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. 35: DENYING RESPONDENT'S MOTION IN LIMINE

On December 21, 2022, Respondent Frank William Bonan II ("Respondent") filed a Motion in Limine Regarding the Testimony of Patrick Hunn ("Motion"), seeking to preclude Mr. Hunn from offering testimony regarding any communications between him and either Respondent or other representatives of Grand Rivers Community Bank ("the Bank") that are covered by the attorney-client privilege.[1] On January 5, 2023, Enforcement Counsel for the Federal Deposit Insurance Corporation ("FDIC") filed a response. For the following reasons, Respondent's motion in limine is denied without prejudice to Respondent's ability to raise privilege objections on a question-by-question basis at the upcoming hearing.

On October 29, 2021, Enforcement Counsel submitted a list of potential fact and hybrid fact/expert witnesses.[2] That list identified Patrick Hunn, Esq., as a potential fact witness, and elaborated that:

> [Hunn] was the Bank's in-house counsel throughout most of 2015 until his resignation in late January 2016 or early February 2016. Hunn will testify regarding his and the Respondent's roles at the Bank during the time period he served as in-house counsel. Hunn will also testify regarding the facts and circumstances regarding the Respondent's plan to

[1] *See* Motion at 1.
[2] Enforcement Counsel's Potential Fact and Hybrid Fact/Expert Witnesses (Oct. 29, 2021).

> purchase and leaseback the Carmi Warehouse from Evergreen Properties through FWB II Holdings and how that plan was subsequently changed using 618 Holdings. Hunn will testify regarding the transaction documents he prepared initially for FWB II Holdings and subsequently modified for 618 Holdings. Hunn will testify concerning the financial ability of the members of 618 Holdings to support the Bank's loan to the 618 Holdings. Hunn will also testify regarding instructions he and Gaskins received from the Respondent in January 2016, before the 618 Holdings loan closing, regarding the closing and both banks, *i.e.*, the Bank and PNB, working it out, so that Gary Evans or his companies could keep the sale/loan proceeds in the amount of $100,000 to operate with.[3]

The Motion represents that Mr. Hunn served as in-house counsel for both the Bank and FWB II Holdings, LLC, another company owned by Respondent.[4] Respondent states that, in these capacities, Mr. Hunn provided legal advice and engaged in privileged communications with Respondent and the Bank.[5] Respondent argues that Mr. Hunn "should be precluded from testifying regarding any attorney-client privileged communications he had with Respondent or with Grand Rivers."[6] Respondent does not provide any further detail as to what specific areas of expected testimony identified by Enforcement Counsel should be deemed to be privileged, nor does he cite to any applicable law or authority regarding the scope of such privilege.

As a general matter, the FDIC's Uniform Rules of Practice and Procedure ("Uniform Rules") 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."[7] The Uniform Rules further state that "[e]vidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable and not unduly

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[3] *Id.* at 6-7.
[4] *See* Motion at 1.
[5] *See id.*
[6] *Id.*
[7] 12 C.F.R. § 308.36(a)(1).

repetitive."[8] Moreover, while the Uniform Rules are clear that "[p]rivileged documents are not discoverable" and identify the attorney-client privilege as one applicable type of privilege in that context,[9] they do not expressly provide that the attorney-client privilege may be invoked to bar hearing testimony—nor, as far as the undersigned can determine, has the FDIC or any of this Tribunal's other constituent federal banking agencies spoken on the subject.

Although the Uniform Rules do not address the admissibility of testimony relaying privileged communications, the undersigned is inclined to recognize attorney-client privilege in the context of hearing testimony just as in the discovery context. There is compelling reason to do so, as the policy justifications animating the privilege have equal force in this Tribunal as in a court of law. That is, recognition of the privilege in these proceedings will encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."[10] Therefore, at the upcoming hearing, the privilege will be recognized consistent with the Federal Rules of Evidence, which provide that "[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court."[11]

Here, however, Respondent's Motion seeks a blanket ruling precluding Mr. Hunn "from testifying regarding any attorney-client privileged communications he had with either Respondent

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[8] *Id.* § 308.36(a)(3). In such a way, for example, hearsay testimony that is deemed to be relevant, material, and reliable may be admitted in hearings before this Tribunal, notwithstanding its general inadmissibility under the Federal Rules of Evidence. *See In the Matter of Michael D. Landry and Alton B. Lewis*, No. 95-65e, 1999 WL 440608, at *23 (May 25, 1999) (FDIC final decision); *Hoska v. Dep't of the Army*, 677 F.2d 131, 139 (D.C. Cir. 1982) ("Provided it is relevant and material, hearsay is admissible in administrative proceedings generally and in adverse action proceedings in particular.").

[9] *Id.* § 308.24(c).

[10] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

[11] Fed. R. Evid. 501.

or Grand Rivers."[12] This general assertion of privilege is insufficient. Instead, a party objecting to questioning on the basis of privilege bears the burden of proving each element of the privilege as it applies to specific communications.[13] Respondent's Motion does not identify any particular expected testimony from Mr. Hunn that Respondent asserts would run afoul of the attorney-client privilege, and the topics identified by Enforcement Counsel as the subject of Mr. Hunn's testimony do not intrinsically suggest that he will be asked to testify as to privileged communications.[14] But if any line of questioning on these topics strays in the direction of confidential communications made for the purpose of obtaining or providing legal advice, Respondent may object to any specific question that he believes to do so at that time.[15] If Respondent believes that Enforcement Counsel's questioning seeks to elicit the substance of privileged communications between Mr. Hunn and the Bank, moreover, Respondent should also be prepared to articulate in his objection why he has the authority to invoke the Bank's privilege.[16]

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[12] Motion at 2.

[13] *See In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998) ("A blanket assertion of the privilege will not suffice. Rather, the proponent must conclusively prove each element of the privilege.") (internal quotation marks and alterations omitted); *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991) ("The claim of privilege cannot be a blanket claim; it must be made and sustained on a question-by-question or document-by-document basis.") (internal quotation marks and citation omitted).

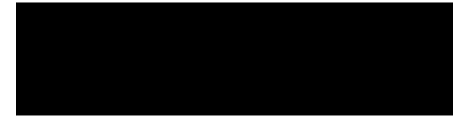
[14] As noted above, Enforcement Counsel's witness list previews several areas of Mr. Hunn's anticipated testimony, including "the facts and circumstances regarding the Respondent's plan to purchase and leaseback the Carmi Warehouse from Evergreen Properties through FWB II Holdings and how that plan was subsequently changed using 618 Holdings," "the transaction documents he prepared initially for FWB II Holdings and subsequently modified for 618 Holdings," "the financial ability of the members of 618 Holdings to support the Bank's loan to the 618 Holdings," and the "instructions he and Gaskins received from the Respondent in January 2016 . . . regarding the closing and both banks." Enforcement Counsel's Potential Fact and Hybrid Fact/Expert Witnesses at 6-7. None of these subjects contemplate by necessity that Mr. Hunn will be asked to testify regarding Respondent's requests for, or Mr. Hunn's provision of, confidential legal advice, nor has Respondent objected on privilege grounds to any of the exhibits on which Mr. Hunn will be relying during his testimony. *See* Joint Witness List (identifying sixteen exhibits that "Mr. Hunn relied upon and will likely be asked to testify concerning"); Respondent's Objections to FDIC's Exhibits at 1-2 (not objecting to any exhibits so identified).

[15] *See* 12 C.F.R. § 308.36(d)(1) (stating that "[o]bjections to the admissibility of evidence must be timely made").

[16] *See* FDIC's Response to Respondent's Motion in Limine Regarding Testimony of Patrick Hunn at 3 (noting that "Respondent has not demonstrated that he has any authority to assert a privilege between the Bank and the Bank's counsel"); *CFTC v. Weintraub*, 471 U.S. 343, 348-49 (1985) ("[W]hen control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well.").

Accordingly, Respondent's Motion is DENIED without prejudice to Respondent's ability to raise timely objections on a question-by-question basis at the upcoming hearing. Should any such objection be sustained on privilege grounds, "the examining counsel may make a specific proffer on the record of what he or she expected to prove by the expected testimony of the witness," which proffer will be preserved for eventual review by the FDIC Board of Directors.[17]

SO ORDERED.



Issued: January 9, 2023

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication

[17] 12 C.F.R. § 308.36(d)(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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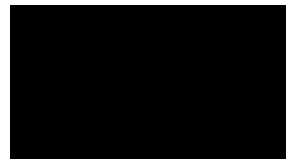

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