FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

In the Matter of FRANK WILLIAM BONAN II, Individually and as an institution-affiliated party of GRAND RIVERS COMMUNITY BANK Grand Chain, Illinois (Insured State Nonmember Bank)	**DECISION AND ORDERS** FDIC-16-0254e FDIC-16-0256k

I. INTRODUCTION

This matter is before the Board of Directors ("Board") of the Federal Deposit Insurance Corporation ("FDIC") following the issuance on November 20, 2023, of a Recommended Decision ("Recommended Decision" or "R.D.") by Administrative Law Judge Jennifer Whang ("ALJ"). Among other things, the ALJ found that Respondent Frank William Bonan II's ("Bonan II" or "Respondent") actions in connection with (1) a loan ("618 Holdings loan") made to 618 Holdings, LLC ("618 Holdings") for the sale and leaseback of a warehouse owned by Evergreen Properties of Illinois, LLC ("Evergreen Properties"), and (2) the release of Grand Rivers Community Bank's ("Grand Rivers" or the "Bank") security interest in a Cabot 900 self-propelled drilling rig ("Rig 23") held as collateral for a loan to Evergreen Drilling, LLC ("Evergreen Drilling") constitute a breach of the fiduciary duties of care and loyalty that Respondent owed to the Bank, as well as engagement in unsafe or unsound banking practices. Accordingly, the ALJ recommends that the Board enter a prohibition order against Respondent under section 8(e) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1818(e), and assess a second-tier civil money penalty ("CMP") in the amount of $105,000 under section 8(i) of the FDI Act, 12 U.S.C. § 1818(i). For the reasons discussed below, although not following the ALJ's decision in all respects, the Board concludes that a prohibition order against Respondent is warranted and that a second-tier CMP of $105,000 is justified.

II. PROCEDURAL HISTORY

The FDIC commenced this action against Bonan II in May 2021 by filing a Notice of Charges ("Notice") seeking an order of prohibition and the imposition of a $105,000 second-tier CMP under 12 U.S.C. §§ 1818(e) and 1818(i). The Notice alleged that Respondent, Chairman of the Board of Grand Rivers, engaged in unsafe or unsound banking practices and breach of his fiduciary duties to Grand Rivers in connection with Grand Rivers' loan relationship with Evergreen Drilling, Evergreen Properties, and related borrowers (collectively the "Evergreen Entities" or "Evergreen"). Respondent answered the Notice on May 26, 2021, and asserted affirmative defenses.

On December 6, 2022, following briefing by Respondent and Enforcement Counsel for the FDIC ("Enforcement Counsel") (together, "the Parties"), the ALJ issued an order denying the Parties' cross-motions for summary judgment and partial summary disposition, which identified a number of disputed questions of material fact as to each of the misconduct, effect, and culpability elements of Sections 1818(e) and 1818(i).

The ALJ held a six-day hearing from January 17-24, 2023. The hearing included testimony from more than 15 witnesses, including Respondent. A total of 310 exhibits were introduced and admitted into evidence in connection with witness testimony.

On November 20, 2023, the ALJ issued the Recommended Decision. On April 19, 2024, Respondent filed exceptions to the ALJ's Recommended Decision ("Exceptions").

III. FINDINGS OF FACT

The Board is mindful that while it "generally defers to an [ALJ's] factual findings, especially those based on the ALJ's judgments as to the credibility of the witnesses, [it] is not bound by them, and may reach different factual findings so long as there is substantial evidence in the record to support those findings." *In the Matter of Preston J. Brooks*, No. AA-EC-91-153, 1993 WL 13966512, at *14-15 (June 17, 1993) (OCC final decision); *see also Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 853 (D.C. Cir. 1970). The Board draws the following facts from the administrative record and the factual findings of the ALJ. *See* 12 C.F.R. § 308.40(c).

A. General Background

At all relevant times, Grand Rivers was a state-chartered bank doing business under the laws of the State of Illinois, with its principal place of business at Grand Chain, Illinois. Respondents Answer and Affirmative Defenses to the FDIC's Notice filed on May 26, 2021 ("Answer") ¶ 1. At all relevant times, it was an insured state non-member bank subject to the FDI Act, 12 U.S.C. §§ 1811-1831aa, the Rules and Regulations of the FDIC, 12 C.F.R. Chapter III, and the laws of the State of Illinois. JX 1 (December 19, 2022, Joint Stipulations of Fact) ¶ 2. Respondent was, during the relevant time period, an "institution-affiliated party" ("IAP") of Grand Rivers as that term is defined in 12 U.S.C. § 1813(u) and for purposes of 12 U.S.C. §§ 1818(e)(7), 1818(i), and 1818(j). *Id.* ¶ 3.

At the time of the September 15, 2014, examination of Grand Rivers, Respondent was Chairman of the Board of Directors of Grand Rivers and a member of the Bank's committee that approved all loan requests. *See* R.D. 14; December 6, 2022 Order No. 30: Regarding Cross-Motions for Summary Judgment ("Order No. 30"), at 7; Hr'g Tr. (Botsch) at 272:23-273:3. He served as a director of the Bank and Chairman of the Board from 2010 through October 20, 2015, and again a few days later until his final resignation on April 20, 2016. Order No. 30 at 7.

During the relevant period, Respondent was also community bank President for the southern region of Peoples National Bank, N.A., McLeansboro, Illinois ("Peoples or PNB"). R.D. at 14. He served on PNB's Board of Directors and its Executive Loan Committee. *Id*.

B. Respondent's Dominant Influence

Respondent exerted a "dominant influence" at Grand Rivers and was the dominant policy and decision maker. *See* R.D. at 15-17. Respondent disputes that he exerted a "dominant influence" at Grand Rivers and states that this characterization is the result of the testimony of two disgruntled former employees (Patrick Hunn and Don Nave). Exceptions at 66-67. However, the testimony from numerous individuals at Grand Rivers makes clear that Respondent was the primary decision maker at the Bank and, in particular, managed and directed the Evergreen relationship at the Bank. *See e.g.*, EX 391 (Gaskins Dep.) 18:10-19:8, 167:4-7; EX 393 (Winters-Ledbetter Dep.) 20:13-19; Hr'g Tr. (Hunn) at 329:14-24; 334:23-335:1.

CEO Whitney Stringer described the Respondent's leadership style as leading "by intimidation rather than respect," explaining that he could sometimes be volatile and vindictive. Hr'g Tr. (Stringer) 34:19-24. Don Nave, a loan review officer at Grand Rivers, reported that when he denied certain loans, Respondent became angry and abusive. Hr'g Tr. (Nave) 195:9-25; 196:1-14. President Keith Botsch testified that Respondent was always trying to push Botsch around to "make me do what he wanted done." Hr'g Tr. (Botsch) 270:16-20. Attorney Patrick Hunn described the Respondent as "rul[ing] with an iron fist," saying it was "his way or no way" and stated that people lost their jobs if they didn't follow his explicit directions. Hr'g Tr. (Hunn) 328:18-22.

CFO Grady Gaskins explained that people were "on edge" when Respondent was around, that he witnessed "shouting and foul language," and that he was not comfortable disagreeing with him. EX 391 (Gaskins Dep.) 19:5-8; 20:8-15. In addition to this testimony, Respondent was found to be a dominant official in the 2016 Report of Examination of Grand Rivers ("2016 Exam"), a finding that was reported in the non-confidential section because it was a concern for examiners. EX 314 at 8; *see also* Hr'g Tr. (Heftner) 502:15-17. Given the ample supporting evidence in the record, the Board concurs with the ALJ's finding that Respondent was a dominant influence based on the testimony from numerous individuals (not only the two that Respondent references in his Exceptions), as well as the 2016 Exam.

C. The Proposed Merger Between Grand Rivers and PNB

In July 2015, then-President Keith Botsch contacted Respondent's father, Bill Bonan Sr., about the possibility of a merger with PNB. R.D. at 18; *see also* Hr'g Tr. (Botsch) 223:6-8. In response, Respondent resigned as the Chairman of the Board of Grand Rivers, and PNB halted merger discussions. R.D. at 18-19.

CEO Stringer and Botsch believed that the merger was in the best interest of Grand Rivers and that the only way to keep it moving forward was to give in to Respondent's demands—choosing his own board members and a monthly compensation of $10,000. R.D. at 18; *see also* EX 166. Under the merger agreement, the two Evergreen loans would not be assumed but rather held by Grand Rivers' holding company. R.D. at 43; *see also* EX 195 (merger agreement); Hr'g Tr. (Botsch) 225:1-22.

D. Evergreen and its Financial Difficulties

Evergreen Drilling was an oil-drilling company based in Carmi, Illinois. Gary Evans, whose daughter "Abbey" served as the Vice President of Evergreen Drilling as of September 2015, controlled the Evergreen Entities. R.D. at 20. At the time, Evergreen Drilling and

Evergreen Properties had outstanding loans with Grand Rivers of approximately $1.2 million, and the Evergreen Entities in total owed PNB approximately $10.5 million (Grand Rivers' loans and PNB's loans are together "the Evergreen Loan Relationship"). R.D. at 20. Evergreen pledged certain collateral securing its loans to the Bank and to PNB. R.D. at 20.

The Evergreen Loan Relationship was managed by Respondent at Grand Rivers, and along with loan officer Scott Collins, at PNB. R.D. at 20.

Evergreen Drilling's oil-drilling business faced financial difficulties during 2015 in the midst of an industry-wide downturn. R.D. at 21; *see also, e.g.*, EX 391 (Gaskins Dep.) 137:21-138:5. Due to these difficulties, PNB accepted for six months payments of only interest on the Evans' loans at PNB, and an increased line of credit was extended to Evergreen on the understanding that the company would reduce its debt to PNB by $1 million by August 2015 through the sale of an equivalent amount of non-critical assets. R.D. at 21. However, by August 2015, Evergreen's loans at PNB had matured and the company still had not reduced its debt. R.D. at 21. Respondent and others at PNB expressed significant concerns about Evergreen's ability to service its debt and began considering how PNB could effectuate the company's options regarding the sale of its assets and potential future increase in cash flow. R.D. at 21.

The Plan for Evergreen

In September 2015, Respondent prepared a handwritten document entitled "Plan for Evergreen," which proposed that the Evergreen Entities sell collateral and refinance their loans in order to repay approximately $5.4 million of their debt to PNB and Grand Rivers. R.D. at 22.

One of the pieces of collateral mentioned in the Plan for Evergreen was a commercial warehouse in Carmi, Illinois, that Evergreen used as its headquarters (the "Carmi Warehouse"). R.D. at 22. The Carmi Warehouse had been pledged as collateral and was the subject of mortgage liens on loans to Evergreen Properties in favor of both Grand Rivers and PNB. R.D. at 23. At the time, the loans secured by the Carmi Warehouse totaled approximately $358,000 to PNB and $638,000 to Grand Rivers as a first and second mortgage, respectively. R.D. at 23. Among other things, the Plan for Evergreen also contemplated that Evergreen would sell one of its drilling rigs – Rig 24 – which was pledged as collateral for a loan to PNB. R.D. at 23.

Evergreen's Agreement with PNB

On September 30, 2015, PNB classified $5.9 million of its loans to Evergreen Drilling as substandard and placed them on non-accrual status. R.D. at 23. Ultimately, in the Fall of 2015, PNB and the Evergreen Entities entered into an agreement that extended the maturity dates of PNB's two Evergreen Drilling loans, bearing a total balance of over $10 million, until the end of April 2016. R.D. at 24. In return Evergreen agreed to liquidate additional assets to pay down its debt, including the proceeds from its then-pending sale of Rig 24, and to pledge new collateral to PNB as further security for the loans. R.D. at 24. One of the pieces of new collateral that Evergreen promised to pledge to PNB "free and clear of all liens or encumbrances" was its Cabot 900 drilling rig, known as Rig 23, despite the fact that Rig 23 was at the time already pledged as security to Grand Rivers. R.D. at 24.

While the record is unclear as to the extent of knowledge of the Grand Rivers Board of Directors as to details, the ALJ found, and this Board agrees, that the Grand Rivers Board generally knew and understood the level of Evergreen's financial difficulties, and in particular Evergreen's negative credit relationship with PNB as of December 2015. R.D. at 24-25.

The Carmi Warehouse

The Plan for Evergreen set out by Respondent involved the sale of Evergreen's Carmi Warehouse in the fall of 2015 to reduce the company's debt. R.D. at 26. However, Respondent also viewed it as "critical" that Evergreen Drilling be able to continue to use the Carmi

Warehouse as its headquarters. R.D. at 26. Accordingly, Respondent contemplated a sale and leaseback transaction in which someone purchased the warehouse from Evergreen, allowing Evergreen to pay down its loans with the proceeds, while the company continued to use the warehouse under the terms of a lease agreement. R.D. at 26.

Respondent's Efforts to Purchase the Carmi Warehouse

Initially, beginning in mid-September 2015, Respondent took steps to purchase and lease back the Carmi Warehouse himself using his company FWBII Holdings ("FWBII-H"). *See* R.D. at 26-27. Carrollton Bank ("Carrollton") agreed to finance Respondent's purchase. R.D. at 27-28. At some point after December 2, 2015, however, Respondent decided that he no longer wished to purchase the Carmi Warehouse and did not consummate the purchase. R.D. at 31-33.

E. The 618 Holdings Loan

While the Carrolton loan was awaiting consummation in December 2015, Respondent was exploring an alternate route—facilitating the purchase and leaseback of the Carmi Warehouse by a new company formed by two of his employees, Jason Harbison ("Harbison") and Adam Tate ("Tate"). R.D. at 33. Originally, Harbison and Tate had been looking to purchase a residential building, but that fell through. EX 395 (Harbison Dep.) 15:14-20 ("For whatever reason, that didn't work out. Subsequently, I think Bill ended up buying it."). In mid-December, Respondent approached them and asked them to purchase the Carmi Warehouse instead, with financing from Grand Rivers. R.D. at 34; *see also* EX 395 (Harbison Dep.) 15:21-24 ("But he said, you know, that deal is not going to work out, but this is a deal—I need you to do me a favor, this deal would help me out a lot."); EX 391 (Gaskins Dep.) 65:13-18.

James Harbison and Adam Tate

At the time Respondent asked Harbison and Tate to purchase the Carmi Warehouse, they both worked for him and lived rent free in housing he owned. R.D. at 33. Harbison provided property management services for Respondent's company, FWBII-H, such as lawn mowing and landscaping through Harbison's company Roundfire Solutions, LLC ("Roundfire Solutions"). R.D. at 33. Tate was a contract employee. R.D. at 33. Neither Harbison nor Tate had significant financial assets. R.D. at 33-34. Harbison had a negative net worth of $190,000 with an adjusted gross income of $62,000. R.D. at 34. Tate had a net worth of $20,000 and an adjusted gross income of $27,000. R.D. at 34.

Respondent Facilitates the 618 Holdings Purchase of the Carmi Warehouse

Respondent initiated the purchase of the Carmi Warehouse by Harbison and Tate, determined the terms, and facilitated the financing through Grand Rivers. R.D. at 33-36. Respondent approached Harbison and Tate and asked them to purchase the warehouse. R.D. at 33. On or before December 17, 2015, Respondent directed CFO Gaskins to prepare a loan request on behalf of Harbison and Tate to purchase the Carmi Warehouse from Evergreen Properties for $1.25 million. R.D. at 36. The loan request was made in the name of 618 Holdings, LLC ("618 Holdings"). R.D. at 36. The terms of purchase and the lease agreement for the purchase of the Carmi Warehouse by 618 Holdings were nearly identical terms as the proposed purchase of the property by Respondent's company, FWBII-H, terms which were negotiated by the Respondent. Hr'g Tr. (Hunn) 348:18-19; EX 391 (Gaskins Dep.) 61:25; 66:1-3. Gaskins also testified that he told examiners that he structured the loan payment reserve based on instructions from Respondent. EX 391 (Gaskins Dep.) 82:23-25.

There is no indication in the record that Respondent ever threatened Harbison and Tate, but the ALJ credited Harbison's testimony that he felt pressured to agree to the deal and that he feared consequences if he did not comply. R.D. at 35; *see also* EX 395 (Harbison Dep.) 21: 9-24 (testifying that he went along with the deal "mostly because of leverage" and that Respondent "was my sole source of income in this economic desert that is Southern Illinois."); EX 395 (Harbison Dep.) 22: 1-5 (if he had not gone along with the deal he expected Respondent would have "fired me, told me I needed to move out, whatever. There would have been a consequence in my opinion."). Other than choosing the name of the company and visiting the Carmi Warehouse once before the sale, Harbison testified that he and Tate had no involvement with the transaction or knowledge of the transaction terms until the day of closing. R.D. at 36; *see also* EX 395 (Harbison Dep.) 19:8-20. Everything was done for them by Grand Rivers' employees at the direction of Respondent. R.D. at 36.

Board Approval of the 618 Holdings Loan

On December 18, 2015, Winters sent the Bank's directors an email to approve certain loan requests, which included the 618 Holdings $1.25 million loan, as well as a $600,000 loan request for Harbison's other company, Roundfire Solutions. R.D. at 37. Neither request showed any cash flow analysis, but instead, the Roundfire Solutions request simply stated "adequate cash flow" and the 618 Holdings request listed a net worth of $150,000—despite not yet being a legal entity. R.D. at 37-38. 618 Holdings, LLC was formed as a company on December 30, 2015. EX 300.

On December 23, 2015, the Board of Directors for Grand Rivers voted to approve the 618 Holdings loan. R.D. at 42. 618 Holdings still did not exist as a legal entity. *Id.*; *see also* EX 300. Respondent originally voted to approve, then abstained. R.D. at 42. Stringer also abstained. *Id*. Other Board members, Gaskins, Lucas Phelps ("Phelps"), and Jake Campbell ("Campbell"), all voted yes by email. R.D. at 42; *see also* EX 296.

Gaskins testified that although he didn't think Harbison and Tate had the ability to repay the loan, he voted for it because he was told to by Respondent, and that if he hadn't, he would be removed from his position by the Respondent. R.D. at 43; *see also* EX 391 (Gaskins Dep.) 76:15-25.

Campbell expressed concerns over the true value of the Carmi Warehouse, the lack of cash flow for 618 Holdings, and Evergreen's ability to make lease payments. R.D. at 43; *see also* EX 273. Nevertheless, he testified that he ultimately voted for the loan because the Evergreen loans wouldn't be included in merger with PNB but the 618 Holdings loan would. R.D. at 43; *see also* Hr'g Tr. (Campbell) 397:13-22; 399:4-6. Campbell also testified that while he knew of Harbison and Tate's negative net worth, he thought they had a better chance of "making good" on the loans than Gary Evans because of oil prices and their financial difficulties. Hr'g Tr. (Campbell) 413:1-11. However, had he known the full state of Evergreen's financial difficulties, in particular the non-accrual status of their loans at PNB, he testified that he would not have voted yes despite his merger concerns. R.D. at 43-44.

Stringer testified that she abstained because she had concerns about the borrowers and the repayment of the loan but that she did not feel comfortable voting against it because she feared being fired as a result. R.D. at 44; *see also* Hr'g Tr. (Stringer) 64:16-22; 67:3-7; 119:5-8.

Creditworthiness of Harbison and Tate

Harbison himself testified that neither he nor Tate were creditworthy. R.D. at 34, 41; *see also* EX 395 (Harbison Dep.) 20:25-21:5. He further testified that neither of the two borrowers was capable of making the $7,753 monthly payment under the terms of the loan. R.D. at 41; *see also* EX 395 (Harbison Dep.) 33:12-23. Harbison said he felt pressured to agree to the transaction, feared consequences if he did not comply, and expected someone to come in and stop it. R.D. at 35, 42; *see also* EX 395 (Harbison Dep.) 21:16-20; 42:9-13.

Employees at Grand Rivers were aware that Harbison and Tate were not creditworthy for the 618 Holdings loan. R.D. at 34, 36, 39, 42. The Bank's attorney Patrick Hunn testified that he was surprised they were purchasing the Carmi Warehouse "due to their financial status or lack thereof." R.D. at 36; *see also* Hr'g Tr. (Hunn) 338:10-14; 338:20-339:2. CFO Gaskins stated that Harbison and Tate were "were not very strong at the time as far as credit approval" and that neither would have the financial capacity to support the loan. R.D. at 39; *see also* EX 391 (Gaskins Dep.) 74:22-23; 75:18-76:9. Senior Loan officer Williams testified that he thought Respondent did not ask him to be involved with the loan because he would not have approved it in light of Harbison and Tate's financial worth and because he knew no way that 618 Holdings was going to generate sufficient revenue to meet payments. R.D. at 39; *see also* Hr'g Tr. (Williams) 660:3-4, 658:20-660:5, 660:12-19. CEO Stringer testified that the two borrowers "didn't have the capacity and were talked into a business arrangement that they couldn't afford to pay for in order to do whatever for Evergreen Drilling." R.D. at 42; *see also* Hr'g Tr. (Stringer) 133:1-4.

During the 2016 Examination of Grand Rivers, in addition to questioning the 618 Holdings loan, examiners also questioned a $50,000 unsecured loan to Harbison. R.D. at 49. Around the same time, representatives from PNB noted their concerns over the same $50,000 loan during a loan review as part of the due diligence for the proposed merger. *Id*. at 52. They found that Harbison did not reasonably qualify for unsecured credit on a $50,000 loan. *Id*.; *see also* Hr'g Tr. (Stringer) 83:7-11 (noting that Harbison couldn't "cash flow" for the $50,000 loan).

Respondent argued that he was misled into believing Harbison and Tate could make the loan payments because he was provided with outdated and inaccurate credit score information. R.D. at 39. However Respondent paid Harbison and Tate's respective salaries. R.D. at 33-34.

Harbison had an adjusted gross income of $62,000 while Tate had an adjusted gross income of $27,000. R.D. at 34. Neither had any significant assets. R.D. at 33-34.

The ALJ determined, and this Board agrees, that Respondent knew or should have known that Harbison and Tate would not be capable of repaying a $1.25 million loan given their income and overall life situation, as well as the Respondent's knowledge of the same. R.D. at 38, 40-42. Taking note of the additional $600,000 loan request made on behalf of Harbison personally, the ALJ found that the Respondent appeared to place little importance on Harbison's financial capacity and ability to repay the bank. R.D. at 41.

Purchase and Sale and Lease Agreements

On January 7, 2016, 618 Holdings and Evergreen Properties finalized the purchase and sale and lease agreements for the Carmi Warehouse. R.D. at 44. The final loan amount was $1,262,109.75. R.D. at 45. The transaction terms and loan structure were formulated by the Respondent and Harbison and Tate had no knowledge of the terms until the day of closing. R.D. at 44-45. The only change either of them made was an inclusion of an escalation of lease payments made by Harbison. R.D. at 45.

From the proceeds Evergreen Properties made on the sale of the Carmi Warehouse, the first and second mortgage liens at PNB and Grand Rivers, respectively, were paid off. R.D. at 45. A lease reserves account was set up in the amount of $150,000, money which was placed into an escrow account to be automatically applied to the first eighteen months of lease payments made by Evergreen Properties to 618 Holdings. *Id*. Finally, $100,000 allocated for operational expenses was given to Evergreen Properties. *Id*.

The 2016 Examination of Grand Rivers

In January 2016, during the examination process, FDIC examiners Mathias Floersch and Reuben Cash looked into the 618 Holdings loan. R.D. at 49. At a February 9 meeting, when asked about the lease reserves structure, Gaskins reported that it was the Respondent's idea to establish the lease reserves, and that the source of repayment on the 618 Holdings loan would be lease payments from Evergreen. R.D. at 49; *see also* Hr'g Tr. (Floersch) 462:21-25; 463:1-2; Hr'g Tr. (Williams) 662:9-20.

The loan was then classified as substandard by the examiners. R.D. at 49-50; *see also* EX 314 at 56 (classification was "due to the lack of financial capacity of the debtors, the inappropriate structuring of the 618 Holdings credit in which an indirect [principal and interest] reserve account was established to make loan payments, the lack of collateral protection, and the questionable ability of Evergreen Properties to generate sufficient income to pay lease payments.").

The ALJ credited the joint fact and expert testimony of examiners Floersch and Cash in their conclusion that the structure of the 618 Holdings loan increased risk to Grand Rivers. R.D. at 51. Floersch and Cash explained that the loan resulted in Grand Rivers taking on additional debt—moving debt previously held by PNB to Grand Rivers, and then also another $250,000 in escrow and operating expenses. *Id*. This additional debt, on the same collateral, reduced the ability of Grand Rivers to recoup those funds, "jeopardizing the Bank's ability to liquidate it in case of default." *Id*. The examiners also testified that the loan file for 618 Holdings lacked a basic analysis of repayment capacity, did not conform to prudent loan workout practices, and that the lease reserves served to mask the loan's true repayment ability (or lack thereof). *Id*.

After a visit from examiners, on April 7, 2016, the 618 Holdings loan was put on non-accrual status. R.D. at 52; *see also* EX 357. On April 20, Respondent resigned from his positions at Grand Rivers and the holding company. *Id*. Gaskins and Campbell also resigned. *Id*.

618 Holdings Loan Default and Impacts

In January 2017 Grand Rivers charged off $500,000 from the 618 Holdings loan.[1] R.D. at 52. 618 Holdings then defaulted on the loan, which had a balance of $668,519 after the charge-off and after Grand Rivers applied the funds from the lease reserve account. *Id*. On April 7, 2017, in order to avoid foreclosure, 618 Holdings entered into a deed-in-lieu of foreclosure with Grand Rivers. R.D. at 52; *see also* EX 353. Brent Clark, a Board Member, testified that Grand Rivers pursued a deed-in-lieu because Harbison and Tate had "no perceivable way to earn that type of cash flow to service that type of debt." R.D. at 53; *see also* Hr'g Tr. (Clark) 737:24-738:4. Harbison testified that he opted for the deed-in-lieu because he was not able to pay the debt. R.D. at 53; *see also* EX 395 (Harbison Dep.) 44:10-18. As of November 2022, the best offer Grand Rivers reportedly received on the property was $500,000. R.D. at 53; *see also* Hr'g Tr. (Stringer) 102:24-25. As of the date of the Recommended Decision, Grand Rivers still owned the Carmi Warehouse. R.D. at 53.

F. The Release of the Rig 23 Collateral

As of the fall of 2015, Evergreen owned several self-propelled oil drilling rigs used to carry out their business. R.D. at 53. This included Rig 23 (a Cabot 900 series model) and Rig 24 (a Service King 775 model). R.D. at 53. Rig 23 was considerably more valuable than Rig 24. R.D. at 53.

[1] Grand Rivers further wrote down the debt in December 2018 by $13,760. EX 357.

In January 2013, Grand Rivers obtained a purchase money security interest ("PMSI") in Rig 23 as collateral for a $490,000 loan to Evergreen Drilling. R.D. at 54; Ex. 9 at 1; Hr'g Tr. (Stringer) 40:22-41:10; Hr'g. Tr. (Nave) 175:9-176:15. Grand Rivers filed UCC-1s expressly reflecting its PMSI in Rig 23 with the Illinois and Indiana Secretaries of State on January 8, 2013 and January 9, 2013, respectively.[2] R.D. at 55. The file number for the Illinois UCC-1 statement was 17906194. R.D. at 55.

Peoples held its own security interest in Rig 23 "through a prior blanket UCC lien securing all of its loans to Evergreen Drilling." R.D. at 55.[3] This interest was subject to Grand Rivers' $490,000 PMSI, which took priority over People's lien. R.D. at 55.

In June 2013, Grand Rivers' then-CEO, James Stroud, prepared an additional loan of approximately $90,000 to Evergreen Drilling that was also secured by its PMSI in Rig 23. R.D. at 55; EX 14 at 1; Hr'g Tr. (Nave) 202:16-20; *see also* Hr'g Tr. (Nave) 180:4-185:11. In May 2014, Respondent directed Donald Nave, as loan officer on Evergreen Drilling, to consolidate the two loans. R.D. at 55. Grand Rivers' executive loan committee approved this consolidation (which advanced a further $126,000 to Evergreen Drilling "for expenses") and the consolidated loan was issued on May 8, 2014. R.D. at 55-56; EX 15 at 1. The promissory note executed by Evergreen Drilling on May 8, 2014 stated that it was secured by Commercial Security Agreement dated January 9, 2013, and referenced UCC file #17906194 (the file number for the

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[2] A search of UCC financing statements ("UCC-1s") filed in a given jurisdiction will show all of the collateral that a specific entity has pledged as security in that jurisdiction, along with the nature of the security interest. R.D. at 54-55. A PMSI is distinct from a blanket lien. *See* Hr'g Tr. (Nave) 175:19-176:3 (describing blanket liens and PMSIs).

[3] A UCC-1 blanket lien gives a creditor a security interest in all of the assets that a borrower has in the event of default, but at a lower priority. R.D. at 55. The existence of a blanket lien held by a creditor in a given jurisdiction would also be discoverable in a UCC-1 search. *Id*.

Illinois UCC-1 statement). EX 9, EX 10, EX 11, EX 17 at 3. EX 55 at 3, 46, Hr'g Tr. (Nave) 184:9-17; Hr'g. Tr. (Clark) 708:8-710:13; Hr'g. Tr. (Stringer) 104:2-106:14.[4]

As of the fall of 2015, the PMSI in Rig 23 was the sole piece of collateral on Grand Rivers' Evergreen Drilling loan. R.D. at 56.

PNB Seeks Release of Grand Rivers' Rig 23 Interest

In or around September 2015, PNB loan officer Scott Collins contacted Grand Rivers to request that it release its security interest in the Rig 23 collateral, apparently in the belief that Grand Rivers had a lien on the wrong drilling rig. R.D. at 56. Donald Nave refused to release Grand Rivers' PMSI in Rig 23 unless Grand Rivers "was paid the full amount of its lien pursuant to the UCC-1 on file with the Illinois and Indiana Secretaries of State." R.D. at 57; *see also* EX 39, EX 40; Hr'g. Tr. (Nave) 188:10-25, 189:1-13.

The Sale of Rig 24

On September 14, 2015, as part of Evergreen Drilling's plan to liquidate assets and pay down its debt to PNB, it entered into a Letter of Intent with U.S. Energy Exploration Corporation ("U.S. Energy") for the sale of Rig 24, a Service King 775 series drilling rig. R.D. at 59; *see also* EX 45; JX 1 ¶ 35.

On October 7, 2015, Gaskins sent an email to Kassie Winters, Grand Rivers Head of Loan Operations ("Winters"), asking if Grand Rivers had Rig 24 as current collateral. EX 88 at 1. Gaskins asked Winters this question because Evergreen Drilling was about to sell Rig 24 and Gaskins knew that Grand Rivers would need to release any UCC filings on Rig 24 to complete the sale. EX 391 (Gaskins Dep.) 109:17-24. Winters responded and stated that "[t]his doesn't

[4] At no time while Nave was employed at the Bank was the Bank told that Rig 23 was a titled motor vehicle. Nave testified that the Bank initially asked for a title, but was told Rig 23 was equipment and did not have a title. Hr'g. Tr. (Nave) 177:15-22.

list a rig number it says Cabot 900 series self-propelled drilling rig SN#11937." EX 88, at 1. The "this" referred to the UCC security agreement that Grand Rivers had for its loan to Evergreen Drilling. EX 393 (Winters-Ledbetter Dep.) 113:22-114:2.

On October 9, 2015, U.S. Energy sent Evergreen Drilling a signed Sale and Purchase Agreement ("Rig Purchase Agreement") to purchase Rig 24 for $1,559,000 (ten percent of the purchase price had already been paid as a nonrefundable deposit). R.D. at 59; *see also* JX 1 ¶ 36. As part of the transaction, Evergreen Drilling represented to U.S. Energy that it owned "good and marketable title to [Rig 24], free and clear of all Encumbrances," other than "such liens or encumbrances which can and shall be removed by application of all or a portion of the purchase price at closing by escrow agent." R.D. at 59; RX 40 (signed copy of Rig Purchase Agreement) § 3.1(c). Evergreen Drilling further warranted that it would provide U.S. Energy "with proof of satisfaction of the indebtedness and/or release of security interest" for those existing liens and encumbrances prior to closing and stated that the escrow agent holding the balance of the purchase price "shall retain the purchase price funds until such proof is provided." R.D. at 59-60; RX 40 § 3.1(c).

The Rig Purchase Agreement included attachments, two of which are pertinent here – Appendix A and Exhibit C. R.D. at 60. Appendix A identifies the drilling rig being sold as a "2010 Service King – SK 775 Series," which is the model number for Rig 24. R.D. at 60; RX 40 at 18.[5] Rig 24 is not identified or described anywhere else in the Rig Purchase Agreement, and in particular it is not identified by rig number. R.D. at 60. Exhibit C purported to be a list of all existing liens and encumbrances on the Service King 775 being sold (*i.e.*, *on Rig 24)* that needed

[5] On September 15, 2015, Abbey Evans had sent Bonan II a copy of the September 14, 2015 Letter of Intent that included Appendix A. EX 45.

to be released before closing so that "good and marketable title" to the rig could be conveyed. R.D. at 60; RX 40 §§ 2.4, 3.1(c); *see also* JX 1 ¶ 37. Exhibit C lists two separate liens that needed to be released as a condition of the sale. Erroneously, one of those liens was actually Grand Rivers' PMSI *on Rig 23* (which was not being sold). RX 40 at 23.[6]

Confusion over Rig 23 and Rig 24

Grand Rivers did not have, and never had, any kind of security interest in Rig 24; the only loan that Evergreen Drilling had with Grand Rivers at this time was the May 2014 consolidated loan secured by Rig 23. R.D. at 60; *see also* JX ¶ 55 ("Rig 24 was never collateral securing Evergreen Drilling's loan with the Bank"). Nor did Grand Rivers have a blanket lien on Evergreen Drilling. R.D. at 60. Anyone could have ascertained these facts by performing a UCC-1 search in Illinois and Indiana. R.D. at 60.

Nevertheless, Exhibit C to the Rig Purchase Agreement listed a security interest held by Grand Rivers that needed to be satisfied before clear title on Rig 24 could be conveyed and the escrow agent could release the remainder of the purchase price. R.D. at 61. The *Rig 24* interest purportedly held by Grand Rivers is listed as "filed with the Illinois Secretary of State at File No. 017906194." R.D. at 61. But this was erroneous; this filing was actually Grand River's Illinois PMSI *on Rig 23*. R.D. at 61. The record does not reveal how this error occurred. R.D. at 61.

The confusion over Rig 23 versus Rig 24 was soon compounded.

On October 9, 2015, Abbey Evans emailed Respondent, asking "We are needing a UCC-1 release from Grand Rivers and Peoples on Rig 24 to attach to the purchase agreement as

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[6] Rig 23 was not described by rig number. It was only identified by reference to the UCC file number. *Compare* EX 127, at Exhibit C (listing security interest in favor of Bank in Illinois with a file number of 017906194) *with* EX 10 at 1 (UCC Financing Statement No. 17906194 filed in connection with the loan to Evergreen Drilling that was secured by a PMSI in Rig 23).

Exhibit C. If at all possible, can we please get this done today." R.D. at 62; EX 122 (October 9, 2015 email chain); JX 1 ¶ 36. Respondent then forwarded Evans's email to Gaskins and Collins and instructed them to "[g]et these releases to Gary." R.D. at 62; EX 122; *see also* JX 1 ¶ 36; RX 103, at 1. Gaskins understood that Respondent was requesting a release for the rig that was being sold, Rig 24. EX 391, Gaskins Dep. 113:2-6. This was not possible with respect to Grand Rivers because Grand Rivers had no security interest in Rig 24, but rather had a PMSI on Rig 23.[7] Later that day Gaskins got back to Respondent mistakenly stating "our ucc-1 is not a blanket it is just on this specific rig [referring to Rig 24] so all I need to do is prepare the termination and I can send it out. I won't file it until payment is received. Just need the attachments to confirm its same equipment and same wording in ucc and purchase agreement. I can take care of it right now." EX 124, at 1; EX 391 (Gaskins Dep.) 114:18-25. Gaskins testified that "this specific rig" referred to Rig 24. EX 391 (Gaskins Dep.) 114:18-25. Respondent did not send him the attachments. Gaskins did not confirm that whatever termination statement Grand Rivers filed pertained to the same drilling rig that Evergreen was selling (*i.e.*, Rig 24). EX 391 (Gaskins Dep.) 115:21-116:4.

Gaskins testified that he and Winters were responsible for confirming that the "Cabot 900" (*i.e.*, Rig 23) was the rig being sold (*i.e.,* rig 24). EX 391 (Gaskins Dep.) 110:19-111:6. Respondent testified at the hearing that, as Chairman of the Board, he was not the one responsible for confirming the accuracy of UCC filings. Hr'g Tr. (Respondent) 907:9-12. However, as to the sale between Evergreen Drilling and US Energy, Respondent directed

[7] Nor was Grand Rivers receiving anything for any release of Rig 24 (even assuming that it had a lien on that rig, which it did not). R.D. at 65.

Gaskins and Winters with respect to the Bank's release of collateral. EX 391 (Gaskins Dep.) 87:4-25; EX 393 (Winters-Ledbetter Dep.) 128:20-25; 129:1-10.

What followed was a stream of further (mis)communications with respect to the release requested by Abbey Evans, the preparation of erroneous UCC termination statements, and directions from Respondent to others at Grand Rivers to release collateral that Grand Rivers did not possess. *See* R.D. at 61-77. For example, later on October 9, Gaskins forwarded Abbey Evans' email (which included the attachment listing the Rig 23 UCC filing) to Winters saying "[n]eed this security interest released/terminated." EX 126 at 1. Gaskins, however, believed that he was instructing Winters to prepare a release for Rig 24. EX 391 (Gaskins Dep.) 121:20-122:4. On the evening of October 9, Gaskins and Winters met at the Grand Rivers office and reviewed the U.C.C. termination statements Winters had prepared for filing in Illinois and Indiana. EX 393 (Winters-Ledbetter Dep.) 157:4-12, 157:21-158:20. The evidence shows that Winters and Gaskins thought they were preparing termination statements related to Rig 24 (which was being sold) when in reality they were doing so for Rig 23 (which was not). *See, e.g.*, EX 393 (Winters-Ledbetter Dep.) 158:8-18.

On October 16, 2015, Winters emailed Respondent copies of unrecorded UCC-3 termination statements she had prepared. EX 143, at 1-2 (Illinois); *see also* EX 142, at 1-2 (Indiana). The termination statements list the UCC file numbers for the original UCC filings on Rig 23. *E.g.*, EX 143, at 2. Respondent did not open the email attachments. Hr'g Tr. (Respondent) 878:25-880:25; 881:1-882:8.

The miscommunications continued. For example, on November 13, 2015, April Riecken of Evergreen Drilling forwarded an email from Denny Boyer (of U.S. Energy) that sought the

"Grand Rivers Bank UCC Release." R.D. at 68; EX 233 (chain including November 13, 2015 email). Ms. Reicken stated:

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

Id. Respondent did not correct the apparent mistake being made between Rig 23 and Rig 24, but rather forwarded this email on to Kassie Winters and Gaskins saying "[g]et this bulkshit [sic] done this morning. Do you understand me." R.D. at 68; EX 233. Both Gaskins and Winters understood this to refer to releases for Rig 24. EX 391 (Gaskins Dep.) 87:4-11; EX 393 (Winters-Ledbetter Dep.) 165:7-14.

The Release of the Rig 23 Collateral

Thus, Respondent demanded that Rig 24 be released on November 13, 2015. R.D. at 70. The problem was that there was no Grand Rivers lien on Rig 24 to be released. There was, however, a PMSI on Rig 23.

In that regard, on that same day, Winters emailed Riecken and Boyer and attached UCC forms that terminated Grand Rivers' Indiana and Illinois interests in Rig 23. R.D. at 70-71; RX 46 at 3, 4. Respondent was copied on this email. R.D. at 71. The forms terminating the Bank's Illinois and Indiana interest in Rig 23 were filed and recorded on November 13, 2015. R.D. at 73; *see* EX 234, at 1.

It is Respondent's position that he believed that the UCC termination filings either released a security interest that did not exist or one that should not have existed. Exceptions at 13; *see also* Hr'g Tr. (Respondent) 906:22-907:3.

In any event, the evidence is that as of November 13, 2015, Respondent, Winters, and Gaskins all believed that the Bank had released its security interest (if any) in Rig 24. Hr'g Tr. (Respondent) 856:8-18; EX 391 (Gaskins Dep.) 132:21-133:2; EX 393 (Winters-Ledbetter Dep.) 145:22-146:4. There is no substantial evidence that any of the three intentionally released Rig 23.

Grand Rivers Discovers the Release of Rig 23 and Charges Off the Loan

The termination of the Bank's PMSI in Rig 23 meant that its consolidated loan to Evergreen Drilling—with an outstanding balance of approximately $550,000—was no longer secured by any collateral. R.D. at 77. Mike Williams, Grand Rivers' senior loan officer, discovered that the loan was unsecured during the joint examination of the Bank in early 2016, when he "pulled an updated UCC search" for Evergreen and realized that the UCC had been released for this loan. R.D. at 77-78. Winters then attended a meeting with Respondent, Williams and other bank personnel in which Winters confessed that she had accidentally released Grand Rivers' Rig 23 interest. R.D. at 78. Grand Rivers obtained a new blanket lien for the Evergreen Drilling loan in March 2016 that was subordinate to the blanket lien already held by PNB. R.D. at 78.

Grand Rivers ultimately charged off the Evergreen Drilling loan in the amount of $489,268 in early January 2017. R.D. at 79.

Respondents Allegations Relating to Motive

Respondent alleges in his Exceptions that the Grand Rivers board had a motive to "throw[] [him] under the bus" to obtain an insurance payment with respect to the release of Rig 23. Exceptions at 15-16. Specifically, Respondent points to the following evidence: On June 16, 2016, Mike Williams sent an email to Winters asking "what collateral is left of Evergreen. I need this ASAP." RX 85, at 3. Winters responded, stating that Grand Rivers "ha[s] a blanket UCC on everything behind PNB." *Id*. at 2. Williams forwarded Winters' response to Keith Botsch, Whitney Stringer, and Brent Clark, stating "When Kassie released (accidentally, she said) our lien on the $2 million drilling unit, instead of remaining unsecured, she/Grady filed a blanket UCC on Inventory, Equipment, and Accounts. PNB (of course) has a prior lien." *Id*. at 1-2. Stinger responded "It's possible we can file an insurance claim. I need to have a sit down with her to get the full story. Originally, she said it was her accident, but it may be that she was instructed by [Respondent] or [Gaskins] who would both be covered under the D&O policy." *Id*. at 1. Botsch responded and stated that Grand Rivers was "going to probably take a loss so I would do what we can to recover from the insurance policy if possible." *Id*.

The Board finds that there is no credible support for the proposition that the Grand Rivers' board acted with any improper motive (or what specific action was allegedly taken that would affect the Board's analysis in this matter).

Respondent's Conflicting Positions

The ALJ found that Respondent's testimony with respect to the issues involving the release of Rig 23 was not credible. R.D. at 12, 73-77. In particular, the ALJ found that Respondent was not credible with respect to whether he believed Grand Rivers held a security interest in Rig 24 at all, and when he believed it. *Id*. For example, at certain points Respondent testified that he was aware that there was no interest in Rig 24, yet still ordered his subordinates to release Rig 24. R.D. at 73. At other points, he testified that he believed Grand Rivers had a blanket lien on Evergreen Drilling that was in a junior position to PNB. R.D. at 73. The Board defers to the ALJ's credibility determinations with respect to Respondents' testimony on this issue.

ANALYSIS

IV. SECTION 1818 VIOLATIONS

A. Standard

Unless otherwise provided by statute, the burden of proof in an administrative proceeding is on the administrative agency to establish its charges by a preponderance of the evidence. *See* 5 U.S.C. § 556(d); *Steadman v. SEC*, 450 U.S. 91, 102 (1981). Here, the FDIC bears the burden to prove that the statutory elements for the entry of a prohibition order and the assessment of a second-tier civil money penalty have been satisfied.

B. The Elements of Sections 1818(e) and 1818(i)

Prohibition Order

For the entry of a prohibition order under 12 U.S.C. § 1818(e), the FDIC must prove the separate elements of misconduct, effect, and culpability.

The misconduct element may be established by showing that Respondent (an IAP) (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 [the Bank]," or (3) "committed any act, omission, or practice which constitutes a breach of [Respondent's] fiduciary duty." 12 U.S.C. § 1818(e)(1)(A).

The effect element may be established `by showing that [the Bank] thereby "has suffered or probably will suffer financial loss or other damage," that the Bank's depositors' interests "have been or could be prejudiced," or that Respondent "has received financial gain or other benefit." 12 U.S.C. § 1818(e)(1)(B).

With respect to the culpability element, it may be satisfied when the alleged misconduct either "involves personal dishonesty" or "demonstrates willful or continuing disregard by [Respondent] for the safety and soundness of [the Bank]." 12 U.S.C. § 1818(e)(1)(C)

Civil Money Penalty

Under 12 U.S.C. § 1818(i), the imposition of a second-tier civil money penalty also requires the satisfaction of multiple elements.

First, the FDIC must show misconduct, which can be the violation of "any law or regulation" or "final cease-and-desist order," the breach of "any fiduciary duty," or the *reckless* engagement "in an unsafe or unsound practice in conducting the affairs" of the Bank. 12 U.S.C. § 1818(i)(2)(B)(i) (emphasis added). Second, the FDIC must show some external effect: (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" the Bank; or (3) that it "result[ed] in pecuniary gain or other benefit" to the Respondent. 12 U.S.C. § 1818(i)(2)(B)(ii). Further, before any civil money penalty can be assessed, the FDIC must take into account the appropriateness of the amount of the penalty sought when considered in light of certain potentially mitigating factors, such as the "gravity of the violation" and the "good faith of the . . . person charged." *See* 12 U.S.C. § 1818(i)(2)(G).

In making its determinations with respect to the misconduct element of both sections 1818(e) and (i), the ALJ adopted the so-called "Horne Standard" to evaluate what constitutes an "unsafe or unsound practice." R.D. at 8. Under this standard, such practices encompass "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." R.D. at 8; *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). The Board likewise adopts the Horne standard in evaluating the misconduct prongs of both 1818(e) and (i).

C. Respondent is Liable for the 618 Holdings Loan and a Prohibition Order is Warranted.

The Board may impose a prohibition order if a preponderance of the evidence shows that Respondent engaged in prohibited conduct (misconduct); the effect of which was to cause the Bank to suffer financial loss or damage, to prejudice or potentially prejudice the Bank's depositors, or to provide financial gain or other benefit to the Respondent (effects); and that Respondent acted with personal dishonesty or a willful or continuing disregard for the safety and soundness of the Bank (culpability). 12 U.S.C. § 1818(e)(1); *Dodge v. Comptroller of Currency*, 744 F.3d 148, 152 (D.C. Cir. 2014) (citing *Proffitt v. FDIC*, 200 F.3d 855, 862 (D.C. Cir. 2000)). This Board agrees with the ALJ that Respondent's actions satisfy each of these three elements and concludes that a prohibition order is warranted.

1. Misconduct

Misconduct under section 8(e) encompasses participation in activity deemed to be an unsafe or unsound banking practice or in breach of a party's fiduciary duty. 12 U.S.C. §1818(e)(1)(A). The ALJ determined that Respondent, with respect to the 618 Holdings loan, engaged in unsafe and unsound banking practices and breached fiduciary duties of care and loyalty owed to Grand Rivers. R.D. at 95-101. As the record clearly supports this conclusion, this Board agrees.

Unsafe or Unsound Banking Practices

The Horne Standard defines unsafe or unsound practices as "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."[8] *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); *see also In the Matter of Patrick Adams*, No. OCC AA-EC-11-50, 2014 WL 8735096, at *8-24 (O.C.C. Sep. 30, 2014) (discussing Horne Standard in detail).

As noted in the Recommended Decision, the record in this matter overwhelmingly establishes that Respondent jeopardized the safety and soundness of Grand Rivers with regards to the 618 Holdings loan by facilitating a sizable loan through two borrowers he knew or should have known were not creditworthy, at a significant and foreseeable risk of loss to Grand Rivers. Under the adopted Horne Standard, he engaged in unsafe or unsound banking practices and therefore meets the misconduct element of 1818(e).

Respondent engaged in banking practices "contrary to generally accepted standards of prudent operation" by facilitating the purchase of the Carmi Warehouse by 618 Holdings. *See Michael v. FDIC*, 687 F.3d 337, 352 (7th Cir. 2012). The record demonstrates that he solicited Harbison and Tate, two of his employees, to purchase the Carmi Warehouse with financing from

[8] Respondent argues that an "'unsafe or unsound practice' must involve more than just an isolated action… [,]" Exceptions at 43. The authority Respondent cites for this argument is a dissent in a Sixth Circuit opinion which also states that the legislative history for defining an unsafe or unsound practice to mean an "imprudent act." *Calcutt v. Fed. Deposit Ins. Corp.*, 37 F.4th 293, 354 (6th Cir. 2022), *cert. granted, opinion rev'd on other grounds*, 598 U.S. 623 (2023). In any event, this Board has adopted the Horne standard, which describes an unsafe or unsound practice as "any action."

Grand Rivers through their newly formed company, 618 Holdings. R.D. at 33; Hr'g Tr. (Harbison) 15:21-24; EX 391 (Gaskins Dep.) 65:13-18. Respondent dictated the terms of the purchase and the related leaseback agreement. *See* R.D. at 33-36; *see also* Hr'g Tr. (Hunn) 348:18-19; EX 391 (Gaskins Dep.) 61:25; 66:1-3; 82:23-25. The borrowers had little involvement in the transaction or even knowledge of the terms until the day of closing. R.D. at 36; *see also* Hr'g Tr. (Harbison) 19:8-20.

The record also demonstrates that these two borrowers were very obviously not creditworthy for the $1.25 million loan. Harbison himself knew the two borrowers were not creditworthy and could not make the $7,753 monthly payments on the loan. R.D. at 34, 41; EX 395 (Harbison Dep.) 20:25-21:5; 33:12-23. The Bank's senior loan officer, attorney, CFO, and CEO also were well aware that Harbison and Tate were not creditworthy for the loan. *See supra* section III.E. In fact, far from qualifying for a $1.25 million loan in the name of 618 Holdings and a separate $600,000 loan to Harbison's other business, examiners and representatives from PNB found that Harbison did not even qualify for a $50,000 unsecured loan. *See* R.D. at 49; Hr'g Tr. (Stringer) 83:7-11.

Respondent argued that he was under the mistaken impression that Harbison and Tate could make the loan payments because he was presented with outdated and inaccurate credit score information. R.D. at 39. Given the different impressions of several others involved in the transaction (including at least one of the borrowers) and the fact that Respondent paid Harbison and Tate's modest salaries, this assertion is not credible.

The consequences of the 618 Holdings loan posed an "abnormal risk of loss or harm" to Grand Rivers. *See Michael*, 687 F.3d at 352; *see also Seidman v. Office of Thrift Supervision*, 37 F.3d 911, 932 (3d Cir. 1994) ("imprudent act" posing an "'abnormal risk of [financial] loss or damage to an institution, its shareholders, or the agencies administering the insurance funds'" is an unsafe and unsound practice) (citation omitted). The record is clear that Respondent should have known that Harbison and Tate were not able to make payments on the loan and facilitated the transaction regardless of this knowledge, constituting engagement in an unsafe and unsound banking practice. *Gulf Fed. Sav. & Loan Ass'n v. FHLBB*, 651 F.2d 259, 264 (5th Cir. 1981) (concluding, based on the legislative history of section 1818(e), that "disregarding a borrower's ability to repay" is an unsafe and unsound practice); *Matter of Grubb*, FDIC-88-282k & 89-111e, 1992 WL 813163, at *29 (Aug. 25, 1992) (approving loans without determining the borrower's ability to repay constitutes an unsafe and unsound practice).

Breach of Fiduciary Duty

In addition to engagement in an unsafe and unsound banking practice, this Board also finds that Respondent breached his fiduciary duties of care and loyalty.[9] Respondent, as the Chairman of the Board of Directors of Grand Rivers, owed Grand Rivers a duty of care, a duty of loyalty, and a duty of candor.[10] *See In the Matter of Seidman*, 37 F.3d 911, 933 (3d Cir. 1994). These duties generally required him to act in good faith and in the best interests of Grand Rivers. *In the Matter of Michael R. Sapp*, Nos. FDIC-13-477(e), FDIC-13-478(k), 2019 WL 5823871, at *14 (F.D.I.C. Sep. 17, 2019).

<u>Duty of Care</u>: Respondent owed Grand Rivers a "constant concern for the safety and soundness" of the institution. *In the Matter of Larry B. Faigin and John J. Lannin*, Nos. 11-

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[9] Although this Board separately concludes that Respondent engaged in unsafe and unsound banking practices, it is worth noting that because of their inherent danger, breaches of fiduciary duty also constitute unsafe and unsound practices. *See Hoffman v. FDIC*, 912 F.2d 1172, 1174 (9th Cir. 1990).

[10] The Recommended Decision does not address the duty of candor. Finding that the misconduct element is sufficiently met by breaches of other fiduciary duties and by engagement in unsafe and unsound banking practices, this Board finds it unnecessary to address the duty of candor.

252e, -254k, -269e, & -270k, 2015 WL 9855325, at *82 (F.D.I.C. Dec. 15, 2015). This concern required him to act as "ordinarily prudent and diligent men would" under similar circumstances. *In the Matter of Charles E. Baker, James E. Baker, and Thomas W. Keating*, 1993 WL 853609, at *7 (*quoting Briggs v. Spaulding*, 141 U.S. 132, 152 (1891)). As Chairman of the Board, Respondent's duties were heightened: "[t]he greater the authority of the director or officer, the broader the range of his duty; the more complex the transaction, the greater the duty to investigate, verify, clarify and explain." *Faigin and Lannan*, 2015 WL 9855325, at *82 (citing *Matter of* ***, 1988 WL 583064, at *9).

Respondent did not merely fail to adequately determine the ability of 618 Holdings to repay the debt and structure the lease reserve as to obscure the loan's repayment ability. Rather he facilitated a loan to borrowers he knew or should have known would be unable to repay the debt. These actions did not represent a "constant concern" for the safety and soundness of Grand Rivers. *Faigin and Lannan*, 2015 WL 9855325, at *82. Respondent breached his duty of care.

The loan files demonstrate that Respondent did not adequately determine the ability of 618 Holdings to repay the debt. These files lacked the "basic analyses of repayment capacity." EX 369R (Cash Report) ¶ 15. They were void of documentation "showing how Evergreen could achieve positive cash flow and how 618 Holdings could repay the Bank." *Id.*; *see also* RX 11R (Schwartz Report) at 6-7. The lease reserves structure was problematic because it may have concealed "the true payment ability of the debtor."[11] Hr'g Tr. (Floersch) 455:13-15. Further, the loan files did not contain a plan to resell the Carmi Warehouse if Evergreen was unable to make

[11] Respondent argued that the lease reserve structure "did not create any false impressions among the Grand Rivers board about 618 Holdings' ability to make loan payments after the 18-month lease reserve expired…" Exceptions at 39. He did not, however, dispute that the lease reserve structure concealed the true payment ability from examiners.

lease payments after the lease reserve account ran dry. EX 369R (Cash Report) ¶ 15. Respondent argues that "[t]hose responsibilities belonged to Winters as Head of Loan Operations." Exceptions at 34. But Respondent cannot escape responsibility for the loan files on a loan he orchestrated. *See* R.D. at 33-36. Further, as Chairman of the Board of Directors, he owed a heightened duty of care to "investigate, verify, clarify, and explain." *Faigin and Lannan*, 2015 WL 9855325, at *82 (citing *Matter of* ***, 1988 WL 583064, at *9).

Respondent breached his duty of care by not ensuring that 618 Holdings was capable of repaying the $1.25 million loan that he facilitated. *In the Matter of Steven D. Haynes*, Nos. 11-370e & -371-k, 2014 WL 4640797, at *11 (July 15, 2014) (FDIC final decision) (failing "to ascertain the borrower's ability to repay prior to approving a loan" constituted breach of fiduciary duty).

The record in this case further establishes that instead of *ensuring* repayment capacity, Respondent facilitated a sizable loan through two borrowers he knew or should have known were not creditworthy, at significant and foreseeable risk of loss to Grand Rivers. *See supra* section III.E. His assertion to the contrary is not credible, but even if he had actually believed the borrowers to be capable of repaying the debt, again he owed a heightened duty of care as Chairman. *Faigin and Lannan*, 2015 WL 9855325, at *82. At bottom, he failed to prudently structure the loan and ascertain repayment capacity, which is sufficient to establish a breach of fiduciary duty. The evidence in the record demonstrates that he also recklessly facilitated a loan to borrowers he knew or should have known would be unable to repay the debt.

Respondent argued that "sometimes bankers have to choose between the better of two loans or the better of two borrowers" and that he did precisely that in facilitating the 618 Holdings loan, which although imperfect, was better than the alternative (letting Evergreen go out of business). Respondent's Post Hearing Brief ("R. Br.") at 37-38. But as the ALJ pointed out, he presented these two options—the 618 Holdings loan or letting Evergreen go out of business—as a false binary. R.D. at 80-81. While the Respondent had no responsibility himself to "personally step in and save troubled loans" by purchasing the Carmi Warehouse (Exceptions at 27), the fact that he had secured financing to do that demonstrates that there was in fact a third option—facilitating a purchase and leaseback arrangement with a creditworthy borrower. Respondent argues that "only one borrower was willing to purchase the Carmi warehouse," but there is nothing in the record that suggests that this option was even explored. *See* Exceptions at 27.

Respondent raised several other arguments for why the 618 Holdings loan was a better choice than letting Evergreen hold onto the Carmi Warehouse and presumably go out of business—namely that 1) unlike the Evergreen loans, the 618 Holdings loan would be taken by PNB through the merger; 2) the 618 Holdings loan provided Evergreen $100,000 in "desperately needed" cash to be used for operations; 3) the structure of the 618 Holdings loan gave Evergreen 18 months to get back on its feet; and 4) the 618 Holdings loan improved Grand Rivers' security position in the Carmi warehouse. R.Br. at 39-41; Exceptions at 35. Had the 618 Holdings loan been replaced by a loan to a creditworthy borrower, these arguments may have been persuasive. However, all of these arguments rely on the same faulty assumption that there were only two options.

The lease reserve structure was intended to give Evergreen time to "get back on its feet," hoping that the oil industry would turn around and Evergreen could buy the property back. R.Br. at 40. If that did not happen, the plan apparently was for Harbison and Tate to sell the property to another buyer. *Id.*; *see also* Exceptions at 39 ("If Evergreen's business did not improve in 18 months, everyone at Grand Rivers expected that 618 Holdings would sell the Carmi warehouse or relet it to another company."). Respondent seemed satisfied that this was a viable option as the property was "in a fantastic location" and "had a lot of value." Hr'g Tr. (Bonan) 796:9-13. If that was accurate, it makes the case for a third option—a creditworthy borrower—seemingly more feasible, less risky, and more beneficial to Grand Rivers than the false binary presented by the Respondent.

Respondent argues that the ALJ erred in giving deference to the opinions of the FDIC examiners because their determinations were arbitrary and capricious and "completely outside the zone of reasonableness." Exceptions at 30. This argument is based on the assertion that they failed to consider all circumstances, principally by not evaluating the "alternative to the 618 Holdings loan (defaulting the Evergreen entities)" and determining which option was better or worse for Grand Rivers. *Id*. at 31. This argument again relies on this false binary and is without merit.

Further, Respondent takes issue with Cash testifying that the 618 Holdings loan was a restructuring and essentially substituting a borrower for Evergreen by arguing that "the facts are clear that the Evergreen entities and 618 Holdings are distinct entities that are not related to each other." *Id*. at 32. This contradictory argument—that examiners acted "outside the zone of reasonableness" in their evaluation of the 618 Holdings loan by not examining a loan that was "not related" to the 618 Holdings loan—further underscores the lack of merit in this argument.

<u>Duty of Loyalty</u>: Respondent also owed Grand Rivers a duty of loyalty. *In the Matter of Neil M. Bush*, OTS No. AP 91-16, 1991 WL 540753, at *5 (O.T.S. Apr. 18, 1991). The duty of loyalty prohibits directors and officers of a bank to advance their own interests, *or those of others*, at the expense of the bank. *Faigin and Lannan*, 2015 WL 9855325, at *82 (citing *Matter*

of ***, 1988 WL 583064, at *9). This duty "prohibits directors from engaging in transactions that involve conflicts of interest with the institution." *In the Matter of Neil M. Bush*, 1991 WL 540753, at *5.

By facilitating the 618 Holdings loan, Respondent advanced the interests of Evergreen and PNB over the interests of Grand Rivers, breaching his duty of loyalty to Grand Rivers. These impacts are consistent with Respondent's reported motivation to "help Abbey out." EX 391 (Gaskins Dep.) at 25:4-10.

PNB benefited from the transaction by clearing $358,000 of debt from Evergreen. This was significant, as Evergreen was a troubled borrower whose loans at PNB had been classified as substandard and placed on nonaccrual. *See* R.D. at 47; JX 1 (Joint Stip.) ¶ 6. Evergreen also benefited from the transaction: paying down debt at both PNB and Grand Rivers, securing their headquarters for 18 months, and receiving $100,000 in operating expenses. *See* R.D. at 45; *see also* JX 1 (Joint Stip.) ¶ 33; EX 302 (email from Respondent to Gaskins and Hunn: "the Evans want to keep 100,000 to operate on"); Hr'g Tr. (Stringer) 74:16-19 (Evergreen did not have to make loan payments for 18 months as they were "buried in the loan").

Conversely, Grand Rivers took on greater risk by essentially trading in a $638,000 second lien position on the Carmi Warehouse for a $1.25 million mortgage loan on the same property (*i.e*. the same collateral), the appraised value of which was questionable. *See* R.D. at 47-48; EX 273 (email between Campbell to Phelps discussing loan concerns and questioning the value of the Carmi Warehouse); EX 274 (email between Botsch, Campbell, and Clark regarding the value of the property); Hr'g Tr. (Botsch) 287:4-8 (describing conversation with Campbell doubting the value of the Carmi Warehouse and suggesting Evergreen had overpaid for it); *see also* Hr'g Tr. (Stringer) 74-75. The loan relationship also shifted from Evergreen (who, although financially troubled did possess assets) to 618 Holdings (a company with no assets, guarantors with a combined negative net worth, and whose ability to make payments on the loan entirely depended on lease payments from a financially troubled tenant). *See* R.D. at 47-48; EX 273 (email between Campbell to Phelps discussing loan concerns: "[t]he 5 year lease doesn't mean anything because the lessee is in a cash flow bind."); EX 34 (email between Respondent and Botsch describing the dire situation Gary Evans was in).

Respondent breached his duty of loyalty by advancing the interests of others—PNB and Evergreen—at the expense of Grand Rivers. *See* EX 369R (Cash Report) ¶ 16 ("In my opinion, Bonan II's actions to structure the loan to 618 Holdings and the origination of the loan to 618 Holdings at Bonan II's direction demonstrates a complete disregard of the Bank's best interest."); *Faigin and Lannan*, 2015 WL 9855325, at *82 (citing *Matter of* ***, 1988 WL 583064, at *9).

2. **Effect**

To show that misconduct had the required "effect" to impose a prohibition order, the evidence must establish that (1) the bank "has suffered or will probably suffer financial loss or other damage;" (2) the interests of the bank's depositors "have been or could be prejudiced;" or (3) the respondent "received financial gain or other benefit" from his misconduct. 12 U.S.C. § 1818(e)(1)(B)(i)-(iii). The ALJ found that with respect to the 618 Holdings loan, the effect element of 1818(e) was met because the bank suffered financial loss. R.D. at 102. This Board agrees.

Grand Rivers charged off a total of $513,760 from the 618 Holdings loan. *See* R.D. at 52 ($500,000 charge off in January 2017); EX 357 ($13,760 charge off in December 2018). 618 Holdings defaulted on the loan and entered into a deed-in-lieu of foreclosure with Grand Rivers. R.D. at 52. As of November 2022, the best offer Grand Rivers received on the property was reportedly $500,000. R.D. at 53; *see also* Hr'g Tr. (Stringer) 102:24-25. As of the date of the Recommended Decision, Grand Rivers still owned the Carmi Warehouse. R.D. at 53. It is undisputed that Grand Rivers suffered financial loss.[12]

Instead, Respondent argues that he cannot be the cause of the financial loss because he did not vote to approve the loan. R. Br. at 53. Indeed, Respondent did abstain from the vote and was not one of the board members who formally voted to approve the loan. However, Respondent had a central role in the creation of the loan, and substantially influenced others to vote to approve the loan, and an individual respondent need not be the sole cause of the harm to be held liable under section 8(e). *See Landry v. FDIC*, 204 F.3d 1125, 1139 (D.C. Cir. 2000) (explaining that the fact that other IAPs may have been "more guilty" does not absolve respondent from responsibility for his actions); *Matter of Adams*, 1997 WL 805273, at *5 (recognizing that "multiple factors, and individuals, may contribute to a bank's losses," and that a respondent cannot escape liability simply because others have contributed to the bank's loss as well).

The record clearly establishes that Respondent, as the Recommended Decision describes in detail, was the "architect" of the 618 Holdings loan. R.D. at 105. He initiated the purchase of the Carmi Warehouse by Harbison and Tate, he dictated the terms of the purchase and the related leaseback, and he facilitated the financing through Grand Rivers. R.D. at 33-36; *see also* supra section III.E. Additionally, while he did abstain from voting for the loan, the record establishes that he influenced the vote to approve it. *See* supra section III.E

[12] Respondent argues that the loss suffered by Grand Rivers must have been reasonably foreseeable. *See* Exceptions at 47. While the support he cites for this proposition does not appear to actually require reasonable foreseeability for the effect element to be met, this Board nevertheless finds that the loss to Grand Rivers, stemming from a loan made to borrowers very clearly not creditworthy for the size of the loan, to be reasonably foreseeable.

Of the three board members who voted to approve the loan, all three expressed concerns. Gaskins did not think Harbison and Tate had the ability to repay the loan. EX 391 (Gaskins Dep.) 76:15-25. Campbell expressed concerns over the true value of the Carmi Warehouse, the lack of demonstrated cash flow for 618 Holdings, and Evergreen's ability to make lease payments. EX 273; *see also* EX 274 (email between Botsch, Campbell, and Clark regarding the value of the property). Phelps, although he lacked banking experience and was largely seen as "yes man," shared concerns over the valuation of the property. *See* Winters Tr. 59:5-6, 172:23-173:3; EX 314 (2016 ROE) at 7 (Phelps "voted affirmatively on every measure or loan presented by or under the direction of [Respondent]"); *see also* EX 273 (email from Phelps to Campbell "I questioned the Evergreen valuation too."); Hr'g Tr. (Campbell) 388:1-5 (testifying that Phelps shared his concerns). CEO Stringer abstained from voting, but said she was not comfortable voting for the loan because of her concerns about the borrowers' ability to repay the loan. Hr'g Tr. (Stringer) 64:16-22; 67:3-7; 119:5-8; *see also* EX 277 (email from Stringer where she states that she's uncomfortable voting on the loan).

Despite concerns from all three members who voted to approve the loan, the 618 Holdings loan was approved. R.D. at 42. Gaskins testified that he voted for it because he feared being fired by the Respondent if did not. EX 391 (Gaskins Dep.) 76:15-25. Stringer testified that she abstained because was fearful that if she voted no she would be fired. Hr'g Tr. (Stringer) 64:16-22; 67:3-7; 119:5-8. These fears of reprisal expressed by the board members, combined with the dominant influence of Respondent (*see* R.D. at 15-17; *supra* section III.B.), make it clear that he influenced the vote to approve the 618 Holdings loan.

While Respondent's influence does not necessarily absolve others who participated in the approval of the 618 Holdings loan from responsibility, Respondent cannot credibly claim that he did not cause the loan because he did not vote for it. To the contrary, it is abundantly clear from the record that he initiated, facilitated, and influenced the loan's approval, and therefore was the proximate cause of Grand Rivers' financial loss. *See Hendrickson v. F.D.I.C.*, 113 F.3d 98, 103 (7th Cir. 1997) (finding the effect element met when respondent's actions facilitated the actionable conduct).

This Board finds ample evidence in the record to support a determination that the effect element of section 8(e) is met, as the Bank suffered financial loss as a result of Respondent's conduct.

3. **Culpability**

Finally, with respect to the culpability element of section 1818(e), the ALJ found that Respondent acted with a willful disregard for the safety and soundness of Grand Rivers with respect to the 618 Holdings loan. R.D. at 108-109. This Board agrees.

Culpability, for purposes of section 1818(e), can be shown by "personal dishonesty" or a "willful or continuing disregard" for the safety and soundness of the financial institution. 12 U.S.C. § 1818(e)(1). "Willful disregard" is "deliberate conduct that exposes 'the bank to abnormal risk of loss or harm contrary to prudent banking practices.'" *Michael*, 687 F.3d at 352 (quoting *De La Fuente v. FDIC*, 332 F.3d 1208, 1223 (9th Cir. 2003)). It exists if the Respondent "deliberately and consciously" acted in a way that that demonstrates a lack of attention to safety and soundness or "a willingness to turn a blind eye to the institution's interests in the face of known risk." *Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995); *accord In the Matter of Donald V. Watkins, Sr.*, FDIC-17-0154e, FDIC-17-0155k, 2019 WL 6700075, at *8 (F.D.I.C. Oct. 15, 2019).

The evidence demonstrates that Respondent knew Harbison and Tate were not creditworthy for a $1.25 million loan, and yet approached them and asked them to purchase the

Carmi Warehouse at that price, with financing he facilitated through Grand Rivers. Respondent set the terms of the loan and the related leaseback agreement. Respondent influenced the Board of Directors to approve the loan. Respondent, a banker with significant experience, also paid the borrowers' salaries. *See generally, supra* section III.E. Regardless of what the two borrowers' credit scores were, Respondent either knew or should have known that they would be unable to repay the loan—and yet, he facilitated the loan despite this knowledge. Respondent's argument that it was the best of two options is unpersuasive—he himself was originally going to purchase the property, and if that were an option, so was another borrower—one who was creditworthy.

Respondent argues that nobody else was willing to purchase the Carmi warehouse (*see* Exceptions at 27), but there was nothing in the evidence to suggest that this was even attempted. Instead, the record demonstrates that if Evergreen wasn't able to make the lease payments after the lease reserve ran out, the plan was for Harbison and Tate to simply sell it to someone else. Exceptions at 39 ("If Evergreen's business did not improve in 18 months, everyone at Grand Rivers expected that 618 Holdings would sell the Carmi warehouse or relet it to another company."). That plan, if nobody else would purchase it, makes Respondent's willful disregard for the safety and soundness of Grand Rivers even more egregious.

Respondent also argues that the ALJ erred by failing to consider the exigent circumstances Respondent was in, which he argues dictated that the culpability element cannot be established. Exceptions at 49. For support, he cited an OCC case where "the Bank had been given a mandate to improve its capital ratios urgently and by any means necessary … There were few options for the Bank's survival." *Id.*; *In the Matter of: Saul Ortega and David Rogers, Jr.*, 2022 WL 7074606, at *62. While he argues that these were "similar circumstances," there is no support for that assertion in the record. While it would certainly be detrimental for Grand Rivers for Evergreen to fail, there is insufficient evidence to support that there were "no good solutions," and no evidence that there were few options for the Bank's survival (indeed, it did survive, despite the significant loss). The ALJ did not err in finding that culpability was established.

Finally, Respondent argues that he had no incentive to intentionally harm Grand Rivers. R.Br. at 65. But *intent* to harm is not required, but rather a willful disregard for the safety and soundness of the institution, which has been established by the evidence. Respondent's initiation of the 618 Holdings loan with two borrowers who were far from creditworthy for the size of the loan, the failure to adequately demonstrate repayment capacity in the loan files (which would have been impossible), and the formatting of the leaseback arrangement that concealed the actual payment capacity of the borrowers, were all "contrary to prudent banking practices." *Michael*, 687 F.3d at 352 (quoting *De La Fuente II*, 332 F.3d at 1223); *see also supra* Section IV.C.1.

Respondent argued that he "made a good faith inquiry into the credit worthiness of Tate and Harbison" and that he was misled into believing that they were creditworthy because he was provided inaccurate credit score information. R.Br. at 65. The mere fact that he paid their salaries makes this assertion indefensible. The borrowers had adjusted gross incomes of $27,000 and $62,000. The monthly payment of $7,752.94 per month—not even taking into account the separate $600,000 loan to Harbison's other company—would result in payments of $93,035.28 annually. This amount is more than the combined adjusted gross incomes of both borrowers. Respondent's facilitation of a loan to borrowers completely incapable of paying the debt put Grand Rivers at an "abnormal risk of loss." *Michael*, 687 F.3d at 352. Respondent turned a "blind eye to the institution's interests in the face of known risk" while advancing the interests of PNB and Evergreen. *See Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995); *accord Donald*

Watkins, 2019 WL 6700075, at *8. The record establishes willful disregard.

D. Respondent is Liable for the 618 Holdings Loan and a Second Tier CMP is Warranted.

The ALJ recommended a second tier CMP of $105,000, and the Board concludes that the evidence in the record supports a CMP in that amount. A second tier CMP may be imposed against a party who (1) commits any violation of law, regulation, or certain orders or written conditions imposed by regulators; (2) recklessly engages in an unsafe or unsound practice in conducting the affairs of the institution; or (3) breaches any fiduciary duty, and whose "violation, practice, or breach . . . is part of a pattern of misconduct;" "causes or is likely to cause more than a minimal loss" to the institution; or "results in pecuniary gain or other benefit" to the party. 12 U.S.C. § 1818(i)(2)(B).

As detailed above, Respondent is subject to a second tier CMP as a result of his breaches of fiduciary duty, which resulted in more than a minimal loss to Grand Rivers. Although the breaches of fiduciary duty standing alone would be sufficient to support the recommended CMP, the Board also finds that Respondent's unsafe and unsound practices were committed recklessly.

Recklessness is established by acts committed "in disregard of, and evidencing conscious indifference to, a known or obvious risk of a substantial harm." *Cavallari v. OCC*, 57 F.3d 137, 142 (2d Cir. 1995); *see also Simpson v. Office of Thrift Supervision*, 29 F.3d 1418, 1425 (9th Cir. 1994). Respondent facilitated the 618 Holdings loan with disregard for the obviously foreseeable risk of substantial harm stemming from a sizable loan made to borrowers who were unable to repay the debt. His unsafe or unsound practices were committed recklessly.

This Board finds that Respondent engaged in breaches of fiduciary duty that caused more than a minimal loss to Grand Rivers, as well as reckless unsafe or unsound practices. The circumstances support assessment of a $105,000 CMP.

E. A CMP, But Not a Prohibition Order, is Warranted for the Release of Rig 23.

Respondent played an important role in the release of Rig 23. He was in charge of the Evergreen loan relationship. He was a party to many of the miscommunications involving the erroneous release of that Rig and failed to clear up the evident confusion about the Bank's interest in the rig being sold. And he exerted his influence to pressure Gaskins and Winters to secure the release. However, the evidence shows that all three relevant individuals at the Bank—Gaskins, Winters, and Respondent—thought that they were dealing with a release of a security interest (if any) in Rig 24, *not* Rig 23. There is no evidence that any of the individuals—including Respondent—intentionally released the wrong rig.[13] Rather, the evidence shows a series of errors stemming from the initial inclusion of the Rig 23 lien on Exhibit C to the Purchase Agreement.

These errors could have been avoided. For example, Respondent could have provided Appendix A (which listed the rig to be sold as a "2010 Service King – SK 775 Series") to Gaskins in response to Gaskins' October 9, 2015 email stating "[j]ust need the attachments to confirm its same equipment and same wording in ucc and purchase agreement." *See* R.D. 130-31; EX 124; EX 45. Or Respondent could have opened the attachments (UCC-3 terminations) to the Kassie Winters October 16, 2015, emails, determined that they involved the wrong rig (perhaps by cross-referencing them against the original UCC filing statements), and called a halt to the erroneous filings. *See* EX 143, at 1-2 (Illinois); *see also* EX 142, at 1-2 (Indiana); EX 10 (PSMI in Cabot 900). He did not. But these failures – as with his actions and inactions with respect to the Rig 23 release overall – were, while substantial, at most negligence. It was

[13] Notably, Respondent was a shareholder in Grand Rivers (through its holding company). *See, e.g.*, Hr'g. Tr. (Respondent) 794:16-795:7. As such, it would not have been in his interest to have Grand Rivers lose its collateral.

Winters and Gaskins that were responsible for making sure the UCC filings were accurate. It is reasonable that Respondent, as Chairman of the Board of Grand Rivers, delegated responsibility for details to his subordinates. It was not reasonable, however, for him to pressure these subordinates to obtain a release for Rig 24 when he was being expressly told that there was no security interest on that Rig to release. *See, e.g.*, EX 233.

To merit a Prohibition Order, Enforcement Counsel must show that Respondent "engaged in prohibited conduct (misconduct), the effect of which was to cause the Bank to suffer financial loss or damage . . . (effects) . . . [and] that such misconduct evidences personal dishonesty or a willful and continuing disregard for the safety and soundness of the Bank (culpability)." *Faigin and Lannin*, 2015 WL 9855325, at *13. As discussed below, the Board finds that Respondent's actions meet the misconduct and effects prongs of Section 1818(e), but they do not meet the culpability prong.

To merit a CMP, in relevant part Enforcement Counsel must show the breach of any fiduciary duty or the *reckless* engagement by Respondent in an unsafe or unsound practice in conducting the affairs of the Bank. Further, Enforcement Counsel must also demonstrate the required effect of Respondent's conduct. The Board finds that both misconduct and effect have been satisfied here.

1. Misconduct

With respect to the misconduct elements of sections 1818(e) and (i), the ALJ found that "Respondent's actions – and lack of action – over the course of the events that culminated in the release of the Bank's Rig 23 security interest evinced a failure of supervision and oversight and a general indifference to the best interests of Grand Rivers that constituted a breach of his fiduciary duties of care and loyalty to that institution as well as recklessly unsafe or unsound banking practices." R.D. at 111. The Board agrees that Respondent breached his fiduciary duty of care to the Bank and that he engaged in unsafe or unsound banking practices (albeit, as discussed below, not recklessly).

As an initial matter, the Board finds that the evidence is insufficient to show that Respondent *knew* that the Bank's interest in Rig 23 was being released. Rather, the evidence shows that Respondent thought either that the Bank had some underlying, albeit mistaken, interest in Rig 24 or that US Energy was asking for a UCC release on collateral that did not exist. All the relevant communications among Respondent, Winters, and Gaskins – where they refer to a rig number – refer to Rig 24, not Rig 23. Further, the testimony of the three relevant individuals – Gaskins, Winters, and Respondent – demonstrates that they all thought they were working on releases related to Rig 24. Rig 23 did not come up. Nevertheless, Respondent acted negligently in supervising his subordinates, including by not clarifying that he was asking for the release of an interest on a Rig that he either believed was invalid or did not exist or providing relevant information about the rigs. Certainly if Bonan actually knew that the Bank had no security interest in Rig 24 at all—as appears likely from his admittedly contradictory testimony—then it was incumbent upon him to ferret out what was actually going on. The same can be said if he thought that there was some mistakenly recorded interest of the Bank in Rig 24. Thus, regardless of what he actually believed, there was sufficient evidence before him that Respondent should have acted to put a halt to the obvious confusion that was occurring. Yet he did nothing of the sort. As the ALJ points out repeatedly, Respondent had the most information of any of the relevant individuals and if he had acted with more care the confusion could have been cleared up and the Rig 23 collateral would not have been released. *See, e.g.*, R.D. at 112-14, 119-22.[14]

Breach of Fiduciary Duty

As Chairman of the Board, Respondent owed the Bank fiduciary duties of loyalty and care. A fiduciary duty is generally defined as the requirement that care be exercised in a manner that an ordinary prudent and diligent person would exercise under similar circumstances. *Faigin & Lannin*, 2015 WL 9855325, at *81; *Id*. at *14 ("Breaches of fiduciary duties arise from knowledge of the pertinent facts and can include a deliberate failure to investigate matters that fall within the officer's responsibilities.") *In the Matter of Tonya Denise Williams*, FDIC-11-553e, 2015 WL 3644010, at *9 (F.D.I.C. Apr. 21, 2015) (bank manager had a duty to act "diligently, prudently, honestly, and carefully" in carrying out her duties (internal quotation marks omitted)); *see also In the Matter of Michael D. Landry and Alton B. Lewis*, No. 95-65e, 1999 WL 440608, at *15 (May 25, 1999) ("The fiduciary duties of institution-affiliated parties . . . for the purposes of section 8(e) of the FDI Act are established by Federal law."), *aff'd on other grounds sub. nom. Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000); R.D. at 94, n. 437. Such a duty required the Respondent at all times "to act in good faith and in the best interests of the Bank." *Sapp*, 2019 WL 5823871 at *14; R.D. at 94 n. 437. The duty requires, among other things, the "proper supervision of subordinates . . . and the constant concern for the [Bank's] safety and soundness." *Faigin and Lannin*, 2015 WL.9855325, at *81-82. Further, [b]ecause of their unique position as safekeepers of depositors' money, directors or officers of depository

[14] Respondent's argument that the FDIC "presented no evidence that [Bonan II] instructed anyone to release a security interest in Rig 23," Exceptions at 50, is therefore correct in one way (he did not explicitly say to release Rig 23). It is incorrect in another, more important way; in the face of clear confusion, Respondent did nothing to resolve the confusion and directed the very filings to be made that released the Rig 23 collateral.

institutions owe a greater duty to the bank than directors of other types of entities." *Id*. at *82. Indeed, the "greater the authority of the director . . . the broader the range of his duty." *Sapp*, 2019 WL 5823871, at *14.

The ALJ found that Respondent failed to properly supervise his subordinates. R.D. at 114. The Board finds that while Respondent appropriately delegated responsibility to his subordinates to ensure the accuracy of the UCC filings, his demands on them to get the release done quickly in the face of clear confusion and conflicting reports about what was actually being released constitutes a breach of his fiduciary duty of care.

For example, on November 15, 2015 April Reiken (of Evergreen Drilling) told Respondent that "[e]ven though there is no collateral for rig 24 at Grand Rivers Denny still wants a recorded UCC-1." EX 233. As the ALJ noted, instead of inquiring about why a UCC-1 would be required when there was "no collateral for rig 24," or what a release on non-existent collateral would look like, Respondent immediately pressured Winters and Gaskins to "[g]et this bulkshit done this morning." EX 233. Respondent should have known – based on what Ms. Reiken was telling him and his own knowledge of the rigs – that something was awry. *Compare* Hr'g Tr. (Respondent) 906:3-4 ("I knew that Grand Rivers did not have Rig 24 as collateral.") *with id*. 944:18-20 ("I believe what was being released then was a general subordinated – or subordinate not subordinated – subordinate UCC that had no value."). Yet he pressed on, and, indeed, exacerbated the likelihood of an error by putting pressure on Winters and Gaskins. This was a breach of his fiduciary duty of care.

Further, the Board agrees that Respondent "failed to discharge his fiduciary responsibility 'to investigate, verify, clarify, and explain' while participating in a transaction in which he should have understood that not all involved appeared to be operating with the same information." R.D. at 115 (citing *Faigin & Lannin*, 2015 WL 9855325, at *82). As the ALJ notes "Respondent knew that Grand Rivers was not obligated to release any collateral, yet directed his subordinates there to release the collateral anyway in order to placate a party to the transaction [U.S. Energy] who was under the mistaken impression that the Bank had collateral in Rig 24 to release." R.D. at 116-17. There is little doubt that Gaskins and Winters did not fulfill their responsibilities to ensure that they were preparing and filing UCC releases on the correct rig. Indeed, Winters admitted that she had mistakenly released the wrong rig. EX 393 (Ledbetter-Winters Dep.) 166:23-167:20. But Respondent cannot "escape liability by pointing the finger at his subordinate, even if the subordinate or subordinates in following the instructions of [the Respondent] contributed to the losses and also engaged in the violative conduct." *Sapp*, 2019 WL 5823871, at *13; *see also* R.D. at 121-22.

Respondent's citation to *Doolittle v. Nat'l Credit Union Ass'n*, 992 F.2d 1531, 1537 (11 th Cir. 1993) is unavailing. *See* Exceptions at 55. In *Doolittle*, the president of a credit union instructed a loan department supervisor not to make certain loans. *Id*. at 1535, 1537. These instructions were ignored. *Id*. The court found that Doolittle could not "be held to have breached his fiduciary duty simply because his underlings failed to follow his orders." *Id*. at 1537. In *Doolittle*, the officer was acting to take corrective action which was ignored by his subordinate. Here, Winters did not disobey corrective orders, as none were forthcoming; nor did she materially disobey any orders.[15] *Doolittle* is inapposite.

[15] Respondent argues that Winters disobeyed him in (1) filing a UCC-3 instead of a UCC-1, and (2) releasing the wrong rig. Exceptions at 54-55. As to the first, the Board finds this to be immaterial. And, in any event, Winters sent the UCC-3s to Respondent and he could have corrected this error (and in the process likely averted the release of Rig 23). *See* EX 142 at 1 ("Attached please find a copy of the original UCC-3 that will be filed online to terminate our UCC with Evergreen Drilling"); EX 143. As to the second, as described above Respondent was at the least complicit in the release of Rig 23.

To the extent that Respondent believed that there *was* some kind of collateral with respect to Rig 24 to release, he nevertheless breached his fiduciary duty of loyalty to the Bank because the Bank was not receiving anything in relation to the sale of Rig 24 (and thus would be giving up an interest with no corresponding benefit) even though PNB was. *See* R.D. at 65, 117-18.[16] The Board does not find, however, that Respondent intended to benefit PNB over Grand Rivers. *See* R.D. at 118 (discussing the effect of Respondent's "divided loyalties").

Ultimately, Gaskins, Winters, and Bonan were all aiming at the same target – Rig 24. But the target they hit was Rig 23. Even though Gaskins and Winters share some of the blame, and even though Winters admitted to her mistake, the responsibility for the mistaken release rests significantly on Respondent's shoulders. He breached his fiduciary duty to the Bank.

Unsafe or Unsound Banking Practices

For the same reasons, Respondent's conduct constituted unsafe and unsound banking practices. *See Sapp*, 2019 WL 5823871, at *13 ("Because of their inherent danger, breaches of fiduciary duty constitute unsafe and unsound practices."); *Watkins, Sr.*, 2019 WL 6700075, at *7 ("An unsafe and unsound banking practice is one that is 'contrary to generally accepted standards of prudent operation' whose consequences are an 'abnormal risk of loss or harm' to a bank." (quoting *Michael*, 687 F.3d at 352).

[16] Respondent argues that he believed that the Bank "had some form of recorded interest in Rig 24 despite having no actual authorized interest in the rig." Exceptions at 51. The ALJ did not credit Respondent's testimony with respect to what he knew about any interest in Rig 24 and laid out his conflicting positions on the issue. *See* R.D. at 73-77; *see also, e.g.*, Hr'g Tr. (Respondent) 849:18-19 ("Q: What did you believe Grand Rivers had on Rig 24 at the time? A: Nothing, I didn't believe they had anything."); 944:18-20 ("I believe what was being released then was a general subordinated – or subordinate not subordinated – subordinate UCC that had no value."). The Board defers to the ALJ's credibility determination. It is clear that Respondent took conflicting positions on the issue. In any event, it is ultimately irrelevant exactly what Respondent believed. It is indisputable that there was confusion about what rig was being discussed at various points and Respondent II could and should have acted to clear up that confusion, but did not.

The ALJ found that Respondent's conduct was not just unsafe and unsound, but recklessly so. The Board does not agree with this aspect of the ALJ's recommended decision.

For a CMP, any unsafe and unsound banking practice must be engaged in "recklessly." Conduct is reckless for the purposes of this prong of Section 1818(i) when it "is done in disregard of, and evidencing a conscious indifference to, a known or obvious risk of substantial harm." *Patrick Adams*, 2014 WL 8735096, at *49 (cleaned up); *see also Faigin & Lannin*, 2015 WL 9855325, at *19 (same). Here, Respondent was actively involved in the erroneous release of Rig 23. He was in charge of the Evergreen relationship. He was on many of the miscommunications relating to the release of the rig. And he did not follow up on the red flags that were coming up in those communications, such as conflicting reports related to whether or not the Bank had any interest to release in Rig 24 at all. As discussed above, Respondent's failure to acknowledge these red flags and act to clarify the confusion surrounding the releases at issue was negligence. *Cf.* Hr'g Tr. (Hefner) 522:10-11 (Enforcement Counsel expert states that Respondent was negligent). But the only Rig that was ever discussed by number was Rig 24. And there is little evidence, if any, that Respondent ever was aware that the Bank would be releasing its only collateral on the Evergreen Drilling Loan – *i.e.*, Rig 23.[17] This risk was not obvious. While Respondent could – and should – have followed up on the various discrepancies (*e.g.*, UCC-1 vs. UCC-3, whether there was any Grand River's interest in Rig 24 at all) in the

[17] The ALJ cites *Blanton v. OCC*, 909 F.3d 1162, 1175 (D.C. Cir. 2018) to support her conclusion that Respondent was aware of the obvious risk posed by his inaction. R.D. at 124. However, in Blanton, the OCC told the bank officer on multiple occasions of the dangers of the bank's practices. *See Blanton*, 909 F.3d at 1173-74. Further bank employees told the officer that the OCC considered the practices unduly risky. *Id*. at 1174. Here, unlike in *Blanton*, there is insufficient evidence that Respondent was aware of the undue risk associated with his inaction. The exhibits and testimony do not make it clear that it was obvious that there was a risk that the wrong rig would be released.

communications, the Board finds insufficient evidence that his inaction evidenced a "conscious indifference" to a "known or obvious risk of substantial harm." In this regard, the Board gives some weight to the fact that Respondent, as Chairman of the Board of the Bank, delegated responsibility for ensuring the accuracy of the filings to Gaskins (CFO) and Winters (Head of Loan Operations), two high-level employees of the bank. Respondent did not carefully supervise those employees, but ultimately his inaction amounts to a mistake. A mistake with dramatic consequences, but nonetheless a mistake.

In summary, with respect to the release of Rig 23, the preponderance of evidence is that Respondent violated his fiduciary duties to the Bank and his actions constituted unsafe and unsound banking practices. Thus, the misconduct prong is met both for the purposes of a Section 1818(e) prohibition order (for breach of fiduciary duty and the and unsound banking practices) and a Section 1818(i) CMP (for breach of fiduciary duty).

2. Effect

As to the effect elements of sections 1818(e) and (i), the Board agrees and adopts the reasoning of the ALJ. R.D. at 126-32. As the ALJ found, "the Bank's release of its Rig 23 interest left its Evergreen Drilling loan unsecured, causing the Bank to obtain a junior lien position on Evergreen's equipment (behind the blanket lien already held by PNB) in order to secure the loan and – and after Evergreen continued to experience financial woes – ultimately resulting in the loan's full balance of $489,268 being charged off in early January 2017." R.D. at 125.

Respondent argues that his conduct was not the proximate cause of any loss to the Bank because if his instructions had been properly followed there would have been no risk to the Bank. Exceptions at 60-62. Not so. This argument is largely a rehash of Respondent's arguments against the misconduct prong. As the Board has concluded, Respondent negligently supervised his subordinates and negligently failed to raise concerns when he was being asked to release what he says he believed to be a non-existent, or mistaken, interest with respect to Rig 24. If Respondent had raised issues as to the evident confusion going on, the release of Rig 23 could have been avoided. For example, if Respondent had opened the attachments to Winters' October 16, 2015, emails (on one of which she expressly states that she would be filing a UCC-3) and made further inquiry as to what was being released, the Bank's loss could have been averted. *See* EX 142 (with cover email referencing a to-be-filed UCC-3); EX 143. While the Board does not find that Respondent knew that Rig 23 might be released, it was obvious that something was wrong with the process of getting the release on Rig 24 that US Energy asked for, and it was foreseeable that the relevant people were talking about the wrong rig. Respondent's conduct proximately caused the Bank a loss – the charge-off of the Evergreen Drilling loan.

Thus the effect prong of both Section 1818(e) and 1818(i) is met.

Respondent's Novation Argument

Respondent argues that the release of Rig 23 did not cause a loss to the Bank because the May 2014 loan consolidation was a novation. *See* Exceptions at 62-63. Respondent does not dispute that after the consolidation the Bank still held Rig 23 as collateral, but says this was as "mere collateral" not as a PMSI. Exceptions at 63. He goes on to argue that because there was a novation, this new position as collateral had to be perfected. *Id*. According to Respondent "[b]ecause there is no evidence that the security interest in Rig 23 was perfected after May 2014, the PMSI was extinguished at that time." *Id*.

The ALJ found, and this Board agrees, that the May 2014 consolidation of the Bank's Evergreen Drilling loans did not constitute a novation that extinguished Evergreen Drilling's obligations under the January 2013 loan granting the Bank a PMSI in Rig 23. *See* R.D. at 126; Order No. 30 at 67-69.

Further, the Board disagrees that there was no evidence that the Bank's PMSI survived the May 2014 consolidation. First, as the ALJ pointed out, "the paperwork for the refinanced loans expressly references the January 2013 PMSI on Rig 23 as collateral for the consolidated loan." R.D. at 126; *see also* EX 15 (May 6, 2024 Commercial Loan Application) at 1 (identifying the loan type as "Comm. Secured" and listing a "Cabot 900 series self-propelled Drilling Rig" as collateral); EX 17 (May 8, 2014 Promissory Note) at 3 (stating, in a section titled "COLLATERAL," that "this Note is secured by Commercial Security Agreement dated January 9, 2013 and securing UCC file #17906194"). Second, more than a year later Respondent evinced his understanding that the Bank still had a PMSI in Rig 23. *See* EX 226 (Respondent states that the Bank has a "PMS" on a Cabot 900 series drilling rig).

Respondent's Titled Vehicle Argument

Respondent also argues that the ALJ improperly shifted the burden of proof to Respondent on the issue of whether Rig 23 was a titled vehicle. Exceptions at 63-64. Respondent's argument runs as follows: (1) Enforcement Counsel had to prove that the release of Rig 23 caused a loss to the Bank, which required that the security interest on that Rig be perfected; (2) under Illinois and Indiana law, a security interest in a vehicle is perfected when it is filed with the Bureau of Motor Vehicles; (3) Enforcement Counsel did not provide evidence as to whether Rig 23 was a titled vehicle; and (4) the ALJ erred by finding that Respondent failed to meet his burden of proof on the issue. *Id*.

Enforcement Counsel presented evidence that the Bank had a valid PMSI on Rig 23 as shown by the UCC filings admitted at the hearing. And, in any event, Enforcement Counsel presented evidence that Rig 23 was *not* a titled vehicle. Specifically, Bank officer Don Nave testified that the Bank had asked Evergreen for a certificate of title for Rig 23 and was "told it was equipment and it did not have a title." Hr'g Tr. (Nave) 177:18-22). Further, as the ALJ points out, a June 17 Order of Replevin proffered by Enforcement Counsel—which established People's priority interest in Evergreen Drilling's personal property—differentiated between titled vehicles and equipment, and listed Rig 23 as equipment. EX 354, at 5. Once the agency "established a prima facie case based on the preponderance of the evidence, the burden of production of evidence to the contrary shifts to the Respondent to rebut or discredit the administrative agency's evidence." *Tonya Williams*, 2015 WL 3644010, at *6.

Respondent did not rebut the agency's evidence. The Board agrees with the ALJ that Respondent has not provided credible evidence that Rig 23 was a titled vehicle. *See* R.D. at 127-28.

The Board finds that Enforcement Counsel presented sufficient evidence to show that Rig 23 was not a titled vehicle and that Respondent offers no credible evidence to rebut that showing. It therefore rejects Respondent's argument on the title issue.[18]

3. Culpability

Finally, with respect to the culpability element of section 1818(e), the ALJ agreed with Enforcement Counsel that "Respondent acted with willful disregard for the Bank's safety and soundness 'when he ordered Bank employees to file UCC releases relating to Evergreen Drilling

[18] Respondent also maintains that it is "extremely relevant" to this matter that as of September 7, 2022 Grand Rivers has claimed in *Grand Rivers Community Bank v. Evergreen Energy, L.L.C. et al.*, Case No. 2017-LM-28 (2nd Judicial Circuit, State of Illinois) that it still has a valid priority security interest in Rig 23. *See* Exceptions at 64; *see also* RX 275, at 2. It is not relevant. The Bank's present litigation position does not impact the fact that due to the releases filed with respect to Rig 23 the Bank incurred loss in the form of a charge-off of the Evergreen Drilling loan. *See* R.D. at 129.

. . . to meet U.S. Energy's demand for the Bank's UCC terminations to be recorded," despite knowing that the UCC security interest that U.S. Energy wanted released did not exist and that the only UCC release that was possible would leave the Bank's $550,000 Evergreen Drilling loan completely unsecured." R.D. at 132.

Here the Board again parts ways with the ALJ's Recommended Decision. The Board finds that Respondent did not act with the requisite "personal dishonesty" or "willful or continuing disregard by [Respondent] for the safety and soundness of [the Bank]."[19]

As detailed above, the Board finds that Respondent acted (and failed to act) negligently in violation of his fiduciary duty of care to the Bank. However, negligence does not alone equate to "willful . . . disregard." *See, e.g., Kim v. OTS*, 40 F.3d 1050, 1054 (9th Cir. 1994) ("[T]he OTS must show a degree of culpability well beyond mere negligence, *i.e.*, there must be a showing of scienter."). To constitute willful disregard, an IAP, through their unsafe or unsound misconduct, must "deliberately and consciously take part in an action that evidences utter lack of attention to an institution's safety or soundness" or demonstrate "a willingness to turn a blind eye to the institution's interests in the face of a known risk." *See* R.D. at 133; *Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995); *see also De La Fuente*, 332 F.3d at 1223 (noting that "some scienter" is necessary to establish culpability and stating that "'[w]illful disregard' means

[19] The ALJ did not find that Respondent acted with "personal dishonesty," and the Board also does not find that there was personal dishonesty involved. Further, the ALJ did not decide whether Respondent's conduct constituted "continuing" disregard for the safety and soundness of the Bank. *See* R.D. at 132, n. 604. "[C]ontinuing disregard" is "conduct which has been voluntarily engaged in over a period of time with heedless indifference to the prospective consequences." *Grubb v. FDIC*, 34 F.3d 956, 962 (10th Cir. 1994) (citation and internal quotation marks omitted). While Respondent acted negligently, this does not rise to the requisite scienter of recklessness necessary to establish culpability under Section 1818(e)(C). *See Michael*, 687 F.3d at 353 ("Although inadvertence alone is not sufficient to establish culpability, recklessness suffices"). Accordingly, the Board finds the record evidence does not support a finding that Respondent acted with a continuing disregard for the safety and soundness of the bank.

'deliberate conduct which exposed the bank to abnormal risk of loss or harm contrary to prudent banking practices" (citation omitted)); *Faigin & Lannin*, 2015 WL 9855325, at *18 ("Courts have held that 'willful or continuing disregard' signifies, at least, 'a mental state . . . akin to recklessness'" (quoting *Kim*, 40 F.3d at 1054)); *Gully v. Nat'l Credit Union Admin. Bd.*, 341 F.3d 155, 164 (2d Cir. 2003) ("Courts have concluded that 'willful . . . disregard' requires a heightened showing of scienter"). Examples of such conduct include turning a "blind eye" to a bank's interest "in the face of known risk," *Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995), engaging in a check-kiting scheme, *see Van Dyke v. Bd. of Governors of Federal Reserve System*, 876 F.2d 1377, 1379 (8th Cir. 1989), and insider abuse, *In the of Matter of Donald E. Hedrick and John K. Snyder*, Nos. OCC-AA-EC-92-176 & 93-94, 1996 WL 772762, at *7 (O.C.C. Sep. 11, 1996).

The Board agrees with the ALJ that "[a]ll the dots were there to connect." R.D. at 133. There is a preponderance of evidence that Respondent knew that there was no security interest in Rig 24 for the Bank to release (or at least that any such recorded interest was in error). *Cf.* Exceptions at 65 ("All [Respondent] ever knew was that Grand Rivers was never supposed to have any form of security interest on Rig 24. . . . [He] believed that Grand Rivers must have mistakenly recorded some kind of interest that related to Rig 24.") There is also clear evidence that he had information in his possession that he could have (and should have) communicated to Winters and/or Gaskins, yet did not act to clarify the situation and avert the loss of collateral on Rig 23. *See, e.g.*, R.D. at 130-31. Indeed, he exacerbated the situation by badgering his subordinates to obtain a release that would satisfy U.S. Energy. But the Board concludes that Bonan's actions constituted negligence and not willful disregard. There is evidence that Bonan was being given conflicting information with respect to whether there was a lien on Rig 24. *See*

EX 124, at 1 (October 9, 2015 email from Gaskins to Respondent) ("Our ucc-1 is not a blanket it is just on this specific rig"); EX 391 (Gaskins Dep.) 114:5-25. Further, he did not turn a blind eye to the Bank's interests; he put two high level employees in charge of ensuring the accuracy of the filings. They did not do so. *See, e.g.,* EX 391 (Gaskins Dep.) 110:8-111:6, 115:12-116:22, 131:21-23; EX 393 (Ledbetter-Winters Dep.) 166:23-167:20. [20]

The Board concludes that the culpability prong of Section 1818(e) is not met with respect to the release of Rig 23. Accordingly, a prohibition order based on that release is not warranted.[21]

F. The Amount of the CMP is Justified.

Before assessing a CMP, the Board is required to consider the appropriateness of the amount being assessed by looking to five mitigating factors: (1) the size of the Respondent's financial resources; (2) the good faith of Respondent; (3) the gravity of the violation; (4) the history of previous violations; and (5) such other matters as justice may require. 12 U.S.C. § 1818(i)(2)(G). In addition, the Interagency Policy Regarding Assessment of CMPs by the Federal Financial Institutions Regulatory Agencies provides thirteen factors for interpreting these statutory factors. Civil Money Penalties Interagency Statement, 63 Fed. Reg. 30226-02, 1998

[20] This is not to say that an IAP can escape responsibility for his or her actions by delegating responsibility to underlings. An IAP cannot. However, it is surely relevant in determining the culpability of Respondent that he tasked Winters and Gaskins with making sure that the release was accurate.

[21] Note that throughout its review, the Board considered that the ALJ found that Bonan's testimony with respect to Rig 23 was not credible. R.D. at 12, 73-77. Bonan testified inconsistently on whether he believed the Bank had any type of lien on Rig 24. As noted earlier, the Board defers to the ALJ's finding. However, the Board's decisions do not rest solely (or even primarily) on Bonan's testimony. It is the record as a whole that the Board considered, rather than reliance on any particular testimony of Bonan.

WL 280287 (adopting Interagency Policy Regarding Assessment of CMPs by the Federal Financial Institutions Regulatory Agencies (June 3, 1998)).

Having considered the statutory and regulatory factors, the record in this case, and Respondent's Exceptions, subject to the Board's findings as to Rig 23 the Board adopts and affirms the reasoning and conclusion of the ALJ that the amount of the CMP in this case, $105,000, is an appropriate civil money penalty in this case. R.D. at 135-39. The Board has also considered its own conclusion that Respondent did not act culpably with respect to the release of Rig 23 (and did not intend to release Rig 23) and determined that this does not suffice under the relevant factors to reduce the $105,000 civil penalty. The ability to pay, the gravity of the misconduct that the Board has found, and the lack of good faith outlined by the ALJ as to Respondent's testimony more than suffice to justify the requested CMP amount.

V. THIS ACTION IS NOT TIME-BARRED

Bonan argues that the FDIC's enforcement proceeding is time-barred. Exceptions at 69. Specifically, Bonan relies on 28 U.S.C. § 2462, which requires that any action by the FDIC be commenced within five years of the date when the claim first accrued. The FDIC filed its Notice on May 5, 2021.[22] Bonan argues that because the actions upon which the Notice is based occurred more than five years prior to that date, the action is untimely. *Id*.

However, Respondent acknowledged to the ALJ that the parties entered into a series of agreements to toll the statute of limitations as to Enforcement Counsel's prospective claims, which, if valid, would result in the action being timely. *See* Respondent Frank William Bonan II's Motion for Summary Judgment and Memorandum in Support, dated August 15, 2022, at 27.

[22] The Notice of Charges is dated May 5, 2021 and this is the date that Respondent uses in his Exceptions. Exceptions at 69. However, the ALJ cites May 7, 2021 as the relevant date. *See, e.g.*, R.D. at 4. It is not necessary to solve this discrepancy as the difference of two days is not determinative of the statute of limitations issue.

Bonan points out that these tolling agreements were never entered into evidence at his hearing. Exceptions at 69. They are, however, in the administrative record. *See* July 21, 2023 Declaration of David A. Beck ("Beck Decl.") (attaching tolling agreements); *see also* 12 C.F.R. § 308.40(c) (Board decision based on review of the entire record of the proceeding). The final such tolling agreement expired on May 12, 2021. *Id*., attaching FDIC EX 400. The ALJ relied on these tolling agreements to find that the statute of limitations did not bar this action. *See* Order No. 30, Regarding Cross-Motions for Summary Judgment at 53-56. The Board finds that the tolling agreements operated to extend the statute of limitations and this action is not time-barred.

Bonan appears to argue in a footnote, Exceptions at 69 n. 9, that the time limit in § 2462 is jurisdictional and it is therefore improper to rely on the tolling agreements.[23] The ALJ rejected this argument. Order No. 30, Regarding Cross-Motions for Summary Judgment at 53-56. Agreeing with the ALJ's reasoning, the Board also rejects it. Section 2462 is not jurisdictional and the tolling agreements apply to render this action timely. *See SEC v. Fowler*, 6 F.4th 255, 258, 260-62 (2d Cir. 2021) (examining § 2462 and holding that it is not jurisdictional and subject to tolling by parties); *see also Boechler v. Commisioner of Internal Revenue*, 596 U.S. 199, 203 (2022) (a procedural requirement is jurisdictional only if Congress clearly states that it is). The only case cited by Respondent in support of his argument – *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016) – expressly did not decide if § 2462 is jurisdictional. *Id*. at 1360, n.1 ("we need not decide for purposes of this appeal whether § 2462's time bar is jurisdictional . . .").

[23] The Respondent's footnote is unclear and can be read as directed only to equitable tolling (which the ALJ did not rely on in making her decision). In any event, § 2462 is not jurisdictional and would not prohibit equitable tolling either.

Further, the relevant loans were charged off no earlier than December 31, 2016. *See* Order No. 30, Regarding Cross-Motions for Summary Judgment, at 56; Hr'g. Tr. (Stringer) 99:8-100:13; Hr'g. Tr. (Clarke) 736:2-737:10; EX 348; EX 350; EX 355; EX 356. As such, the effect prongs of Sections 1818(e) and (i) were not fulfilled until that date. Therefore, the claims did not accrue until that date and the May 5, 2021 Notice was timely filed regardless of whether the tolling agreements apply. *See, e.g.*, *Proffitt v. FDIC*, 200 F.3d 855, 862-63 (D.C. Cir. 2000) (1818(e) claim accrued, and limitations period began to run, when bank actually suffered loss).

VI. THERE IS NO DUE PROCESS VIOLATION

Respondent argues that his due process rights have been violated for three reasons: 1) the FDIC is both prosecuting and adjudicating this enforcement action; 2) the FDIC's administrative discovery rules do not permit depositions; and 3) the FDIC allegedly did not properly serve the Notice of Charges. Exceptions at 69-74.

A. Administrative Agencies May Prosecute and Adjudicate.

Respondent's Fifth Amendment right to due process was not violated by the FDIC having both investigatory and adjudicatory functions. The Supreme Court's seminal case addressing due process and the combination of functions is *Withrow v. Larkin*, 421 U.S. 35 (1975). In *Withrow*, the Supreme Court held that the "combination of investigative and adjudicative functions [in a single body] does not, without more, constitute a due process violation." *Id.* at 58. Rather there must be "special facts and circumstances" before the "risk of unfairness is intolerably high." *Id*. No such special facts or circumstances exist here.

Respondent argues that the "Fifth Amendment prohibits the FDIC from acting as both prosecutor and judge" because "the risk of bias is too great." Exceptions at 71-72. Respondent's claim fails. As an initial matter, adjudicators are afforded a "presumption of honesty and integrity." *Withrow*, 421 U.S. at 47. To overcome this presumption, it is Respondent's burden to show a "conflict of interest or some other specific reason for disqualification." *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). Respondent has failed to rebut this presumption here. He acknowledges that "the members of the FDIC adjudicating this action are not the same people investigating and prosecuting" and that "it is possible" that the FDIC adjudicators "could separate their devotion to the agency to which they are employed." Exceptions at 71-72. Nevertheless, he claims that "the FDIC personnel adjudicating this matter could find any criticism" he raised as "a negative reflection on the adjudicators' roles, leadership, and the FDIC as a whole" thereby resulting in an unacceptable risk of bias. *Id.* at 72.

This single speculative claim of potential bias is woefully insufficient to impugn the fairness of the Board members and rebut the presumption that they are "'men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Withrow*, 421 U.S. at 55 (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941). "[T]he combination of investigative and adjudicative functions into a single administrator does not, in itself, demonstrate such bias." *Hess v. Bd. of Trustees of S. Illinois Univ.*, 839 F.3d 668, 675 (7th Cir. 2016).

Even assuming, *arguendo*, there is some inherent "level of 'institutional bias,'" "such an interest does not render all agencies incapable of adjudicating disputes within their own proceedings given the strong public interest in effective, efficient, and expert decisionmaking in the administrative setting." *Doolin Sec. Sav. Bank, F.S.B. v. FDIC*, 53 F.3d 1395, 1407 (4th Cir. 1995); *see also McLaughlin v. Union Oil Co. of California*, 869 F.2d 1039, 1047 (7th Cir. 1989) ("Bias cannot be inferred from a mere pattern of rulings by a judicial officer, but requires evidence that the officer had it 'in' for the party for reasons unrelated to the officer's views of the law"); *United States v. Sykes*, 7 F.3d 1331, 1339 (7th Cir. 1993) (conclusions, and opinions, or rumors are not sufficient); *Gleason v. Welborn*, 42 F.3d 1107, 1112 (7th Cir. 1994) (a decision adverse to a party—even one adverse on all the issues raised—is not evidence of bias where that decision is supported by the law and facts). Respondent has failed to carry his burden of showing that his right to due process was violated merely because the FDIC has prosecutorial and adjudicatory functions.

The Respondent argues that *Withrow* no longer applies, but instead relies on the more recent *Williams v. Pennsylvania*. 579 U.S. 1 (2016). That reliance is misplaced. In *Williams*, the Court found an "impermissible risk of actual bias" when a judge had "significant, personal involvement as a prosecutor" in the defendant's case. *Id*. at 8. Specifically, the Court found that there was a due process violation where the judge previously had been a prosecutor in defendant's case and authorized seeking the death penalty against the defendant. *Id.* at 8-10. The Court determined that "an unconstitutional potential for bias exists when *the same person* serves as both accuser and adjudicator in a case." *Id*. at 8 (emphasis added).

Williams is distinguishable. In Respondent's case, different individuals at the same agency are prosecuting and adjudicating. Notably, the Court in *Williams* relied heavily on *In re Murchison*, 349 U.S. 133, 138 (1955), which involved an individual acting in the role of both a grand jury and judge raising similar concerns. However, in *Withrow*, the Court explained that "*Murchison* has not been understood to stand for the broad rule that the members of an administrative agency may not investigate facts, institute proceedings, and then make the necessary adjudications." 421 U.S. at 54. The situation at hand is not analogous to *Williams* and *Murchison*; rather, *Withrow* is the applicable law.

The same agency adjudicating and prosecuting Respondent's case does not, without the "special facts and circumstances" required by *Withrow*, amount to a due process violation.

Withrow 421 U.S. at 58; *see also Hess*, 839 F.3d at 675; *Serafinn v. Loc. 722, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 597 F.3d 908, 919 (7th Cir. 2010) ("mere commingling of prosecutorial and adjudicatory functions are insufficient to show bias"); *Bakalis v. Golembeski*, 35 F.3d 318, 326 (7th Cir. 1994) ("[p]artiality will not be presumed simply because the same tribunal investigates and adjudicates")).

B. Respondent's Claim of Insufficient Pretrial Discovery Does Not Present a Due Process Violation.

Respondent's administrative proceeding is governed by the Administrative Procedure Act ("APA"). 5 U.S.C. § 551 *et seq.* The APA does not provide for pretrial discovery in the administrative process. *Kelly v. EPA*, 203 F.3d 519, 523 (7th Cir. 2000). Further, there is no constitutional right to pretrial discovery in administrative proceedings. *Id.*; *see also Silverman v. Commodity Futures Trading Comm'n*, 549 F.2d 28, 33 (7th Cir. 1977) ("There is no basic constitutional right to pretrial discovery in administrative proceedings."); *Starr v. Comm'r*, 226 F.2d 721, 722 (7th Cir. 1955) ("it has never been held that the Constitution of the United States requires that discovery procedure be adopted by any court"). However, if a particular situation would result in a denial of due process, discovery must be granted. *Mister Disc. Stockbrokers, Inc. v. S.E.C.*, 768 F.2d 875, 878 (7th Cir. 1985) (quoting *McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979)).

Respondent argues that "parties to FDIC proceedings are prevented from taking depositions" and claims that this deprivation violated his due process rights under the Fifth Amendment. Exceptions at 72. However, this is not entirely correct. Depositions are permitted "upon a showing of good cause." 12 C.F.R. § 308.107(e)(1)(i). Indeed, Respondent availed himself of this pretrial discovery when he deposed witnesses who were unavailable for trial. *See* Exceptions at 72.

While pre-trial depositions are not automatically granted, the FDIC's Uniform Rules *do* provide for examination and cross-examination of witnesses at the hearing. *See* 12 C.F.R. § 308.35. Respondent availed himself of this opportunity, cross-examining witnesses presented by FDIC Enforcement and presenting and examining his own witnesses. *See generally* Hr'g Tr.

More specifically, Respondent argues that he was unable to depose key witnesses in the case, namely Tate, Stringer, and Botsch. *See* Exceptions at 73. Notably, Tate was not a witness in this case. *See generally* Hr'g Tr. However, both Stringer and Botsch testified at the hearing, and Respondent's counsel did cross-examine them. *See* Hr'g Tr (Stringer) at 112; Hr'g Tr (Botsch) at 290. While Respondent was not provided an opportunity to depose these witnesses *before* trial, he was provided an opportunity to examine them at the hearing.

Accordingly, Respondent's argument that he has a due process right to examine the witnesses against him, and that the lack of that opportunity violated his constitutional right to a "fundamentally fair proceeding" is unavailing. Exceptions at 73. He was afforded the right he complains of lacking. Respondent was able to depose unavailable witnesses before trial and cross-examine witnesses at the hearing. He was not in fact deprived of the opportunity to examine the witnesses against him, and his inability to depose them in advance of trial did not result in a denial of due process. *Kelly*, 203 F.3d at 523 (no constitutional right to pretrial discovery).

C. Notice was Properly Served.

Finally, Respondent argues that the FDIC did not adequately serve Respondent with the Notice of Charges (Notice). Exceptions at 73. As an initial matter, service of process may be waived by giving the court "a reasonable expectation" that a respondent "will defend the suit on the merits." *See Mobile Anesthesiologists Chicago, LLC v. Anesthesia Assocs. of Houston*

Metroplex, P.A., 623 F.3d 440, 443 (7th Cir. 2010) ("[t]o waive or forfeit a personal jurisdiction defense, a defendant must give a plaintiff a reasonable expectation that it will defend the suit on the merits"); *see also United States v. Ligas*, 549 F.3d 497, 501 (7th Cir. 2008) ("a defendant who properly raises a jurisdictional defense can nevertheless waive the defense by his subsequent conduct"). In this case, there can be no doubt that Respondent actively participated in all aspects of trial and defended the suit on the merits. Accordingly, the Board finds that Respondent waived his ability to challenge service of process.

Even assuming, *arguendo*, that Respondent did not waive this argument, we find that FDIC properly effectuated service**.** Service here is governed by 12 C.F.R. § 308.11(c)(2), which provides that service may be effectuated by (i) personal service; (ii) delivery to the person's residence or workplace; (iii) delivery to a registered agent; (iv) registered or certified mail; or (v) "any other method reasonably calculated to give actual notice." 12 C.F.R. § 308.11(c)(2).

The FDIC initially attempted to serve respondent electronically by way of his attorney, but his attorney refused service by e-mail. Exceptions at 74. Although Respondent received actual notice from his attorney, he argued that this was insufficient because his attorney refused service by e-mail, so there was no "date of service" informing when his response to the Notice would be due. *Id*. Nevertheless, he filed an Answer to the Notice of Charges on May 26. Respondent's Answer and Affirmative Defenses, at 40.

Additionally, it is undisputed that the FDIC also served him via overnight courier at his residence. FDIC's Opposition to Bonan II's Motion for Summary Disposition at 26 ("Opp. to SJ"). Under most circumstances, service by overnight courier would be "reasonably calculated to give actual notice," which is sufficient to meet service of process requirements. *See* 12 C.F.R. § 308.11(c)(2)(v); *see also In the Matter of Ricardo Carrasco*, 1998 WL 34083429 (Oct. 8,

1998) (notice sufficient even though Respondent did not actually receive notice, as the methods of service were "in most situations reasonably calculated to give actual notice"); *In the Matter of Ghaith R. Pharaon, Agha Hasan Abedi, Swaleh Naqvi, & Kemal Shoaib,* 1992 WL 12012684 (Feb. 14, 1992) (notice provided to Respondent by his secretary constituted a "method reasonably calculated to give actual notice").

Respondent does not dispute this service in his Exceptions. Nor does he claim unusual circumstances that would render service by overnight courier insufficient, nor claim that he did not receive actual notice. Instead, he argues that 1) service is not always sufficient merely because of actual notice; and 2) the due date for his response "was forced to be completed with unnecessary urgency" because the date of service was not clear. Exceptions at 74.

As for Respondent's first argument, he does not argue that he was not provided service through a courier. His Exceptions do not provide any reference at all to this, but instead focus on the fact that his attorney refused service by e-mail. It appears, then, that service was properly executed under the "any other method reasonably calculated to give actual notice" option of 12 C.F.R. § 308.11(c)(2)(v). As for Respondent's second argument, this Board agrees with FDIC Enforcement that while that may "make an otherwise untimely Answer timely," it does not rise to the level of a due process violation. *See* Opp. to SJ at 26.

Respondent was served with the Notice of Charges, had actual notice of the proceeding, responded to the charges, and otherwise fully participated in the proceedings. This Board finds that Respondent's actions overcome his improper service claim and additionally, that service was properly effectuated.

VII. THE SEVENTH AMENDMENT DOES NOT ENTITLE RESPONDENT TO A JURY TRIAL

Respondent argues that he is entitled to a jury trial under the Seventh Amendment. *See* Exceptions at 74-77. He is incorrect. Respondent is not entitled to a jury trial under the Seventh Amendment for either the imposition of a prohibition order or a CMP. A prohibition order is equitable in nature, and in any event the public rights exception to the Seventh Amendment right to trial by jury applies. Likewise, the public rights exception applies to an administrative proceeding by the FDIC for a CMP. The Supreme Court's recent decision in *SEC v. Jarkes*y ("*Jarkesy*") reinforces these conclusions. *See SEC v. Jarkesy*, 144 S. Ct. 2117 (2024).

To determine whether Respondent's Seventh Amendment right to a jury has been violated, the Board applies a two-part analysis: (1) does the action implicate the Seventh Amendment, and (2) if so, does the "public rights" exception apply? *See Jarkesy*, 144 S. Ct. At 2127.

A. A Prohibition Order is an Equitable Remedy that Does Not Implicate the Seventh Amendment.

This proceeding for prohibition under § 1818(e) does not implicate the Seventh Amendment, as debarment from the banking industry is an equitable remedy rather than a legal one. The purpose of prohibition is remedial rather than punitive. It serves to protect the banking industry from the misconduct of insiders and, thereby, to maintain public confidence in the banking system.

The Seventh Amendment provides that the jury trial right is "preserved" for "suits at common law," and the Supreme Court has explained on numerous occasions that this language distinguishes between legal and equitable actions and requires a jury trial only for actions that were legal in 1791. Indeed, *Jarkesy* reiterates the point:

> [T]he Framers used the term "common law" in the Amendment "in contradistinction to equity, and admiralty, and maritime jurisprudence." . . . The Amendment therefore "embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume."

144 S. Ct. at 2128 (quoting *Parsons v. Bedford*, 3 Pet. 433, 436 (1830)); *see also, e.g.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989) (no jury necessary for claim that is not "legal in nature"); *Atlas Roofing Co., Inc. v. OSHA*, 430 U.S. 442, 449 (1977) ("The phrase 'Suits at common law' has been construed to refer to cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not."). In making the determination of whether a claim is "legal in nature" or equitable, "courts [must] consider the cause of action and the remedy it provides[,]" and "the remedy [is] the 'more important' consideration." *Jarkesy*, 144 S. Ct. at 2129.

Prohibiting Respondent from further service in the banking industry – essentially an injunction – is an equitable remedy and falls within the domain of courts of equity rather than law.

Several courts have held that a prohibition order serves a remedial purpose. In *United States v. Stoller*, 906 F. Supp. 39 (D. Mass. 1995), *aff'd*, 78 F.3d 710 (1st Cir. 1996), for example, the court recognized that "section 1818(e) was intended to serve the legitimate remedial purpose of protecting insured institutions from the dangers of misconduct by bank insiders," and noted that the possibility of reinstatement mitigated any punitive aspect of a removal and prohibition sanction. *Id*. at 41-42. The First Circuit affirmed, holding that the absence of a criminal component to the misconduct giving rise to removal and prohibition favored the conclusion that § 1818(e) was remedial, not punitive. 78 F.3d at 721. The Fifth and Tenth Circuits reached the same conclusion. *United States v. Rusk*, 96 F.3d 777, 779 (5th Cir.

1996) ("[D]ebarment orders do not serve a punitive purpose but rather the remedial goal of protecting the banking industry."); *United States v. Hudson*, 14 F.3d 536, 542 (10th Cir. 1994) ("[T]he OCC's use of debarment as a means of protecting the integrity of the banking system and the interests of the depositors is a legitimate remedial purpose that need not necessarily be defined as also serving as deterrence or retribution."); *see also Bae v. Shalala*, 44 F.3d 489, 496 (7th Cir. 1995) (debarment under Generic Drug Enforcement Act remedial, not punitive). This Board has also so held. *In the Matter of John J. Schmalzer*, FDIC-00-007e, 2004 WL 2930775, at *4 (FDIC Oct. 21, 2004) ("Orders of removal and prohibition under section 8(e) of the Act are remedial and ar*e issued not to punish, but rather to protect the public . . . ."); In the Matter of Richard M. Wright*, FDIC-95-79e, 2000 WL 1742018, at *3 (FDIC Oct. 2, 2000) (same); *In the Matter of Douglas A. Winter*, FDIC-89-29e, 1997 WL 602923, at *4 (FDIC Aug. 20, 1997) (same); I*n the Matter of Allan Hutensky*, FDIC-92-300e, 1997 WL 557612, at *2 (FDIC July 8, 1997) ("Section 8(e) of the FDI Act is a remedial, not a punitive statute.").

And even if the effect of prohibition orders is also, in part, to deter or punish misconduct, *see Proffitt v. FDIC*, 200 F.3d 855, 860-61 (D.C. Cir. 2000) (finding prohibition to be punitive but also noting that it has a "dual effect of protecting the public from a dishonest banker"), this does not alter the Board's conclusion. Remedies can be equitable even if punishment or deterrence is among their rationales or effects. *See, e.g.*, *S.E.C. v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006) (SEC's equitable disgorgement remedy has "the effect of deterring subsequent fraud"); *EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1253 (11th Cir. 1997) (EEOC's injunctive remedies "deter[] the employer from future discrimination"); *F.T.C. v. Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011) (SEC's disgorgement remedies are equitable even if their "primary purpose . . . is to deter violations of the laws by depriving violators of their ill-gotten gains"); *U.S. v. Stoller*, 78 F.3d 710, 724 (1st Cir. 1996) (finding, in a double jeopardy analysis, that a debarment order imposed by the FDIC was "predominately remedial in nature")*; Navarro v. Procter & Gamble Co.,* 529 F. Supp. 3d 742, 754 (S.D. Ohio 2021) ("[T]he availability of injunctive relief . . . presumably deters and punishes infringement, but that does not change its character as equitable relief.") (citations omitted); *Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP*, 325 F. Supp. 2d 841, 851 (M.D. Tenn. 2004) (equitable remedies do not require jury trial even if "deterrence" is among their purposes), *injunction terminated on other grounds*, 423 F.3d 539 (6th Cir. 2005). Just as legal relief "incidental to or intertwined with equitable relief" is equitable for purposes of the Seventh Amendment, *see, e.g.*, *Tull v. U.S.*, 481 U.S. 412, 424 (1987), a deterrence or punishment element to a remedy that is incidental to the remedy's primary equitable purpose does not make the entire remedy legal. *Jarkesy* is not to the contrary, as the Supreme Court observed that "*monetary* remedies" may be legal rather than equitable if they are "designed to punish or deter the wrongdoer," and did not address nonmonetary remedies at all. *Jarkesy*, 144 S. Ct. at 2129. *Jarkesy* did not alter the long-settled rule that purely equitable remedies, whatever their purpose or effect, do not require a trial by jury.

Thus, the remedy—the "most important" consideration—points to the lack of a right to a jury trial. This conclusion is buttressed when one looks at the "cause of action." The imposition of a prohibition order here is based on breach of fiduciary duty and unsafe or unsound business practices. These bases for prohibition fall outside the Seventh Amendment because they do not correspond to causes of action tried before a jury in 1791.

Courts have often recognized that actions for breach of fiduciary duty do not implicate the Seventh Amendment because actions for breach of fiduciary duty, to the extent they existed in 1791, were brought against trustees, not corporate officers, and even those actions were solely equitable and did not include damages. "[I]n colonial times, the English High Court of Chancery had exclusive jurisdiction over trusts." *Evans v. Pearson Enter.*, 434 F.3d 839, 849 (6th Cir. 2006). For that reason, the Supreme Court noted in *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry,* 494 U.S. 558 (1990), that a modern action that is comparable to an equitable action by a trust beneficiary would not require a jury trial. *Id*. at 568-69. Similarly, in *Osborn v. Griffin*, 865 F.3d 417 (6th Cir. 2017), the Sixth Circuit found that "a jury trial was not required for Plaintiffs' fiduciary duty claims," even though the remedies sought were monetary. *Id*. at 461. Even if there were a valid analogy to actions at law—and there is not—the novelty of the cause of action would permit administrative resolution. *See Granfinanciera*, 492 U.S. at 53 ("In certain situations . . . Congress may fashion causes of action that are closely analogous to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable.").

Not only was there no action for breach of fiduciary duty at common law, there was no duty to enforce. Historically, corporate officers, and bank officers in particular, could not be sued for unduly risky practices, as their obligations were to maximize wealth for their shareholders. As one commentator has explained:

> [Throughout] much of the nineteenth century, bank fiduciary duties were considered purely a matter of state common law. Consequently, they mostly developed in parallel with corporate fiduciary duties, with a high deference to board autonomy and an increasing emphasis on maximizing shareholder profits. . . . [D]uring this period, bank directors were given very broad latitude to pursue shareholders' interests, with a robust business judgment rule and effectively no judicial enforcement against excessive risk-taking by bank managers and directors. Reflecting the mores of the era, bank depositors were generally denied standing to sue for a breach of fiduciary duty, as it was assumed that their relationship with the bank was a contractual one and did not extend to the bank's

> officers and directors. Shareholder wealth maximization was seen as the primary goal of bank directors, even at the expense of depositors.

David Min, *Federalizing Bank Governance*, 51 Loy. U. Chi. L.J. 833, 849-50 (2019). Another commentator similarly observes:

> Nineteenth-century bank director liability law proceeded from the premise that shareholders invest capital in a bank with the implicit expectation of maximized profits. This premise gave rise to three allied propositions. First, it was assumed that shareholders either constituted the board or delegated authority to the board to make profit-maximizing decisions. Second, courts assumed that shareholders expected directors to take the necessary risks to achieve such profits. Finally, because shareholders stood to gain from any profits, courts concluded that shareholders bore the corresponding risk of loss.
>
> This conception of shareholders' interests militated in favor of broad board discretion, largely free from judicial supervision. When shareholder and director interests clashed, nineteenth-century courts almost always subordinated shareholder claims to board autonomy. The upshot was that courts from that era rewarded, rather than penalized, risk. **Nineteenth-century courts, for example, refused to hold directors of state-chartered institutions liable for overconcentrations of credit to single borrowers. Early decisions also showed lenience toward numerous practices treated harshly today, including worthless junior liens, loose appraisal practices, disregard of internal loan procedures, and additional loans to delinquent borrowers. Taken together, the nineteenth-century cases displayed an appetite for bank risk that is virtually shocking by modern mores.**
>
> The ethos of potential profit maximization at any risk level was also evident in the numerous nineteenth century cases that denied injured depositors the standing necessary to sue bank directors for negligent mismanagement. The depositor standing cases proceeded from the premise that the sole contractual relationship depositors had was with their banks and not with the banks' boards of directors. The necessary consequence, in the eyes of many courts, was that depositors lacked privity of contract with, and thus standing to sue, bank directors. The depositor standing doctrine neatly aligned with the view that the duty of care only served the interests of shareholders.

Patricia A. McCoy, *A Political Economy of the Business Judgment Rule in Banking: Implications for Corporate Law*, 47 Case W. Res. L. Rev. 1, 23-26 (1996) (emphasis added); see also *id*. at 29

("During most of the nineteenth century, potential profit maximization, not loss avoidance, was the prevailing norm. The vast majority of courts during that period refused to interfere with lending decisions, even when such decisions were reckless and likely to result in losses. Some courts went so far as to permit conflicts of interest where a possible profit was to be had."). Thus, shareholders had no remedy at law against corporate managers for their abuses, and while the derivative suit was ultimately created as an equitable action against such managers, that later development simply underscores the absence of common-law accountability for corporate insiders. *Ross v. Bernhard*, 396 U.S. 531, 534 (1970).

It was not until the late nineteenth century, after the Supreme Court held that the National Bank Act imposed a duty of care on directors and officers, *see Briggs v. Spaulding*, 141 U.S. 132 (1891), that courts began to read a duty of care into the common law outside the Act. *Wheeler v. Aiken County Loan & Sav. Bank,* 75 F. 781, 785 (C.C.D.S.C. 1896); *Holmes v. McDonald*, 226 Ill. 169, 175-76 (1907); *Earle v. Humphrey*, 121 Mich. 518, 525 (1899). Those comparatively recent developments simply underscore the absence of eighteenth-century roots for the FDIC's enforcement actions. S*ee Moitoso v. FMR LLC*, 410 F. Supp. 3d 320, 330 (D. Mass. 2019) (post-founding common-law developments do not control for Seventh Amendment purposes: "the 18th-century common law of England is paramount in the Seventh Amendment analysis" (citations omitted)); *In re Aircrash Disaster*, 909 F. Supp. 1083, 1111 (N.D. Ill. 1995) (post-1791 developments in the common law are "not the pertinent inquiry" for Seventh Amendment purposes).

Thus, as neither bank depositors nor shareholders nor anyone else historically had a right of action against bank insiders for recklessness in the management of banks, the FDIC's actions for unsafe and unsound practices and breach of fiduciary duty to the bank "bring no common law soil with them." *Jarkesy*, 144 S. Ct. 2137. They are new actions, and such analogues as did exist in 1791 were brought in courts of equity rather than law.

To the extent Respondent attempts to create an analogy to other types of actions where a jury might be required, there is no reasonable comparison between breach of fiduciary duty and unsafe and unsound practices, on the § 1818(e) side, and any common-law action brought before juries in the eighteenth century. *See* Exceptions at 75 (analogizing the FDIC's allegations to fraud and to professional malpractice).

First, Respondent claims that because one of the "prongs" of a § 1818(e) action – the culpability prong– can be satisfied by showing "personal dishonesty," an action under § 1818(e) *as a whole* amounts to a traditional fraud claim. Not so. Claims brought under § 1818(e) are not analogous to fraud claims either in elements or remedy. A determination of "personal dishonesty" does not equate to a civil fraud claim; personal dishonesty is a broader concept. *See Van Dyke v. Board of Gov. of the Federal Reserve Sys.*, 876 F.2d 1377, 1379 (8th Cir. 1989) (noting that Federal Reserve Board finding that personal dishonesty must be evaluated on a case-by-case basis and need not amount to civil fraud was a permissible construction of statute at issue in that case); *see also Michael v. FDIC*, 687 F.3d 337, 351 (7th Cir. 2012) (noting that personal dishonesty can include "a lack of straightforwardness and a lack of integrity"). An action for a prohibition order is not modeled on common law fraud—it does not, for instance, involve reasonable reliance, a showing of materiality, or damages—nor does it provide a type of remedy available only in law courts. Further, "personal dishonesty" relates to only one of the three prongs under § 1818(e) – the "culpability" prong. The remaining prongs of § 1818(e) – "misconduct" and "effect" – have nothing to do with the substance or framework of a fraud claims. A §1818(e) claim, which consists of three prongs each of which can be satisfied by a number of different showings, is not somehow transformed into a fraud claim because one of those potential showings is "personal dishonesty." A finding of "personal dishonesty" is a sufficient but not a necessary finding even on the culpability prong. *See Haynes v. FDIC*, 664 Fed. Appx. 635, 637-38 (9 th Cir. 2016) (FDIC Board "not required to find personal dishonesty . . . [t]he statute lists willful of continuing disregard as an alternative to personal dishonesty"). And the remedy for any misconduct involving "personal dishonesty" – the most important factor in determining whether a claim is legal or equitable – remains equitable. Debarment from the banking industry is, as described above, an equitable remedy unknown to the common law as it existed in the eighteenth century.

Second, as to Respondent's single sentence stating that "unsafe and unsound banking practices" equates to a traditional legal cause of action for professional malpractice, the Board finds that Respondent has failed to adequately support such an argument. The single case cited by Respondent, *Resnick v. Schwartz*, No. 17C04944. 2018 WL 4191525, at *9 (N.D. Ill. Sep. 3, 2018), stands merely for the proposition that professional malpractice is a "legal" cause of action. It does not address the issue of whether an unsafe and unsound banking practices claim is an analogue of professional malpractice. Respondent does not otherwise offer any support for his bare assertion. And, in any event, regardless of how the cause of action is characterized a prohibition order is a non-monetary equitable *remedy* not a legal one. *See, e.g.*, *Tull*, 481 U.S. at 421 (characterizing the relief sought is more important than finding a "precisely analogous common-law cause of action").

B. The Public Rights Exception Applies to Both the Prohibition Order and the Civil Money Penalty.

Even assuming solely for the sake of argument that administrative proceedings for prohibition orders were legal in nature and implicated the Seventh Amendment, the public rights exception applies to allow them to be heard in an administrative proceeding before an ALJ. The same goes for proceedings to assess a CMP.

The Supreme Court has explained that the public rights exception "has been held to permit Congress to assign certain matters to agencies for adjudication even though such proceedings would not afford the right to a jury trial." *Jarkesy*, 144 S. Ct. at 2127. And as the Court explicitly acknowledged, under the exception, "the Government may extract civil penalties in administrative tribunals in some contexts." Id. at 2134 n. 2.

While the Supreme Court in *Jarkesy* declined to apply the "public rights" exception to the SEC's securities fraud action, it did affirm that the exception remains good law, 144 S. Ct. at 2132, and declined to overturn prior decisions setting forth the parameters of the exception, specifically *Stern v. Marshall*, 564 U.S. 462 (2011), and *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). Actions for prohibition under § 1818(e) and CMP under § 1818(i) fall within the public rights exception as explained in *Stern* and *Granfinanciera*, and further detailed in *Jarkesy*.

Normally, if a suit is in the nature of an action at common law, then it "presumptively concerns private rights, and adjudication by an Article III court is mandatory." *Jarkesy*. 144 S. Ct. at 2132. However, the Court's "precedent has also recognized a class of cases concerning . . . 'public rights,'" that the Court described as "matters [that] 'historically could have been determined exclusively by [the executive and legislative] branches,' even when they were 'presented in such a form that the judicial power [wa]s capable of acting on them." *Id*. .

The *Jarkesy* Court provided examples of the "historic categories of adjudications [that] fall within the exception." *Id*. The *Jarkesy* Court cited as examples of public rights cases those involving the revenue collection power, *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1956); immigration enforcement, *Oceanic Steam Navigation Co. v.*

Stranahan, 214 U.S. 320, 335 (1909); tariffs, *Ex parte Bakelite Corp.*, 279 U.S. 438, 446 (1929); Native American tribe relations, *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011), public lands issues, *Crowell v. Benson*, 285 U.S. 22, 51 (1932), and patent rights, *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 334 (2018); *United States v. Duell*, 172 U.S. 576, 582-83 (1899). The Court also cited *Crowell* for the proposition that matters involving "pensions" and "payments to veterans" may be decided before an administrative tribunal, and the *Crowell* Court extended that holding to, *inter alia*, "public health" and "the facilities of the post office."

The FDIC's action enforcing banking laws fits into the types of action enumerated in *Jarkesy* as within the public rights exception. "Banking is one of the longest regulated and most closely supervised of public callings." *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947); *see also Blue Ridge Bank v. Veribanc, Inc.*, 675 F. Supp. 1007, 1011 (W.D. Va. 1987) ("Partly because of the important role banks play in our economy, and because they have such an important effect on the public welfare, the banking industry is highly regulated at state and national levels."). Effective banking regulation ensures the continued stability of the financial system and federal regulations permeate every aspect of banking. Just as the federal government has an interest in ensuring the effective operation of the laws governing taxation, immigration, and international trade, it has a compelling interest in preventing banking misconduct, and Congress has leeway to provide for the adjudication of those matters in an administrative forum. *See Stern v. Marshall,* 564 U.S. 462, 490-91 (2011) (exception applies to "cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority. . . .

[W]hat makes a right 'public' rather than private is that the right is integrally related to particular Federal Government action").

This is reinforced by the history of enforcement at the FDIC. Section 1818 enforcement claims more closely resemble the "matters [that] historically could have been determined exclusively by [the executive and legislative] branches" identified in *Jarkesy* than do the securities fraud claims at issue in that case. Prior to 2010 SEC securities fraud claims historically had been brought only in Article III courts. On the other hand, § 1818 enforcement claims historically have been brought exclusively in executive branch administrative proceedings.

Further, unsafe and unsound conduct and other acts that imperil an insured institution threaten public funds. Unlike the SEC in *Jarkesy*, the FDIC's enforcement regime helps to protect the Deposit Insurance Fund. Diminished health of the Deposit Insurance Fund could require use of public funds in the Treasury and FDIC enforcement actions reduce the risk of that happening. *See Spawn v. Western Bank-Westheimer*, 989 F.2d 830, 837 (5th Cir. 1993) ("[A]lthough the FDIC relies on premiums from insured banks to pay the cost of deposit insurance, *see* 12 U.S.C. § 1817, the FDIC also relies on borrowing from the United States Treasury to meet its obligations, *see* 12 U.S.C. § 1824."). In *Jarkesy*, there was no similar implication for public funds. For these reasons, multiple courts of appeals have recognized that conduct affecting insured depository institutions affects public rights. In *Simpson v. OTS*, 29 F.3d 1418 (9th Cir. 1994), the court found the public rights exception applicable to a restitution order pursuant to § 1818(b)'s cease and desist authority because "Congress created the administrative forum to effectuate and protect the public interest," specifically by "safeguard[ing] the thrift industry, the depositors, and the federal insurance fund." *Id.* at 1423.

The misconduct at issue "threatened [the bank's solvency" and "undermin[ed] the interests and confidence of Cascade's depositors. . . . By instituting the cease-and-desist proceedings, the OTS served a public purpose of the sort Congress envisioned in providing for administrative adjudication." *Id.* Likewise, in *Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995), the court found that "Congress enacted FIRREA in order to safeguard the thrift industry and the FDIC," and the enforcement proceeding "stemmed from Cavallari's disregard of an order issued by the OCC pursuant to its regulatory authority under FIRREA." *Id.* at 145. Thus, the proceeding "implicate[d] public rights." *Id.*; *see also Akin v. OTS*, 950 F.2d 1180, 1184, 1186 (5th Cir. 1992) (public rights exception applies to enforcement proceeding addressing "unsafe or unsound banking practices stemm[ing] from reckless disregard of an institutional officer's duties"; the proceeding was "a proper administrative forum for adjudicating public rights").

The *Jarkesy* decision also reiterated the holding of *Granfinanciera*, where the Court explained that "[i]f a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court." 492 U.S. at 54-55. In considering this, the *Jarkesy* Court stated that when "Congress ha[s] already authorized jury trials for certain [relevant] matters [this] demonstrate[s] that jury trials were not generally 'incompatible' with the overal [statutory] regime." *Jarkesy*, 144 S. Ct. at 2135. But here, unlike with the SEC's authority to bring an enforcement proceeding in an Article III court, the FDIC's governing statute does *not* provide for a right to bring an Article III proceeding. *See* 12 U.S.C. § 1818(h)(1) (hearing on enforcement actions "shall be conducted in accordance with the provisions of chapter 5 of title 5," and 90 days after the matter is submitted, the "appropriate

Federal banking agency" shall render a decision). This demonstrates that section 1818 administrative proceedings are "closely intertwined" with the federal banking regulatory regime.

Finally, the remaining considerations identified in *Granfinanciera* – a decision upheld and specifically relied upon by the *Jarkesy* court – support application of the public rights exception. *Granfinanciera* directed courts to consider whether Congress "created a new cause of action . . . because traditional rights and remedies were inadequate to cope with a manifest public problem," whether "requiring jury trials would go far to dismantle the statutory scheme" because the proceeding has been "placed in an administrative forum with which the jury would be incompatible," and whether "providing jury trials" would "impede swift resolution of the proceedings." 492 U.S. at 60, 61, 63 (citations omitted).

As discussed above, a proceeding for a prohibition order is a new cause of action, with a remedy "unknown to the common law." Similarly, Congress created a new cause of action, with remedies therefor, "unknown to the common law" when it authorized CMP in 1978, long after the FDIC was given its other enforcement powers. Pub. L. No. 95-630, 92 Stat. 3641 (1978). And, as discussed above, unsafe and unsound banking practices and breaches of fiduciary duty to banks are causes of action not rooted in the common law soil as it existed in 1791.

Requiring jury trials would also "go far to dismantle the statutory scheme" because – in contrast to the SEC enforcement regime considered in *Jarkesy* – nothing in Section 1818 authorizes the FDIC to seek prohibition orders or civil money penalties in federal court. The FDIC statutory scheme calls for these remedies to be adjudicated in administrative proceedings, and depriving the FDIC of that option would leave it with no recourse at all to prevent unsafe or unsound banking practices or other banking misconduct. This would surely dismantle the statutory scheme meant to protect the banking system and the public.

With respect to whether requiring a jury trial would impede swift resolution of the proceedings, this also supports the public rights exception. Because the FDIC's statute does not provide for the FDIC to bring enforcement actions in federal court, requiring a jury could well put a halt to any such proceedings. This would go far beyond impeding a swift resolution; it would prevent adjudication at all.

The public rights exception applies to the FDIC's enforcement proceeding in this matter. No jury trial is required and there has been no violation of the Seventh Amendment.

VIII. THERE IS NO VIOLATION OF THE "TAKE CARE" CLAUSE OF THE CONSTITUTION

Respondent argues that the entire proceeding should be dismissed because the FDIC Board members' tenure protections, along with the "for cause" removal restrictions for ALJs, are both unconstitutional. Exceptions, at 77. He argues that both violate the "Take Care" clause of the Constitution, requiring that the President "shall take Care that the Laws be faithfully executed," because the President cannot remove either the Board members or the ALJ at will. *Id.*; U.S. Const. art. II, § 3. "Neither alleged infirmity" succeeds. *See Calcutt v. Fed. Deposit Ins. Corp.*, 37 F.4th 293, 310 (6th Cir. 2022), *cert. granted, opinion rev'd on other grounds*, 598 U.S. 623 (2023).

A. Respondent Does Not Allege Harm.

Fatal to his claims, Respondent does not allege that any harm came from the alleged constitutional violations. An unconstitutional removal restriction would need to result in "compensable harm" to provide Respondent with a remedy. *See Collins v. Yellen*, 594 U.S. 220, 259–60 (2021); *see also Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 211 (2020) ("In the specific context of the President's removal power, we have found it sufficient that the challenger "sustain[s] injury" from an executive act that allegedly exceeds the official's authority"); *Calcutt v. Fed. Deposit Ins. Corp.*, 37 F.4th 293, 314 (6th Cir. 2022), *cert. granted, opinion rev'd on other grounds*, 598 U.S. 623 (2023) ("*Collins* instructs that relief from agency proceedings is predicated on a showing of harm, a requirement that forecloses Calcutt from receiving the relief he seeks").

On this basis alone, the Board finds that Respondent's argument is without merit. Respondent has not shown or even alleged that the "President had attempted to remove [a Board member or the ALJ] but was prevented from doing so by a lower court decision holding that he did not have "cause" for removal." *Collins*, 594 U.S. at 259–60. He has not alleged that the "President had made a public statement expressing displeasure with actions taken" by a Board member or the ALJ and would remove him or her but for the removal restriction. *Id*. He has not alleged that any of the Board members or the ALJ were biased against him. And he has not otherwise argued that the Recommended Decision of the ALJ or the final decision of the Board might be different but for the allegedly unconstitutional removal restrictions.

In other words, Respondent has not alleged any injury that would make the removal restrictions, if they are indeed unconstitutional, actionable. *See Collins*, 594 U.S. at 259–60; *Seila L. LLC,* 591 U.S. at 211; *Calcutt*, 37 F.4th at 314; *see also Kaufmann v. Kijakazi*, 32 F.4th 843, 849 (9th Cir. 2022) (party "challenging an agency's past actions must instead show how the unconstitutional removal provision *actually harmed* the party"); *Bhatti v. Fed. Hous. Fin. Agency*, 15 F.4th 848, 854 (8th Cir. 2021) (remanding to district court to determine if "compensable harm" existed to entitle shareholders to relief). Respondent's claims for relief on these grounds are therefore without merit.

B. The Removal Restrictions for FDIC Administrative Law Judges Are Not Unconstitutional.

This Board further finds that in addition to Respondent's failure to allege injury stemming from the alleged unconstitutional removal provisions, the "for cause" removal restrictions for FDIC ALJs are *not* unconstitutional.

FDIC ALJs may only be removed for "good cause established and determined by the Merit Systems Protection Board" (MSPB). 5 U.S.C. § 7521(a). MSPB members are then removable by the President only for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). Respondent argues that these "two layers of for-cause removal" impede the ability of the president to ensure that the laws are faithfully executed. Exceptions, at 78.

Respondent principally relies on *Free Enterprise Fund* to assert that the Constitution prohibits the two layers of for-cause removal for ALJs. However the Supreme Court in *Free Enterprise Fund* expressly stated that the holding "does not address that subset of independent agency employees who serve as administrative law judges." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 507 n. 10 (2010). The Court declined to extend the holding because many ALJs "perform adjudicative rather than enforcement or policymaking functions" or "possess purely recommendatory powers." *Id.*; *see also Calcutt*, 37 F.4th at 319 ("the Court took care to omit ALJs from the scope of its holding").

Justice Kavanaugh, when sitting on the D.C. Circuit during the *Free Enterprise Fund* proceedings, explained that the for-cause protections for ALJs are distinguishable from other removal restrictions, in part because many "ALJs perform adjudicatory functions that are subject to review by agency officials . . . and that arguably would not be considered 'central to the functioning of the executive Branch' for purposes of the Article II removal precedents." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 699 n.8 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (quoting *Morrison v. Olson*, 487 U.S. 654, 691–92 (1988)).

After Respondent's hearing, the FDIC ALJ issued a Recommended Decision. The FDIC Board then reviewed the Recommended Decision, along with all of the evidence and arguments made in the case, and issued this final decision. *See* 12 C.F.R. § 308.5(b)(7) (an ALJ's powers include ruling "upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Board of Directors has the power to … decide any other motion that results in a final determination of the merits of the proceeding"). As Respondent points out, the "FDIC Board is not bound to follow the ALJ's recommended interpretation." *See* Exceptions at 26. The FDIC ALJs perform adjudicative functions, possessing "purely recommendatory powers." *See Free Enter. Fund*, 561 U.S. at 507 n. 10. This removes the for-cause protections for FDIC ALJs from the holding in *Free Enterprise Fund*. *Id.*

Respondent also cites the Fifth Circuit's ruling in *Jarkesy v. Sec. & Exch. Comm'n*, which held, in part, that the statutory removal restrictions for SEC ALJs were invalid. 34 F.4th 446, 463 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023), and *cert. denied*, 143 S. Ct. 2690 (2023), and *aff'd and remanded,* 144 S. Ct. 2117 (2024).

Respondent's reliance is misplaced for three reasons. First, *Jarksey's* Fifth Circuit opinion is not controlling in the Seventh Circuit. Second, the Court invalidated the statutory removal restrictions in part because SEC ALJs "perform substantial executive functions." *Jarkesy*, 34 F.4th at 463. SEC ALJs differ from FDIC ALJs in that the SEC "can decide against reviewing an ALJ's decision," making the ALJ's decision final. *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. 237, 239 (2018) (citing 17 C.F.R. § 201.360(d)(2); 15 U.S.C. § 78d–1(c). Pp. 2051 –

2055.). This is an important distinction—in contrast FDIC ALJs *only* perform adjudicatory functions and their decisions are never final, which fits the exception recognized in *Free Enterprise Fund*. Finally, the Fifth Circuit did not invalidate the administrative proceedings based on the finding that the removal provisions for SEC ALJs were invalid. *Jarkesy*, 34 F.4th at 463 n. 17 ("we do not decide whether vacating would be the appropriate remedy based on this error alone").

The "for clause" removal restrictions for FDIC ALJs are not unconstitutional, and Respondent's claims that the "Take Care" clause was violated are without merit.

IX. CONCLUSION

For the foregoing reasons, the Board finds that a prohibition order is warranted in this case as well as the assessment of a second tier CMP of $105,000.

FEDERAL DEPOSIT INSURANCE CORPORATION

WASHINGTON, D.C.

In the Matter of FRANK WILLIAM BONAN II, Individually and as an institution-affiliated party of GRAND RIVERS COMMUNITY BANK Grand Chain, Illinois (Insured State Nonmember Bank)	**ORDER TO PROHIBIT FROM FURTHER PARTICIPATION AND TO PAY CIVIL MONEY PENALTY** FDIC-16-0254e FDIC-16-0256k

ORDER TO PROHIBIT

The Board of Directors ("Board") of the Federal Deposit Insurance Corporation ("FDIC"), having considered the entire record of this proceeding and finding that Respondent Frank William Bonan II, formerly the Chairman of the Board of Grand Rivers Community Bank ("Bank"), Grand Chain, Illinois, engaged in unsafe or unsound banking practices and breaches of his fiduciary duties resulting in loss to the Bank, and that his actions involved willful and continuing disregard for the safety and soundness of the Bank, hereby ORDERS and DECREES that:

1. Frank William Bonan II shall not participate in any manner in any conduct of the affairs of any insured depository institution, or any other institution, credit union, bank or agency enumerated in section 8(e)(7)(A) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the FDIC and the appropriate Federal

financial institutions regulatory agency as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D).

2. As described in 12 U.S.C. § 1818(e)(6)(B), Frank William Bonan II shall not solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent or authorization with respect to any voting rights in any insured depository institution, or any other institution, credit union, bank or agency enumerated in section 8(e)(7)(A) of the FDI Act, 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D).

3. As described in 12 U.S.C. § 1818(e)(6)(C), Frank William Bonan II shall adhere to all voting agreements previously approved by the appropriate Federal banking agency with respect to any insured depository institution, or any other institution, credit union, bank or agency enumerated in section 8(e)(7)(A) of the FDI Act, 12 U.S.C. § 1818(e)(7)(A), except as otherwise permitted, in writing, by the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D).

4. As described in 12 U.S.C. § 1818(e)(6)(D), Frank William Bonan II shall not vote for a director, or serve or act as an institution-affiliated party, as that term is defined in section 3(u) of the FDI Act, 12 U.S.C. § 1813(u), of any insured depository institution, or any other institution, credit union, bank or agency enumerated in section 8(e)(7)(A) of the FDI Act, 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D).

5. This ORDER shall be effective thirty (30) days from the date of its issuance.

6. The provisions of this ORDER will remain effective and in force except in the event that, and until such time as, any provision of this ORDER shall have been modified, terminated, suspended, or set aside by the FDIC.

SO ORDERED.

IT IS FURTHER ORDERED that copies of this Decision and Order shall be served on Counsel for Frank William Bonan II, FDIC Enforcement Counsel, and the Administrative Law Judge.

Dated at Washington, D.C., this 17th day of December 2024.

DEBRA DECKER Digitally signed by DEBRA DECKER
Date: 2024.12.17 15:20:10 -05'00'

Debra A. Decker
Executive Secretary

ORDER TO PAY CIVIL MONEY PENALTY

The Board, having considered the entire record in this proceeding, and taking into account the appropriateness of the penalty with respect to the size of the financial resources and good faith of Respondent, the gravity of the violations, and such other matters as justice may require, hereby ORDERS and DECREES that:

1. A civil money penalty is assessed against Frank William Bonan II in the amount of $105,000 pursuant to 12 U.S.C. § 1818(i).

2. This ORDER shall be effective and the penalty shall be final and payable sixty (60) days from the date of its issuance.

The provisions of this ORDER will remain effective and in force except to the extent that, and until such time as, any provision of this ORDER shall have been modified, terminated, suspended, or set aside by the FDIC.

SO ORDERED

IS FURTHER ORDERED that copies of this Decision and Order shall be served on Counsel for Frank William Bonan II, FDIC Enforcement Counsel, and the Administrative Law Judge.

Dated at Washington, D.C. this 17th day of December 2024.

DEBRA DECKER Digitally signed by DEBRA DECKER
Date: 2024.12.17 15:21:27 -05'00'

Debra A. Decker
Executive Secretary