FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

In the Matter of: **BRYAN E. DALTON**, an institution-affiliated party of RiverBank Pocahontas, Arkansas (Insured State Nonmember Bank)	Docket Nos.: FDIC-21-0034e FDIC-22-0024k

ORDER NO. 12: DENYING ENFORCEMENT COUNSEL'S MOTION FOR PARTIAL SUMMARY DISPOSITION

The Federal Deposit Insurance Corporation ("FDIC") commenced this action against Bryan E. Dalton ("Respondent") on May 24, 2022, filing a "Notice of Intention to Prohibit from Further Participation, Notice of Assessment of Civil Money Penalty, Findings of Fact and Conclusions of Law, Order to Pay, Notice of Hearing, and Prayer for Relief" ("Notice") and seeking an order of prohibition and the imposition of a $35,000 civil money penalty pursuant to 12 U.S.C. §§ 1818(e) and 1818(i)(2). The Notice alleges that Respondent, in his capacity as loan officer of RiverBank (or "the Bank"), engaged in actionable misconduct, including unsafe or unsound banking practices and the breach of his fiduciary duties to the Bank, in connection with four of the Bank's borrowers ("Borrowers One through Four" or "the Borrowers") whose loans were serviced by Respondent.

Following discovery and in advance of the upcoming hearing, Enforcement Counsel for the FDIC filed a "Motion for and Memorandum in Support of Partial Summary Disposition" ("Motion"), along with accompanying exhibits, on May 5, 2023.[1] On June 2, 2023, Respondent

[1] Enforcement Counsel included its "Statement of Material Facts as to Which There is No Genuine Issue in Dispute" within the Motion in section III. All references to Enforcement Counsel's statement of material facts will be referred to as "EC SMF ¶." All references to Enforcement Counsel's exhibits will be designated as EC-MSD-XX.

filed a "Response to FDIC's Motion for and Memorandum in Support of Partial Summary Disposition" ("Response"), along with accompanying exhibits.[2]

In its Motion, 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 present as to the issue of Respondent's loan relationships with Borrowers One through Four.[3] Respondent contends that there are material facts in dispute regarding whether he engaged in unsafe and unsound practices, breached his fiduciary duties, intended to deceive investigators, and caused the Bank to suffer a loss, all of which preclude the entry of summary disposition. For the reasons set forth below, the undersigned concludes that there remain genuine issues of disputed material fact and therefore denies Enforcement Counsel's Motion.

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 demonstrate 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."[4] 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."[5] The summary disposition standard "is similar to that of the summary judgment standard under Rule 56 of the Federal Rules of Civil Procedure."[6]

[2] Respondent's Exhibit 1 is a Counter-Statement to FDIC's Material Facts as to Which There is No Genuine Issue in Dispute. All references to Respondent's counter-statement will be referred to as "R SMF-OPP ¶." All references to Respondent's remaining exhibits will be designated as R-OPP-XX.

[3] Enforcement Counsel does not seek summary disposition as to any statutory elements underpinning the FDIC's notice of assessment of a civil money penalty. *See* Motion at 5 n.2. This issue may be addressed at the upcoming hearing.

[4] 12 C.F.R. § 308.29(a).

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

[6] *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).

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."[7] 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.[8]

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."[9] 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."[10] 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."[11]

"[I]n granting a motion for summary disposition, a trier of fact is not obliged to credit the non-moving party's factual assertions when they are not supported on the 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."[12] 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.[13]

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[7] *Scott v. Harris*, 550 U.S. 372, 380 (2007).
[8] *Heffernan v. Azar*, 417 F. Supp. 3d 1, 7 (D.D.C. 2019) (quoting *Anderson*, 477 U.S. at 248, 255).
[9] 12 C.F.R. § 308.29(b)(2).
[10] *Id.*
[11] *Id.*
[12] *Blanton*, 2017 WL 4510840, at *6.
[13] *See* 12 C.F.R. § 308.30.

II. Jurisdiction

The Parties agree that the Bank was, at all times pertinent to this proceeding, an insured state nonmember bank, subject to the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. §§ 1811-1831aa, 12 C.F.R. Chapter III, and the laws of the State of Arkansas.[14] There is likewise no dispute that Respondent, as a loan officer of the Bank, is an institution-affiliated party ("IAP") of the Bank within the meaning of 12 U.S.C. § 1818(u).[15] And OFIA ALJs are empowered to hear actions against IAPs of covered institutions brought by the constituent federal banking agencies.[16] The undersigned therefore finds that the FDIC has jurisdiction to bring this enforcement action against Respondent before this Tribunal.[17]

III. Elements of Sections 1818(e)

To merit the entry of a prohibition order against an IAP under 12 U.S.C. § 1818(e), 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 or business institution," or (3) "committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty."[18] 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,"

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[14] Notice ¶¶ 1-2; Answer ¶ 1; EC SMF ¶¶ 1-2; R OPP-SMF ¶¶ 1-2.

[15] Notice ¶¶ 3-4; Answer ¶ 1; EC SMF ¶¶ 3-4; R OPP-SMF ¶¶ 3-4.

[16] *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).

[17] *See* Notice ¶ 5; Answer ¶ 1; EC SMF ¶ 5; R OPP-SMF ¶ 5.

[18] 12 U.S.C. § 1818(e)(1)(A).

that the institution's depositors' interests "have been or could be prejudiced," or that the charged party "has received financial gain or other benefit."[19] 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."[20]

Although the misconduct prong of Section 1818(e) 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 FDI Act or its subsequent amendments. John Horne, Chairman of the Federal Home Loan Bank Board ("FHLBB") during the passage of the Financial Institutions Supervisory Act of 1966, submitted a memorandum to Congress that described such practices as encompassing "any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds."[21] This so-called Horne Standard has long guided federal banking agencies, including the FDIC Board of Directors, in bringing and resolving enforcement actions.[22] It has also been recognized as "the authoritative definition of an unsafe or unsound practice" by federal appellate courts.[23] The undersigned accordingly adopts the Horne Standard when evaluating charges of unsafe or unsound practices.

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[19] *Id.* § 1818(e)(1)(B).

[20] *Id.* § 1818(e)(1)(C).

[21] *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).

[22] *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).

[23] *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 Section 1818(e). 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 prohibition order may be entered (assuming misconduct and culpability can be shown) if the misconduct has resulted in financial gain or other benefit to the IAP, even if it has not caused loss to the institution or prejudiced the interests of the institution's depositors. Each component of the "misconduct" element is thus 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, for the purposes of the instant Motion, the Notice alleges that Respondent engaged in unsafe or unsound banking practices and breached his fiduciary duty to the Bank in connection with the loan relationships he had with Borrowers One through Four;[24] that this misconduct resulted in financial loss to the Bank and/or personal gain by Respondent, thus satisfying Section 1818(e)'s effect element;[25] and that Respondent's actions demonstrated personal dishonesty and willful or continuing disregard for the safety and soundness of the Bank, thus satisfying culpability.[26] As noted, Enforcement Counsel's motion for partial summary disposition concerns only the satisfaction of the necessary elements for a Section 1818(e) prohibition order relating to the allegations regarding the loan relationships with Borrowers One through Four.[27]

[24] *See* Notice ¶¶ 49-50.
[25] *See id.* ¶¶ 51, 52, and 55.
[26] *See id.* ¶¶ 53, 54.
[27] *See* Motion at 5, n. 2.

IV. Factual Summary

The following is drawn from the Parties' pleadings, Enforcement Counsel's statement of material fact and Respondent's opposition thereto, and the exhibits submitted in support thereof. Where the Parties appear to be in some genuine factual dispute, both accounts are noted as well as the evidence that each side has marshaled in support.

As a loan officer at the Bank, Respondent was responsible for the loans of Borrowers One through Four from 2018 to 2019 ("the Relevant Period").[28] According to Enforcement Counsel, part of Respondent's duties as a loan officer was to secure guarantees and conditional commitments from the U.S. Department of Agriculture ("USDA") Farm Service Agency ("FSA") for the loans in question.[29] The FSA guarantees loans to family farmers and ranchers from "USDA-approved" commercial lenders at reasonable terms to buy farmland or finance agricultural production.[30] The FSA charges the lender a fee for the guarantee, and the lender may pass the fee onto the borrower.[31]

Because Respondent only had lending authority up to $10,000, all of the loans at issue needed approval from either the Bank's Board or the Bank Board's Loan Subcommittee.[32] The Bank's lending policy stated that certain loans required collateral as security and that a government guarantee, such as from the FSA, was an acceptable form of collateral to secure the loans.[33]

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[28] *See* Notice ¶¶ 9, 19, 27, 34; Answer ¶¶ 5, 14, 22, 29.

[29] EC SMF ¶¶ 30, 57, 79, 98. Respondent contests these factual allegations to the extent that they suggest that Respondent had *sole* responsibility for the loans to Borrowers One through Four. *See* R SMF-OPP ¶¶ 30, 57, 79, 98.

[30] EC SMF ¶ 6 (citing https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/guaranteed-farm-loans/index) (last accessed July 7, 2023); *see also* R SMF-OPP ¶ 6.

[31] EC SMF ¶ 7 (citing EC-MSD-22 (Baltz Declaration) ¶ 7); *see also* R SMF-OPP ¶ 7.

[32] *See* EC-MSD-5 (Lending Limits).

[33] Motion at 29. *See also* EC-MSD-5 (Lending Limits) at 10.

On or about May 9, 2019, Respondent signed an "Assumed Name Certificate" in Randolph County, Arkansas, for an entity called "FSAEV," which was a sole proprietorship of Respondent.[34] Respondent asserts that FSAEV did consulting work for Bank customers who needed assistance in obtaining loans, including completing financial statements, making cash-flow projections, and obtaining environmental assessments. According to Respondent, those services could not be performed by the Bank because they were outside the scope of the Bank's operation.[35] Respondent further asserts that the Bank's President, Kyle Baltz, knew about FSAEV and even helped Respondent name the business and apply for his "DBA" (doing business as).[36]

Borrower One

Respondent drafted, or directed an assistant to draft, Borrower One's loan memorandum, which stated that a condition of loan approval was that the loan have a 90% FSA guarantee.[37] Loan documentation showed that Borrower One agreed to pay $26,387.50 as that guarantee.[38] An FSA guarantee was never secured on the loan for Borrower One.[39] The FSA has no records pertaining to Borrower One during Respondent's employment at the Bank.[40]

On or about February 28, 2019, Respondent approved Borrower One's Credit Memo, which listed an FSA guarantee fee of $26,387.50.[41] On that same day, Respondent presented a loan application for Borrower One to the Bank's Board of Directors for approval.[42] During the

[34] EC SMF ¶¶ 25-27; R SMF-OPP ¶¶ 25-27.
[35] Response at 13 (citing R-OPP-2 (Dalton Declaration) ¶¶ 42-44).
[36] *Id.* (citing R-OPP-2 (Dalton Declaration) ¶¶ 44-46).
[37] *See* Notice ¶ 10; EC SMF ¶¶ 31-32; R SMF-OPP ¶¶ 31-32. *See also* EC-MSD-3 (Borrower One Loan Docs) at 2.
[38] *See* Notice ¶ 11; EC SMF ¶ 33; R SMF-OPP ¶ 33.
[39] *See* Notice ¶ 17; Answer ¶ 12; *see also* EC SMF ¶ 47.
[40] EC SMF ¶ 46; R SMF-OPP ¶ 46.
[41] EC SMF ¶ 35; R SMF-OPP ¶ 35.
[42] EC SMF ¶ 36; R SMF-OPP ¶ 36; *see also* EC-MSD-7 (Board Minutes 2/28/19) at 6.

Board meeting, Respondent stated that $900,000 of the loan amount to Borrower One would have an FSA guarantee.[43] On that same day, the Bank's Board approved the loan to Borrower One.[44]

According to Enforcement Counsel, Respondent prepared an alleged "FSA Conditional Commitment" for Borrower One, which contained the same FSA account number as another borrower account and a different FSA guarantee percentage than in the loan memorandum (95% versus 90%).[45] Enforcement Counsel asserts that Respondent provided the alleged "FSA Conditional Commitment" for Borrower One to the FSA and to the Bank's investigators "when they asked whether the loan to Borrower [One] had an FSA guarantee."[46] Respondent disputes this and contends that the FSA Conditional Commitment for Borrower One was an incomplete draft that was never submitted to the FSA or given to Bank investigators.[47]

On or about May 15, 2019, the Bank disbursed loan proceeds to Borrower One in connection with a loan totaling $1,100,000.[48] On or about May 17, 2019, Respondent withdrew $10,000 from Borrower One's checking account and had the Bank issue a check payable to FSAEV for $10,000.[49] Respondent endorsed and deposited the $10,000 check to FSAEV at his account at Iberiabank.[50] On or about June 3, 2019, Respondent had the Bank issue a check payable to FSAEV for $14,937.50 from Borrower One's account.[51] Respondent similarly endorsed and deposited the $14,937.50 check to FSAEV at his account at Iberiabank.[52]

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[43] EC SMF ¶ 37; R SMF-OPP ¶ 37; *see also* EC-MSD-7 (Board Minutes 2/28/19) at 6.

[44] EC SMF ¶ 38; R SMF-OPP ¶ 38; *see also* EC-MSD-3 (Borrower One Loan Docs).

[45] EC SMF ¶¶ 42-44; EC-MSD-11 (Conditional Commitment) at 1.

[46] EC SMF ¶ 45.

[47] R SMF-OPP ¶¶ 42-45; *see also* Response at 11 (asserting that "[i]n drafting the Commitments, [Respondent] used a FSA Conditional Commitment for another loan as a template").

[48] EC SMF ¶ 28; R SMF-OPP ¶ 28. *See also* EC-MSD-3 (Borrower One Loan Docs) at 3.

[49] *See* Notice ¶ 12; EC SMF ¶¶ 48, 51; R SMF-OPP ¶¶ 48, 51; *see also* EC-MSD-25 (check).

[50] *See* Notice ¶ 14; Answer ¶ 10; EC SMF ¶ 50; R SMF-OPP ¶ 50; *see also* EC-MSD-4 (Iberia Bank Statements) at 1.

[51] *See* Notice ¶ 15; EC SMF ¶¶ 53-54; R SMF-OPP ¶¶ 53-54.

[52] *See* Notice ¶ 16; Answer ¶ 12; *see also* EC-MSD-4 (Iberia Bank Statements) at 4.

Borrower Two

Respondent drafted, or directed an assistant to draft, Borrower Two's loan memorandum.[53] Loan documentation showed that Borrower Two agreed to pay $26,387.50 as an FSA guarantee.[54] An FSA guarantee was never secured on the loan for Borrower Two.[55] The FSA has no records pertaining to Borrower Two during the Relevant Period.[56]

On or about February 28, 2019, Respondent presented two loan applications for Borrower Two to the Bank's Board for approval.[57] During the Board meeting, Respondent stated that $900,000 of the loan amount to Borrower Two would have an FSA guarantee.[58] According to Enforcement Counsel, the Loan Approval Sheet for the two loans to Borrower Two stated that approval was contingent on both loans having an FSA guarantee, which Respondent disputes.[59] On that same day, the Bank's Board approved the loans to Borrower Two.[60]

According to Enforcement Counsel, Respondent prepared an alleged "FSA Conditional Commitment" for Borrower Two, which contained the same FSA account number as another borrower account and a different FSA guarantee percentage than in the loan memorandum (95% versus 90%).[61] Enforcement Counsel asserts that Respondent provided the alleged "FSA Conditional Commitment" for Borrower Two to the FSA and to the Bank's investigators "when they asked whether the loan to Borrower [Two] had an FSA guarantee."[62] Respondent disputes

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[53] *See* Notice ¶ 20; EC SMF ¶ 31; R SMF-OPP ¶ 31.

[54] *See* Notice ¶ 21; EC SMF ¶ 58; R SMF-OPP ¶ 58; *see also* EC-MSD-28 (Borrower Two Loan Docs) at 3.

[55] *See* Notice ¶ 25; Answer ¶ 20; EC SMF ¶ 69; R SMF-OPP ¶ 69.

[56] EC SMF ¶ 68; R SMF-OPP ¶ 68.

[57] EC SMF ¶ 60; R SMF-OPP ¶ 60; *see also* EC-MSD-7 (Board Minutes 2/28/19) at 6.

[58] EC SMF ¶ 61; R SMF-OPP ¶ 61; *see also* EC-MSD-7 (Board Minutes 2/28/19) at 6.

[59] *See* EC SMF ¶ 63; R SMF-OPP ¶ 63 (disputing EC SMF ¶ 63); *see also* EC-MSD-28 (Borrower Two Loan Docs) at 1.

[60] EC SMF ¶ 62; R SMF-OPP ¶ 62; *see also* EC-MSD-28 (Borrower Two Loan Docs) at 1.

[61] EC SMF ¶¶ 65-66, Motion at 31; *see also* EC-MSD-11 (Conditional Commitment) at 11.

[62] EC SMF ¶ 67.

this and contends that the FSA Conditional Commitment for Borrower Three was an incomplete draft that was never submitted to the FSA or given to Bank investigators.[63]

On or about May 17, 2019, the Bank disbursed loan proceeds to Borrower Two in connection with a loan totaling $1,150,000.[64] On or about May 20, 2019, Respondent had the Bank issue a check payable to FSAEV for $15,792 from Borrower Two's account.[65] Respondent endorsed and deposited the $15,792 check to FSAEV at his account at Iberiabank.[66] On or about June 28, 2019, Respondent had the Bank issue a check payable to FSAEV for $17,948 from Borrower Two's account.[67] Respondent then endorsed and deposited the $17,948 check to FSAEV at his account at Iberiabank.[68]

Borrower Three

Respondent drafted, or directed an assistant to draft, Borrower Three's loan memorandum, which stated that a condition of loan approval was that the loan have a 90% FSA guarantee.[69] Loan documentation showed that Borrower Three agreed to pay $26,158.08 for such a guarantee.[70] An FSA guarantee was never secured on the loan for Borrower Three.[71] The FSA has no records pertaining to Borrower Three during the Relevant Period.[72]

On or about December 12, 2018, Respondent presented a loan application for Borrower Three to the Bank's Board for approval.[73] During the Board meeting, Respondent stated that the

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[63] R SMF-OPP ¶¶ 65-67.
[64] *See* Notice ¶ 18; EC SMF ¶ 55; R SMF-OPP ¶ 55; *see also* EC-MSD-28 (Borrower Two Loan Docs) at 3.
[65] *See* Notice ¶ 22; EC SMF ¶¶ 56, 71-72; R SMF-OPP ¶¶ 56, 71-72.
[66] *See* Notice ¶ 23; Answer ¶ 18; EC SMF ¶ 73; R SMF-OPP ¶ 73; *see also* EC-MSD-4 (Iberia Bank Statements) at 1.
[67] *See* Notice ¶ 24; EC SMF ¶¶ 74-75; R SMF-OPP ¶¶ 74-75.
[68] *See* Notice ¶ 24; EC SMF ¶ 76; R SMF-OPP ¶ 76; *see also* EC-MSD-4 (Iberia Bank Statements) at 4.
[69] *See* Notice ¶ 28; EC SMF ¶¶ 31, 80; R SMF-OPP ¶¶ 31, 80; *see also* EC-MSD-31 (Borrower Three Loan Docs) at 2.
[70] *See* Notice ¶ 29; EC SMF ¶ 81; R SMF-OPP ¶ 81; *see also* EC-MSD-31 (Borrower Three Loan Docs) at 4.
[71] *See* Notice ¶ 32, Answer ¶ 27; EC SMF ¶ 91; R SMF-OPP ¶ 91.
[72] EC SMF ¶ 90; R SMF-OPP ¶ 90.
[73] EC SMF ¶ 82; R SMF-OPP ¶ 82; *see also* EC-MSD-6 (Board Minutes 12/12/18) at 3.

loan to Borrower Three would be subject to either an FSA or Small Business Administration ("SBA") guarantee.[74] On that same day, the Bank's Board approved the loan to Borrower Three.[75]

According to Enforcement Counsel, Respondent prepared an alleged "FSA Conditional Commitment" for Borrower Three, which contained the same FSA account number as another borrower account and a different FSA guarantee percentage than in the loan memorandum (95% versus 90%).[76] Enforcement Counsel asserts that Respondent provided the alleged "FSA Conditional Commitment" for Borrower Three to the FSA and to the Bank's investigators "when they asked whether the loan to Borrower [Three] had an FSA guarantee."[77] Respondent disputes this and contends that the FSA Conditional Commitment for Borrower Three was an incomplete draft that was never submitted to the FSA or given to Bank investigators.[78]

On or about May 20, 2019, the Bank disbursed loan proceeds to Borrower Three in connection with a loan totaling $1,113,390.[79] On or about May 24, 2019, Respondent had the Bank issue a check payable to FSAEV for $16,158 from Borrower Three's account.[80] Respondent endorsed and deposited the $16,158 check to FSAEV at his account at Iberiabank.[81]

Borrower Four

Respondent drafted, or directed an assistant to draft, Borrower Four's loan memorandum.[82] Loan documentation showed that Borrower Four agreed to pay $4,725 as an FSA guarantee.[83] An

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[74] EC SMF ¶ 83; R SMF-OPP ¶ 83; *see also* EC-MSD-6 (Board Minutes 12/12/18) at 3.
[75] EC SMF ¶ 84; R SMF-OPP ¶ 84; *see also* EC-MSD-31 (Borrower Three Loan Docs) at 1.
[76] EC SMF ¶¶ 87-88; Motion at 31; *see also* EC-MSD-11 (Conditional Commitment) at 5.
[77] EC SMF ¶ 89.
[78] R SMF-OPP ¶¶ 87-89.
[79] *See* Notice ¶ 26; EC SMF ¶ 77; R SMF-OPP ¶ 77; *see also* EC-MSD-31 (Borrower Three Loan Docs) at 4.
[80] *See* Notice ¶ 30; EC SMF ¶¶ 93-94; R SMF-OPP ¶¶ 93-94.
[81] *See* Notice ¶ 31; Answer ¶ 26; EC SMF ¶ 95; R SMF-OPP ¶ 95; *see also* EC-MSD-4 (Iberia Bank Statements) at 1.
[82] EC SMF ¶ 31; R SMF-OPP ¶ 31.
[83] *See* Notice ¶ 35; EC SMF ¶ 99; R SMF-OPP ¶ 99.

FSA guarantee was never secured on the loan for Borrower Four.[84] The FSA has no records pertaining to Borrower Four during the Relevant Period.[85]

On or about April 11, 2019, the Bank Board's Loan Subcommittee had a meeting, where Respondent was present.[86] At that meeting, the Loan Subcommittee approved the loan to Borrower Four.[87] Respondent concedes that the minutes of the Loan Subcommittee indicate that this loan was approved "subject to obtaining an FSA 90% guaranty," but contends that the Loan Offering Memorandum itself does not mention this subject.[88]

On or about May 23, 2019, the Bank disbursed loan proceeds to Borrower Four in connection with a loan totaling $350,000.[89] On or about May 28, 2019, Respondent had the Bank issue a check payable to FSAEV for $13,116 from Borrower Four's account.[90] Respondent endorsed and deposited the $13,116 check to FSAEV at his account at Iberiabank.[91]

<u>Termination</u>

In mid-June 2019, the Bank conducted a routine documentation review of new loans which revealed that the loan files for Borrowers One through Four did not contain evidence of FSA guarantees.[92] According to a sworn declaration from President Baltz submitted by Enforcement Counsel, when the Bank asked Respondent to show evidence of securing the FSA guarantees, Respondent provided the Conditional Commitment forms for Borrowers One through Three

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[84] *See* Notice ¶ 38; Answer ¶ 32; EC SMF ¶ 103.

[85] EC SMF ¶ 102; R SMF-OPP ¶ 102.

[86] EC SMF ¶ 101; R SMF-OPP ¶ 101); *see also* EC-MSD-8 (Board Subcommittee Minutes 2/28/19).

[87] EC SMF ¶ 100; EC-MSD-33 (Borrower Four Loan Docs) at 1.

[88] *See* R SMF-OPP ¶ 100 (disputing EC SMF ¶ 100).

[89] *See* Notice ¶ 33; EC SMF ¶ 96; R SMF-OPP ¶ 96; *see also* EC-MSD-33 (Borrower Four Loan Docs) at 4.

[90] *See* Notice ¶ 36; EC SMF ¶¶ 104-105; R SMF-OPP ¶¶ 104-105.

[91] *See* Notice ¶ 37; Answer ¶ 32; EC SMF ¶ 106; R SMF-OPP ¶ 106; *see also* EC-MSD-4 (Iberiabank Statements) at 1.

[92] *See* EC-MSD-22 (Baltz Declaration) ¶ 24.

described above.[93] Respondent disputes this, averring that the Bank did not ask him for "evidence of his attempts to secure FSA guarantees on the Loans," because President Baltz "knew that the loans were not able to be guaranteed by [the] FSA."[94]

The Bank reimbursed Borrowers One through Four a total sum of $87,951.50, which was the amount that the Bank's investigation revealed had been deposited from the Borrowers' accounts into Respondent's FSAEV account.[95] The Bank filed a claim with its insurer for the $87,951.50 in alleged loss related to this reimbursement.[96] The Bank's insurer paid the Bank $62,951.40 due to the Bank's $25,000 policy deductible.[97] Respondent admits each of these facts but asserts that any loss suffered by the Bank was "voluntarily made" and was not attributable to him, given his contentions that President Baltz "knew that the loans in question were not FSA guaranteed" and that Respondent "was instructed to close the loans."[98]

On or about July 19, 2019, Respondent wrote a postdated check for July 22, 2019 from his FSAEV account at Iberiabank in the sum of $87,981.50 payable to the Bank, which had the notation "Restitution" in the memo section of the check.[99] Respondent does not deny that he wrote a check for $87,951.50, but represents that the notation in the memo stating "Restitution" was proposed by Joyce Radcliffe, the Bank's Chief Operations Officer.[100]

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[93] *See id.* ¶¶ 25-26.
[94] R SMF-OPP ¶ 24 (disputing EC SMF ¶ 24).
[95] EC SMF ¶¶ 113, 115; R SMF-OPP ¶ 115.
[96] EC SMF ¶ 118.
[97] *Id*. ¶ 120; *see also* EC-MSD-15 (Insurance check).
[98] *See* R SMF-OPP ¶¶ 115-120.
[99] *See* Notice ¶ 39; EC SMF ¶ 112; *see also* EC-MSD-13 (FSAEV check).
[100] Response at 16 (citing R-OPP-2 (Dalton Declaration) ¶ 53).

The Bank attempted to cash Respondent's check on July 23, 2019, but was notified that the account had insufficient funds, and that the account had been closed.[101] Respondent asserts that he informed President Baltz that he did not have sufficient funds to cover the check.[102]

Respondent's employment with the Bank terminated on August 6, 2019.[103]

V. Analysis

A. Misconduct

Enforcement Counsel argues that the undisputed material facts demonstrate that Respondent, as a Bank loan officer, was responsible for obtaining guarantees from the FSA as a condition of the Bank approving loans to Borrowers One through Four.[104] According to Enforcement Counsel: 1) Respondent personally drafted and signed various documents in the Borrowers' loan files that indicated that the loans would have an FSA guarantee; 2) Respondent presented the loan applications for the Borrowers to the Bank's Board or the Bank Board's Loan Subcommittee for approval; 3) the Bank's Board or the Bank Board's Loan Subcommittee approved these loans based on the representation from Respondent that they included FSA guarantees, and that the Bank would charge these borrowers a guarantee fee; 4) Respondent failed to obtain FSA guarantees, but instead charged the Borrowers consulting fees made payable to FSAEV; and 5) Respondent failed to disclose that the loans did not have FSA guarantees to the Bank Board before the Bank disbursed funds to the Borrowers.[105] In addition, Enforcement Counsel asserts that when Bank investigators asked Respondent to provide evidence that these loans included FSA guarantees, Respondent drafted and provided FSA Conditional Commitment

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[101] *See* Notice ¶¶ 41-42.

[102] Response at 16 (citing R-OPP-2 (Dalton Declaration) ¶¶ 51-52, 54); *compare with* EC-MSD-22 (Baltz Declaration) ¶ 35 (stating that Respondent asked that the Bank wait until July 23, 2019 to cash the check).

[103] See EC-MSD-26 (Termination letter).

[104] Motion at 28.

[105] *Id.*

forms for Borrowers One through Three that contained incorrect information, including bearing the FSA account number for another Bank borrower account.[106]

Enforcement Counsel asserts that Respondent's failure to obtain FSA guarantees on the loans to Borrowers One through Four, as well as his failure to notify the Bank Board and the Bank Board's Loan Subcommittee that the loans to Borrowers One through Four did not have FSA guarantees before the Bank disbursed the loan proceeds, breached his fiduciary duties and was an unsafe or unsound practice.[107] Furthermore, Enforcement Counsel asserts that Respondent's attempt to deceive Bank investigators with alleged sham FSA Conditional Commitment forms was a form of additional misconduct that was an attempt to mask his other misconduct.[108]

In response, Respondent asserts that 1) the Bank—and specifically President Baltz—knew that loans in question were not FSA guaranteed; 2) the FSA guarantees for Borrowers One through Three became unavailable after loan approval because construction work had begun on the properties before the guarantees were obtained; 3) there was not enough time to obtain an FSA guarantee for Borrower Four because the borrower needed the funds quickly; and 4) he performed consulting work for each borrower, therefore, the funds payable to FSAEV were proper.[109] In addition, Respondent asserts that he did not deceive investigators with the Conditional Commitment forms, as these were merely drafts that were never submitted to the FSA or provided to anyone at the Bank.[110]

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[106] *Id.*

[107] *Id.* at 30, 32-33.

[108] *Id.* at 31.

[109] Response at 6.

[110] *Id.*; *see id.* at 12 (asserting that "[t]he Commitments were not provided to anyone, including RiverBank personnel or investigators, as evidence of obtaining FSA Guarantees for the three [] loans").

Respondent does not dispute that the loans to Borrowers One through Three were supposed to be FSA guaranteed.[111] Rather, Respondent asserts that various circumstances prevented the Bank from being able to obtain those guarantees. For Borrower One, for example, Respondent asserts that the Bank found out that Borrower One had completed dirt work before an Environmental Assessment was completed; therefore, an application for an FSA guarantee could not be made.[112] Respondent further asserts that President Baltz instructed Respondent to close the loan to Borrower One without the FSA guarantee.[113]

Similarly, as to Borrower Two, Respondent asserts that before the completion of the Environmental Assessment on the real property, President Baltz drove by the property and discovered that construction had already begun; therefore, an application for an FSA guarantee could not be made.[114] Respondent asserts that President Baltz instructed him to close the loan to Borrower Two without the FSA guarantee.[115]

As to Borrower Three, Respondent asserts that before the completion of the Environmental Assessment on the real property, he was contacted by a contractor asking about payment for dirt work—and because dirt work was performed prior to the Environmental Assessment was completed, an application for an FSA guarantee could not be made.[116] Just as with Borrowers One and Two, Respondent asserts that President Baltz instructed him to close the loan to Borrower Three without the FSA guarantee.[117]

[111] *Id*. at 7.
[112] *Id*. at 7-8 (citing R-OPP-2 (Dalton Declaration) ¶¶ 15-16).
[113] *Id.* at 8 (citing R-OPP-2 (Dalton Declaration) ¶ 17).
[114] *Id.* (citing R-OPP-2 (Dalton Declaration) ¶¶ 22-23).
[115] *Id.* (citing R-OPP-2 (Dalton Declaration) ¶ 24).
[116] *Id.* at 9 (citing R-OPP-2 (Dalton Declaration) ¶¶ 29, 31).
[117] *Id.* (citing R-OPP-2 (Dalton Declaration) ¶¶ 30, 32).

With regard to the alleged FSA Conditional Commitment forms for Borrowers One through Three, Respondent does not dispute that he made such drafts by using the form from another borrower as a template.[118] Respondent simply asserts that the incorrect information would have been ultimately corrected had the forms been sent to the FSA.[119] Furthermore, Respondent asserts that it was clear that the forms were not signed by the FSA and therefore does not support Enforcement Counsel's allegations of fraud.[120]

As to Borrower Four, Respondent asserts that while the Board mentioned obtaining a FSA guarantee, the "Loan Offering Memorandum" did not state that a FSA guarantee was a condition of approval.[121] Respondent further asserts that President Baltz stated that there was no time to obtain a FSA guarantee, as funds were needed immediately because it was planting season.[122]

In sum, Respondent asserts that the circumstances surrounding the loans in question changed after the loans were approved, that he informed President Baltz of these changes, and that President Baltz told Respondent to proceed with closing the loans, thereby relieving Respondent of the need to obtain FSA guarantees.[123]

The undersigned finds that there is little dispute regarding the documentary evidence presented thus far, as summarized above. The majority of Respondent's arguments in opposition to Enforcement Counsel are based on his declaration, which recounts purported conversations with President Baltz. President Baltz also submitted a declaration; however, his declaration does not address all of the statements in Respondent's declaration.[124] There are also certain material factual

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[118] *Id.* at 11 (citing R-OPP-2 (Dalton Declaration) ¶¶ 58-59).
[119] *Id.* at 11-12 (citing R-OPP-2 (Dalton Declaration) ¶¶ 61-63).
[120] *Id.* at 12.
[121] *Id.* at 9 (citing R-OPP-2 (Dalton Declaration) ¶ 36); *see also* EC-MSD-33 (Borrower Four Loan Docs) at 2.
[122] *Id.* (citing R-OPP-2 (Dalton Declaration) ¶ 37).
[123] *Id.* at 10.
[124] *See generally* EC-MSD-22 (Baltz Declaration).

issues—for example, whether Respondent ever provided the Conditional Commitment forms to President Baltz or other Bank personnel as ostensible evidence of his efforts to secure FSA guarantees on the Borrowers' loans—on which the Parties' accounts fundamentally differ, and which must be resolved at hearing.[125] Therefore, the undersigned finds that testimony from President Baltz and Respondent will be essential to the issues in dispute.

In addition, it would be helpful for the Parties to adduce testimonial evidence regarding the details of the Bank's loan policy if there were a change in circumstances after a loan is initially approved but before it is closed and funded—specifically, whether and to what extent those changes would need to be documented, and whether the loan in question would need to be reapproved. There is also some question as to what the service agreements between FSAEV and Borrowers One through Four covered, along with the circumstances regarding the post-dated payment acknowledgments, which is discussed in the next section; therefore, testimony from any and all of the Borrowers will also be essential to the issues in dispute.

Accordingly, based on a review of the evidence in the record at this time, and construing all evidence in the light most favorable to Respondent as the non-moving party, the undersigned finds that genuine issues of material fact remain in dispute to the extent outlined above. Testimony from witnesses will be essential in determining whether Enforcement Counsel has met its burden in showing that Respondent's actions constitute misconduct.

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[125] *Compare*, *e.g.*, EC-MSD-22 (Baltz Declaration) ¶ 26 ("Dalton gave me three FSA-guaranteed 'conditional commitment' forms purportedly concerning Borrowers 1, 2, and 3, as evidence of his attempt to secure FSA guarantees on their Loans.") *with* R-OPP-2 (Dalton Declaration) ¶ 63 ("The three (3) draft Conditional Commitments were not provided to anyone, including bank personnel or investigators, as evidence of obtaining FSA Guarantees for the three (3) loans.").

B. Effect

Borrower One signed a contract with FSAEV on February 26, 2019[126] and paid a total of $24,937.50 to FSAEV out of their loan proceeds over two separate occasions ($10,000 on May 17, 2019 and $14,937.50 on June 3, 2019).[127] Borrower Two signed a contract with FSAEV on February 26, 2019[128] and paid a total of $33,740 to FSAEV out of their loan proceeds over two separate occasions ($15,792 on May 20, 2019 and $17,948 on June 28, 2019).[129] Borrower Three signed a contract with FSAEV on December 3, 2018[130] and paid a total of $16,158 to FSAEV on May 24, 2019.[131] And Borrower Four signed a contract with FSAEV on April 15, 2019[132] and paid a total of $13,116 to FSAEV on May 28, 2019.[133] The total payments made to FSAEV from Borrowers One through Four was $87,951.50.[134] Borrowers One through Four all signed approval of payments to FSAEV on July 19, 2019, which post-dated all of the payment dates.[135]

In contrast to the amounts that the Borrowers paid to FSAEV, the agreed upon amounts that the Borrowers were to be charged for the FSA guarantee totaled $83,658.08 (comprising $26,387.50 for Borrower One, $26,387.50 for Borrower Two, $26,158.08 for Borrower Three, and $4,725 for Borrower Four).[136] According to Enforcement Counsel, the actual bank loss attributable to Respondent is the total of the lesser of the FSAEV payments or the agreed upon FSA fee, which

[126] *See* R-OPP-5 (FSAEV Contract Borrower One) at 5-6.

[127] *See* Notice ¶¶ 12, 15; EC SMF ¶¶ 48, 51, 53-54; R SMF-OPP ¶¶ 48, 51, 53-54; *see also* EC-MSD-25 (check).

[128] *See* R-OPP-6 (FSAEV Contract Borrower Two) at 5-6.

[129] *See* Notice ¶¶ 22, 24; EC SMF ¶¶ 56, 71-72, 74-75; R SMF-OPP ¶¶ 56, 71-72, 74-75.

[130] *See* R-OPP-7 (FSAEV Contract Borrower Three) at 5-6.

[131] *See* Notice ¶ 30; EC SMF ¶¶ 93-94; R SMF-OPP ¶¶ 93-94.

[132] *See* R-OPP-8 (FSAEV Contract Borrower Four) at 5-6.

[133] *See* Notice ¶ 36; EC SMF ¶¶ 104-105; R SMF-OPP ¶¶ 104-105.

[134] Motion at 34 (*see* Table 1).

[135] *See* R-OPP-9 (FSAEV Payment Acknowledgement Borrower One), R-OPP-10 (FSAEV Payment Acknowledgement Borrower Two), R-OPP-11 (FSAEV Payment Acknowledgement Borrower Three), R-OPP-12 (FSAEV Payment Acknowledgement Borrower Four).

[136] Motion at 34 (*see* Table 1).

totals $72,208.[137] It is therefore Enforcement Counsel's position that "[t]he Bank suffered $72,208 in loss from Respondent's misconduct."[138] Furthermore, Enforcement Counsel asserts that the fact that the Bank recovered all of the amounts reimbursed to Borrowers One through Four from its insurer, less its $25,000 deductible, does not alter the actual loss suffered by the Bank.[139]

Respondent does not dispute that he ran a business known as FSAEV. As noted above, Respondent asserts that he did consulting work for Borrowers One through Four, as evidenced by the FSAEV contracts with Borrowers One through Four, and that payments were made for services rendered.[140] Respondent acknowledges that approval for the various payments was dated after the payments were made, but argues that such approvals are proper ratifications of the payments.[141] According to Respondent, the Bank's decision to repay Borrowers One through Four for the fees paid to FSAEV was voluntary and does not constitute a loss that is attributable to Respondent.[142]

As noted above, there is some question as to what the service agreements between FSAEV and Borrowers One through Four covered, along with the circumstances regarding the post-dated payment acknowledgments; therefore, testimony from any and all of the Borrowers will be essential to the issues in dispute.

Accordingly, based on a review of the evidence in the record at this time, and construing all evidence in the light most favorable to the Respondent as the non-moving party, the undersigned finds that genuine issues of material fact remain in dispute with respect to the issue of effect,

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[137] *Id*. at 34.

[138] *Id*.

[139] *Id*. (*see* n.154).

[140] Response at 13-15 (citing R-OPP-5 (FSAEV Contract Borrower One), R-OPP-6 (FSAEV Contract Borrower Two), R-OPP-7 (FSAEV Contract Borrower Three), R-OPP-8 (FSAEV Contract Borrower Four)).

[141] *Id*. at 15; *see also* R-OPP-9 (Payment Acknowledgement Borrower One); R-OPP-10 (Payment Acknowledgement Borrower Two); R-OPP-11 (Payment Acknowledgement Borrower Three); R-OPP-12 (Payment Acknowledgement Borrower Four).

[142] Response at 17.

including the extent to which the Bank's reimbursement of the Borrowers' FSAEV fees was voluntary, as Respondent claims. Testimony from witnesses will be essential in determining whether Enforcement Counsel has met its burden showing that Respondent's actions caused the Bank actual loss.

C. **Culpability**

Enforcement Counsel argues that Respondent's failure to obtain FSA guarantees on the loans to Borrowers One through Four, and to notify the Bank Board and the Board's Loan Subcommittee that the loans to Borrowers One through Four did not have FSA guarantees before the Bank disbursed the loan proceeds, demonstrated a willful and continuing disregard for the Bank's safety and soundness.[143] In addition, Enforcement Counsel asserts that Respondent's failure to notify the Bank Board and the Board's Loan Subcommittee that the loans to Borrowers One through Four did not have FSA guarantees before the Bank disbursed the loan proceeds, as well as his alleged attempt to deceive Bank investigators with FSA Conditional Commitment forms, demonstrated personal dishonesty.[144] Enforcement Counsel also asserts that Respondent's check with the notation "restitution" is further evidence of his culpability.[145]

Respondent does not deny that he wrote a check for $87,951.50, but asserts that he informed President Baltz that he did not have sufficient funds to cover the check.[146] As for the notation of "restitution" in the memo line of the check, Respondent asserts that Joyce Radcliffe, the Bank's Chief Operations Officer, suggested that he write it in.[147]

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[143] Motion at 34.
[144] *Id.* at 34-35.
[145] *Id.* at 36.
[146] Response at 16 (citing R-OPP-2 (Dalton Declaration) ¶¶ 51-52, 54).
[147] *Id.* (citing R-OPP-2 (Dalton Declaration) ¶ 53).

It is typically, although not exclusively, appropriate to resolve questions of culpability at the hearing stage rather than on summary disposition.[148] Based on a review of the evidence in the record at this time, and construing all evidence in the light most favorable to the Respondent as the non-moving party, the undersigned finds that genuine issues of material fact remain in dispute on the issue of culpability. Testimony from witnesses will be essential in determining whether Enforcement Counsel has met its burden showing that Respondent actions caused willful and continuing disregard for the Bank's safety and soundness and/or demonstrated personal dishonesty.

VI. <u>Conclusion</u>

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. The Parties will have an opportunity to present evidence and arguments at the upcoming hearing scheduled for September 26-28, 2023 in Little Rock, Arkansas.

SO ORDERED.

Issued: July 11, 2023

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication

[148] *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"); *but see In the Matter of Carl V. Thomas et al.*, Nos. 99-027-B-I, -CMP-I, & E-I, 2005 WL 1520020, at *7 (June 7, 2005) (FRB final decision) (finding Section 1818(e) culpability elements satisfied on summary disposition); *In the Matter of Charles F. Watts*, Nos. 98-046e & -044k, 2002 WL 31259465, at *6 (Aug. 6, 2002) (FDIC final decision) (same).

CERTIFICATE OF SERVICE

On July 11, 2023, I served a copy of the foregoing **Order** upon the following persons via email:

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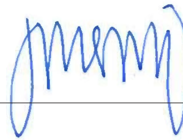

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