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. 34: GRANTING ENFORCEMENT COUNSEL'S MOTION IN LIMINE

On December 22, 2022, Enforcement Counsel for the Federal Deposit Insurance Corporation ("Enforcement Counsel") filed a Motion in Limine ("Motion") that (1) seeks to exclude testimony and other evidence relating to the post-examination conduct of former Federal Deposit Insurance Corporation ("FDIC") Examiner Eric Mark;[1] and (2) incorporates by reference arguments made in Enforcement Counsel's Prehearing Statement seeking to exclude the proposed expert witness testimony of Respondent Frank William Bonan II ("Bonan" or "Respondent").[2] On January 6, 2023, Respondent opposed Enforcement Counsel's Motion, arguing that the challenged exhibits and testimony regarding Examiner Mark "are evidence of bias that affect the credibility of the FDIC's witnesses" and that Respondent's "experience in the banking industry . . . qualifies him to provide expert testimony in this matter."[3] For the reasons below, the undersigned agrees with Enforcement Counsel and grants the instant Motion in both respects.

[1] *See* Motion at 1, 3-7.
[2] *See id.* at 7-8; *see also* Enforcement Counsel's Prehearing Statement ("ECPS") at 48-54 (Dec. 19, 2022).
[3] Respondent's Opposition to FDIC's Motion in Limine ("Opposition") at 2 (Jan. 6, 2023).

Pursuant to the procedural schedule issued on June 21, 2021, the deadline for the parties to identify their fact and hybrid fact/expert witnesses was October 29, 2021.[4] On that date, Respondent filed his List of Fact and Expert Witnesses.[5] Respondent identified Bethany Shaw and Examiner Mark as fact witnesses, noting that Ms. Shaw was a member of the Board of Directors of Peoples National Bank ("PNB") during the events at issue in this proceeding.[6] The witness list explained that "Ms. Shaw was involved in discussions with the FDIC's lead investigator and may be called to testify regarding the same."[7] In addition, Respondent identified himself as both a fact witness and an expert witness in this matter.[8] The witness list indicated that, in Respondent's capacity as an expert witness, he would testify as to "the structure of the loan transactions discussed in the Notice of Charges; the practices and procedures implemented at Grand Rivers Community Bank ["Grand Rivers" or "the Bank"] and [PNB] with respect to approving and structuring loans; standards of care utilized throughout the banking industry; and other banking matters."[9]

This Tribunal's February 28, 2022 Order set a March 8, 2022 deadline for the identification of expert witnesses, including their topics of expertise and curricula vitae, as well as for the exchange of initial expert reports.[10] On March 8, 2022, Respondent filed an Expert Witness Disclosure that again identified Respondent as an expert witness.[11] This disclosure stated that Respondent had prepared an expert report "containing his opinions regarding the financial

[4] *See* Order No. 5: Notice Regarding Telephone Conference and Order Setting the Procedural Schedule at 1 (June 21, 2021).

[5] *See* Respondent's List of Fact and Expert Witnesses at 1, 5 (Oct. 29, 2021).

[6] *Id.* at 2-3. The parties' December 19, 2022 Joint Witness List no longer lists Examiner Mark as a prospective fact witness. *See* Joint Witness List at 13-15.

[7] Respondent's List of Fact and Expert Witnesses at 3.

[8] *See id.* at 1, 5.

[9] *Id.* at 5.

[10] Order No. 12: Granting Unopposed Motion to Further Amend Order Setting the Procedural Schedule Deadline to Disclose Expert Witnesses (Feb. 28, 2022).

[11] *See* Respondent's Expert Witness Disclosures ("EWD") at 2 (Mar. 8, 2022).

condition of Grand Rivers while he was the Chairman; the purpose and structure of the loan transactions discussed in the Notice of Charges; and the practices and procedures implemented at Grand Rivers Community Bank with respect to approving and structuring the loan, among other things."[12] That report, which is denoted as the "Opinion Testimony of Frank William Bonan II," was submitted with Respondent's expert witness disclosures.[13]

Enforcement Counsel now argues that Respondent should be precluded from offering testimony or other evidence[14] relating to Examiner Mark's post-examination conduct, because any contention that Examiner Mark was biased against Respondent is not relevant to Enforcement Counsel's claims.[15] Second, Enforcement Counsel argues that Respondent should be excluded as an expert witness because he has not demonstrated sufficient qualifications, his testimony contains legal conclusions, and his testimony contains assertions of fact and opinion that are not properly the subject of expert testimony.[16] In opposition, Respondent asserts that "[e]vidence of bias is nearly always relevant"[17] and argues that his own experience as "an owner and Chairman of the Board of Grand Rivers for many years" qualifies him to opine as an expert in these proceedings.[18] The undersigned will address these arguments in turn.

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[12] *Id.*

[13] Opinion Testimony of Frank William Bonan II, attached as Ex. C to EWD ("Bonan Report").

[14] Enforcement Counsel seeks the exclusion of Respondent's proposed exhibits RX 068, RX 069, and RX 070, which relate to Examiner Mark's post-examination conduct. Specifically, Exhibit RX 068 is an affidavit from Bethany Shaw dated August 31, 2016, in which Ms. Shaw details an interaction with Examiner Mark that took place in June 2016. *See* RX 068 ("Shaw Decl."), attached as Ex. 1 to the Declaration of Jann L. Harley ("Harley Decl.") (Dec. 12, 2022). Exhibit RX 069 contains emails between Mark Johnson, attorney for the Bank, and Whitney Stringer, the Bank's CEO, regarding Ms. Shaw's interaction with Examiner Mark. *See* RX 069, attached as Ex. 2 to Harley Decl. Exhibit RX 070 is a July 21, 2016 email from Daniel Malone to Regina Hayes that memorializes a telephone conversation between Mr. Malone and Mr. Johnson regarding Ms. Shaw's interaction with Examiner Mark. *See* RX 070, attached as Ex. 3 to Harley Decl.

[15] *See* Motion at 1.

[16] *See id.* at 7-8; ECPS at 48-52.

[17] Opposition at 2 (internal quotation marks and citation omitted).

[18] *Id.* at 5.

A. Relevance of Examiner Mark's Alleged Bias

Consideration of Enforcement Counsel's motion to exclude evidence relating to Examiner Mark's post-examination conduct requires some factual context. On January 18, 2016, the FDIC and the Illinois Department of Financial and Professional Regulation ("IDFPR") began a joint on-site examination of Grand Rivers; Mark was the FDIC's examiner-in-charge.[19] Following that examination, the examiners completed a draft Report of Examination and forwarded that draft report to the FDIC's Chicago Regional Office on March 29, 2016.[20] The FDIC and IDFPR eventually issued a Joint Report of Examination to the Bank on September 7, 2016.[21]

Respondent offers as evidence an affidavit prepared by Bethany Shaw indicating that she spoke with Examiner Mark on June 6, 2016 at a bar in Dallas, Texas.[22] Ms. Shaw's affidavit describes an extended conversation in which Mark, who was in an inebriated state: (1) stated that "the FDIC does not investigate innocent people," in response to Ms. Shaw's comment that she "felt like the FDIC was after" Respondent;[23] (2) told Ms. Shaw that, in order to stay out of trouble, she should "stay away from" Respondent;[24] and (3) referenced Ms. Shaw's lake house and stressed that the FDIC could "come and take all of [her] personal property" if she failed to act independently and in the best interests of PNB as a member of that bank's Board.[25] Ms. Shaw's affidavit indicates that she understood Mark's words as attempts at intimidation.[26]

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[19] Joint Report of Examination at 1 ("JROE"), attached as Ex. 1 to Declaration of Traci Hefner ("Hefner Decl.") (Dec. 12, 2022).

[20] Hefner Decl. ¶ 6.

[21] *Id.* ¶ 8. The FDIC and IDFPR returned to the Bank on September 26, 2016 and March 13, 2017, and continued their review of certain loans at issue in this matter on both occasions, but there is no representation that Examiner Mark played any role in either instance. *See id.* ¶¶ 9-10.

[22] Shaw Decl. at 1.

[23] *Id.*

[24] *Id.* at 2.

[25] *Id.*

[26] *Id.* at 4.

The FDIC's Uniform Rules of Practice and Procedure provide that "relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law."[27] Enforcement Counsel argues that testimony regarding Examiner Mark's alleged post-examination conduct is "neither relevant nor material."[28] The undersigned agrees. The purpose of this proceeding is to determine whether Enforcement Counsel has proven the allegations against Respondent that are set forth in the Notice of Charges. There is no indication that testimony by Ms. Shaw (or anyone else) regarding Examiner Mark's post-examination conduct would have any bearing upon the veracity of those allegations. Instead, it appears that Respondent hopes to show that Mark's alleged animus towards Respondent influenced the FDIC's decision to issue the Notice of Charges. But even if Respondent succeeded in making such a showing—which the proffered evidence would be insufficient to do on its own—it would not influence the outcome of this action, as "[o]nly the specific acts of the Respondent[] alleged in the Notice are relevant and material to this proceeding."[29] The doubtful relevance of this evidence to the merits of this proceeding is underscored by Respondent's prehearing statement, which omits any reference to Ms. Shaw or Examiner Mark and instead acknowledges that "the case has been whittled down to two discrete transactions,"[30] that is, the 618 Holdings loan and the release of the Rig 23 collateral.

In response, Respondent notes that Examiner Mark "held a supervisory role over many of the witnesses in this case, including [Examiners] Reuben Cash and Mathias Floresch," and

[27] 12 C.F.R. § 308.36(a)(1).

[28] Motion at 6.

[29] *In the Matter of Michael D. Landry and Alton B. Lewis*, No. 95-65e, 1999 WL 440608, at *25 (May 25, 1999) (FDIC final decision).

[30] Respondent's Prehearing Statement at 1 (Dec. 19, 2022); *see also id.* at 6 ("In sum, the remaining contested issues in this case involve only two discrete transactions.").

contends that "any bias held by Mr. Mark, who spearheaded the examination, likely infected the other examiners."[31] Respondent therefore argues that he "should be permitted to explore the possibility that the FDIC witnesses in this case are biased because of loyalty to one another."[32] But this supposition is too tenuous a thread on which to support the admission of a reported conversation between Examiner Mark and Ms. Shaw months after the examination had concluded. Assuming the truth of Ms. Shaw's affidavit—and taking as read the inappropriateness of Examiner Mark's behavior that evening under that account—it establishes at most that Examiner Mark, after the end of the FDIC's 2016 examination, believed Respondent to have committed misconduct. This is not evidence of bias on the part of Examiner Mark, let alone other FDIC witnesses. Again, the thrust of the upcoming hearing is whether Enforcement Counsel can prove the truth of its allegations against Respondent, and evidence that both post-dates and is unrelated to those allegations does nothing to illuminate that inquiry. While charges of bias may be relevant to the extent that they cast doubt on the veracity of the agency's claims against a respondent, Respondent has not made a persuasive argument that this is the case here.

Accordingly, because evidence concerning Examiner Mark's post-examination conduct would be neither relevant nor material, Enforcement Counsel's motion to exclude such evidence is granted, and Respondent may not introduce evidence or testimony on that topic at the upcoming hearing.[33] Rule 36(d)(3) of the FDIC's Uniform Rules of Practice and Procedure provides that exhibits that have been deemed inadmissible and excluded following objection, as with the three exhibits at issue here, will be retained and transmitted in conjunction with the administrative record

[31] Opposition at 3.

[32] *Id.* (internal quotation marks and citation omitted).

[33] Based on the parties' Joint Witness List, it appears that the only purpose of Ms. Shaw's testimony is "to testify about her discussions with [Examiner Mark] regarding Respondent and the FDIC's investigation of Grand Rivers." Joint Witness List at 13-14. Therefore, her testimony is not relevant and she will not be permitted to testify.

of the case once the hearing has been completed and a recommended decision issued.[34] To the extent that Respondent wishes to proffer for the Board's consideration specifically what matters of material relevance he would have sought to show through witness questioning regarding these particular documents—that is, Exhibits RX 068, 069, and 070—he may make a brief oral representation to that effect at the hearing.[35]

B. Expert Testimony by Respondent Bonan

Next, the undersigned considers Enforcement Counsel's argument that Respondent should be precluded from offering expert testimony. Although not binding on this Tribunal, the undersigned looks to the Federal Rules of Evidence to inform evidentiary determinations.[36] Federal Rule of Evidence 702 provides that

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
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> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
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> (b) the testimony is based on sufficient facts or data;
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> (c) the testimony is the product of reliable principles and methods; and
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> (d) the expert has reliably applied the principles and methods to the facts of the case.[37]

In contrast, a lay witness may offer opinion testimony if that opinion is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."[38]

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[34] *See* 12 C.F.R. § 308.36(d)(3).

[35] *See id.* § 308.36(d)(2).

[36] *See id.* § 308.36(a)(2) (providing that "[e]vidence that would be admissible under the Federal Rules of Evidence is admissible" in enforcement proceedings before this Tribunal).

[37] Fed. R. Evid. 702.

[38] Fed. R. Evid. 701.

First, the undersigned finds merit to Enforcement Counsel's challenge to Respondent's qualifications. Respondent's expert witness disclosures did not include a curriculum vitae for Bonan, although a curriculum vitae was provided for Gary M. Schwartz and Steven M. Wallace, the only other two expert witnesses identified by Respondent.[39] The only apparent reference to Bonan's qualifications in his expert report is the statement that he owned a 13 percent interest in the Bank and served as its Chairman of the Board, during which time "the Bank worked its way out of [a] cease and desist order" and improved its regulatory rating.[40] The undersigned agrees with Respondent that Rule 702 permits experience to be the source of witness's expertise.[41] However, as Enforcement Counsel argues, Bonan's report does not explain how Bonan relied on his experience-derived expertise to reach any specific opinions outlined therein.[42]

Respondent's response to the Motion, moreover, does nothing to cure matters. While Bonan's experience as "an owner and Chairman of the Board of Grand Rivers for many years" may indeed qualify him as an expert in certain banking-related topics,[43] there is little indication that he has applied such expertise here. Respondent had represented that he would be opining on "the structure of the loan transactions discussed in the Notice of Charges; the practices and procedures implemented at [Grand Rivers] and [PNB] with respect to approving and structuring loans; standards of care utilized throughout the banking industry," all potentially valid topics for a banking expert.[44] Bonan's report, however, contains few if any opinions on those topics.[45] Rather, insofar as they can be discerned, those opinions largely concern Bonan's own culpability (he says

[39] *See* EWD at 1-2.
[40] Bonan Report at 1, 11.
[41] *See* Opposition at 5.
[42] *See* ECPS at 50-51.
[43] Opposition at 5.
[44] Respondent's List of Fact and Expert Witnesses at 5; *see* EWD at 2.
[45] *See* ECPS at 49 (summarizing opinions offered in Respondent's report).

he is not), the appropriateness of the FDIC's action against him (he says it is not), and whether his conduct otherwise satisfied the statutory prerequisites of 12 U.S.C. § 1818 (he says it does not).[46] As Enforcement Counsel observes, the report also signals Respondent's intent to testify as an expert "regarding his beliefs about investigations conducted by the FDIC's Office of Inspector General (OIG), the United States Attorney's Office for the Southern District of Illinois, and the FDIC examiner's interactions with the Bank after Respondent's departure."[47]

But Respondent, presumably, is not an examiner.[48] He is not a lawyer. To the extent that his opinion on topics such as whether his conduct was actionably unsafe or unsound or whether he breached his fiduciary duty to the Bank could be considered something other than a pure legal conclusion (which would not be admissible as expert testimony in any event),[49] it is well beyond whatever limited remit Respondent's banking expertise may confer upon him. Although the Federal Rules of Evidence do not foreclose testimony "just because it embraces an ultimate issue,"[50] expert

[46] *See*, *e.g.*, Bonan Report at 4 (opining that his "alleged failure to advise the Bank that PNB had placed Evergreen's loans in non-accrual status . . . could not constitute misconduct, an unsafe or unsound banking practice, or a breach of [his] fiduciary duty to the Bank"), 5 (opining that he "lack[s] the high degree of misconduct or culpability required to sustain a finding of a violation under § 1818"), 8 (opining that the Bank did not suffer a loss due to the November 2015 release of the Rig 23 collateral because a legal novation had already released the Bank's security interest in that collateral), 9 (opining that the FDIC has "completely ignored" its own enforcement manual in bringing an action against him).

[47] ECPS at 49 (citing Bonan Report at 5).

[48] Conclusions of federal bank examiners regarding the extent to which "a particular practice poses a safety and soundness concern" for purposes of 12 U.S.C. § 1818 are entitled to a significant measure of deference by this Tribunal. *In the Matter of Steven Ellsworth*, Nos. AA-EC-11-41 & -42, 2016 WL 11597958, at *11 (Mar. 23, 2016) (OCC final decision); *see also In the Matter of Patrick Adams*, No. AA-EC-11-50, 2014 WL 8735096, at *36 (Sep. 30, 2014) (OCC final decision) ("The conclusion that given conduct is an unsafe or unsound practice is ultimately an application of a legal standard to evidence, including examiner judgment, and deference is due that judgment.").

[49] *See DM Trans, LLC v. Scott*, 38 F.4th 608, 620 (7th Cir. 2022) ("This testimony reflects an inadmissible legal conclusion which restates the legal argument Arrive now advances."); *Good Shepherd Manor Found., Inc. v. City of Momence*, 323 F.3d 557, 564 (7th Cir. 2003) (""[E]xpert testimony as to legal conclusions that will determine the outcome of the case is inadmissible."); *Burkhart v. WMATA*, 112 F.3d 1207, 1212 (D.C. Cir. 1997) ("Expert testimony that consists of legal conclusions cannot properly assist the trier of fact."); *Weston v. WMATA*, 78 F.3d 682, 684 n. 4 (D.C. Cir. 1996) ("An expert witness may not deliver legal conclusions on domestic law, for legal principles are outside the witness' area of expertise under Federal Rule of Evidence 702.").

[50] Fed. R. Evid. 704(a).

testimony is only admissible if it "will help the trier of fact to understand the evidence or to determine a fact in issue."[51] Respondent's self-serving opinions do not assist the undersigned in either respect and will not be accorded the evidentiary weight of an expert.[52]

For these reasons, Enforcement Counsel's motion is granted. Respondent may be called as a fact witness and may offer testimony in that capacity; however, none of Respondent's testimony shall be deemed to be in the capacity of an expert witness. This designation does not prevent Respondent from offering his opinion as a layperson, which he may provide on a limited basis. Using the Federal Rules of Evidence as a guide, "[l]ay opinion testimony is admissible if the specialized knowledge at issue was gained through experience rather than through scientific or technical training, so long as the witness testifie[s] based solely on personal experience with the case at issue."[53] Respondent has no leeway to offer opinions or inferences that stray beyond the bounds of his personal experience or that the undersigned does not deem directly helpful to the determination of the case at hand. And, of course, nothing in this ruling limits Respondent's ability to offer non-opinion testimony on matters to which he has personal knowledge.[54]

SO ORDERED.

Issued: January 9, 2023

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication

[51] Fed. R. Evid. 702(a).

[52] Furthermore, there is no indication that Bonan's opinions are "the product of reliable principles and methods" which have been "reliably applied . . . to the facts of the case," as required by Rule 702. Fed. R. Evid. 702(c)-(d).

[53] *Barnes v. Dist. of Colum.*, 924 F. Supp. 2d 74, 83 (D.D.C. 2013) (internal quotation marks and citation omitted); *see also* Fed. R. Evid. 701; *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988) (Federal Rules of Evidence "permit[] even a lay witness to testify in the form of opinions or inferences drawn from her observations when testimony in that form will be helpful to the trier of fact").

[54] Fed. R. Evid. 602. For example, much of the "expert" testimony Respondent has previewed concerns subjects which Bonan may possess direct knowledge of, rather than mere opinion, such as "the financial condition of Grand Rivers while he was the Chairman; the purpose and structure of the loan transactions discussed in the Notice of Charges; and the practices and procedures implemented at Grand Rivers Community Bank with respect to approving and structuring the loan." EWD at 2.

CERTIFICATE OF SERVICE

On January 9, 2023, I served a copy of the foregoing **Order** upon the following individuals via email:

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