § 791 (1946))

[311] *See Arch Min. Corp. v. Babbitt*, 104 F.3d 660, 670 (4th Cir. 1997) (holding that district court had jurisdiction to consider a § 2462 statute of limitations defense as an affirmative defense); *FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996) (holding that "[S]ection 2462 is subject to equitable tolling"); *United States v. Core Lab'ys, Inc.*, 759 F.2d 480, 484 (5th Cir. 1985) (same).

Although the language "shall not be entertained" has been held to imbue other statutes with jurisdictional effect,[312] the undersigned finds *Fowler*'s review of Section 2462's legislative history to be persuasive. Because Section 2462 is not jurisdictional, the Parties' tolling agreements extended the limitations period and Respondent's statute of limitations argument must be rejected. In any event, Respondent has not offered any argument in response to Enforcement Counsel's contention that the 618 Holdings loan and Evergreen Drilling loan were charged off no earlier than December 31, 2016. Because the effect prongs of Section 1818(e) and 1818(i) were not fulfilled until that date, the FDIC's claim against Respondent did not fully accrue until that date,[313] and the Notice was timely filed on May 7, 2021, before the conclusion of the five year limitations period. Accordingly, even if the undersigned accepted Respondent's argument that Section 2462 is properly viewed as jurisdictional, Respondent's statute of limitations argument would fail.

VI. <u>Argument and Analysis on the Merits</u>

Enforcement Counsel contends that the undisputed facts demonstrate that Respondent's conduct with respect to the 618 Holdings loan constitutes actionably unsafe or unsound practices that caused a loss to the Bank and represented personal dishonesty and willful disregard for the Bank's safety and soundness on the part of Respondent, thus entitling Enforcement Counsel to the entry of summary disposition in its favor on those issues.[314] Respondent, on the other hand, argues that he is entitled to summary disposition on all claims against him on the grounds that "the FDIC

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[312] *See Taylor v. Owens*, 990 F.3d 493, 497 (6th Cir. 2021) (holding 28 U.S.C. § 2255(e), which provides that a habeas corpus petition "shall not be entertained" if the petitioning prisoner "has failed to apply for relief, by motion, to the court which sentenced him," to be jurisdictional).

[313] *See Gabelli v. SEC*, 568 U.S. 442, 448 (2013) ("[T]he standard rule is that a claim accrues when the plaintiff has a complete and present cause of action.") (internal quotations omitted); *see also*, *e.g.*, *FERC v. Powhatan Energy Fund*, 949 F.3d 891, 898 (4th Cir. 2020) (claim accrues "when the plaintiff can file suit and obtain relief") (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)); *Savory v. Cannon*, 947 F.3d 409, 427 (7th Cir. 2020) (all "essential element[s] of [a] claim" necessary for accrual); *Proffitt v. FDIC*, 200 F.3d 855, 862-63 (D.C. Cir. 2000) (12 U.S.C. § 1818(e) claim accrued, and limitations period began to run, when bank actually suffered loss).

[314] *See* EC Mot. at 6.

has produced no evidence showing that" he engaged in misconduct, caused harm to the Bank, or acted with the requisite culpability.[315] The undersigned concludes that the charge-offs alleged by Enforcement Counsel constitute loss to the Bank within the meaning of Section 1818 as a matter of law, and otherwise finds that disputed questions of material fact exist precluding the entry of summary disposition for either party.[316]

A. The 618 Holdings Loan

It is Enforcement Counsel's position that the statutory elements of misconduct, effect, and culpability as to the 618 Holdings loan issue have been demonstrated on the present record,[317] while Respondent argues that there is no evidence "that any of his involvement with the loan to 618 Holdings LLC was improper[] or that any of his actions or inactions caused harm to Grand Rivers."[318] The undersigned largely concludes that any such determination in either party's favor is premature.

1. Misconduct

Enforcement Counsel argues that Respondent's conduct in "direct[ing] Bank employees to create the Bank's loan to 618 Holdings" constituted unsafe or unsound practices by "(1) extending credit with insufficient or inappropriate repayment sources; (2) extending credit with insufficient collateral; and (3) inappropriately us[ing] loan proceeds to fund a reserve account to make principal and interest loan payments for 18 months."[319] Elaborating on this, Enforcement Counsel offers five reasons that the Bank's origination of the 618 Holdings loan was actionably unsafe or

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[315] Resp. Mot. at 2.

[316] As previously noted in Part II *supra*, the undersigned also agrees with Enforcement Counsel that the FDIC has jurisdiction to bring this action against Respondent before this Tribunal. *See* EC Mot. at 10-11.

[317] *See id.* at 11-22 (misconduct), 22-23 (effect), 24-28 (culpability).

[318] Resp. Mot. at 2.

[319] EC Mot. at 11.

unsound. First, "the borrower, 618 Holdings, and the guarantors were not able to repay the loan."[320] Second, "the structure of the loan was not for the benefit of the Bank and would simply hide the borrower's inability to repay."[321] Third, "the loan had insufficient collateral protection."[322] Fourth, "618 Holdings' lease from the seller [Evergreen Properties] was not a reliable source of repayment because the lessee . . . was financially troubled."[323] Fifth, "there was no actual credit documentation or analysis performed by the Bank relating to the transaction."[324] Enforcement Counsel also offers the opinion of FDIC examiner Matt Floersch that the structure of the 618 Holdings loan, and its origination to a non-creditworthy borrower and guarantors "without determining the financial ability of the Evergreen Entities . . . to support and make lease payments,"[325] was imprudent and improper in a way that meets the Horne Standard for unsafe or unsound practices.[326]

Respondent, by contrast, contends that he is entitled to summary disposition in connection with the 618 Holdings loan, *inter alia*, because he did not withhold any pertinent information regarding 618 Holdings, Harbison and Tate, or the financial situation of the Evergreen Entities from Bank board members prior to the loan's approval; because any material information not disclosed by Respondent was already known to the Bank Board; because there is no evidence that Respondent benefited financially from the 618 Holdings loan; and because the structure of the 618 Holdings loan was in the Bank's interests and did not result in any abnormal risk of loss.[327]

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[320] *Id.* at 14.

[321] *Id.*

[322] *Id.*

[323] *Id.*

[324] *Id.*

[325] EC-PSD-4 (Floersch Decl.) ¶ 11.

[326] *See* EC Mot. at 15, 16; EC-PSD-4 (Floersch Decl.) ¶¶ 7-11; *see also* Part IV *supra* (discussion of Horne Standard).

[327] *See generally* Resp. Mot. at 18-25; *see also* Resp. Opp. at 9 (asserting that "[t]he deal was structured in such a way that at all times, regardless of Tate and Harbison's personal ability to pay the loan, Grand Rivers had a means of

As the undersigned has detailed in Part III.D *supra*, however, there are numerous disputed questions of material fact with respect to Respondent's conduct and the 618 Holdings loan that preclude summary disposition on the issue of misconduct. These include, but are by no means limited to, questions about Respondent's knowledge, intent, and conduct in the course of the conception, consideration, and approval of the 618 Holdings loan; questions regarding the knowledge of Bank board members as to various aspects of the loan and the financial conditions of the involved parties; questions about the loan's structure and whether it comported with prudent banking practices; questions as to the information and documentation contained within the Bank's files for 618 Holdings and the Evergreen Entities; and questions regarding the Bank's support for the FDIC's adverse classification of the loan shortly after its approval.[328] The overarching question of whether Respondent committed actionable misconduct in connection with the 618 Holdings loan must therefore be resolved at hearing.

2. Effect

It is undisputed that the Bank charged off $500,000 of the 618 Holdings loan amount in January 2017 and subsequently wrote down the loan by an additional $13,760.[329] As Enforcement Counsel observes, "[t]he FDIC Board has held that charged-off loans result in loss to the [b]ank" sufficient to satisfy the effect elements of Section 1818(e) and Section 1818(i).[330] Other of OFIA's

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securing payment on the loan given the significant value of the Carmi Warehouse, which had been valued at $1,245,000 at the time the loan was made").

[328] *See supra* at 14, 15, 17, 20-21, 22, 24-25.

[329] *See* ESOF ¶¶ 110, 112; Resp. Opp. SOF at 38.

[330] EC Mot. at 22 (citing *In the Matter of James L. Leuthe*, Nos. 95-15e & -16k, 1998 WL 43823, at *15 (June 26, 1998) (FDIC final decision); *see also In the Matter of Harry C. Calcutt III*, Nos. 12-568e & 13-115k, 2020 WL 847520, at *16 (Dec. 15, 2020) (FDIC final decision) ("[L]oan charge-offs represent a loss to the bank as a matter of law."), *aff'd*, *Calcutt*, 37 F.4th at 330 ("The charge-off on the loan to Bedrock Holdings, which was part of the Bedrock Transaction, is an effect under [12 U.S.C. § 1818]."). On September 29, 2022, the Supreme Court stayed the Sixth Circuit's mandate in *Calcutt* (and the FDIC Board's associated removal and prohibition order) "pending the timely filing and disposition of a petition for a writ of certiorari." *Calcutt*, No. 22-A-255 __ S.Ct. ___, 2022 WL 4546340 at *1 (Kavanaugh, J.); *see also* https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22a330.html (extending time for cert. petition to January 30, 2023).

constituent banking agencies have reached the same conclusion.[331] Thus, to the extent that Respondent's conduct ultimately "caused" the Bank to charge off the loan and incur this loss—or, to put it in the words of Section 1818(e), that the Bank's loss occurred "by reason of" Respondent's conduct—the statutory effect prongs have been satisfied.[332]

Nor is it a barrier to proof of causation that it was the Bank rather than Respondent "that decided to charge off the loan while it was performing and release the guarantors from their obligations on the personal guarantees."[333] The FDIC Board has made it clear that a respondent in a Section 1818 enforcement action "cannot escape liability simply because others have contributed to the bank's loss as well."[334] And interpreting a related statutory provision in *In the Matter of Grant Thornton LLP*, the Comptroller of the Currency similarly concluded that an independent auditor had caused actionable loss to a bank through its issuance of an unqualified audit opinion, even though it was the bank's actions in response to the opinion that arguably were more directly responsible for any loss suffered.[335]

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[331] *See In the Matter of Mai Ly-Vu*, Nos. 19-018-E-I & -B-I, 2021 WL 5037459, at *9 (Sept. 29, 2021) (FRB final decision) (holding that "charge-off of loan was a loss supporting a prohibition order"); *In the Matter of Steven J. Ellsworth*, Nos. AA-EC-11-41 & -42, 2016 WL 11597958, at *17 (Mar. 23, 2016) (OCC final decision) (loss to bank came in the form of charged off loans).

[332] *See* 12 U.S.C. §§ 1818(e)(1)(B)(i), 1818(i)(2)(B)(ii)(II).

[333] Resp. Mot. at 25-26. Respondent also argues that the charged-off loan has not yet resulted in loss to the Bank because the Bank "has not sold the Carmi [Warehouse] despite obtaining a deed in lieu of foreclosure." *Id.* at 26. Enforcement Counsel does not address this point in its opposition, and it may be developed further as appropriate.

[334] *In the Matter of Michael R. Sapp*, Nos. 13-477(e) & 13-477(k), 2019 WL 5823871, at *15 (Sep. 17, 2019) (FDIC final decision); *see also Landry v. FDIC*, 204 F.3d 1125, 1139 (D.C. Cir. 2000) (IAP responsible for misconduct causing loss even if "others may have been more guilty"); *In the Matter of Jeffrey Adams*, No. 93-91(e), 1997 WL 805273, at *5 (Nov. 12, 1997) (FDIC final decision) (noting that "multiple factors, and individuals, may contribute to a bank's losses" without absolving respondent of liability).

[335] *In the Matter of Grant Thornton LLP*, Nos. AA-EC-04-02 & -03, 2006 WL 5432171, at *25 (Dec. 29, 2006) (OCC final decision) (noting that under the auditor's theory of causation, "conduct of independent contractors could never be the cause of a loss or other adverse effect for purposes of [the applicable statute], because it would always be the financial institution's acts or omissions that led to the loss to, or adverse effect on, the bank"), *vacated on other grounds sub nom. Grant Thornton LLP v. OCC*, 514 F.3d 1328 (D.C. Cir. 2008).

Likewise, if it was Respondent's conduct that led the Bank to approve a substandard loan for which a charge-off was later deemed necessary, then it may fairly be said that he caused the Bank loss for purposes of Section 1818.[336] This is true even if—perhaps *especially* if—Respondent was no longer at the Bank when the charge-off occurred and did not play a role in the decision to charge off the loan. To hold otherwise would mean that an IAP could never be held accountable for the origination of imprudent loans (or, as with Rig 23, for behavior resulting in a previously sound loan becoming unsecured) exposing their institution to an abnormal risk of loss if they themselves did not then take steps to remediate that risk. That cannot be the case.

Having held that the 618 Holdings loan charge-off can constitute actionable bank loss, the undersigned finds that the factual record as presently developed does not yet permit a determination of causation. Disputed questions of material fact exist that must first be resolved—such as Respondent's role in the Bank's approval of the 618 Holdings loan; whether Respondent ensured that the Bank Board had all pertinent information with respect to 618 Holdings, its guarantors, and the Evergreen Entities; and whether the loan itself was imprudently risky at the time it was made—and which the Parties will have the opportunity to address at hearing.

3. Culpability

Enforcement Counsel argues that, through his conduct in connection with the 618 Holdings loan, Respondent has demonstrably acted with both personal dishonesty and a willful or continuing disregard for the safety and soundness of the Bank in a manner that fulfills the "culpability" element of a Section 1818(e) enforcement action.[337] Respondent, on the other hand, asserts that the 618 Holdings loan "was an earnest attempt to provide a solution to a troubled loan and a

[336] *See* EC Mot. at 23 (asserting that Respondent "created and facilitated the plan for the Bank to make the loan to 618 Holdings" and then "utilized his dominant influence to obtain Board approval for the imprudent loan").

[337] *See id.* at 24-28.

troubled company" and states that he "took what he believed to be appropriate corrective actions with respect to the Evergreen Entities."[338] The undersigned finds that any evaluation of culpability on the present record would require the sort of "credibility determinations, weighing [of] evidence, and drawing inferences from facts" that this Tribunal is precluded from undertaking except in its capacity as factfinder.[339]

Requiring as it does some proof of scienter, or state of mind, it is typically appropriate to resolve questions of culpability at the hearing stage rather than on summary disposition.[340] With respect to a showing of personal dishonesty, Enforcement Counsel has not yet shown that Respondent's conduct that has thus far been established is reflective of "a disposition to lie, cheat, or defraud; untrustworthiness; lack of integrity; misrepresentation of facts and deliberate deception by pretense or stealth; or want of fairness and straightforwardness," rather than a good faith belief that he was acting in the Bank's best interests.[341] Similarly, willful disregard for the safety and soundness of an institution requires a finding of deliberate and conscious misconduct, which cannot yet be made.[342] The Parties' respective motions for summary disposition on issues of culpability are therefore denied.

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[338] Resp. Mot. at 26-27.

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

[340] *See*, *e.g.*, *Miller v. FDIC*, 906 F.2d 972, 974 (4th Cir. 1990) (noting "the general rule that summary judgment is seldom appropriate in cases wherein particular states of mind are decisive elements of a claim or defense"); *Gomez v. Trustees of Harvard Univ.*, 677 F. Supp. 23, 24 (D.D.C. 1988) (noting that "intent and state of mind [are] areas that are particularly ill-suited for summary disposition"); *see also* FRB Mot. at 52 (acknowledging that "scienter is ordinarily left for the factfinder").

[341] *In the Matter of Tonya Williams*, No. 11-553e, 2015 WL 3644010, at *10 (Apr. 21, 2015) (FDIC final decision) (internal quotation marks and citation omitted). The undersigned does observe, consistent with note 63 *supra*, that Respondent's representation to the Carrollton Bank loan officer that he was no longer interested in purchasing the Carmi Warehouse via FWBII-H because "[t]he property owner and I can't get along," EC-PSD-3M (email chain including January 4, 2016 email from F. Bonan II to C. Dickey), is at least somewhat suggestive of "a want of fairness or straightforwardness," given the evidence that has thus far been adduced regarding Respondent's amicable relationship with Gary Evans and Abbey Evans (now Bonan).

[342] *See Dodge v. OCC*, 744 F.3d 148, 160 (D.C. Cir. 2014). The Notice, although not Enforcement Counsel's instant motion, also alleges that Respondent acted with continuing disregard for the safety and soundness of the Bank, which "requires conduct over a period of time with heedless indifference to the prospective consequences." *Id.* (internal quotation marks and citation omitted). To the extent that Respondent presently seeks summary disposition

B. The Rig 23 Collateral

Respondent asserts that he is entitled to summary disposition on Enforcement Counsel's claims regarding the Rig 23 collateral on three grounds. First, he claims that he "did not direct the release of any PMSI [the Bank] may have had in Rig 23," and that he was not responsible for the filing of statements terminating those interests.[343] Second, Respondent argues that the UCC-1 statements did not properly perfect any interest in Rig 23 because the rig was a titled vehicle for which a UCC-1 statement alone is insufficient, and therefore the Bank was not harmed by the termination of the Bank's interest in that collateral.[344] Third, Respondent argues that the Bank was not harmed by the termination of the Bank's PMSI in Rig 23 because the refinancing of Evergreen Drilling's loan constituted a novation that eliminated the Bank's prior security interest.[345] Enforcement Counsel offers arguments in response to each of these points.

As detailed in Part III.E, there are many questions of disputed fact that remain with respect to the November 2015 termination of the Bank's Indiana and Illinois security interests in Rig 23.[346] Enforcement Counsel asserts that these factual disputes should not be resolved at the summary disposition stage, as they primarily "come[] down to an evaluation of the credibility of the FDIC's witnesses and the lack of credibility of the Respondent's rebuttal witnesses as well as the resulting inferences that can be drawn from the witness's testimony."[347] The undersigned agrees, and Respondent's motion for summary disposition of the termination issue is denied on that basis. Respondent's other arguments, however, relate to the predominantly legal question of whether the

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on the issue of continuing disregard, his motion does not clearly say so, and such a determination would be premature in any event.

[343] Resp. Mot. at 11; *see id.* at 10-12.

[344] *See id.* at 12-14.

[345] *See id.* at 14-16.

[346] *See supra* at 29, 30, 32, 34-35.

[347] EC Opp. at 13.

Bank's interest in Rig 23 was enforceable prior to the termination of the Indiana and Illinois UCC-1 statements, and the undersigned addresses those here.

1. Whether the Bank's Security Interest in Rig 23 was Not Perfected Because the Rig is Governed by State Vehicle Codes

To begin with, Respondent argues that the Bank's interest in Rig 23 was never perfected because "[u]nder both Illinois and Indiana law, the filing of a financial statement is not sufficient for perfecting a security interest in property that is subject to the state's vehicle code."[348] According to Respondent, (1) Rig 23 was a registered vehicle; (2) applicable state law requires that a security interest on a vehicle must be recorded on that vehicle's certificate of title; and (3) it was not so recorded here.[349] Thus, Respondent contends, the UCC-1 financing statements were ineffective to secure the Bank's interest in Rig 23 from the beginning, and the Bank therefore could not have been harmed by their termination.[350] In response, Enforcement Counsel asserts that Respondent has failed to produce Rig 23's certificate of title and has no evidence Rig 23 was ever registered as a vehicle in Indiana, which is the applicable jurisdiction.[351] The undersigned agrees with Enforcement Counsel.

Whether a credit interest is secured is a question of state law.[352] The Parties do not clearly agree on whether the perfection of the Bank's security interest in Rig 23 is governed by the law of Indiana, where Evergreen Drilling is located, or the law of Illinois, which governs the loan

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[348] Resp. Mot. at 13.

[349] *See id.*

[350] *See id.* at 12 (asserting that "Grand Rivers was not harmed because Grand Rivers never had a perfected security interest in Rig 23, so any UCC termination filed would have had no effect on any of Grand Rivers' previous, enforceable interests"). The undersigned notes that this argument is in tension with Respondent's admission in his Answer that the Bank did, in fact, have a properly perfected PMSI in Rig 23 following the $490,000 loan in 2013. *See* Answer at 6; *see also* Part III.E *supra* at 26.

[351] *See* EC Opp. at 14-15.

[352] *See Butner v. United States*, 440 U.S. 48, 55 (1979).

agreement between Evergreen Drilling and the Bank.[353] Enforcement Counsel is correct, however, that both jurisdictions have adopted the relevant portions of the UCC providing that when collateral is located in a jurisdiction, the laws of that jurisdiction govern perfection of that collateral.[354] Accordingly, Indiana law governs whether the Bank's interest in Rig 23 was perfected by the Bank's initial filing of its UCC financing statement.

Indiana law provides that:

> the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to:
>
> > (1) a statute, regulation, or treaty of the United States whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt IC 26-1-9.1-310(a);
> >
> > (2) any Indiana statute covering automobiles, trailers, mobile homes, or boats, which provides for a security interest to be indicated on a certificate of title as a condition or result of perfection; or
> >
> > (3) a statute of another jurisdiction which provides for a security interest to be indicated on a certificate of title as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the property.[355]

Under Indiana's Vehicle Code, a security interest in a vehicle (unless that vehicle is inventory held for sale) is perfected when it is filed with the Indiana Bureau of Motor Vehicles.[356] The Vehicle Code further requires an applicant for a certificate of title to disclose "any liens, mortgages, or other encumbrances on the vehicle."[357]

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[353] Enforcement Counsel argues that Indiana law governs the perfection of Rig 23 as collateral because both the collateral itself and the debtor Evergreen Drilling are located in Indiana. *See* EC Opp. at 15. Respondent does not squarely address this question, because he asserts that both Indiana and Illinois law are aligned on the perfection of a security interest in property that is subject to the state's vehicle code. *See* Resp. Mot. at 13.

[354] *See* EC Opp. at 14-15; *compare* Ind. Code Ann. § 26-1-9.1-301(2), *with* 810 Ill. Comp. Stat. Ann. 5/9-301(2).

[355] Ind. Code Ann. § 26-1-9.1-311.

[356] *Id.* § 9-17-5-5.

[357] *Id.* § 9-17-2-2(2).

Respondent's argument on this point falters because, even assuming arguendo that failure to perfect the Rig 23 collateral would establish that no harm befell the Bank as a result of Respondent's involvement with the Evergreen Drilling loans, Respondent has failed to produce any certificate of title for Rig 23.[358] It is therefore unclear whether the Evergreen Drilling loans were, in fact, recorded on that certificate of title, should one exist. Respondent's only evidence marshalled in support of his argument is a photograph of a Cabot 900 rig—purportedly Rig 23—bearing an Oklahoma license plate.[359] As Enforcement Counsel notes, this raises more questions than it answers.[360] Indiana law provides that the Indiana Bureau of Motor Vehicles is only authorized to issue a certificate of registration for vehicles that have been titled in Indiana.[361] Respondent's photograph suggests that Rig 23 was not titled in Indiana, and thus any efforts by the Bank to record the lien on Rig 23's certificate of title with the Indiana Bureau of Motor Vehicles would have been fruitless. Moreover, it has not been shown whether the loan was noted on the certificate of registration for Rig 23 in Oklahoma, or any other state for that matter.

Enforcement Counsel points out that there is an additional barrier to entry of summary disposition for Respondent on this issue: Indiana's Vehicle Code does not require all vehicles to be titled.[362] Instead, the code exempts from the registration requirement any "vehicle that is not designed for or employed in general highway transportation of persons or property and is occasionally operated or moved over the highway."[363] Enforcement Counsel highlights evidence in the record that Rig 23 was often transported using other vehicles, suggesting that the extent of

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[358] *See* EC Opp. at 15 (noting that "there is no evidence that Rig 23 was ever registered in the State of Indiana or that the State of Indiana ever issued a certificate of title for Rig 23").

[359] *See* R-MSD-FF (Rig 23 Photo).

[360] *See* EC Opp. at 15-16.

[361] Ind. Code Ann. § 9-18-2-10(a).

[362] *See* EC Opp. at 16.

[363] Ind. Code Ann. § 9-18.1-2-2(7).

its operation on roadways may not have called for registration under Indiana law, and therefore it may not have been subject to the requirement that liens be recorded on the certificate of title.[364] The record has not been developed in this area sufficient to answer that question.

In conclusion, several disputed questions of fact preclude entry of summary disposition for Respondent on his arguments relating to the perfection of the Rig 23 collateral, including whether and where Rig 23 was titled; whether the Bank's interest in Rig 23 was noted on any certificate of title for Rig 23; and whether the nature of Evergreen Drilling's use of Rig 23 subjected it to regulation under Indiana's vehicle code.[365] Respondent's motion for summary disposition is therefore denied as to this argument.

2. Whether the Refinancing of Evergreen Drilling's Loans Eliminated the Bank's Interests in Rig 23

Next, Respondent argues that the May 8, 2014 agreement between the Bank and Evergreen Drilling that consolidated and refinanced two prior Evergreen Drilling loans held by the Bank acted as a novation that terminated the Bank's security interest in Rig 23.[366] Respondent contends that this putative elimination of the Bank's interest in Rig 23 meant that the subsequent termination of the Bank's UCC financing statement did not work any injury to the Bank.[367] Enforcement Counsel responds that the relevant portions of Illinois's UCC do not provide that refinancing a PMSI has the effect of eliminating the collateral secured by the original loans.[368]

The May 8, 2014 Promissory Note is governed by Illinois law.[369] Under Illinois law, a novation is "the substitution of a new obligation for an existing one, which is thereby

[364] *See* EC Opp. at 16-17.
[365] Ind. Code Ann. § 9-18.1-2-2(7).
[366] *See* Resp. Mot. at 14-16.
[367] *Id.*
[368] *See* EC Opp. at 17-18.
[369] *See* R-MSD-D (GRCB Commercial Loan Application and May 8, 2014 Promissory Note) at 3.

extinguished."[370] A party raising the defense that an obligation has been terminated via a novation must establish, by a preponderance of the evidence, four elements: "[1] a previous, valid obligation; [2] a subsequent agreement of all the parties to the new contract; [3] the extinguishment of the old contract; and [4] the validity of the new contract."[371]

The undersigned concludes that it is unnecessary to resolve the Parties' arguments regarding the Illinois UCC, because the May 8, 2014 Promissory Note concerning the refinanced Evergreen Drilling loans expressly identifies Rig 23 as collateral that secured the consolidated loan.[372] In a section titled "COLLATERAL," the note states that "this Note is secured by Commercial Security Agreement dated January 9, 2013 and securing UCC file #17906194."[373] The loan application's cover sheet identified the loan type as "Comm. Secured" and listed a "Cabot 900 series self-propelled Drilling Rig" as collateral.[374] Without a doubt, the consolidated loan could not terminate the Bank's security interest in collateral that is expressly identified within the consolidated loan itself.

Moreover, whether a refinancing agreement is a novation that releases previously-secured collateral is informed by the intention of the obligee.[375] Even beyond the plain text of the consolidated loan, there is no indication that the Bank ever intended that refinancing Evergreen Drilling's existing loans would release Rig 23 as secured collateral. Indeed, it is implausible that the Bank would have intended that the refinancing—which *increased* the amount the Bank loaned

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[370] *Cincinnati Ins. Co. v. Leighton*, 403 F.3d 879, 887 (7th Cir. 2005).

[371] *Id.* (quoting *Phillips & Arnold, Inc. v. Frederick J. Borgsmiller, Inc.*, 462 N.E.2d 924, 928 (Ill. 1984)).

[372] *See* Part III.E *supra* at 27.

[373] R-MSD-D (GRCB Commercial Loan Application and May 8, 2014 Promissory Note) at 1.

[374] *Id.* at 3.

[375] *Cincinnati Ins. Co.*, 403 F.3d at 887 ("For there to be a novation, the obligee must assent to the substitution and agree to release the obligor."); *see also Newkirk v. Vill. of Steger*, 536 F.3d 771, 774 (7th Cir. 2008) ("Secret hopes and wishes count for nothing. The status of a document as a contract depends on what the parties express to each other and to the world, not on what they keep to themselves.") (applying Illinois law).

to Evergreen Drilling by $126,000—would have the effect of *decreasing* the amount of collateral identified to secure that debt. If the Bank had intentionally entered into such an agreement, that itself may have constituted unsafe and unsound practices. Accordingly, the undersigned rejects Respondent's argument that the May 8, 2014 refinancing of the Bank's loans to Evergreen Drilling had the legal effect of releasing Rig 23 as collateral.

VII. Conclusion

For the reasons set forth above, and in light of the disputed questions of material fact that have been identified on the present record, the undersigned hereby denies Enforcement Counsel's instant motion for partial summary disposition except as to the issues of jurisdiction and (to the extent detailed) effect, and Respondent's instant motion for summary disposition in all respects. Under the Uniform Rules, a recommended decision regarding the partial entry of summary disposition will be deferred until after a hearing on the remaining issues is conducted.[376]

SO ORDERED.

December 6, 2022

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Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication

[376] 12 C.F.R. § 19.30. Pursuant to the July 1, 2022 Order No. 21 Modifying Procedural Schedule, such hearing is presently scheduled to begin on January 17, 2023. The Parties have agreed that the hearing will be held in the Bankruptcy Court at the Thomas F. Eagleton U.S. Courthouse in Eastern District of Missouri, 111 South 10th Street, St. Louis, Missouri. *See* October 27, 2022 Joint Status Report.

CERTIFICATE OF SERVICE

On December 6, 2022, I served a copy of the foregoing **Order** upon the following individuals via email:

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