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

RECOMMENDED DECISION

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication
February 22, 2024

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TABLE OF CONTENTS

RECOMMENDED DECISION

I. Overview

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") with the Office of Financial Institution Adjudication ("OFIA"), and seeking an order of prohibition and the imposition of a $35,000 second-tier civil money penalty pursuant to 12 U.S.C. §§ 1818(e) and 1818(i)(2). The Notice alleges that Respondent, in his capacity as a 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.

On July 11, 2023, following briefing by Respondent and Enforcement Counsel for the FDIC ("Enforcement Counsel") (collectively "the Parties"), the undersigned issued "Order No. 12: Denying Enforcement Counsel's Motion for Partial Summary Disposition." Order No. 12 identified a number of disputed questions of material fact as to the misconduct, effect, and culpability elements of Sections 1818(e) and 1818(i) to be resolved in a hearing before this Tribunal in its fact-finding capacity.

A two-day hearing was held in Little Rock, Arkansas from September 26-27, 2023 to resolve the questions of material fact that remained in genuine dispute and to address the disposition of all other issues. During the course of the hearing, this Tribunal heard testimony from ten fact witnesses, including Respondent, and one hybrid fact-expert witness. A total of 24 exhibits were introduced and admitted into evidence in connection with witness testimony, along with 61 additional exhibits that were deemed non-controversial and admitted without a sponsoring witness.

Specifically, the 85 exhibits admitted into evidence include 4 joint exhibits (JX-1 through JX-4), 65 Enforcement Counsel exhibits (EX-1 through EX-22 and EX-24 through EX-66, including confidential exhibits EX-32C, EX-43C, EX-44C, EX-61C, EX-62C, and EX-63C) and 16 Respondent exhibits (RX-1 through RX 16, including confidential exhibit RX-16C). In addition, the Parties submitted joint stipulations on August 4, 2023, subsequently revised on December 8, 2023, in connection with their prehearing statements.[1]

At the hearing, the Parties agreed to the post-hearing briefing schedule, which was adopted by the undersigned in Order No. 14. While Enforcement Counsel filed its post-hearing brief ("EIB") and proposed findings of fact and conclusions of law by the December 8, 2023 deadline, Respondent failed to file anything at all. The FDIC's Rules of Practice and Procedure state that "[a]ny party who fails to file timely with the administrative law judge any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion."[2] Therefore, Respondent has now forfeited any ability to respond to Enforcement Counsel's post-hearing briefing (and did not file a response to that briefing in any event).

Now, on the strength of the full record of this case, including the weight of the evidence, established or admitted facts, inherent probabilities, the undersigned's credibility determinations based on the testimony of witnesses, and reasonable inferences drawn from the record as a whole, and after considering Enforcement Counsel's post-hearing briefing and associated submissions

[1] The revised joint stipulation will be referred to as "Stipulation ¶ __."

[2] 12 C.F.R. § 308.37; *see also* Order No. 3: Issuance of Ground Rules (July 18, 2022) ("The failure to file a brief may be construed as a waiver of all arguments concerning the issues presented. Briefs shall address each of the contested issues identified. Any issue not specifically addressed on brief will be considered abandoned by that party for decisional purposes.").

containing Enforcement Counsel's proposed findings, conclusions, and additional exhibits,[3] the undersigned makes the following findings of fact, conclusions of law, and recommended orders.[4]

The undersigned finds that Respondent engaged in unsafe and unsound practices, breached his fiduciary duties, received financial gain, caused the Bank to suffer a loss in connection with his loan relationships with Borrowers One through Four, and showed personal dishonesty by intending to deceive the Bank. Accordingly, the undersigned finds that the misconduct, effect, and culpability elements of Sections 1818(e) and 1818(i) have each been satisfied and recommends that Respondent be subject to an order of prohibition and be assessed a civil money penalty in the amount of $35,000.

II. Jurisdiction

As already set forth in Order No. 12, 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.[5] 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).[6]

[3] In conjunction with its post-hearing brief, Enforcement Counsel also submitted five additional exhibits as follows:

Attachment A	State of Arkansas, Circuit Court, Criminal Division, Cover Sheet regarding Defendant Bryan E. Dalton, Case No. 61CR2021-116
Attachment B	State of Arkansas, Circuit Court, Criminal Division, Guilty Plea Statement regarding Defendant Bryan E. Dalton, Case No. 61CR2021-116
Attachment C	State of Arkansas, Circuit Court, Criminal Division, Sentencing Order regarding Defendant Bryan E. Dalton, Case No. 61CR2021-116
Attachment D	Transcript for Case No. CR-2021-116 and Case No. CR-2022-103 on October 2, 2023
Attachment E	Reporter's Certification for Transcript for Case No. CR-2021-116 and Case No. CR-2022-103 on October 2, 2023

Enforcement Counsel did not formally move for the admission of these documents; however, as they are state court documents, the undersigned finds they are non-controversial documents and should be considered by this Tribunal, as well as by the FDIC Board upon its review of this Recommended Decision as proffered exhibits.

[4] Although no reply briefs were filed by the date set forth in the procedural schedule, *see* Order No. 5: Regarding Scheduling Conference and Setting Procedural Schedule (August 11, 2022), the due date for a recommended decision is forty-five days after the expiration of the time allowed for filing reply briefs. *See* 12 C.F.R. § 308.38.

[5] *See* Order No. 12 at 4; *see also* Notice ¶¶ 1-2; Answer ¶ 1; Stipulation ¶¶ 1-2.

[6] *See* Order No. 12 at 4; *see also* Notice ¶¶ 3-4; Answer ¶ 1; Stipulation ¶¶ 3-4.

And OFIA administrative law judges ("ALJs") are empowered to hear actions against IAPs of covered institutions brought by the constituent federal banking agencies.[7] The undersigned therefore finds that the FDIC has jurisdiction to bring this enforcement action against Respondent before this Tribunal.[8]

III. Applicable Standard

The burden of proof in an administrative proceeding, unless otherwise provided by statute, is on the administrative agency to establish its charges by a preponderance of the evidence.[9] Under the preponderance-of-the-evidence standard, the party with the burden of proof must adduce evidence making it more likely than not that the facts it seeks to prove are true.[10] Here, the FDIC has the burden to prove that the statutory elements for the entry of a prohibition order and the assessment of first- and second-tier civil money penalties have been satisfied. This Tribunal is then tasked with making "a comparative judgment" to determine whether the agency has presented "the greater weight of the evidence" as to the satisfaction of the statutory elements.[11]

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

To merit the entry of a prohibition order against an IAP under 12 U.S.C. § 1818(e), an appropriate federal banking 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

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[7] *See* 12 U.S.C. §§ 1813(q)(2)(A) (providing that the FDIC is an "appropriate federal banking agency" with respect to insured state nonmember banks), 1818(e)(4) (providing for administrative hearings to resolve federal banking agency notices of intention to prohibit IAPs from participation in the affairs of insured depository institutions); 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 (empowering OFIA ALJs to conduct administrative proceedings in matters brought by the FDIC).

[8] *See* Order No. 12 at 4; *see also* Notice ¶ 5; Answer ¶ 1; Stipulation ¶ 5.

[9] *See* 5 U.S.C. § 556(d); *Steadman v. SEC*, 450 U.S. 91, 102 (1981).

[10] *See In the Matter of Michael Sapp*, Nos. 13-477e & 13-478k, 2019 WL 5823871, at *8, 14 (Sept. 17, 2019) (FDIC final decision) (applying preponderance standard in FDIC enforcement action); *Concrete Pipe & Prods. of Calif. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 622 (1993) ("The burden of showing something by a preponderance of the evidence . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.") (internal quotation marks and citation omitted).

[11] *Almerfedi v. Obama*, 654 F.3d 1, 5 (D.C. Cir. 2011) (internal quotation marks and citations omitted).

IAP has (1) "directly or indirectly violated any law or regulation [or] any cease-and-desist order which has become final," (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."[12] The effect element may be satisfied 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."[13] And the culpability element may be satisfied when the alleged misconduct either "involves personal dishonesty" or "demonstrates willful or continuing disregard by [an IAP] for the safety or soundness of such insured depository institution."[14]

The imposition of a second-tier civil money penalty under 12 U.S.C. § 1818(i) also requires the satisfaction of multiple elements.[15] First, the agency must show misconduct, which can take the form of a violation of "any law or regulation" or final cease-and-desist order,[16] 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.[17] 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"): (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

[12] 12 U.S.C. § 1818(e)(1)(A).
[13] *Id.* § 1818(e)(1)(B).
[14] *Id.* § 1818(e)(1)(C).
[15] The assessment of a first-tier civil money penalty, by contrast, requires satisfaction of the misconduct element described here, but not the corresponding effect element. *See id.* § 1818(i)(2)(A).
[16] The misconduct elements of both Sections 1818(e) and 1818(i) can also be satisfied by the violation of a condition imposed in writing by a federal banking agency or 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 such violations in this case.
[17] *Id.* § 1818(i)(2)(B)(i).

depository institution"; or (3) that it "results in pecuniary gain or other benefit to such party."[18] 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," "the gravity of the violation," and "such other matters as justice may require."[19]

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 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."[20] This so-called Horne Standard has long guided federal banking agencies, including the FDIC, in bringing and resolving enforcement actions.[21] It has also been recognized as "the authoritative definition of an unsafe or

[18] *Id.* § 1818(i)(2)(B)(ii). *See In the Matter of John Richard Lamm*, Nos. 12-052e, 12-053k, & 15-274b, 2018 WL 2297269, at *4 (Mar. 20, 2018) (FDIC final decision) (referring to this as the statute's "effects" prong); *accord In the Matter of Douglas V. Conover*, Nos. 13-214e & -217k, 2016 WL 10822038, at *27 (Dec. 14, 2016) (FDIC final decision).

[19] 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.*, *In the Matter of William R. Blanton*, No. AA-EC-2015-24, 2017 WL 4510840, at *27 (July 10, 2017) (OCC final decision), *aff'd on other grounds sub nom. Blanton v. OCC*, 909 F.3d 1161 (D.C. Cir. 2018).

[20] *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).

[21] *See*, *e.g.*, *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); *In the Matter of Patrick Adams*, No. AA-EC-11-50, 2014 WL 8735096, at **8-24 (Sept. 30, 2014) (OCC final decision) (discussing Horne Standard in detail).

unsound practice" by federal appellate courts.[22] The undersigned accordingly adopts the Horne Standard when evaluating charges of unsafe or unsound practices under the relevant statutes.

The banking agencies have repeatedly and expressly declined to impose a requirement that risky, imprudent conduct must directly affect an institution's financial soundness or stability in order to be considered "unsafe or unsound," adhering instead to a plain reading of the Horne Standard as articulated above. In its *Smith & Kiolbasa* decision in March 2021, for example, the Board of Governors of the Federal Reserve System ("FRB"), one of OFIA's constituent agencies, observed that it "has found [actionably imprudent] practices unsafe or unsound if they could be expected to create a risk of harm or damage to a bank, without necessarily attempting to measure their impact on the bank's overall financial stability."[23] The FRB further explained that "[a] construction of 'unsafe or unsound' conduct that focuses on the nature of the act rather than any 'direct effect' of such act on the institution's financial stability is [more] consistent with the structure of [S]ection 1818."[24] The FDIC and the Office of the Comptroller of the Currency ("OCC") have held similarly.[25] The undersigned will therefore apply the Horne Standard, unadorned by any further requirement.

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

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[22] *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).

[23] *In the Matter of Frank E. Smith and Mark A. Kiolbasa*, No. 18-036-E-I, 2021 WL 1590337, at *21 (Mar. 24, 2021) (FRB final decision), *aff'd on other grounds sub nom. Smith v. Bd. of Gov. of the Fed. Res. Sys.*, 73 F.4th 815 (10th Cir. 2023).

[24] *Id.* at *22; *accord Patrick Adams*, 2014 WL 8735096, at *16.

[25] *See*, *e.g.*, *Patrick Adams*, 2014 WL 8735096, at **3-4 (rejecting an unsafe or unsound practices standard that "requires that a practice produce specific effects that threaten an institution's financial stability"); *In the Matter of Marine Bank & Trust Co.*, No. 10-825b, 2013 WL 2456822, at *4-5 (Mar. 19, 2013) (FDIC final decision) (declining to apply more restrictive standard).

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 prove only one component of each.

V. Findings of Fact

These findings are drawn as appropriate from Enforcement Counsel's pleadings, from the Parties' stipulations, from the undisputed material facts detailed in Order No. 12, from hearing testimony ("Tr.") and supporting exhibits admitted therewith, and from the proposed findings of fact submitted by Enforcement Counsel in connection with its post-hearing briefing,[26] along with the additional attachments to Enforcement Counsel's post-hearing brief.

Enforcement Counsel asserts that this Tribunal should assign no credibility to Respondent or to any of the supposed service agreements and payment acknowledgments to which he testified at the hearing in this matter, as his guilty plea in state court immediately subsequent to the hearing directly contradicts his hearing testimony.[27] The undersigned agrees with Enforcement Counsel and finds that Respondent's hearing testimony was largely not credible in substance and therefore accords it little evidentiary weight. At the hearing, Respondent testified in a manner that was inconsistent with record evidence and inconsistent with the testimony from other Bank employees, in addition to contradicting his subsequent guilty plea "to four felony counts of theft of property that were based on the same underlying misconduct as this enforcement proceeding."[28]

[26] Unless expressly stated otherwise, the undersigned adopts Enforcement Counsel's proposed findings of fact, as they went unchallenged by Respondent.
[27] *See* EIB 13, 17.
[28] *Id*. at 8; *see* Attachment B to Enforcement Counsel's Post-Hearing Brief (State of Arkansas, Circuit Court, Criminal Division, Guilty Plea Statement regarding Defendant Bryan E. Dalton, Case No. 61CR2021-116).

Background

Respondent served as a loan officer at the Bank and was subject to the Bank's "Code of Ethics Policy," which forbade employees from, among other things, having any conflicts of interest, or even the appearance of conflicts of interests.[29] 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").[30] 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.[31] The FSA guarantees loans to family farmers and ranchers from "USDA-approved" commercial lenders at reasonable terms to buy farmland or finance agricultural production.[32] The FSA charges the lender a fee for the guarantee, and the lender may pass the fee onto the borrower.[33]

Respondent only had lending authority up to $10,000; therefore, all of the loans at issue needed approval from either the Bank's Board of Directors ("Board") or the Bank Board's Loan Subcommittee.[34] 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.[35] Once a loan was approved, the Bank required "material" changes—such as a

[29] EIB 18. *See* EX-41 (Code of Ethics Policy) at 3.
[30] *See* Stipulation ¶ 3; *see also* Notice ¶¶ 9, 19, 27, 34; Answer ¶¶ 5, 14, 22, 29.
[31] At the summary disposition stage, it was noted that Respondent contested these factual allegations to the extent they suggested that Respondent had sole responsibility for the loans to Borrowers One through Four. *See* Order No. 12 at 7. The evidence shows that, regardless of whether Respondent had "sole" responsibility for the loans in question, Respondent's duties as the loan officer assigned to Borrowers One through Four included securing the guarantees and conditional commitments from the USDA FSA. *See* Tr. 202-03 (Jumper 9/26/23). *See also* Tr. 41 (Radcliff 9/26/23) (testifying that Respondent, as the loan officer in charge of the loans for Borrowers One through Four, was responsible for ensuring that all the conditions from the Board's approval or the Board's Loan Subcommittee had been fulfilled).
[32] Stipulation ¶ 6.
[33] *Id.* ¶ 7.
[34] *Id.* ¶ 13; *see also* EX-5 (Designation of Loan Authority); Tr. 33 (Radcliff 9/26/23). The Bank's Loan Subcommittee included President Baltz and two other directors. Tr. 154 (K. Baltz 9/26/23).
[35] Stipulation ¶¶ 14-15.

waiver of an FSA guarantee—to go back to the Board or Loan Subcommittee for reapproval, which would be reflected either in the Board's minutes or in emails.[36]

If the Board or Loan Subcommittee approved a loan that was conditioned upon obtaining an FSA guarantee, the loan officer was responsible for seeking a conditional commitment from the FSA.[37] If the FSA was willing to provide such a conditional guarantee, it would send a letter to the lender and a conditional-commitment form.[38] The conditional-commitment form contained a list of requirements for the FSA to issue the guarantee.[39] The FSA assigns unique account numbers to borrowers who seek FSA guarantees upon submission of their loans to the FSA, which only occurs if the loans are submitted to the FSA by the loan officer.[40]

At the time a loan closes, the loan officer fills out a disbursement request and authorization form ("DRA form") using the Bank's software, which is a request approved by the borrower to the Bank that includes the charges that the borrower is expected to pay, including the FSA guarantee fee.[41] After the loan closes, the loan officer will print out tickets from the Bank software, upload them into the Bank's computer system, and the loan is then considered "active."[42]

FSAEV

On May 9, 2019, Respondent signed and filed an "Assumed Name Certificate" in Randolph County, Arkansas, for an entity called "FSAEV," which was a sole proprietorship of Respondent.[43] The Assumed Name Certificate stated that FSAEV was a consulting entity.[44] While Respondent previously alleged that the Bank's President, Kyle Baltz, knew about FSAEV and even helped

[36] Tr. 155-57 (K. Baltz 9/26/23); *see also* Tr. 38-39 (Radcliff 9/26/23), Tr. 201-02 (Jumper 9/26/23).
[37] Tr. 202 (Jumper 9/26/23).
[38] Tr. 202-03 (Jumper 9/26/23); *see also* EX-12 (Conditional-Commitment for H.M. & A.M.); EX-45 (FSA letter to H.M. & A.M.).
[39] Stipulation ¶ 10.
[40] *Id.* ¶ 17.
[41] *Id.* ¶ 8; *see also* Tr. 203-04, 208-09 (Jumper, 9/26/23); EX-3 (Borrower One documents).
[42] Tr. 210 (Jumper 9/26/23).
[43] Stipulation ¶¶ 21, 23; *see also* JX-1 (FSAEV assumed name certificate).
[44] Stipulation ¶ 22.

Respondent name the business and apply for his "DBA" (doing business as),[45] there was contrary testimony from President Baltz at the hearing, who denied showing Respondent how to prepare an assumed name certificate.[46] The undersigned finds President Baltz's testimony to be credible and persuasive and gives Respondent's testimony little weight.

At the hearing, Respondent testified that FSAEV did consulting work for Bank customers who needed assistance in obtaining loans, including "preparing financial statements, cash flow statements, [and] environmental [studies]."[47] Respondent alleged that those services could not be performed by the Bank because of "liability" issues.[48] Testimony from other Bank employees, however, contradicts Respondent. For example, President Baltz testified that in order to get an FSA guarantee for a loan, things like cash flow projections and a Form 851 need to be prepared. According to President Baltz, Form 851 requires someone—in this case, the Bank's loan officer—to go out to the property and see whether there are any environmental issues with it.[49] The Bank's Chief Operating Officer ("COO"), Joyce Radcliff, also testified that the major responsibilities of a loan officer included preparing the loan offering memorandum and all the legwork, such as preparing cash flows, getting appraisals and making sure "environmentals" were in place, if needed.[50] The undersigned finds the testimony from the Bank employees to be more persuasive than that of Respondent; accordingly, Respondent's testimony is given little weight.

During cross-examination, Respondent testified that although he ostensibly provided consulting services, he had no documentary evidence of cash flow projections, current financial

[45] Order No. 12 at 8.
[46] Tr. 175-76, 192 (K. Baltz 9/26/23).
[47] Tr. 359 (Dalton 9/27/23).
[48] Tr. 359 (Dalton 9/27/23).
[49] Tr. 181-84 (K. Baltz 9/26/23).
[50] Tr. 30, 84-85 (Radcliff 9/26/23) ("[W]e [the Bank] help you with your cash flows and things like that. You don't have to pay extra for that. It's just part of the preparing the loan offering memorandum. And most of the customers already had it.")

statements, management of crop carryover, management of grain sales, financial counseling and management, environmental assessments, soil surveys, operation planning, map requirements, or fence requirements to support the services he supposedly provided.[51] Despite it having "service agreements" with each of the four borrowers, a topic discussed more fully below, the undersigned thus finds that FSAEV did not provide any consulting work to Borrowers One through Four to justify the fees in question. The undersigned further finds that the Bank did not have a liability issue with Bank employees, such as loan officers, assisting borrowers with preparing documents to secure a FSA guarantee, such as preparing cash flow statements and environmental reports.

Borrower One

Respondent was the loan officer responsible for the loan to Borrower One.[52] Respondent generated, or directed an assistant to generate, a loan memorandum, which contained the proposed terms of the loan.[53] Borrower One's loan memorandum stated that the loan's approval was conditioned upon it having a 90% FSA guarantee.[54] Loan documentation showed that Borrower One agreed to pay $26,387.50 for the FSA guarantee.[55] Respondent, however, never obtained an FSA guarantee on the loan to Borrower One.[56] The FSA has no records pertaining to Borrower One during Respondent's employment at the Bank.[57]

On February 28, 2019, Respondent approved Borrower One's Credit Memo, which listed an FSA guarantee fee of $26,387.50.[58] On that same day, Respondent presented a loan application for Borrower One to the Bank's Board of Directors for approval.[59] During the Board meeting,

[51] Tr. 420-23 (Dalton 9/27/23).
[52] Stipulation ¶ 26.
[53] *Id.* ¶ 27.
[54] *Id.* ¶ 28.
[55] *Id.* ¶ 29.
[56] *Id.* ¶ 38.
[57] *Id.* ¶ 37.
[58] *Id.* ¶ 31.
[59] *Id.* ¶ 32.

Respondent stated that $900,000 of the loan amount to Borrower One would have an FSA guarantee.[60] The Bank's Board then approved the loan to Borrower One.[61]

On or about May 15, 2019, Respondent approved the closing of the loan to Borrower One without an FSA guarantee and authorized the disbursement of loan proceeds to Borrower One in connection with a loan totaling $1,100,000.[62] Respondent did not have the authorization to waive the FSA guarantee requirement, and failed to tell the Board or Loan Subcommittee that the loans were closed without the FSA guarantee.[63] The loan disbursements to Borrower One began on or about May 23, 2019.[64]

On 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.[65] Respondent endorsed and deposited the $10,000 check to FSAEV at his account at IberiaBank.[66] On June 3, 2019, Respondent had the Bank issue a check payable to FSAEV for $14,937.50 from Borrower One's account.[67] Respondent similarly endorsed and deposited the $14,937.50 check to FSAEV at his account at IberiaBank.[68]

Respondent presented evidence ostensibly showing that FSAEV had entered into a "Service Agreement" and "Indemnity Agreement" with Borrower One on or about February 26, 2019.[69] Respondent signed both documents on behalf of FSAEV and also notarized both

[60] *Id.* ¶ 33.
[61] *Id.* ¶ 34.
[62] *Id.* ¶ 24.
[63] *See* Tr. 109 (Radcliff 9/26/23); Tr. 177 (K. Baltz 9/26/23); Tr. 212-13, 215 (Jumper 9/26/23).
[64] Stipulation ¶ 25.
[65] *Id.* ¶ 39; *see also* EX-25 (Check No. 31037).
[66] Stipulation ¶ 40; *see also* EX-4 (IberiaBank Statements) at 1.
[67] Stipulation ¶ 42.
[68] *Id.* ¶ 43; *see also* EX-4 (IberiaBank Statements) at 4.
[69] See RX-2 (Borrower One Service Agreement); RX-3 (Borrower One Indemnity Agreement).

documents.[70] Respondent also presented evidence that Borrower One signed a "Payment Acknowledgement" on or about July 19, 2019, which Respondent notarized.[71]

During the hearing, Borrower One testified that he never had an agreement with Respondent to do any work for Borrower One outside of being his Bank loan officer.[72] Borrower One acknowledged that in order to get the FSA guarantee, he understood that he needed to, among other things, 1) contact the Quapaw Indian group in order to get approval, 2) contact the state historic preservation office, 3) contact the Fish and Wildlife agency to determine whether the land was in a wetland, 4) prepare a stormwater prevention plan, 5) prepare an environmental impact study, 6) have a solid waste management plan, and 7) prepare an energy impact study.[73] Borrower One testified that he knew an outside company could be hired to do the necessary things, but it was Borrower One's impression that the Bank was "taking care of it."[74]

When shown the "Service Agreement" and "Indemnity Agreement," Borrower One testified that his name was on both documents, but he could not be sure that he signed either document; the signature, however, was similar to that on his loan agreement, which he did not doubt was his signature.[75] When shown the "Payment Acknowledgement," Borrower One confirmed that it was his signature.[76] Borrower One also testified that he did not recall whether Respondent notarized any paperwork in front of him.[77]

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[70] *See id.*
[71] *See* RX-10 (Borrower One Payment Acknowledgement).
[72] Tr. 293 (Borrower One 9/27/23).
[73] Tr. 298-301 (Borrower One 9/27/23).
[74] Tr. 301-302 (Borrower One 9/27/23).
[75] Tr. 296-97 (Borrower One 9/27/23) referring to RX-2 (Borrower One Service Agreement) and RX-3 (Borrower One Indemnity Agreement) ("I'm not going to say I didn't sign it, but I'm questioning it." Tr. 297:13-14 (Borrower One 9/27/23)).
[76] Tr. 297-98 (Borrower One 9/27/23) referring to RX-10. ("[Y]es, it looks like my signature. I wouldn't question the signature on it." Tr, 298 (Borrower One 9/27/23)).
[77] Tr. 293 (Borrower One 9/27/23).

During cross-examination, Respondent acknowledged that the Arkansas Secretary of State instructions for notaries provide that a notary cannot notarize his or her own signature and cannot notarize any documents for which he or she stands to gain a financial benefit.[78] Despite this, Respondent disputed that he was notarizing his own signature in RX-2 through RX-13, because he was signing on behalf of FSAEV.[79] COO Radcliff, who is also a notary in Arkansas, testified that a notary never notarizes their own papers and that individuals are not allowed to self-notarize a document if they are a party.[80] The undersigned finds that the plain language of the Arkansas instructions for notaries, which is supported by COO Radcliff's testimony, clearly states that one cannot notarize a document if they are a party on the document or stands to gain a financial benefit. Therefore, the notary stamps on exhibits in RX-2 through RX-13 are meaningless and carry no weight.

As to the signatures on the "Service Agreement," "Indemnity Agreement," and "Payment Acknowledgement," the undersigned finds that there is no need to determine whether they were actually signed by Borrower One or—as respectively detailed below—any of the other Borrowers, because the documents carry little weight regardless of whether the signatures are valid or not. A signed "Service Agreement" does not absolve Respondent's misconduct if he did not actually provide any services. As noted above, the undersigned has found that FSAEV did not provide any consulting work to Borrowers One through Four.

Borrower Two

Respondent was the loan officer responsible for the loan to Borrower Two.[81] Respondent generated, or directed an assistant to generate, a loan memorandum, which contained the proposed

[78] Tr. 431-34 (Dalton 9/27/23); *see also* EX-64 (Arkansas Notary Public and eNotary Handbook).
[79] Tr. 431-32 (Dalton 9/27/23).
[80] Tr. 143 (Radcliff 9/26/23).
[81] Stipulation ¶ 46.

terms of the loan.[82] Borrower Two's loan memorandum stated that a condition of loan approval was that the loan of $1,150,000 would have a $900,000 FSA guarantee.[83] Loan documentation showed that Borrower Two agreed to pay $26,387.50 for the FSA guarantee.[84] Respondent, however, never obtained an FSA guarantee on the loan to Borrower Two.[85] The FSA has no records pertaining to Borrower Two during Respondent's employment at the Bank.[86]

On February 28, 2019, Respondent presented a loan application for Borrower Two to the Bank's Board of Directors for approval.[87] During the Board meeting, Respondent stated that $900,000 of the loan amount to Borrower Two would have an FSA guarantee.[88] On that same day, the Bank's Board approved the loan to Borrower Two.[89]

On or about May 17, 2019, Respondent approved the closing of the loan to Borrower Two without an FSA guarantee and authorized the disbursement of loan proceeds to Borrower Two in connection with a loan totaling $1,150,000.[90] Respondent did not have the authorization to waive the FSA guarantee requirement and failed to tell the Board or Loan Subcommittee that the loans were closed without the FSA guarantee.[91] The loan disbursements to Borrower Two began on or about May 20, 2019.[92]

On or about May 20, 2019, Respondent had the Bank issue a check payable to FSAEV for $15,792 from Borrower Two.[93] Respondent endorsed and deposited the $15,792 check to FSAEV

[82] *Id.* ¶ 27.
[83] *Id.* ¶¶ 44, 50.
[84] *Id.* ¶ 47.
[85] *Id.* ¶ 54.
[86] *Id.* ¶ 53.
[87] *Id.* ¶ 49.
[88] *Id.* ¶ 50.
[89] *Id.* ¶ 51.
[90] *Id.* ¶ 44.
[91] Tr. 177 (K. Baltz 9/26/23), Tr. 212-13 (Jumper 9/26/23).
[92] Stipulation ¶ 45.
[93] *Id.* ¶ 56; *see also* EX-15 (Insurance Forms) at 11 (Check No. 31040).

at his account at IberiaBank.[94] On or about June 28, 2019, Respondent had the Bank issue a check payable to FSAEV for $17,948 from Borrower Two's account.[95] Respondent similarly endorsed and deposited the $17,948 check to FSAEV at his account at IberiaBank.[96]

Respondent presented evidence ostensibly showing that FSAEV had entered into a "Service Agreement" and "Indemnity Agreement" with Borrower Two on or about February 26, 2019.[97] Respondent signed both documents on behalf of FSAEV and also notarized both documents.[98] Respondent also presented evidence suggesting that Borrower Two signed a "Payment Acknowledgement" on or about July 19, 2019, which Respondent notarized.[99]

Borrower Two testified that he never entered into an agreement with Respondent or FSAEV to provide services to Borrower Two outside of Respondent's role as a loan officer at the Bank.[100] In addition, Borrower Two testified that he never saw Respondent notarize a document in front of him.[101]

When shown the "Service Agreement" and "Payment Acknowledgment" Borrower Two testified that he was unsure of whether it was his signature on those documents.[102] When shown the "Indemnity Agreement," however, Borrower Two testified that it looked to be his signature.[103]

Borrower Two testified that he did recall seeing Respondent after his loan closed. Specifically, Borrower Two testified that Respondent called him and they met on the side of the

[94] Stipulation ¶ 57; *see also* EX-4 (IberiaBank Statements) at 1.
[95] Stipulation ¶ 59; *see also* EX-15 (Insurance Forms) at 19 (Check No. 31126).
[96] Stipulation ¶ 61; *see also* EX-4 (IberiaBank Statements) at 4.
[97] *See* RX-4 (Borrower Two Service Agreement), RX-5 (Borrower Two Indemnity Agreement).
[98] *Id.*
[99] *See* RX-11 (Borrower Two Payment Acknowledgement).
[100] Tr. 375 (Borrower Two 9/27/23).
[101] Tr. 375 (Borrower Two 9/27/23).
[102] Tr. 381-82 (Borrower Two 9/27/23) referring to RX-4 (Borrower Two Service Agreement) and RX-11 (Borrower Two Payment Acknowledgement).
[103] Tr. 382 (Borrower Two 9/27/23) referring to RX-5 (Borrower Two Indemnity Agreement).

road and that he signed something on the front hood of his truck.[104] Borrower Two testified that he did not read the document before signing it.[105]

As noted above with respect to Borrower One regarding the exhibits RX-2 through RX-13, these documents—the "Service Agreement," "Indemnity Agreement," and "Payment Acknowledgement"—are given little to no weight with respect to Borrower Two as well. The notary stamps on those documents are meaningless and carry no weight, and there is no need to determine whether the signatures on these documents are valid or not.

Borrower Three

Respondent was the loan officer responsible for the loan to Borrower Three.[106] Respondent generated, or directed an assistant to generate, a loan memorandum, which contained the proposed terms of the loan.[107] Borrower Three's loan memorandum stated that its approval was conditioned upon the loan having a 90% FSA guarantee.[108] Loan documentation showed that Borrower Three agreed to pay $26,158.08 for the FSA guarantee.[109] Respondent, however, never obtained an FSA guarantee on the loan to Borrower Three.[110] The FSA has no records pertaining to Borrower Three during Respondent's employment at the Bank.[111]

On December 12, 2018, Respondent presented a loan application for Borrower Three to the Bank's Board of Directors for approval.[112] During the Board meeting, Respondent stated that

[104] Tr. 382 (Borrower Two 9/27/23).
[105] Tr. 383 (Borrower Two 9/27/23).
[106] Stipulation ¶ 64.
[107] *Id.* ¶ 27.
[108] *Id.* ¶ 65.
[109] *Id.* ¶ 66.
[110] *Id.* ¶ 72.
[111] *Id.* ¶ 73.
[112] *Id.* ¶ 67.

the loan to Borrower Three would have either an FSA or Small Business Administration ("SBA") guarantee.[113] On that same day, the Bank's Board approved the loan to Borrower Three.[114]

On or about May 20, 2019, Respondent approved the closing of the loan to Borrower Three without an FSA guarantee and authorized the disbursement of loan proceeds to Borrower Three in connection with a loan totaling $1,113,390.[115] Respondent did not have the authorization to waive the FSA guarantee requirement and failed to tell the Board or Loan Subcommittee that the loans were closed without the FSA guarantee.[116] The loan disbursements to Borrower Three began on or about May 23, 2019.[117] On or about May 24, 2019, Respondent had the Bank issue a check payable to FSAEV for $16,158 from Borrower Three's checking account.[118] Respondent endorsed and deposited the $16,158 check to FSAEV at his account at IberiaBank.[119]

Respondent presented evidence ostensibly showing that FSAEV had entered into a "Service Agreement" and "Indemnity Agreement" with Borrower Three on or about December 3, 2018.[120] Respondent signed both documents on behalf of FSAEV and also notarized both documents.[121] Respondent also presented evidence of a "Payment Acknowledgement" dated on or about July 19, 2019, which contains what Respondent represents to be Borrower Three's signature, and which Respondent notarized.[122]

Borrower Three testified that construction dirt work began on the subject property in August 2019, which was after his loan closed in May 2019.[123] Borrower Three also testified that

[113] *Id.* ¶ 68. Enforcement Counsel does not develop the record further regarding a potential SBA guarantee.
[114] *Id.* ¶ 69.
[115] *Id.* ¶ 62.
[116] Tr. 177 (K. Baltz 9/26/23), Tr. 212-13 (Jumper 9/26/23).
[117] Stipulation ¶ 63.
[118] *Id.* ¶ 74; *see also* EX-15 (Insurance Forms) at 13 (Check No. 31059).
[119] Stipulation ¶ 76; *see also* EX-4 (IberiaBank Statements) at 1.
[120] *See* RX-6 (Borrower Three Service Agreement), RX-7 (Borrower Three Indemnity Agreement).
[121] *See id.*
[122] *See* RX-12 (Borrower Three Payment Acknowledgement).
[123] Tr. 306-07 (Borrower Three 9/27/23).

he had done some land clearing—taking trees out on one to two acres—in June 2019, which was also after his loan closed.[124] Borrower Three testified that he had never had an FSA guaranteed loan before and was not aware that he could not do certain things until FSA guaranteed the loan—such as land clearing and dirt work—or that the state preservation office and Quapaw Indians needed to be contacted in order to get the FSA guarantee.[125]

Borrower Three testified that he never entered into a service agreement or indemnity agreement with Respondent or FSAEV and that neither Respondent nor FSAEV ever provided services to Borrower Three outside of Respondent's role as a loan officer at the Bank.[126] Borrower Three further testified that he never authorized any payments to FSAEV.[127] In addition, Borrower Three testified that he never saw Respondent notarize a document in front of him.[128]

Borrower Three testified that Respondent never reached out to him after his loan closed.[129] When Borrower Three was shown alleged text messages between himself and Respondent to see if they refreshed his recollection, Borrower Three testified that he could not recall whether he had any text conversations with Respondent after his loan closed.[130]

When shown the "Service Agreement," "Indemnity Agreement," and "Payment Acknowledgment" Borrower Three testified that it was not his signature on any of those documents.[131] When shown a copy of a 2009 loan document, Borrower Three testified at first that he did not think it contained his signature, but that he had no reason to believe the document was

[124] Tr. 314 (Borrower Three 9/27/23).
[125] Tr. 315 (Borrower Three 9/27/23).
[126] Tr. 309 (Borrower Three 9/27/23).
[127] Tr. 310, 327 (Borrower Three 9/27/23).
[128] Tr. 309 (Borrower Three 9/27/23).
[129] Tr. 308-09 (Borrower Three 9/27/23).
[130] Tr. 324-25 (Borrower Three 9/27/23).
[131] Tr. 311-12 (Borrower Three 9/27/23) referring to RX-6 (Borrower Three Service Agreement), RX-7 (Borrower Three Indemnity Agreement), and RX-12 (Borrower Three Payment Acknowledgement).

forged, and then acknowledged that it looked like his signature.[132] Comparing the documents, the undersigned notes that they all contain "printed" signatures that look very similar.

As noted above with respect to Borrower One regarding the exhibits RX-2 through RX-13, these documents—the "Service Agreement," "Indemnity Agreement," and "Payment Acknowledgement"—are given little to no weight with respect to Borrower Three as well. The notary stamps on those documents are meaningless and carry no weight, and there is no need to determine whether the signatures on these documents are valid or not.

Borrower Four

Respondent was the loan officer responsible for the loan to Borrower Four.[133] Respondent generated, or directed an assistant to generate, a loan memorandum, which contained the proposed terms of the loan.[134] Borrower Four's loan memorandum stated that its approval was conditioned upon the loan having an FSA guarantee.[135] Loan documentation showed that Borrower Four agreed to pay $4,725 for the FSA guarantee.[136] The FSA has no records pertaining to Borrower Four during Respondent's employment at the Bank.[137]

The Bank's Loan Subcommittee met on April 11, 2019. Respondent was present at that meeting, during which the loan application for Borrower Four was presented.[138] The Loan Subcommittee approved the loan to Borrower Four subject to obtaining an FSA 90% guarantee and updated appraisal value on equipment and real estate.[139]

[132] Tr. 320-21 (Borrower Three 9/27/23) referring to RX-16C (Unredacted signature – Borrower #3).
[133] Stipulation ¶ 79.
[134] *Id.* ¶ 27.
[135] Tr. 166-67 (Baltz, 9/26/23); *see also* EX 33 (Borrower Four documents) at 2.
[136] Stipulation ¶ 80.
[137] *Id.* ¶ 82.
[138] *Id.* ¶ 81; *see also* EX-8 (2019 Loan Subcommittee Minutes) at 4-5.
[139] EX-8 (2019 Loan Subcommittee Minutes) at 4.

On or about May 23, 2019, Respondent approved the closing of the loan to Borrower Four without an FSA guarantee and authorized the disbursement of loan proceeds to Borrower Four in connection with a loan totaling $350,000.[140] Respondent did not have the authorization to waive the FSA guarantee requirement and failed to tell the Board or Loan Subcommittee that the loans were closed without the FSA guarantee.[141] The loan disbursements to Borrower Four began on or about May 23, 2019.[142] On or about May 28, 2019, Respondent had the Bank issue a check payable to FSAEV for $13,116 from Borrower Four's checking account.[143] Respondent endorsed and deposited the $13,116 check to FSAEV at his account at IberiaBank.[144]

Respondent presented evidence ostensibly showing that FSAEV had entered into a "Service Agreement" and "Indemnity Agreement" with Borrower Four on or about April 15, 2019.[145] Respondent signed both documents on behalf of FSAEV and also notarized both documents.[146] Respondent also presented evidence that Borrower Four supposedly signed a "Payment Acknowledgement" on or about July 19, 2019, which Respondent notarized.[147]

Borrower Four testified that he never entered into a service agreement or indemnity agreement with Respondent or FSAEV and that neither Respondent nor FSAEV ever provided services to Borrower Four outside of Respondent's role as a loan officer at the Bank.[148] Borrower Four further testified that he never authorized any payments to FSAEV.[149] In addition, Borrower Four testified that he never saw Respondent notarize a document in front of him.[150]

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[140] Stipulation ¶ 77.
[141] Tr. 177 (K. Baltz 9/26/23), Tr. 212-13 (Jumper 9/26/23).
[142] Stipulation ¶ 78.
[143] *Id.* ¶ 83; *see also* EX-15 (Insurance Forms) at 17 (Check No. 31063).
[144] Stipulation ¶ 85; *see also* EX-4 (IberiaBank Statements) at 1.
[145] *See* RX-8 (Borrower Four Service Agreement), RX-9 (Borrower Four Indemnity Agreement).
[146] *See id.*
[147] *See* RX-13 (Borrower Four Payment Acknowledgement).
[148] Tr. 324 (Borrower Four 9/27/23).
[149] Tr. 348 (Borrower Four 9/27/23).
[150] Tr. 336 (Borrower Four 9/27/23).

When shown the "Service Agreement" and "Payment Acknowledgment," Borrower Four testified that he could not be sure that his signature was on those documents, but that the signature did look similar to his.[151] With reference to the "Indemnity Agreement," however, Borrower Four testified that it was not his signature.[152]

Borrower Four testified that he recalled a time after his loan closed—in July 2019—when Respondent unexpectedly came out to his farm for him to sign a paper "on getting some refund back on the interest rate on where [Borrower Four] bought a place at the lake."[153]

As noted above with respect to Borrower One regarding the exhibits RX-2 through RX-13, these documents—the "Service Agreement," "Indemnity Agreement," and "Payment Acknowledgement"—are given little to no weight with respect to Borrower Four as well. The notary stamps on those documents are meaningless and carry no weight, and there is no need to determine whether the signatures on these documents are valid or not.

The Bank's Investigation and Respondent's Termination

The Bank's Loan Operations Manager, Amy Jumper, testified that in mid to late June 2019, she was conducting routine document reviews for the new loans that had closed the month prior which revealed that the loan files for Borrowers One through Three did not contain evidence of FSA guarantees.[154] When Ms. Jumper researched the matter and saw that fees had been paid to "FSAEV," she asked President Baltz if FSAEV was another department at FSA. At that point, President Baltz, along with other Bank employees, started to investigate the matter further.[155]

[151] Tr. 338-39 (Borrower Four 9/27/23) referring to RX-8 (Borrower Four Service Agreement) and RX-13 (Borrower Four Payment Acknowledgement).
[152] Tr. 339 (Borrower Four 9/27/23) referring to RX-9 (Borrower Four Indemnity Agreement).
[153] Tr. 334-36 (Borrower Four 9/27/23).
[154] Tr. 197, 211-14 (Jumper 9/26/23).
[155] Tr. 197, 214-15 (Jumper 9/26/23).

On or about July 9, 2019, President Baltz directed Respondent to provide documentation concerning the FSA guarantees for Borrowers One through Three.[156] On July 10, 2019, Respondent gave Baltz three documents that appeared to be FSA conditional guarantees concerning Borrowers One through Three.[157] Upon further investigation, the Bank determined that the three FSA conditional guarantees concerning Borrowers One through Three were fraudulent.[158]

During the summary disposition phase, Respondent asserted that the conditional commitments were incomplete drafts that were never submitted to the FSA or given to Bank investigators, but during the hearing, he did not provide any testimony regarding these conditional commitments.[159] By contrast, President Baltz, along with other Bank employees, did provide testimony, which the undersigned finds persuasive and consistent with the evidence presented.[160] The undersigned finds that the evidence shows that Respondent prepared the "FSA Conditional Commitments" for Borrowers One through Three, which contained the same FSA account number, namely -5607, as another borrower account—specifically Bank borrowers H.M. and A.M.—and a different FSA guarantee percentage than in the loan memorandum (i.e. 95% versus 90%) for the purpose of deceiving the Bank's investigators.[161] As it has been established that "[t]he FSA assigns unique account numbers to borrowers who seek FSA guarantees upon submission of their loans to the FSA,"[162] it did not take the Bank's investigators long to figure out that the conditional commitments were fraudulent—and the undersigned agrees on the strength of the record.

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[156] EX-34 (K. Baltz notes) at 1.
[157] Tr. 171 (K. Baltz 9/26/23), see also EX-34 (K. Baltz Notes) at 1, EX-11 (Conditional Commitments for Borrower 1-3).
[158] EX-34 (K. Baltz notes).
[159] *See* Order No. 12 at 18.
[160] Tr. 171-174 (K. Baltz 9/26/23); *compare* EX-11 (Conditional Commitments for Borrowers 1-3) *with* EX-12 (Conditional Commitment for Bank borrowers H.M. and A.M.).
[161] Stipulation ¶ 18; *see also* Tr. 171 (K. Baltz 9/26/23); EX-34 (K. Baltz Notes) at 1; EX-11 (Conditional Commitment for Borrowers 1-3); EX-45 (FSA letter to H.M. & A.M.).
[162] Stipulation ¶ 17.

After a meeting with President Baltz and COO Radcliff on July 11, 2019, Respondent was put on administrative leave and told to return at the beginning of the following week.[163] President Baltz testified that, after Respondent left, he went into Respondent's office and found a handwritten list in the trash in Respondent's handwriting,[164] which COO Radcliff testified looked like a "business plan."[165] On July 12, 2019, the Bank contacted its fidelity insurer about Respondent's alleged misconduct.[166]

In all, the Bank's investigation found that Respondent had deposited a total of $87,951.50 from the Borrowers' accounts, including Borrower Four, to his FSAEV account.[167] The Bank then reimbursed Borrowers One through Four that total amount.[168] The Bank filed a claim with its insurer for the $87,951.50 in alleged loss related to this reimbursement.[169] The Bank's insurer paid the Bank $62,951.40 due to the Bank's $25,000 policy deductible.[170]

Respondent met with President Baltz and COO Radcliff on July 15, 2019, and then again on July 16, 2019, and July 19, 2019.[171] On 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.[172] While Respondent did not deny that he wrote the check for $87,951.50, he testified that the notation in the memo

[163] Tr. 64-65 (Radcliff 9/26/23); *see also* EX-34 (K. Baltz notes) at 2.
[164] Tr. 173-74 (K. Baltz 9/26/23); *see also* EX-32P (handwritten notes from trash REDACTED), EX-32C (handwritten notes from trash).
[165] Tr. 69 (Radcliff 9/26/23).
[166] EX-15 (Insurance Forms).
[167] Stipulation ¶ 87.
[168] Tr. 106-07 (Radcliff 9/26/23) ("we knew we had to make the borrowers right" Tr. 106), ("each one of [the four borrowers] understood that they had been made good" Tr. 107), (""we put the money back in their account and showed them how we had, you know, made their accounts whole" Tr. 107). See also Stipulation ¶ 88 noting that the effective dates of the reimbursements were retroactive.
[169] Tr. 77 (Radcliff 9/26/23).
[170] Tr. 105-06 (Radcliff 9/26/23) referring to EX-15 (Insurance Forms).
[171] *See* EX-13 (Radcliff handwritten notes 7/15/19); EX-14 (Radcliff handwritten notes 7/16/19); EX-22 (Radcliff handwritten notes 7/19/19).
[172] Tr. 100-101 (Radcliff 9/26/23) referring to EX-15 (Insurance Forms) at 23.

stating "Restitution" was proposed by COO Radcliff.[173] 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.[174] Respondent's employment with the Bank was terminated on August 6, 2019.[175]

State Court Criminal Proceedings

On October 2, 2023, just five days after the hearing concluded, Respondent pled guilty to four felony theft of property charges in the State of Arkansas Circuit Court in connection with the loans at issue in these proceedings.[176] The state court ordered Respondent to serve four years of probation and to pay $87,951.50 in restitution to the Bank and the Bank's insurer, among other sanctions.[177]

VI. Analysis

Enforcement Counsel asserts that Respondent embezzled $87,951.50 in loan proceeds from four Bank borrowers, which caused financial loss to the Bank and resulted in financial gain to Respondent.[178] According to Enforcement Counsel, Respondent's actions were "premeditated, deliberate, and repeated"—namely, "he set up a sham 'consulting' business to divert to his own pockets money that was intended to pay for government guarantees on loans to four Bank borrowers; he authorized six fraudulent transactions involving the Borrowers; and he repeatedly tried to conceal his misconduct from Bank staff."[179] Enforcement Counsel asserts that, in causing the Bank financial loss and financially enriching himself, Respondent's actions were unsafe and

[173] Tr. 406 (Dalton 9/27/23).
[174] Tr. 102 (Radcliff 9/26/23). A review of the IberiaBank bank statements shows that the account was closed on July 23, 2019. On July 22, 2019, Respondent wrote a check to "FSAEV-Bryan Dalton" in the amount of $8,500 for "cash," which is after he wrote the Bank the check for "restitution." *See* EX-4 (IberiaBank Statements).
[175] EX-26 (Termination Letter).
[176] *See* Attachments A-E to Enforcement Counsel's Post-Hearing Brief.
[177] *See* Attachment C to Enforcement Counsel's Post-Hearing Brief.
[178] *See* EIB 31.
[179] *Id.* at 7.

unsound practices, clearly breached his fiduciary duty to the Bank, and demonstrated personal dishonesty, along with a willful and continuing disregard for the safety and soundness of the Bank, thereby meeting all the elements of a prohibition order under 12 U.S.C. §1818(e).[180] Furthermore, Enforcement Counsel argues that Respondent's actions were recklessly unsafe or unsound, breached his fiduciary duties, were part of a pattern of misconduct, caused more than minimal loss to the Bank, and resulted in pecuniary gain to Respondent, thereby meeting all the elements of a second-tier civil money penalty under 12 U.S.C. §1818(i)(2)(B).[181]

For the reasons set forth below the undersigned concludes that Respondent engaged in unsafe and unsound practices and breached his fiduciary duty, which caused more than a minimal loss to the Bank and that resulted in financial gain to Respondent. Furthermore, the undersigned finds that Respondent's actions demonstrated personal dishonesty. Therefore, all the elements for a prohibition order under 12 U.S.C. §1818(e) and a second-tier civil money penalty under 12 U.S.C. §1818(i) have been met.[182]

A. Misconduct

1. Unsafe and Unsound Practices

As noted above, the Horne Standard adopted by the federal banking agencies and applied here by the undersigned defines unsafe and unsound 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,

[180] *Id.* at 28.
[181] *Id*.
[182] Because each of the requisite statutory elements has already been met, the undersigned declines to make a ruling with regard to whether Respondent's actions were recklessly unsafe or unsound, were part of a pattern of misconduct, or were demonstrative of a willful or continuing disregard for the safety and soundness of the Bank.

its shareholders, or the agencies administering the insurance funds."[183] The FDIC Board considers the failure to obtain adequate collateral, or a guarantee before a loan, to be an unsafe and unsound practice.[184] The FDIC Board also considers falsifying bank records[185] and unauthorized diversions of loan proceeds for personal benefit as unsafe and unsound practices.[186] Enforcement Counsel asserts that Respondent's actions involved numerous unsafe or unsound practices, most notably his failure to obtain the FSA guarantees and his FSAEV embezzlement scheme.[187] Respondent also acted in an unsafe and unsound manner, according to Enforcement Counsel, in failing to report the lack of guarantees to the Board or Loan Subcommittee before the Bank closed the loans and disbursed funds, as well as in his attempt to deceive the Bank that FSA guarantees were obtained when he prepared the conditional commitment forms for Borrowers One through Three.[188] The undersigned agrees with Enforcement Counsel in all respects.

As previously detailed, Respondent not only personally drafted and signed various documents for the Borrowers' loan files which indicated that the loans to Borrowers One through Four would have FSA guarantees, but also presented loan applications indicating that the loans would be guaranteed to the Board or Loan Subcommittee for approval. The Board or Loan Subcommittee then approved the loans to Borrowers One through Four with the condition that they be guaranteed. The FSA guarantee acted as collateral for the loan; therefore, Respondent's failure to obtain a guarantee for these loans made these loans more risky for the Bank. As has been

[183] *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).
[184] *See*, *e.g.*, *Michael Sapp*, 2019 WL 5823871, at *13.
[185] *See*, *e.g.*, *In the Matter of Tim M. Lane*, No. 92-96e, 1993 WL 535310, at *1 (Nov. 23, 1993) (FDIC final decision) (finding an unsafe and unsound practice where, among other misconduct, the respondent falsified a borrower's financial statements to show a rosier picture of the borrower's financial condition).
[186] *See*, *e.g.*, *In the Matter of Charles F. Watts*, Nos. 98-046e & -044k, 2002 WL 31259465, at *6-7 (Aug. 6, 2002) (FDIC final decision).
[187] EIB 29.
[188] *Id.*

established, no single individual at the Bank—not the Bank's president, and certainly not a loan officer who only had lending authority up to $10,000—had the authority to waive a requirement for a guarantee, which was considered a material change, without the loan being reapproved. In addition, if a loan was reapproved with a material change, it would be documented in the Board's minutes, or via email.

Instead of informing the Board or Loan Subcommittee that guarantees were not obtained before the loans closed, Respondent authorized the withdrawal of funds from the Borrower's accounts to an entity named FSAEV, which amounted to embezzling a total of $87,951.50. The "advice of charge" disbursement slips listed these withdrawals as "partial FSA loan fee" or "all other loan fees."[189] Because the name of FSAEV was so close to FSA, the tellers responsible for issuing the checks did not find anything unusual about the disbursement requests,[190] which allowed Respondent to carry out this scheme for multiple Borrowers over the course of at least two months.[191] The evidence shows that no services were provided for these payments to FSAEV; therefore, Respondent's allegation that FSAEV earned the fees, or that the fees were prepayment for work to be performed, is flatly rejected.

When Respondent's loan files were reviewed by Ms. Jumper and Respondent was questioned about the FSA guarantees, he submitted false FSA conditional commitment forms for Borrowers One, Two, and Three in an attempt to deceive the Bank into believing that he had submitted the paperwork for genuine FSA guarantees. The evidence shows that Respondent

[189] *See* EX-25 at 3; EX-36.

[190] Tr. 254-55 (Mulock 9/26/23) ("Q: Okay. And when you asked Mr. Dalton about FSAEV, did he tell you it was FSA Environmental? A. I don't remember the word "environmental" ever coming up, no. . . . He never said anything about environmental. From what I recall, he just said it's a FSA program and then that was – it was left at that.")

[191] Respondent opened his account at IberiaBank on approximately May 14, 2019 and closed it on approximately July 23, 2019. He made deposits from FSAEV from May 20, 2019 through June 28, 2019, and his withdrawals consisted of multiple payments to "AMEX" and the "Navy Federal Credit Union." See EX-4 (IberiaBank Statements).

produced these conditional commitments in direct response to the Bank's request for proof that the loans had FSA guarantees; Respondent's allegation that these forms were merely "drafts" and were not intended to deceive is therefore also rejected.

Respondent's position during the summary disposition phase was 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.[192] During the hearing, Respondent's counsel appeared to allege that the Bank lacked proper procedures to prevent these types of unauthorized disbursements.[193] Respondent's arguments are rejected. It is unnecessary for the undersigned to determine whether the Bank had sufficient internal controls to prevent an untrustworthy loan officer from hatching a scheme to embezzle funds from borrowers in order to conclude that the scheme itself is actionable misconduct. Accordingly, the undersigned finds that Respondent's actions constituted unsafe and unsound practices which are contrary to generally accepted standards of prudent operations.

2. Breach of Fiduciary Duty

As a Bank loan officer, Respondent owed the Bank fiduciary duties of loyalty and of care, which obligated him at all times "to act in good faith and in the best interests of the Bank."[194] The fiduciary duty of care required Respondent "to act diligently, prudently, honestly, and carefully in carrying out [his] responsibilities."[195] Bank employees can breach this fiduciary duty by failing to disclose material information, even when not asked.[196] The duty of loyalty, moreover, "includes a

[192] *See* Order No. 12 at 18.
[193] *See generally* Tr. 112-20 (Radcliff 9/26/23), Tr. 219-23 (Jumper 9/26/23).
[194] *Michael Sapp*, 2019 WL 5823871, at *14.
[195] *In the Matter of Tonya Williams*, No. 11-553e, 2015 WL 3644010, at *9 (Apr. 21, 2015) (FDIC final decision) (internal quotation marks and citation omitted).
[196] *See*, *e.g.*, *Donald Watkins,* 2019 WL 6700075, at *7; *De la Fuente v. FDIC*, 332 F.3d 1208, 1222 (9th Cir. 2003).

duty to avoid conflicts of interests and to act solely for the benefit of the [B]ank."[197] Enforcement Counsel asserts that Respondent's actions breached his fiduciary duties of care and loyalty to the Bank when he 1) failed to seek and obtain the FSA guarantees, 2) failed to report the lack of FSA guarantees to the Board or Loan Subcommittee, 3) embezzled loan proceeds, and 4) presented fraudulent documents—the FSA conditional commitments—to Bank investigators.[198]

For many of the same reasons enumerated above regarding how Respondent's actions constituted unsafe and unsound practices, the undersigned agrees that they also encompass breaches of his fiduciary duties of care and loyalty. First, Respondent failed to perform his job duties as the Bank's loan officer when he failed to obtain FSA guarantees. Then he failed to report that the loans were closing without the FSA guarantees, which has already been established above as a material change which required reapproval. Then he authorized withdrawals totaling $87,951.50 for "fees" to FSAEV when FSAEV did not provide any legitimate consulting services. And even if FSAEV did provide legitimate consulting services, Respondent's operation of a consulting business would likely be a conflict of interest (and was in any case a violation of the Bank's code of ethics).[199] Finally, Respondent tried to prolong his duplicity when the Bank asked for documentation that he obtained FSA guarantees by providing fraudulent conditional commitment forms for Borrowers One through Three. The evidence is thus clear that Respondent breached his fiduciary duties to the Bank.

[197] *In the Matter of Steven Ellsworth*, Nos. AA-EC-11-41 and -42, 2016 WL 11597958, at *15 (March 23, 2016) (OCC final decision); *accord*, *e.g.*, *Smith & Kiolbasa*, 2021 WL 1590337, at *15; *Michael v. FDIC*, 687 F.3d 337, 351 (7th Cir. 2012).
[198] EIB 32.
[199] *See* Tr. 108-09 (Radcliff 9/26/23); EX-41 (Code of Ethics Policy) at 3.

3. Violation of Arkansas State Law

According to Enforcement Counsel and as supported by state documents submitted with Enforcement Counsel's post-hearing briefing, Arkansas state prosecutors charged Respondent with violations of Arkansas Code § 5-36-103(b)(1)(A)--which is theft of property valued at or more than $25,000, a Class B felony—and Arkansas Code § 5-36-103-(b)(2)(A)—which is theft of property valued at more than $5,000 and less than $25,000, a class C felony.[200] According to Enforcement Counsel, the supporting affidavit for Respondent's arrest warrant details the theft of $87,951.50 from the loan proceeds of the same borrowers in the FDIC's enforcement proceeding.[201] Enforcement Counsel asserts that Respondent's guilty plea to those four felony charges "**provides sufficient evidence to meet the statutory elements for the issuance of an order or prohibition**" and that the guilty plea "**amounts to admissions by Respondent to the statutory elements for the assessment of a second tier CMP."**[202]

The undersigned agrees with Enforcement Counsel that the four felony Arkansas state charges stem from the same misconduct alleged in this proceeding and certainly have a bearing on his credibility, which is discussed *infra*. Enforcement Counsel, however, did not allege a violation of any state laws in the notice of charges, nor was there any amended notice of charges to incorporate any violations of state law. Therefore, the undersigned makes no finding of misconduct based on Respondent's violation of Arkansas state law.

[200] EIB 8-9.
[201] *Id.* at 9; *see also* Attachment A, pp. 4-9 to Enforcement Counsel's Post-Hearing Brief.
[202] EIB 8 (emphasis in original).

B. Effect

The following amounts were paid to FSAEV out of the respective Borrowers' loan proceeds, along with the agreed upon FSA fee that each Borrower agreed to pay:[203]

	Date of Payment[204]	Amount paid to FSAEV[205]	Total Amount paid to FSAEV	Agreed Upon FSA Fee	Actual Loss
Borrower One	5/17/19	$10,000.00			
Borrower One	6/3/19	$14,937.50			
Total			$24,937.50	$26,387.50[206]	$24,937.50
Borrower Two	5/20/19	$15,792.00			
Borrower Two	6/28/19	$17,948.00			
Total			$33,740.00	$26,387.50[207]	$26,387.50
Borrower Three	5/24/19	$16,158.00	$16,158.00	$26,158.08[208]	$16,158.00
Borrower Four	5/28/19	$13,116.00	$13,116.00	$ 4,725.00[209]	$ 4,725.00
Total			$87,951.50	$83,658.08	$72,208.00

According to Enforcement Counsel, while the Bank reimbursed the four Borrowers a total of $87,951.50, the actual loss attributable to the Bank solely for Respondent's failure to secure the FSA guarantees is $72,208, which is the lesser of the total of each borrower's FSAEV payment or agreed-upon FSA fee.[210] Enforcement Counsel asserts that sometimes Respondent withdrew funds more than the FSA fee amount and sometimes he withdrew less than the FSA fee amount, but that there is a direct link between the amounts that the Borrowers paid for the guarantees and the actual loss.[211] Enforcement Counsel further 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

[203] *Id.* at 36.
[204] EX-15 (Insurance Forms) at 8-20.
[205] *Id.*
[206] EX-3 (Borrower One documents) at 3.
[207] EX-28 (Borrower Two documents) at 3.
[208] EX-31 (Borrower Three documents) at 4.
[209] EX-33 (Borrower Four documents) at 4.
[210] *See* EIB 35.
[211] *See id.*

alter the actual loss suffered by the Bank.[212] In addition, Enforcement Counsel asserts that Respondent's misconduct directly resulted in financial gain to him, totaling $87,951.50.[213]

In the summary disposition phase, Respondent previously alleged that the Bank's decision to repay each of the four Borrowers' fees paid to FSAEV was voluntary and did not constitute a loss that is attributable to Respondent.[214] The undersigned finds this to be unpersuasive. As noted in Order No. 12, there was some question at that stage as to what the service agreements between FSAEV and Borrowers One through Four covered, along with the circumstances regarding the post-dated payment acknowledgments. Now having heard testimony from Respondent and the four borrowers, the undersigned finds that FSAEV did not do any consulting work for Borrowers One through Four to justify any fees charged and that Respondent's unauthorized disbursements to FSAEV were part of his embezzlement scheme. While Borrowers One through Four all signed approval of payments to FSAEV on July 19, 2019,[215] which post-dated all of the payment dates, the undersigned has already explained above why these payment acknowledgements carry little weight. The undersigned agrees with Enforcement Counsel that the Bank suffered a loss attributable to Respondent's misconduct and that Respondent received financial gain from his misconduct. Accordingly, the undersigned finds that the effects prongs of 12 U.S.C. §§ 1818(e) and 1818(i) are hereby satisfied.

C. Culpability

Personal dishonesty within the meaning of Section 1818(e)'s culpability prong encompasses "a disposition to lie, cheat, or defraud; untrustworthiness; lack of integrity; misrepresentation of facts and deliberate deception by pretense and stealth; or want of fairness or

[212] *See id.*
[213] *See id.* at 36.
[214] *See* Order No. 12 at 21.
[215] *See* RX-10 (Borrower One Payment Acknowledgement); RX-11 (Borrower Two Payment Acknowledgement); RX-12 (Borrower Three Payment Acknowledgement); RX-13 (Borrower Four Payment Acknowledgement).

straightforwardness."[216] The personal dishonesty standard is also "satisfied when a person disguises wrongdoing . . . or fails to disclose material information," but only if it can be shown that they have done so with the requisite knowledge of the wrongfulness of their actions.[217]

Enforcement Counsel asserts that Respondent's actions demonstrated personal dishonesty due to 1) failing to obtain FSA guarantees on the loans to Borrowers One through Four and failing to disclose to the Board, the Loan Subcommittee, or Bank management the fact that the loans to Borrowers One through Four lacked FSA guarantees; 2) providing conditional commitment forms to Bank investigators with the intent to deceive the investigators that loans to Borrowers One through Three were FSA guaranteed; 3) embezzling $87,951.50; and 4) writing a post-dated check with the notation "restitution," and in the interim, withdrawing the funds from that bank account and closing the account.[218] Furthermore, Enforcement Counsel asserts that Respondent's actions, detailed above, also demonstrated a willful and continuing disregard for the safety or soundness of the Bank.[219]

At the summary disposition stage, Respondent asserted that he informed President Baltz that he did not have sufficient funds to cover the $87,951.50 check, that he never expected the Bank to cash the check, and that he only wrote the term "restitution" because it was suggested by COO Radcliff.[220] While the undersigned declined to make a finding regarding culpability at that stage, now having heard testimony from the witnesses, the undersigned finds that the evidence shows that Respondent's actions exhibited personal dishonesty. As noted above, Respondent's testimony contradicts the testimony of other witnesses, and Respondent could not provide any documentary evidence to support that FSAEV performed any services for Borrowers One through

[216] *Tonya Williams*, 2015 WL 3644010, at *10 (internal citation omitted).
[217] *Dodge v. OCC*, 744 F.3d 148, 160 (D.C. Cir. 2014); *accord*, *e.g.*, *Smith & Kiolbasa*, 2021 WL 1590337, at *28.
[218] *See* EIB 37.
[219] *See id.* at 37-40.
[220] *See* Order No. 12 at 22; *see also* EIB 38-39 citing Answer at 5 ¶¶ 33-34.

Four. Even setting up a consulting entity with the name "FSAEV," which is obviously similar to "FSA," shows Respondent's intent to deceive and prevent detection from the Bank as long as possible.[221] In addition, the evidence proffered by Enforcement Counsel after the hearing—namely Respondent's guilty plea to four felony Arkansas state charges which stem from the same misconduct alleged in this proceeding—is consistent with the undersigned's finding regarding the lack of Respondent's credibility and supports a showing of personal dishonesty that meets the culpability prong of 12 U.S.C. § 1818(e). Having found that Respondent's conduct exhibited personal dishonesty, there is no need to determine whether it also constituted willful or continuing disregard for the Bank's safety and soundness, as the elements for a 12 U.S.C. § 1818(e) prohibition order have already been satisfied.

D. Section 1818(i)

The undersigned has concluded that Respondent has breached his fiduciary duties of care and loyalty and caused more than a minimal loss to the Bank due to his actions with Borrowers One through Four. As a result, the statutory elements for the assessment of a second-tier civil money penalty under 12 U.S.C. § 1818(i) have been met as well.

Enforcement Counsel also asserts that Respondent's conduct constituted recklessly unsafe and unsound backing practices for purposes of Section 1818(i)'s misconduct element.[222] The undersigned finds no need to reach a conclusion on this, as that element of Section 1818(i) is already met here by Respondent's breach of fiduciary duty.[223]

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[221] Tr. 215 (Jumper 9/26/23) ("I then took [the FSAEV] check to Kyle and told him I didn't know if this was a new program for our poultry loans through FSA or another department."); *see also* Tr. 254-55 (Mulock 9/26/23) ("Q: Okay. And when you asked Mr. Dalton about FSAEV, did he tell you it was FSA Environmental? A. I don't remember the word "environmental" ever coming up, no. . . . He never said anything about environmental. From what I recall, he just said it's a FSA program and then that was – it was left at that.").

[222] EIB 40.

[223] *See* 12 U.S.C. § 1818(i)(2)(B)(i)(III).

Likewise, Enforcement Counsel asserts that Respondent's actions with Borrowers One through Four were part of a pattern of misconduct for the purposes of the effect element of 12 U.S.C. § 1818(i)(2)(B)(ii)(I).[224] The undersigned finds that it is unnecessary to reach a conclusion on this, as that element of Section 1818(i) is met here by the fact that Respondent's breach of fiduciary duty caused more than a minimal loss to the Bank and resulted in pecuniary gain to Respondent.[225]

E. Civil Money Penalty

Before assessing a civil money penalty, the federal banking agencies are bound to consider the appropriateness of the amount being assessed in light of five mitigating factors: (1) the size of the respondent's financial resources; (2) the respondent's good faith; (3) the gravity of the respondent's violation; (4) the history of any previous violations; and (5) "such other matters as justice may require."[226] With respect to the $35,000 civil money penalty sought by the FDIC against Respondent in this matter, Enforcement Counsel has made a submission adverting to these factors and to the thirteen interagency factors that financial institution regulatory agencies must also weigh in conjunction when determining a civil money penalty amount.[227] Considering Enforcement Counsel's submission, assessing the relevant factors, and for the reasons given below, this Tribunal recommends to the Board that $35,000 is an appropriate monetary penalty for Respondent's misconduct in this case.

The purpose of a civil money penalty "is to deprive the violators of any financial benefit derived as a result of the violations, provide a sufficient degree of punishment, and [act as] an adequate deterrent to the respondents and others from future violations of banking laws and

[224] EIB 36.
[225] *See* 12 U.S.C. §§ 1818(i)(2)(B)(i)(III), (ii)(II)-(III).
[226] *Id.* § 1818(i)(2)(G).
[227] EIB 40-42, 44.

regulations."[228] The interagency guidance regarding the assessment of civil money penalties further states that "in cases where the violation, practice, or breach causes quantifiable, economic benefit or loss," a civil money penalty amount that merely recompenses the loss or strips the violator of their benefit will be insufficient "to promote compliance with statutory and regulatory requirements."[229] Rather, "[t]he penalty amount should reflect a remedial purpose and should provide a deterrent to future misconduct."[230]

As to the Respondent's financial resources, while Respondent is currently a graduate student pursuing a Masters of Business Administration, he appears to be working in a good job and will have the ability to pay the assessed amount going forward.[231] Accordingly, this factor does not warrant mitigation of the penalty amount sought.

As to Respondent's good faith, in the undersigned's view, this factor encompasses both good faith shown (or not shown) in the course of a respondent's misconduct as well as any showing of good faith made by a respondent, for example through willing cooperation or genuinely expressed regret and responsibility for their actions, during the agency's investigation and the enforcement proceedings themselves. Such an interpretation provides an incentive for respondents to be forthcoming and cooperative through the investigative and enforcement process. That interpretation also lessens the duplicative effect that a finding of personal dishonesty or willfulness or a conscious engagement in misconduct might otherwise have on this mitigating factor—

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

[229] Civil Money Penalties Interagency Statement, OCC Bulletin No. 98-32, 1998 WL 434432, at *2 (adopting Federal Financial Institutions Examination Council's Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies (June 3, 1998)) ("Interagency CMP Policy").

[230] *Id.*

[231] According to Enforcement Counsel, during Respondent's state court guilty plea proceeding, his criminal defense attorney stated that Respondent was "currently working in a really good job," implying that Respondent does, in fact have the financial resources to pay the penalty. EIB 42 citing Attachment D at 9.

otherwise, no showing of good faith sufficient to mitigate an assessed penalty could ever be made in most cases before this Tribunal. Here, the undersigned has found that while Respondent was cooperative in the course of these proceedings—at least before declining to submit post-hearing briefing in contravention of the Uniform Rules and the undersigned's Ground Rules—that his testimony was self-serving and lacked credibility during the hearing. Thus, on balance, Respondent's good faith is not a significant mitigating factor.

As to the gravity of the violation, the undersigned finds that there is nothing that would warrant mitigation of the civil money penalty amount.

There is no evidence of a history of previous violations, and so this serves as a potential mitigating factor for the civil money penalty amount.

As to the "other matters as justice may require" factor, Enforcement Counsel does not specifically invoke this factor in post-hearing briefing (and Respondent submits none); therefore, the undersigned does not consider it as a mitigating factor.

Overall, having considering Enforcement Counsel's rather cursory submission regarding the appropriateness of the civil money penalty amount being assessed in light of the five statutory factors and thirteen interagency factors, and with the deterrent purpose of civil money penalties in mind, the undersigned concludes that the $35,000 civil money penalty sought by Enforcement Counsel is appropriate based on the lack of good faith exhibited by Respondent and the gravity of the violation.

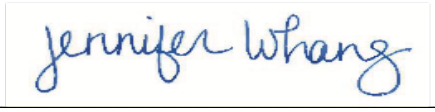
VII. Conclusion and Recommended Orders

The FDIC seeks a prohibition order and the assessment of a $35,000 second-tier civil money penalty against Respondent in this case for allegations relating generally to his loan relationships with Borrowers One through Four. Enforcement Counsel argues that a prohibition order and civil money penalty are justified because (1) Respondent engaged in unsafe and unsound banking practices and breached his fiduciary duties to the Bank, thus satisfying the statutory misconduct elements; (2) Respondent's actions caused loss to the Bank and resulted in financial gain to Respondent, thus satisfying the effect elements; and (3) Respondent exhibited personal dishonesty, thus satisfying the culpability element.

In consideration of the Parties' arguments and the factual record developed by the September 2023 hearing, and for the reasons and to the extent set forth in detail in this Recommended Decision, the undersigned now concludes that each of the elements of a Section 1818(e) prohibition order and a second-tier Section 1818(i) civil money penalty have been proven as to Respondent regarding all four borrowers. Therefore, in accordance with 12 C.F.R. § 308.28, the undersigned recommends that the FDIC Board enter a prohibition order against Respondent and assess a second-tier civil money penalty amount in the amount of $35,000 due to his misconduct. The record of this proceeding will be transmitted to the FDIC Board in conjunction with this Recommended Decision, as well as a certified index of the administrative record and a certified index of exhibits.

SO ORDERED.

Issued: February 22, 2024



Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication

CERTIFICATE OF SERVICE

On February 22, 2024, I served a copy of the foregoing **Recommended Decision** upon the following persons via email:

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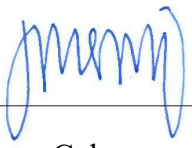

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