FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

In the Matter of: **FRANK WILLIAM BONAN II**, individually and as an institution-affiliated party of Grand Rivers Community Bank Grand Chain, Illinois (Insured State Nonmember Bank)	Docket Nos.: FDIC-16-0254e FDIC-16-0256k

RECOMMENDED DECISION

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication
(November 20, 2023)

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The Federal Deposit Insurance Corporation ("FDIC") commenced this action against Respondent Frank William Bonan II ("Bonan II" or "Respondent") on May 7, 2021, filing a Notice of Charges ("Notice") seeking an order of prohibition and the imposition of a $105,000 second-tier civil money penalty pursuant to 12 U.S.C. §§ 1818(e) and 1818(i). The Notice alleges that Respondent, in his capacity as Chairman of the Board of Grand Rivers Community Bank, Grand Chain, Illinois ("the Bank" or "Grand Rivers"), engaged in actionable misconduct, including unsafe or unsound banking practices and the breach of his fiduciary duties to the Bank, in connection with the Bank's loan relationship with Evergreen Drilling, LLC ("Evergreen Drilling"), Evergreen Properties of Illinois, LLC ("Evergreen Properties"), and related borrowers (collectively "the Evergreen Entities" or "Evergreen").[1] The allegations center around (1) a loan made to 618 Holdings, LLC ("618 Holdings"), a company formed by two of Respondent's employees at his instigation, to finance the sale and leaseback of a warehouse owned by Evergreen Properties ("the 618 Holdings loan"); and (2) the release of the Bank's security interest in a Cabot 900 self-propelled drilling rig ("Rig 23" or "the Cabot 900") held as collateral for a loan to Evergreen Drilling ("the Rig 23 collateral"), leaving that loan unsecured.[2]

On December 6, 2022, following briefing by Respondent and Enforcement Counsel for the FDIC ("Enforcement Counsel") (collectively "the Parties"), the undersigned issued an Order denying the Parties' cross-motions for summary disposition and partial summary disposition ("MSD Order") and identifying 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) to be resolved in a hearing before this Tribunal in its fact-finding capacity.

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[1] *See* Notice ¶ 10.

[2] *See id.* ¶¶ 49-82 (618 Holdings), 83-115 (Rig 23).

A six-day hearing was held from January 17-24, 2023 to resolve as necessary the questions of material fact that remained in genuine dispute and to address the disposition of all other issues. During the course of the hearing, this Tribunal heard testimony from ten fact witnesses, including Respondent, and five expert witnesses or hybrid fact-expert witnesses.[3] A total of 310 exhibits were introduced and admitted into evidence in connection with witness testimony. Now, on the strength of the full record of this case, including the weight of the evidence, established or admitted facts, inherent probabilities, the undersigned's credibility determinations based on the testimony of witnesses, and reasonable inferences drawn from the record as a whole, and after considering the Parties' post-hearing briefs ("EC Br." and "R Br.") and response briefs ("EC Reply" and "R Reply") and associated submissions containing their proposed findings and conclusions ("EPF" and "RPF"), the undersigned makes the following findings of fact, conclusions of law, and recommended orders.

I. <u>Jurisdiction</u>

At all times pertinent to this proceeding, the Bank was an insured state nonmember bank, subject to the Federal Deposit Insurance ("FDI") Act, 12 U.S.C. §§ 1811-1831aa, and Respondent was an institution-affiliated party ("IAP") as that term is defined in 12 U.S.C. § 1818(u).[4] The FDIC is therefore the appropriate federal banking agency with jurisdiction over the Bank and its IAPs for purposes of 12 U.S.C. § 1813(q), and it is authorized to initiate and maintain this prohibition and civil money penalty action against Respondent before this Tribunal, the Office of Financial Institution Adjudication ("OFIA").

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[3] Three additional witnesses—Kassie Winters Ledbetter, Grady Gaskins, and Jason Harbison—were granted leave to attend depositions in December 2022 in lieu of testifying at the hearing itself, due to extenuating personal circumstances that rendered them unavailable during the hearing dates. *See* 12 C.F.R. § 308.27; *see also* Order No. 28: Denying Motion to Quash Deposition Subpoenas of Kassie Winters Ledbetter and Grady Gaskins (November 29, 2022); Order No. 31: Denying Motion to Quash Deposition Subpoena of Jason Harbison (December 7, 2022).

[4] *See* JX 1 (December 19, 2022 Joint Stipulations of Fact ("Joint Stip.")) ¶¶ 2-3.

II. Applicable Standard

The burden of proof in an administrative proceeding, unless otherwise provided by statute, is on the administrative agency to establish its charges by a preponderance of the evidence.[5] Under the preponderance-of-the-evidence standard, the party with the burden of proof must adduce evidence making it more likely than not that the facts it seeks to prove are true.[6] Here, the FDIC has 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. This Tribunal is then tasked with making "a comparative judgment" to determine whether the agency has presented "the greater weight of the evidence" as to the satisfaction of the statutory elements.[7]

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

To merit the entry of a prohibition order against an IAP under 12 U.S.C. § 1818(e), an appropriate federal banking agency must prove the separate elements of misconduct, effect, and culpability. The misconduct element may be satisfied, among other ways, by a showing that the IAP has (1) "directly or indirectly violated any law or regulation [or] any cease-and-desist order which has become final," (2) "engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution," or (3) "committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty."[8] The effect element may be satisfied by showing either that the institution at issue thereby "has suffered or probably will suffer financial loss or other damage," that the institution's

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

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

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

[8] 12 U.S.C. § 1818(e)(1)(A).

depositors' interests "have been or could be prejudiced," or that the charged party "has received financial gain or other benefit."[9] And the culpability element may be satisfied when the alleged misconduct either "involves personal dishonesty" or "demonstrates willful or continuing disregard by [an IAP] for the safety or soundness of such insured depository institution."[10]

The imposition of a second-tier civil money penalty under 12 U.S.C. § 1818(i) also requires the satisfaction of multiple elements.[11] First, the agency must show misconduct, which can take the form of a violation of "any law or regulation" or final cease-and-desist order,[12] the breach of "any fiduciary duty," or the *reckless* engagement "in an unsafe or unsound practice in conducting the affairs" of the institution in question.[13] Second, the agency must show some external consequence or characteristic of the IAP's alleged misconduct, likewise generally termed "effect" in past decisions issued by the FDIC Board of Directors ("FDIC Board"): (1) that it "is part of a pattern of misconduct"; (2) that it "causes or is likely to cause more than a minimal loss to such depository institution"; or (3) that it "results in pecuniary gain or other benefit to such party."[14] Before any civil money penalty can be assessed upon satisfaction of these elements, the agency must take into account the appropriateness of the amount of penalty sought when considered in

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[9] *Id.* § 1818(e)(1)(B).

[10] *Id.* § 1818(e)(1)(C).

[11] The assessment of a first-tier civil money penalty, by contrast, requires satisfaction of the misconduct element described here, but not the corresponding effect element. *See id.* § 1818(i)(2)(A).

[12] The misconduct elements of both Sections 1818(e) and 1818(i) can also be satisfied by the violation of a condition imposed in writing by a federal banking agency or any written agreement between such an agency and the depository institution in question. *See id.* §§ 1818(e)(1)(A)(i), (i)(2)(A). The FDIC does not allege such violations in this case.

[13] *Id.* § 1818(i)(2)(B)(i).

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

light of certain potentially mitigating factors, including the "good faith of the . . . person charged," "the gravity of the violation," and "such other matters as justice may require."[15]

Although the misconduct prongs of both Sections 1818(e) and (i) may be satisfied by an IAP's engagement or participation in an "unsafe or unsound practice" related to the depository institution with which he or she is affiliated, that phrase is nowhere defined in the FDI Act or its subsequent amendments. John Horne, Chairman of the Federal Home Loan Bank Board ("FHLBB") during the passage of the Financial Institutions Supervisory Act of 1966, submitted a memorandum to Congress that described such practices as encompassing "any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds."[16] This so-called Horne Standard has long guided federal banking agencies, including the FDIC, in bringing and resolving enforcement actions.[17] It has also been recognized as "the authoritative definition of an unsafe or unsound practice" by federal appellate courts.[18] The undersigned accordingly adopts the Horne Standard when evaluating charges of unsafe or unsound practices under the relevant statutes.

Furthermore, while Respondent contends that conduct may not be deemed "unsafe or unsound" for purposes of Sections 1818(e) and 1818(i) unless it poses an abnormal risk of loss or

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[15] 12 U.S.C. § 1818(i)(2)(G); *see also In re Sealed Case (Administrative Subpoena)*, 42 F.3d 1412, 1416 (D.C. Cir. 1994) ("In assessing money penalties, Congress requires [banking] agencies to consider several mitigating factors."); *accord*, *e.g.*, *In the Matter of William R. Blanton*, No. AA-EC-2015-24, 2017 WL 4510840, at *27 (July 10, 2017) (OCC final decision), *aff'd on other grounds sub nom. Blanton v. OCC*, 909 F.3d 1161 (D.C. Cir. 2018).

[16] *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).

[17] *See*, *e.g.*, *In the Matter of Donald V. Watkins, Sr.*, Nos. 17-154e & -155k, 2019 WL 6700075, at *7 (Oct. 15, 2019) (FDIC final decision) (applying Horne Standard); *In the Matter of Patrick Adams*, No. AA-EC-11-50, 2014 WL 8735096, at **8-24 (Sept. 30, 2014) (OCC final decision) (discussing Horne Standard in detail).

[18] *Gulf Federal Sav. & Loan Ass'n of Jefferson Parish v. FHLBB*, 651 F.2d 259, 264 (5th Cir. 1981); *see also Patrick Adams*, 2014 WL 8735096, at **14-17 (surveying application of Horne Standard by various circuits).

damage "that threatens the financial stability of the banking institution,"[19] that is not the controlling law. The banking agencies have repeatedly and expressly declined to impose a requirement that risky, imprudent conduct must directly affect an institution's financial soundness or stability in order to be considered "unsafe or unsound," adhering instead to a plain reading of the Horne Standard as articulated above. In its *Smith & Kiolbasa* decision in March 2021, for example, the Board of Governors of the Federal Reserve System ("FRB"), one of OFIA's constituent agencies, observed that it "has found [actionably imprudent] practices unsafe or unsound if they could be expected to create a risk of harm or damage to a bank, without necessarily attempting to measure their impact on the bank's overall financial stability."[20] The FRB further explained that "[a] construction of 'unsafe or unsound' conduct that focuses on the nature of the act rather than any 'direct effect' of such act on the institution's financial stability is [more] consistent with the structure of [S]ection 1818."[21] The FDIC and the Office of the Comptroller of the Currency ("OCC") have held similarly.[22] The undersigned will therefore apply the Horne Standard, unadorned by any further requirement, to the question of whether Respondent's alleged misconduct constituted unsafe or unsound practices within the meaning of the statute.[23]

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[19] R Br. at 33 (internal quotation marks and citation omitted); *see also* R Reply at 19.

[20] *In the Matter of Frank E. Smith and Mark A. Kiolbasa*, No. 18-036-E-I, 2021 WL 1590337, at *21 (Mar. 24, 2021) (FRB final decision).

[21] *Id.* at *22; *accord Patrick Adams*, 2014 WL 8735096, at *16 (noting that the standard suggested here by Respondent "conflicts with the fundamental structure of the FDI Act by introducing an effects element, textually reserved as a predicate for more severe remedies, into the definition of an element of misconduct").

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

[23] Respondent cites to the Sixth Circuit's *Calcutt* decision as support for his proposition that "a finding of a threat to a bank's stability is required in order for an 'unsafe or unsound' practice to be established. R Br. at 33-34 (citing *Calcutt v. FDIC*, 37 F.4th 293, 325 (6th Cir. 2022), *reversed and remanded on other grounds*, 598 U.S. 623 (2023). Where the Supreme Court and the FDIC Board have not squarely addressed an issue, however, the undersigned gives deference to the decisions of the other OFIA agencies—the OCC, the FRB, the National Credit Union Administration ("NCUA"), and previously the Office of Thrift Supervision—as well as the law of the D.C. Circuit and the circuit in which the home office of the depository institution in question is located as the twin fora to which a respondent is entitled to appeal any final decision of the FDIC Board. *See* 12 U.S.C. § 1818(h)(2). The depository

It is a central aspect of this statutory scheme that *only one* of the potential triggering conditions is necessary for the satisfaction of each element of Sections 1818(e) and 1818(i). That is, the "misconduct" element of Section 1818(e) is fulfilled if an IAP has breached a fiduciary duty to the institution, regardless of whether the IAP has also violated any laws or engaged in unsafe or unsound practices, and vice versa. Likewise, a second-tier civil money penalty may be assessed (assuming misconduct can be shown) if the misconduct has resulted in pecuniary gain to the IAP, even if it has not caused loss to the institution and is not part of an actionable pattern. Each component of the "misconduct" element is an independent and sufficient basis on which to ground an enforcement action if the other elements have also been shown. The same is true of the "effect" element and the "culpability" element. The FDIC need prove only one component of each.

IV. Conclusions of Law

As noted, the FDIC seeks a prohibition order and the assessment of a $105,000 second-tier civil money penalty against Respondent in this case for allegations relating generally to the Bank's loan relationship with the Evergreen Entities, and specifically to the 618 Holdings loan and the release of the Rig 23 collateral that—as detailed below—occurred in the fall and winter of 2015.

With respect to the 618 Holdings loan, Enforcement Counsel argues that a prohibition order and civil money penalty are justified because (1) Respondent engaged in unsafe and unsound banking practices and breached his fiduciary duties to the Bank (EC Br. at 24-38), thus satisfying the statutory misconduct elements; (2) Respondent's actions caused loss to the Bank and—for purposes of 12 U.S.C. § 1818(i)—were part of a pattern of misconduct (*id.* at 39-40, 59), thus

institution here, Grand Rivers Bank, is located in Illinois, which is in the Seventh Circuit. Even if the FDIC Board had not spoken on the matter, then (which, as stated, is not the case), the *Calcutt* decision would only be a data point when considering the appropriate result in the instant proceedings—and the undersigned finds the extensive analysis of the issue by the Comptroller of the Currency in the *Patrick Adams* case significantly more persuasive than the relatively cursory reasoning in *Calcutt* in any event. *Compare Patrick Adams*, 2014 WL 8735096, at **14-19 *with Calcutt*, 37 F.4th at 325-26.

satisfying the effect elements; and (3) Respondent exhibited personal dishonesty and continuing and willful disregard for the Bank's safety and soundness (*id.* at 40-45), thus satisfying 12 U.S.C. § 1818(e)'s culpability element.

Similarly, with respect to the Bank's release of the Rig 23 collateral, Enforcement Counsel contends that (1) Respondent committed misconduct by breaching his fiduciary duties and *recklessly* engaging in unsafe or unsound banking practices (EC Br. at 45-56);[24] (2) Respondent's actions had the effect of causing loss or probable loss to the Bank and were part of a pattern of misconduct (*id.* at 56-57, 59); and (3) Respondent demonstrated the requisite culpability by acting with continuing and willful disregard for the safety and soundness of the Bank (*id.* at 57-58).[25]

In consideration of the Parties' arguments and the factual record developed by the January 17, 2023 hearing, and for the reasons and to the extent set forth in detail in this Order, the undersigned now concludes that each of the elements of a Section 1818(e) prohibition order and a second-tier Section 1818(i) civil money penalty have been proven as to Respondent on both the issue of the 618 Holdings loan and of the Bank's release of Rig 23 as collateral. The undersigned therefore recommends the entry of an order of prohibition and the assessment of a $105,000 civil money penalty against Respondent.

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[24] Enforcement Counsel's post-hearing brief conclusorily asserts that Respondent's conduct regarding the 618 Holdings loan constituted recklessly unsafe or unsound practices as well as on the Rig 23 release, *see* EC Br. at 59, but the rest of the brief does not seek to develop that argument and the undersigned accordingly does not consider it. *Compare id.* at 28-35 (arguing that Respondent's involvement in the 618 Holdings loan was an unsafe or unsound banking practice, but not mentioning recklessness) *with id.* at 52-53 (asserting that the release of the Rig 23 collateral involved recklessly unsafe or unsound practices by Respondent).

[25] Enforcement Counsel argues in passing in its post-hearing brief that Respondent's involvement in prospective Bank loans to Evergreen Drilling president Abbey Evans and her company Bentley Operating LLC in the fall of 2015 (collectively "the Bentley Operating plan") are additional evidence of Respondent's continuing disregard for the Bank's safety and soundness and part of the pattern of misconduct that makes assessment of a civil money penalty appropriate here. *See* EC Br. at 45, 59; *see also* Notice ¶¶ 29-48 (discussing the proposed loans). Because Enforcement Counsel nowhere during the course of this proceeding has made an affirmative case that the Bentley Operating plan constitutes actionable misconduct on Respondent's part in the first instance, it follows that it cannot be considered part of a pattern of such or as evidence of continuing disregard for purposes of the statute, and the undersigned therefore does not do so.

V. Findings of Fact

These findings are drawn as appropriate from the Parties' pleadings and stipulations, from the proposed findings of fact submitted by Enforcement Counsel and Respondent in connection with the post-hearing briefing, from hearing testimony ("Tr."),[26] and from supporting exhibits admitted therewith ("EX," "RX," and "JX") and submitted in connection with the Parties' summary disposition briefing and oppositions thereto ("EC-PSD," "R-MSD," "EC-OPP," and "R-OPP").[27] The undersigned will additionally highlight the genuine questions of materially disputed fact identified at the summary disposition stage, where relevant, and indicate the extent to which those questions have been resolved or narrowed by evidence adduced at the hearing.

As an initial matter, the undersigned observes that Respondent's hearing testimony was largely not credible in substance or demeanor, and she therefore accords it little evidentiary weight. Respondent repeatedly testified in a manner that was contradictory, self-serving, and inconsistent with record evidence and with his own litigation position. As detailed further below, Respondent contradicted himself regarding key aspects of the 618 Holdings issue (in particular whether he believed borrowers Jason Harbison and Adam Tate were creditworthy, and whether it would have mattered to him when backing their loan) and the Rig 23 issue (in particular what he believed about whether the Bank held a security interest in the rig being sold, Rig 24, and when he believed it). At one point, Respondent disavowed the contents of a sworn report that his counsel had submitted

[26] The Gaskins, Winters Ledbetter ("Winters"), and Harbison depositions in lieu of hearing testimony mentioned in note 3 *supra* are entered in the record as exhibits EX 391, EX 393, and EX 395 respectively, but citations to those depositions will be denoted simply as "Tr.", consistent with testimony at the hearing, for the sake of convenience.

[27] While the federal banking agencies "generally defer[] to an [administrative law judge ("ALJ")]'s factual findings, especially those based on the ALJ's judgments as to the credibility of the witnesses, the [agency] 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); *accord Patrick Adams*, 2014 WL 8735096, at *7.

under his signature, when it contradicted his testimony at the hearing.[28] Respondent also implausibly claimed not to recognize his own handwriting, despite having previously stipulated in this matter that the handwritten document in question was his own.[29] Further, after admitting in a prior sworn statement that he had lied to Carrollton Bank loan officer Chris Dickey regarding the reason he had backed out of his decision to purchase the Carmi warehouse, Respondent recanted during his hearing testimony and claimed (in the face of evidence to the contrary) that what he said to Dickey was true.[30] And Respondent testified that, at the time of the Rig 24 sale, he did not know the rig numbers of the rigs owned by Evergreen Drilling, despite numerous contemporaneous documents in which he referred to the rigs by their numbers with familiarity and facility.[31] Put simply, there is ample reason to conclude that Respondent's testimony on these and other issues generally cannot be taken at face value, and the undersigned bears that significant caveat in mind when making her factual findings.

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[28] *See* Bonan Tr. 917:16-19 ("Q: Mr. Bonan, if you didn't write this report, who did? A: I have no idea. Q: And you are disavowing what it said, what I just read? A: I don't know what they mean, whoever wrote this."); *see also id.* 916:12-918:10; RX 149 (Opinion Testimony of Frank William Bonan II). In a January 9, 2023 order, this Tribunal precluded Respondent from offering this report as expert opinion testimony or offering himself as an expert. *See* Order No. 34: Granting Enforcement Counsel's Motion in Limine at 7-10. The report is listed as a rejected exhibit in the certified index of exhibits filed commensurately with this Recommended Decision, and provided as such in the administrative record submitted pursuant to 12 C.F.R. § 308.38(a).

[29] *See* EX 56 (handwritten notes entitled "Plan for Evergreen"); *compare* Bonan Tr. 938:16 ("I don't recognize the handwriting."), 938:20-23 ("I don't remember writing this. This doesn't look like my handwriting, and I can't answer if this is exactly my plan or not.") *with* Respondent's Responses to the FDIC's Statement of Material Facts in Support of Motion for Partial Summary Disposition ("Resp. Opp. SOF") at 9 (stating that "[Bonan] admits that he prepared a handwritten document titled 'Plan for Evergreen'").

[30] *See* Bonan Tr. 914:23-916:1.

[31] *See id.* at 848:2-5 ("[A]t the time . . . I didn't know rig numbers, I knew them by Cabot 900 or Service King 775. I wasn't too versed on rig numbers because those were rig numbers that they had internally placed on them."); *see also* EX 56 (Plan for Evergreen) (mentioning Rig 19, Rig 20, Rig 21, Rig 23, and Rig 24 by number and demonstrating knowledge of which numbers correspond to which rigs by noting that Rig 21 is a Service King 675 and that Rig 23 is a "Kabat 900" [sic]); EX 38 (August 31, 2015 email from F. Bonan II to S. Collins) (correcting Collins that "Rig number 23 should be rig 24" in draft document); EX 42 (September 8, 2015 email from F. Bonan II to S. Collins) (stating that "[t]he buyer is signing contract today and wiring non refundable deposit of 10 percent on rig 24. . . . Has potential buyer for rig 23."); EX 180 (October 27, 2015 email from F. Bonan II to C. Zimmerman, S. Collins, F. Bonan, Sr., and H. Bonan) (referencing multiple rigs by their numbers and again referring to "Rig 23" as a "Kabat 900" [sic]).

A. Respondent's Close Ties to Peoples National Bank

Respondent began his banking career at Peoples National Bank, N.A., McLeansboro, Illinois ("Peoples" or "PNB"), where he worked under his father, Frank William Bonan, Sr. ("Bonan Sr."), who was bank president.[32] Over the course of a number of years, Respondent advanced at Peoples, ultimately becoming the community bank president for the southern region of that bank and then serving on PNB's Board of Directors and its Executive Loan Committee.[33] Even after purchasing stock in and becoming Chairman of the Board of Directors of Grand Rivers Bank, and during the events that are the subject of these proceedings, Respondent continued in his leadership positions at PNB, where he apparently remains today.[34] Of course, notwithstanding his familial ties to Peoples and his longer tenure there, Respondent agreed at the hearing that he "[wasn't] supposed to favor one bank over the other" while serving in his dual roles.[35]

B. Grady Gaskins

Another individual who had significant ties to both banks in question was Grady Gaskins, who Respondent brought over from PNB to serve as Chief Financial Officer ("CFO") of Grand Rivers and also to manage Respondent's own personal business affairs.[36] Gaskins, who had no prior CFO experience, was a commercial loan officer under Respondent at PNB when he left that position, and he found himself playing a similar role at Grand Rivers, again under Respondent's direct supervision and direction.[37] At the same time, Gaskins was managing the day-to-day

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[32] *See* Bonan Tr. 773:5-775:5. Respondent's uncle Hunt Bonan was also a principal shareholder and director at PNB. *See* Clark Tr. 727:16-18; *see also* EX 346 (September 2016 Joint Visit Report of Grand Rivers Bank) at 26 (describing PNB as "a financial institution controlled by the Bonan family").

[33] *See* Bonan Tr. 777:7-14; Answer ¶ 4; JX 1 (Joint Stip.) ¶ 46.

[34] *See* Bonan Tr. 780:4-11, 941:15-18; Answer ¶¶ 3-4; R Br. at 55 n.13 (stating that Respondent "has worked at PNB without incident since he left Grand Rivers").

[35] Bonan Tr. 942:1-3.

[36] Gaskins Tr. 11:18-22.

[37] *See id.* at 10:11-14, 12:15-13:4; *see also id.* at 13:16-20 (noting that Gaskins did not work under Mike Williams, the senior loan officer, when performing commercial loan officer duties while CFO at Grand Rivers).

operations of Respondent's outside business, FWBII Holdings (or "FWBII-H"), which owned and managed Respondent's real estate holdings.[38] Gaskins's duties in that capacity included "collecting rent, ensuring the maintenance on real estate was kept up, [and] tracking any issues related to maintenance."[39] He also "was in charge of communicating with different banks where [Respondent's] various loans were held, whether that was supplying financial information on behalf of Mr. Bonan [or] negotiating terms for new purchases or loan renewals."[40] In April 2016, Gaskins resigned from his position as CFO after Respondent instructed him to do so.[41]

C. Respondent's Management Style and Dominance at Grand Rivers

At the summary disposition stage, Respondent disputed whether he "was in fact the dominant policy and decision maker" during his time as Chairman of Grand Rivers Bank, including the relevant period of the fall and winter of 2015, and the undersigned found that this was a genuine issue of fact to be resolved at hearing.[42] The record evidence now conclusively and uniformly establishes that Respondent exerted a "dominant influence" at the Bank in line with the observations made in the 2016 Joint Report of Examination ("ROE") conducted by the FDIC and the State of Illinois Department of Financial and Professional Regulation ("IDFPR") and cited in the MSD Order.[43] Gaskins, for example, stated that "basically everybody in the Bank took orders from Mr. Bonan."[44] He added that "[i]n my experience with him when he gives a direction he

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[38] *See id.* at 16:12-20.

[39] *Id.* at 16:20-24.

[40] *Id.* at 17:5-9.

[41] *See id.* 15:10-19 ("[A]t that time Mr. Bonan and I had had discussions and he told me it was basically a deal where he was going to resign and asked me to resign at the same time as well.").

[42] *See* MSD Order at 8.

[43] EX 314 (2016 ROE) at 8; *see also id.* at 7 ("The dominance of Mr. Bonan, along with weak oversight, contributed to the overall decline in the bank's financial condition since the prior examination"), 9 ("As a result of the critically deficient oversight, Mr. Bonan has been permitted to exercise his authority seemingly unchecked.").

[44] Gaskins Tr. 18-19:21; *see also* Hunn Tr. 334:25-335:1 ("[N]obody did anything without having direct instructions from Mr. Bonan."); Winters Tr. 20:18-19 ("He had pretty much final say in everything.").

wants it done exactly how he has told it to be done and any changes he's—he is—doesn't—that doesn't sit well with him."[45] The Bank's attorney, Patrick Hunn, likewise testified that Respondent tended "to rule with an iron fist. It was his way or no way. There was no discussing issues with him. He gave direction. You had to follow him."[46]

Furthermore, witness after witness painted a picture of Respondent as a domineering and vindictive man who "led by intimidation rather than respect."[47] Hunn recalled that "Mr. Bonan had a very volatile personality. If he didn't like what you were doing, what you were saying, he would do his best to chew you up and down. People lost their jobs if they didn't explicitly follow his direction."[48] Both he and Bank credit analyst Don Nave described Respondent as "abusive,"[49] with Nave stating that he did not feel comfortable asking Respondent for clarification if he did not understand a request.[50] Gaskins and Kassie Winters, the Bank's Head of Loan Operations, further emphasized Respondent's "demanding and aggressive" nature in expecting his instructions to be carried out "without question" and "right away."[51] Moreover, while Respondent stated that he was going through a divorce during this period and the stress of that spilled over into his interactions

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[45] Gaskins Tr. 167:4-7.

[46] Hunn Tr. 329:15-17.

[47] Stringer Tr. 34:19-22 (adding that Respondent was "sometimes volatile, vindictive at times").

[48] Hunn Tr. 329:19-22.

[49] *Id.* 344:17-19 ("Working for Mr. Bonan had gotten to be a point where it was so abusive that I started looking for other employment."); Nave Tr. 196:1, 13-14 ("I saw him get angry at a lot of employees and cuss them out."); *see also* Gaskins Tr. 19:5-22 ("I know people, I believe were on edge when Mr. Bonan would come around. I witnessed, you know, some shouting, foul language, things of that nature. . . . [I]f he came into the bank offices usually there was an issue of some sort. . . . I could hear him arrive before physically seeing him."); EC Br. at 8 n.1 (quoting from EX 24, a June 11, 2015 email from Respondent to Gaskins and Whitney Stringer that is replete with profanity and abusive overtones, as a representative example of Respondent's management style).

[50] Nave Tr. 196:8-10.

[51] *See* Gaskins Tr. 16:5-11 ("Daily I was subjected to pressures from Mr. Bonan. I would say that Mr. Bonan daily would—we would communicate on a daily basis and there was—if there was something that he needed, he needed it pretty much right away."); Winters Tr. 22:1-20 ("[Respondent was] demanding and aggressive. . . . When he wanted something, he wanted it right then and he wanted it without question. . . . He was very intimidating."); *see also* Hunn Tr. 345:12 ("Everything with Mr. Bonan was an emergency.").

with people,[52] only Nave testified that Respondent's behavior in this regard was in any way out of the norm[53]—and, in any event, it is Respondent's personality and leadership style during the events in question that is most relevant here even if he was not always that way.[54]

The evidence also reflects a high level of micromanagement, control, and attention to detail by Respondent when furthering his personal business interests. In a five-page, single-spaced email sent late at night to Gaskins and two other subordinates at PNB and Grand Rivers in September 2015, for example, Respondent gives directions on a host of issues ranging from hiring mowers and directing the design and color scheme for office buildings to giving $1/hour raises to specified junior employees of various properties.[55] Similarly, in a June 2015 email to Gaskins and Chief Executive Officer ("CEO") Whitney Stringer, Respondent questions the calculation of the previous month's interest income by providing his own numbers and directs the two to visit a new Bank branch to "[t]ime how long it takes to open an account and tell those dumb mother fuckers exactly what to do."[56] The undersigned finds that these emails and the general tenor of witness testimony regarding the level of attention paid by Respondent to matters under his subordinates' purview are broadly at odds with the hands-off approach that Respondent professes to have taken with respect to the circumstances of the release of the Rig 23 collateral, as discussed *infra*.

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[52] *See* Bonan Tr. 810:1-22 (calling "that six to eight-month time period . . . the worst time in [his] life").

[53] *See* Nave Tr. 196:1-3 ("[H]e never cussed me out up until about a few months before I left [in October 2015], and then it became a common thing.").

[54] *See* Bonan Tr. 810:5-9 (agreeing that he was "using a lot of foul language" and had "a short fuse" during this time), 811:12-14 (saying that he was not proud of his behavior).

[55] *See* EX 43 (September 14, 2015 email chain including email from F. Bonan II to G. Gaskins, D. O'Bright, and A. Sosenko) at 3 ("The person assisting Chaurdas with eldorado gets named manager and get 1.00. West city girl is named manager and gets a 1.00 increase. Herrin girl named manager and given $1.00.").

[56] EX 24 (June 11, 2015 email from F. Bonan II to G. Gaskins and W. Stringer).

D. The Proposed Merger and Respondent's Fall 2015 Resignation

Respondent's dominance over the Bank's affairs is aptly demonstrated in an episode involving a proposed merger between Grand Rivers and PNB in the fall of 2015. H. Keith Botsch, who served as president of Grand Rivers at that time as well as being a member of the board of directors of both banks (and the accountant for Evergreen Drilling), testified that he had approached Bonan Sr. with the idea of a merger in June 2015 due to his concerns that Grand Rivers was growing too quickly and that "things were just kinda getting out of control."[57] He stated that his relationship with Respondent soured as a result of the merger discussion but that otherwise "the current stockholders wanted that merger to go through."[58] As a result, Botsch and other shareholders devised a proposal in October to expand the Bank's board from five to ten members, thereby increasing the number of directors who supported the merger.[59]

In response to this proposed board expansion, Respondent abruptly resigned from the boards of Grand Rivers and its holding company on October 20, 2015, maintaining that he would only return to his positions if the current boards, including Botsch, stepped down and he was permitted to choose his own board members.[60] Respondent also demanded a dispensation of $10,000 per month to serve as Chairman of the Board.[61]

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[57] Botsch Tr. 223:21-224:18.

[58] *Id.* at 272:6-7; *see id.* at 271:16-18 ("Mr. Bonan and I had been very close at one time, but after this July 11, 2015 merger request with his dad, our relationship became zero."). Respondent, by contrast, testified that he and Botsch had stopped getting along during this period because Botsch had "tried to insert himself in my divorce." Bonan Tr. 809:25; *see also id.* at 823:21-824:3. The undersigned need not decide the truth of the matter.

[59] *See* Botsch Tr. 272:6-273:3; EPF ¶ 21.

[60] *See* EX 161 (October 20, 2015 email from F. Bonan II to K. Botsch and W. Stringer) (resignation); EX 166 (email chain including October 21, 2015 email from K. Botsch to the Grand Rivers board) (outlining "[B]ill's demands"); EPF ¶¶ 21-22.

[61] *See* EX 166 (email chain including October 21, 2015 email from W. Stringer to K. Botsch); EPF ¶ 23.

Upon Respondent's resignation, PNB halted all merger discussions.[62] Both Stringer and Botsch believed that the merger was in the best interests of Grand Rivers and felt that quickly acceding to Respondent's demands was the only way to keep it moving forward.[63] Botsch and the rest of the board therefore resigned, and Respondent selected himself, Stringer, Gaskins, Jake Campbell, and Lucas Phelps to serve as the Bank's sole board members.[64]

According to the 2016 Joint ROE, all members of the newly constituted board "were either personal or business associates of [Respondent] and appear[ed] to operate under his dominant influence."[65] Kassie Winters concurred, testifying that in her view, the new board "were all people who would vote yes without a whole lot of questions."[66] She explained that she "base[d] that on the fact that he had close personal relationships with those individuals, one of which didn't have a whole lot of experience in banking, Mr. Phelps. So he wouldn't really know the correct questions to ask upon a loan approval."[67] In light of the fact that both Stringer and Campbell expressed significant reservations regarding the 618 Holdings loan (see Part V(G) at pp. 25, 42-44 *infra*), the undersigned disagrees that the board as a whole was necessarily inclined to rubber-stamp Respondent's preferred outcomes; nevertheless, the evidence suggests that Respondent could at least be assured that Gaskins and Phelps would be reliable allies in any board vote.

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[62] *See* Stringer Tr. 53:22-54:4; *see also* Clark Tr. 731:4-7 ("Mr. Bonan was, you know, the lead of our bank; he was our Chairman. And his father is on the lead at the other bank that we were looking at merging with, so they had capacity to determine whether the merger was up or down.").

[63] *See* Botsch Tr. 280:17-20 ("[I]f we didn't meet Bill's . . . demands, then he would get the merger derailed. And the rest of us wanted that merger to go through so bad."); Stringer Tr. 49:2-6, 55:7-11 ("By reinstating Bill as the chairman of the Board with his requirements met, then basically he would work with his dad on getting this merger put together.").

[64] *See* Botsch Tr. 280:21-281:8; *see also* EX 173 (email chain including October 21, 2015 email from F. Bonan II to M. Williams) ("Merger is back on The entire board resigned today Appointed me as chairman Allowed me to place my own board Guess that means I won"); EPF ¶ 24.

[65] EX 314 (2016 ROE) at 7 (further asserting that Respondent's "influence impedes the directors' ability to effectively oversee the affairs of the bank and fulfill their fiduciary duties").

[66] Winters Tr. 59:5-6.

[67] *Id.* at 172:23-173:3.

E. The Evanses and the Evergreen Entities

The Evergreen Entities (including Evergreen Drilling and Evergreen Properties) were controlled by Gary Evans, a 40-year veteran of the oil and gas business, whose daughter Abbey served as the Vice President of Evergreen Drilling as of September 2015.[68] At the time, Evergreen Drilling and Evergreen Properties had outstanding loans with the Bank of approximately $1.2 million, and the Evergreen Entities in total owed PNB approximately $10.5 million (the Bank's loans and PNB's loans are together denoted "the Evergreen Loan Relationship").[69] Evergreen had also pledged certain collateral securing its loans to the Bank and to PNB.[70]

As with PNB, Respondent's interests were intertwined with those of Evergreen on both a personal and professional level during the relevant time period. In addition to knowing Gary Evans and believing him to be honest and trustworthy, Respondent was in a romantic relationship with Abbey Evans (now Bonan) during the fall of 2015, and they later married.[71]

On the business side, the Evergreen Loan Relationship was managed at this time by Respondent at Grand Rivers and, with loan officer Scott Collins, at PNB.[72] Gaskins testified that all work performed by he and Winters on the Evergreen loans at Grand Rivers came at Respondent's direction.[73] Don Nave likewise stated that Respondent "gave all the terms for the [Evergreen] loans, what the amount was, [ ] interest rate, payment structure, everything."[74]

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[68] *See* EPF ¶ 25; Answer ¶ 10; Bonan Tr. 791:18-21.

[69] *See* EPF ¶¶ 26-27; Answer ¶¶ 11-12.

[70] *See* EPF ¶ 28; Answer ¶ 13.

[71] *See* Bonan Tr. 791:13-19, 816:22-23, 818:13-14.

[72] *See* Winters Tr. 24:13-15; Stringer Tr. 34:14-18; Answer ¶ 20.

[73] *See* Gaskins Tr. 22:7-24:2.

[74] Nave Tr. 170:5-6.

Evergreen's Financial Troubles

Evergreen Drilling's oil drilling business faced financial difficulties during 2015 in the midst of an industry-wide downturn.[75] In January 2015, Gary and Abbey Evans requested that their loans at PNB be renewed and placed on an interest-only basis for six to twelve months due to concerns about the winter weather reducing the company's cash flow.[76] Respondent was reluctant to make an interest-only concession, writing that doing so would "for sure be a trouble debt restructure" and would cause the loans to be classified as "substandard."[77] Such a classification was undesirable because it triggered additional reporting requirements and risked examiners treating the loans as problem loans.[78] Nevertheless, the loans were made interest-only for six months and an increased line of credit was given 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 its non-critical assets.[79]

By August 2015, Evergreen's loans at PNB had matured, and the company still had not reduced its debt.[80] Throughout that month, Respondent and others at PNB—including Bonan Sr., Botsch, and loan officer Collins—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.[81] In mid-August, Respondent communicated to Botsch his belief that Evergreen's situation was "dire" given the persistently low

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[75] *See* Campbell Tr. 423:1-4; Bonan Tr. 817:4-5.

[76] *See* EPF ¶¶ 33-34; EX 19 (email chain including January 28, 2015 email from K. Botsch to F. Bonan II and S. Collins).

[77] EX 19 (email chain including January 28, 2015 email from F. Bonan II to K. Botsch); *see* EPF ¶ 37.

[78] *See* Botsch Tr. 233:4-17; Cash Tr. 572:19-573:4; *see also* EPF ¶¶ 38-39; EX 386 (Interagency Supervisory Guidance on Troubled Debt Restructuring).

[79] *See* EPF ¶¶ 40-41.

[80] *See id.* ¶ 42.

[81] *See id.* ¶¶ 43-53.

price of oil and Gary Evans's unwillingness to liquidate equipment to pay off PNB.[82] Respondent opined that Evans "literally needs to close shop and sale [sic] everything," because "[e]very day he is open with employees he gets deeper and deeper in the whole [sic]."[83] The undersigned notes that there is some inconsistency between the views expressed by Respondent at this time and Respondent's hearing testimony that he had faith in Gary Evans's ability to ride out the economic downturn.[84]

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 the Bank.[85] At hearing, Respondent summarized the plan: "[Evergreen's] fixed costs stayed the same. Oil dropped. And so Gary was in a position and Evergreen was in a position where they had to reduce debt. So that was, that was their only way out of this. They had to sell assets and reduce debt."[86] Gaskins also testified as to his understanding that Respondent's primary motivations for this plan were to "move the debt from [Peoples]" and to "help Abbey out."[87]

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[82] EX 34 (email chain including August 16, 2015 email from F. Bonan II to K. Botsch) (also stating that "[Gary Evans] knows he is screwed. He even said that in our last meeting."); *see* EPF ¶ 55.

[83] EX 35 (email chain including August 18, 2015 email from F. Bonan II to K. Botsch); *see* EPF ¶ 62.

[84] *See* Bonan Tr. 791:23-25 (stating that Evans "had ridden through so many other downturns, I really believed that he would ride this downturn, just like he had done in previous years").

[85] *See* EPF ¶ 89; Answer ¶ 26; EX 56 (Plan for Evergreen). As noted *supra* at p. 13 & n. 29, Respondent claimed at the hearing that he did not recognize the handwriting on this document and did not recall writing it. *See* Bonan Tr. 938:16-23. In light of Respondent's earlier stipulation that the handwriting was his, however, *see* Resp. Opp. SOF at 9, as well as Gaskin's testimony that he recognized the document as having been written by Respondent, *see* Gaskins Tr. 33:21-23, the undersigned places no weight on the accuracy or credibility of Respondent's averred handwriting blindness and post hoc lapse of memory.

[86] Bonan Tr. 795:13-17.

[87] Gaskins Tr. 25:4-10.

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"), which had been pledged as collateral and was the subject of mortgage liens on loans to Evergreen Properties by both the Bank and PNB.[88] At the time, the loans secured by the Carmi Warehouse totaled approximately $638,000 to the Bank and $358,000 to PNB as a second mortgage and first mortgage, respectively.[89] Among other things, the plan also contemplated that Evergreen would sell one of its drilling rigs, Rig 24, which was pledged as collateral for a loan to PNB, and would enter into a sale-leaseback transaction for two other rigs, Rigs 19 and 20, to be financed by a loan from Grand Rivers to a company formed by Abbey Evans.[90]

Evergreen's Forbearance Agreement with PNB

On September 30, 2015, PNB classified $5.9 million of its loans to Evergreen Drilling as substandard and placed them on nonaccrual status.[91] At the same time, Respondent and other officials at PNB were preparing a proposed Forbearance Agreement to be executed between PNB and the Evergreen Entities, under which PNB would refrain from collecting on the principal owed by Evergreen Drilling for a given period in exchange for Evergreen's agreement to sell certain of its assets under specified time limits, including Rig 24.[92] In its final form as approved by PNB's Board in late October 2015 and executed one week later, the Forbearance Agreement (now an

[88] *See* EPF ¶¶ 90-91; Answer ¶ 16.

[89] *See* Resp. Opp. SOF at 10; EX 314 (2016 ROE) at 55.

[90] *See* EPF ¶¶ 90, 92-93; *see also* n. 25 *supra* (discussing Bentley Operating).

[91] *See* Answer ¶ 24; EPF ¶ 71. Broadly speaking, nonaccrual loans are those for which a lending institution should not accrue interest income because the loans are delinquent or there is reasonable doubt regarding their ultimate collectability. The 2016 ROE states that a substandard asset is one that "is inadequately protected by the current sound worth and paying capacity of the obligor or of the collateral pledged, if any. Assets so classified must have a well-defined weakness or weaknesses that jeopardize the liquidation of the debt. They are characterized by the distinct possibility that the institution will sustain some loss if the deficiencies are not corrected." EX 314 (2016 ROE) at 49.

[92] *See* EPF ¶¶ 67-70.

Extension Agreement) extended the maturity dates of that bank's two Evergreen Drilling loans, bearing a total balance of over $10 million, until the end of April 2016.[93] 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.[94] 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 that time already pledged as security to Grand Rivers.[95]

The Board's Knowledge of Evergreen's Difficulties

One material factual dispute identified at the summary disposition stage and explored at the hearing was the extent to which the Grand Rivers board knew and understood the level of Evergreen's financial difficulties, and particularly the company's negative credit relationship with PNB, when it voted to approve the 618 Holdings loan in December 2015.[96] Respondent contends that "problems with Evergreen Drilling's financial condition in August 2015 were well and widely known throughout the Southern Illinois oil industry and banking industry, including by the Bank,"[97] while Enforcement Counsel marshals testimony from board members Whitney Stringer and Jake Campbell suggesting that they would have acted differently regarding the 618 Holdings loan had they known that PNB had determined Evergreen's loans there to be impaired, placed them on nonaccrual, and entered into an agreement with the company for the liquidation of assets towards the payment of its debt.[98]

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[93] *See id.* ¶¶ 81, 88; Answer ¶¶ 98, 101; *see also* EX 198 (November 3, 2015 Extension Agreement) at 1-2.

[94] *See* EPF ¶ 88; EX 198 (Extension Agreement) at 2.

[95] *See* EPF ¶ 88; EX 198 (Extension Agreement) at 2 & Ex. A; *see also* Part (V)(H) *infra* at pp. 58-59.

[96] *See* MSD Order at 17-18, 20; *see also* Part (V)(G) *infra* at pp. 42-44.

[97] Answer ¶ 20; *see also* R Reply at 11-13.

[98] *See* EPF ¶¶ 189-193.

It appears uncontested that Respondent did not disclose to Board members the specific existence or nature of Evergreen's Extension Agreement with PNB.[99] On balance, however, the record shows that the Bank's board members, including Stringer and Campbell, would have been reasonably apprised of Evergreen's financial straits and cash flow difficulty during the relevant period, even if they did not know the details of its arrangement at the other bank.[100] With respect to Stringer in particular, Respondent adduces evidence that Stringer was told directly by Botsch that the Evergreen loans would be going before the Watch Committee at PNB—and that, as a member of the Bank's Watch Committee herself, she would understand that this was not a good thing.[101] Moreover, Stringer also knew that the Grand Rivers' Evergreen loans were among a very limited subset of loans that PNB was refusing to assume under the terms of the merger being discussed in the fall of 2015;[102] this in itself should have been a red flag as to how PNB viewed the loans' collectability.[103] The undersigned therefore agrees with Respondent on this issue.

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[99] *See*, *e.g.*, Bonan Tr. 802:21-803:13.

[100] *See*, *e.g.*, Botsch Tr. 253:21-23 ("I think everybody in our community knew that Evergreen was in trouble"); Campbell Tr. 421:11-15 (agreeing that "it was general knowledge that Evergreen was having cash flow problems"); Gaskins Tr. 138:16-24 (recalling discussions at Grand Rivers board meetings regarding Evergreen's financial issues); Nave Tr. 206:20-207:11 (expressing belief that Grand Rivers board members and officers knew that Evergreen was experiencing problems); *see also* Bonan Tr. 803:3-804:16 (asserting that "the fact that Evergreen was in financial trouble . . . and that something had to be done or they were going to go under" was communicated to the Grand Rivers board "numerous times").

[101] *See* EX 156 (email chain including October 19, 2015 email from K. Botsch to W. Stringer) ("Hunt Bonan just called me about the Evergreen loan. He says it is going to the watch committee tomorrow morning and the board in the afternoon."); *see also* Bonan Tr. 802:14-17 ("[S]he knew that [PNB] was taking a very active, that it was not going well at [PNB]. For a loan to go to the Watch Committee, that means it's not going very well.").

[102] *See* Stringer Tr. 41:24-43:15 (proposed merger would exclude Bank's Evergreen loans); RX 125 (draft Merger Agreement dated November 27, 2015) at 66. Instead, the loans would have been put with Main Street Bancshares, the Bank's holding company. *See* EX 167 (email chain including October 21, 2015 email from F. Bonan, Sr. to F. Bonan II and K. Botsch) ("The loans we [PNB] don't want will go to Main Street or we will take them with the option to put to Main Street if they don't pay as agreed for two years after the close. PNB will service the loans at Main Street for free.").

[103] *See* Botsch Tr. 283:21-284:1 ("That was [] the loans that Peoples determined was not the best credit risk, such as Evergreen's loans would go up to Main Street to the holding company and Peoples would service those, and they were supposed to—eventually they would get moved to Peoples if they performed like they were supposed to.").

F. <u>The Carmi Warehouse</u>

Although the Plan for Evergreen detailed by Respondent involved the sale of the Carmi Warehouse in the fall of 2015 to reduce the company's debt, Respondent also viewed it as "critical" that Evergreen Drilling be able to continue to use that property as its headquarters, noting that an oil and gas company could not function well without a suitably large yard and corporate office.[104] Respondent accordingly pictured 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 occupied and used the warehouse under the terms of a lease agreement.[105]

Respondent Seeks to Purchase the Carmi Warehouse

Beginning in mid-September 2015, Respondent became increasingly determined to buy the warehouse himself, adding it to his growing real estate portfolio. At the hearing, Respondent explained why such an idea was attractive and why he felt he needed to move quickly for the benefit of Evergreen:

> Well, Gary [Evans] was under a time restriction on reducing debt. He had to sell assets. It was do or die. Everybody knew that. Keith had broached the idea with me of him and Jake Campbell purchasing the building, so that idea was in my head. And so I was strong at the time. I believed in the value of the property. And I believed in Evergreen's ability to continue to make it; even though they were having extreme hard times, I believed that they would make it, and so I was going to, I offered to purchase the building and have them lease it back.[106]

Respondent thus informed Gaskins and others of his intentions to purchase and lease back the Carmi Warehouse using his company, FWBII Holdings, providing Gaskins with the terms and

[104] Bonan Tr. 800:10-20.

[105] *See* Gaskins Tr. 27:5-21; Bonan Tr. 798:6-17, 799:24-800:7 (stating that the idea of purchasing the warehouse and leasing it back to Evergreen had originally been Botsch's).

[106] Bonan Tr. 813:5-15.

structure of such a deal and directing him to "find a bank to do this."[107] Under the envisioned structure, Evergreen would receive $1.25 million as proceeds from the sale of the warehouse, of which total it would give Respondent $150,000 to cover its first two years of rent.[108] Respondent would then use that $150,000 as part of his down payment on a $1 million mortgage loan to purchase the property, putting up the additional $100,000 down payment himself.[109] Respondent directed the Bank's attorney, Patrick Hunn,[110] to create a draft purchase agreement and draft lease agreement between Evergreen and FWBII-H on September 22, 2015, giving a closing date for the transaction of November 1, 2015.[111]

Carrollton Bank Agrees to Finance Respondent's Purchase

On October 16, 2015, Gaskins emailed Chris Dickey, a loan officer at Carrollton Bank (or "Carrollton") to request a loan on Respondent's behalf to finance the sale and leaseback of the Carmi Warehouse between FWBII-H and Evergreen Properties.[112] While discussions were ongoing, Respondent emailed Gaskins and Hunn on October 27, 2015, stating that the warehouse transaction had "moved up the list on priority" following the Bank's failure to approve certain loans for Abbey Evans, because "[t]hey just need more debt gone."[113] Hunn testified that he

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[107] Gaskins Tr. 27:5-21; *see* EX 43 (September 14, 2015 email chain including email from F. Bonan II to G. Gaskins, D. O'Bright, and A. Sosenko); JX 1 (Joint Stip.) ¶ 14.

[108] *See* JX 1 (Joint Stip.) ¶ 14. After the two years in advance rent payments had elapsed, Evergreen would pay Respondent, through FWBII-H, $8,250 per month for the next sixty months, with rent payments increasing every five years thereafter. *See id.*; EX 43 (September 14, 2015 email chain including email from F. Bonan II to G. Gaskins, D. O'Bright, and A. Sosenko) at 4.

[109] *See* JX 1 (Joint Stip.) ¶ 14.

[110] As with Gaskins, Respondent frequently appropriated the time of Bank counsel Hunn to do work for FWBII Holdings. *See* Hunn Tr. 331:19-332:3.

[111] *See* JX 1 (Joint Stip.) ¶¶ 15-16; EX 47 (September 22, 2015 email from P. Hunn to G. Gaskins attaching draft Purchase and Sale Agreement); EX 48 (email chain including September 22, 2015 email from P. Hunn to G. Gaskins indicating attachment of draft Lease Agreement).

[112] *See* EX 139 (October 16, 2015 email from G. Gaskins to C. Dickey attaching draft Purchase and Sale Agreement and draft Lease Agreement); JX 1 (Joint Stip.) ¶¶ 17-19.

[113] EX 182 (October 27, 2015 email from F. Bonan II to G. Gaskins, P. Hunn, and D. O'Bright) (noting that "[t]his has moved up the list on priority since Keith fucked Abbeys loan"); *see also* EPF ¶¶ 98-121, 131 (describing Respondent's unsuccessful efforts to fund loans to Abbey Evans and her company Bentley Operating).

interpreted this email as "informing us that the priority status of that Evergreen property purchase had changed and that it is now a top priority."[114]

On November 2, 2015, Respondent followed up with Dickey regarding his loan request. Consistent with the increased urgency expressed in his email to Hunn and Gaskins, Respondent impressed upon Dickey the depth of his financial resources and his desire to make the warehouse purchase happen, writing:

> How is my credit request coming along for the purchase of the Evergreen property. I don't know if anyone has told you but I have had a hell of a year this year. ***My part that came to me after debt on the Clayton building sale was 2.4 million.*** This property would be a nice addition to my portfolio[.][115]

Dickey responded that he was seeking formal approval of the loan from the credit committee and that "[a]ssuming all goes as planned, I will issue a commitment letter to you to sign so we can order appraisal, title, etc."[116] Respondent then thanked Dickey for his "hard work and dedication on this glorious project" and reaffirmed that the property "really adds nicely to my portfolio."[117]

On November 5, 2015, Dickey notified Respondent that his loan request had been approved and provided him with a conditional commitment letter outlining the terms of the proposed transaction for a loan of up to $1 million.[118] In contrast to Respondent's original idea, these terms provided that the $150,000 in sale proceeds from Evergreen would not go to Respondent but would be placed directly in an escrow account at Carrollton "to be debited for the initial 18 loan

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[114] Hunn Tr. 335:19-21; *see also id.* at 336:3-6 (relaying that he understood the email to relate "to that Evergreen transaction and FWBII Holdings' purchase of that property").

[115] EX 205 (email chain including November 2, 2015 email from F. Bonan II to C. Dickey) at 3 (emphasis added).

[116] *Id.* (email chain including November 4, 2015 email from C. Dickey to F. Bonan II) at 2.

[117] EX 201 (email chain including November 4, 2015 email from F. Bonan II to C. Dickey).

[118] *See* EX 205 (email chain including November 5, 2015 email from C. Dickey to F. Bonan II and attaching conditional commitment letter).

payments."[119] Respondent would also provide a $250,000 down payment for the transaction and offer Carrollton Bank an unlimited personal guaranty.[120]

The Deal is Finalized With Carrollton Bank

When he had not received a signed commitment letter by November 9, 2015, Dickey reached out to Respondent to ask if he had any questions or concerns about the terms of the transaction.[121] Dickey and Respondent then discussed a revised transaction structure proposed by Respondent in which the escrowed $150,000 from Evergreen would not only be used as "funds to pay the lease payments so they don't need to worry about the lease payment for cash flow purposes," but would also count as equity on the property, thus allowing Respondent to make a smaller down payment.[122] After considering this structure, Dickey told Respondent that it would only be possible if the $150,000 was "truly pledged as collateral and not used for a payment stream"—that is, not used as a lease payment reserve to be debited—adding that he understood that "this is not a viable option based on what Evergreen and you had planned."[123]

Ultimately, Respondent and Dickey agreed to terms that did not include any escrow account from the loan proceeds out of which payments would automatically be made. Instead, the size of the loan was increased to $1.15 million, and the extra $150,000 would be held as collateral for 24 months and then either used to pay down the loan or released to Respondent.[124] Meanwhile,

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[119] *Id.* (email chain attaching conditional commitment letter) at 5; *see* EPF ¶ 134.

[120] *See* EPF ¶ 133; Dickey Tr. 614:3-618:22.

[121] *See* EX 214 (email chain including November 9, 2015 email from C. Dickey to F. Bonan II).

[122] EX 215 (email chain including November 10, 2015 email from C. Dickey to F. Bonan II) at 1-2; *see* Dickey Tr. 620:19-22 ("Bill had requested that $150,000 be taken and put into a separate account to be used as extra collateral rather than putting as much money down.").

[123] EX 215 (email chain including November 10, 2015 email from C. Dickey to F. Bonan II) at 1-2; *see* Dickey Tr. 620:22-25.

[124] *See* JX 1 (Joint Stip.) ¶ 23; EPF ¶ 137; EX 219 (email chain including November 12, 2015 email from C. Dickey to F. Bonan II) at 1-2.

Respondent would only be required to make a $100,000 down payment.[125] Respondent stated that this structure was "perfect" because he had the resources to make the first 24 months of payments himself "without any income from Gary" and this would "force [him] to save the cash."[126] Respondent's monthly loan payment under these terms would be $8,600 per month, which he would be required to pay whether or not Evergreen made its lease payments to him.[127]

Respondent returned a signed commitment letter with these handwritten revisions on November 13, 2015.[128] When offered the option of closing sooner or waiting until the beginning of 2016, Respondent stated that "I need to close around December 18th if possible."[129] Here, again, Respondent's desire to close quickly rather than waiting for a later date is consistent with his testimony that this transaction was "do or die" for Evergreen and that time was of the essence.[130]

The terms agreed to, Dickey arranged for an appraisal of the Carmi Warehouse using an appraiser suggested by Respondent.[131] On December 2, 2015, Dickey informed Respondent that the warehouse had been appraised at $1,245,000, or $5,000 less than the purchase contract price.[132]

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[125] *See* Dickey Tr. 621:13-25.

[126] EX 219 (email chain including November 11, 2015 email from F. Bonan II to C. Dickey and November 12, 2015 email from F. Bonan II to C. Dickey) at 1, 2; *see* EPF ¶ 138; *see also* EX 215 (email chain including November 11, 2015 email from F. Bonan II to C. Dickey) at 1 (stating that "[m]aking those first 24 months in payments will not be any problem at all for me").

[127] *See* Dickey Tr. 627:6-15; Bonan Tr. 910:5-913:22; EX 215 (email chain including November 11, 2015 email from C. Dickey to F. Bonan II) at 1 (reaffirming that Respondent "would personally make payments out of pocket").

[128] *See* EX 381 (email chain including November 13, 2015 email from G. Gaskins to C. Dickey attaching "the signed commitment letter"); EX 382 (signed commitment letter with handwritten revisions). The undersigned notes that the Notice, the Answer, the Joint Stipulations of Fact, and Enforcement Counsel's proposed findings of fact all erroneously state that the signed commitment letter was returned to Dickey two days later, on November 15, 2015, but offer no support for this in the record.

[129] EX 219 (email chain including November 12, 2015 email from F. Bonan II to C. Dickey).

[130] Bonan Tr. 813:5-15 ("Gary [Evans] was under a time restriction on reducing debt. He had to sell assets. It was do or die. Everybody knew that."); *see also* EX 182 (October 27, 2015 email from F. Bonan II to G. Gaskins, P. Hunn, and D. O'Bright) ("This has moved up the list on priority. . . . they just need more debt gone").

[131] *See* EX 252 (email chain including November 12, 2015 email from F. Bonan II to C. Dickey) at 1; Bonan Tr. 815:20-21, 816:2-10 (stating that there were "only one or two commercial appraisers in the entire area" and that this individual "had done a large amount of work for PNB").

[132] *See* EX 253 (email chain including December 2, 2015 email from C. Dickey to F. Bonan II) at 1. Examiners' questions regarding the reliability of this appraisal amount are discussed *infra* at n. 194.

Respondent agreed to pay the additional $5,000 himself at closing.[133] Respondent then reversed his earlier preference regarding the closing date, writing Dickey that "I really don't want to close this until end of December so I can start fresh on January 1."[134] When Dickey suggested closing on January 5th or 6th so that the loan payments would be due around the same time as Evergreen's rent payments, Respondent replied, "That would be perfect."[135] Thus, everything had been finalized, and the only thing left was the closing itself.

Respondent Backs Out of the Carrollton Bank Deal

Sometime after his December 2, 2015 email stating that a closing date in early January "would be perfect," Respondent decided that he no longer wished to purchase the Carmi Warehouse. When Dickey returned from vacation on January 4, 2016 and learned that the deal was off, he emailed Respondent to ask what had happened.[136] In response, Respondent told Dickey that "[t]he property owner and I can't get along" and "[t]hat it would be better because of that not to do the deal."[137] As noted *supra*, Respondent later acknowledged in sworn testimony that this statement to Dickey was not accurate, although—in the face of the record evidence that he believed Gary Evans was "a borrower that's honest and that you could trust" and otherwise got along quite well with the Evanses—he recanted and stood by his initial statement at the hearing.[138]

When asked while on the stand to elaborate on his reasons for not going through with the Carmi Warehouse transaction, Respondent offered the following answer:

> You know, I think at the time, you know, everything was, you know, just, there was a lot going on, and, you know, I was afraid, I was

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[133] *See* EX 253 (email chain including December 2, 2015 email from F. Bonan II to C. Dickey) at 1.

[134] EX 254 (email chain including December 2, 2015 email from F. Bonan II to C. Dickey) at 1.

[135] EX 256 (email chain including December 3, 2015 email from C. Dickey to F. Bonan II and December 5, 2015 email from F. Bonan II to C. Dickey) at 1.

[136] *See* EX 303 (January 4, 2016 email from C. Dickey to F. Bonan II); EPF ¶ 145.

[137] EX 304 (email chain including January 4, 2016 email from F. Bonan II to C. Dickey).

[138] Bonan Tr. 791:13-14; *see* EPF ¶ 145; Bonan Tr. 914:23-916:1.

> afraid, you know, Abbey and I had gone on a date or two during that time period, so I was afraid of the close appearance of it. . . . [Y]ou know, it was a downturn in the oil market, and southern Illinois is an oil market, and so I had lots of credit at PNB that I was having to help work out. We had lots of credit at Grand Rivers that had lots to work out. I knew an exam was coming up at Grand Rivers Community Bank which I was getting prepared for, loan review and getting everybody ready to go. So to say that I had a little bit to do is probably an understatement.[139]

Not only does this explanation contradict what Respondent told Dickey, thus underscoring the untruthful nature of that statement, but it is not credible on its own terms. Nothing here explains why Respondent might have been motivated to back out of the Carrollton Bank deal at a point when everything was done but signing the paperwork. Indeed, to the extent that he had many other things to do and "there was a lot going on," it was surely much more work for Respondent to start from scratch in finding a solution to a problem—Evergreen's need to sell the Carmi Warehouse and pay down debt—that he supposedly viewed as time-sensitive and critical to the survival of one of his banks' biggest clients. Certainly the least labor-intensive approach would have been to proceed and put the finishing touches on his purchase of the Carmi property.

It must also be noted that withdrawing from this deal benefited Respondent at the expense of the Bank and other parties. Both Respondent and Dickey testified that had the loan gone through, Carrollton would have had first lien position on the Carmi property and would have paid off any existing liens, thus benefiting the Bank and PNB.[140] The Carrollton deal would also have benefited Evergreen, both in paying down its debt and in offering a backstop to any difficulty making lease payments during the downturn, in the form of the $150,000 collateral.[141] On the other hand, deciding not to do the deal benefited Respondent financially, in the short and long term: he did not

[139] Bonan Tr. 816:19-817:16.

[140] *See* Dickey Tr. 633:24-634:9; Bonan Tr. 912:17-913:2 (agreeing that the deal would have paid off the existing mortgages at Grand Rivers and PNB and "would have been beneficial to both banks").

[141] *See* Bonan Tr. 911:12-16 (referring to the $150,000 in collateral as "prepaid rent").

have to come up with a $100,000 down payment or make up the $5,000 appraisal shortfall, he no longer faced exposure on the loan balance as a whole in the form of a personal guaranty, and he was not responsible any longer for making $8,600 loan payments monthly out of his own pocket for at least two years.[142] In short, and as discussed in the following section, the evidence suggests that Respondent changed his mind about purchasing the Carmi Warehouse not because he did not get along with Gary Evans or because his hands were full with other matters, but because he had found what he believed to be a more preferable way to get Evergreen the funds it needed and reduce its debt to PNB—riskier to the Bank, perhaps, as shall be seen, but requiring less financial outlay on his own part and of no personal risk to him.

G. The 618 Holdings Loan

Respondent thus abandoned his plan, at the eleventh hour, to purchase the Carmi Warehouse himself through FWBII-H via a loan from Carrollton Bank. Instead, while the Carrollton loan was awaiting consummation in December 2015, Respondent was exploring an alternate route—namely, facilitating the purchase and leaseback of the Carmi Warehouse by a new company formed in the name of Jason Harbison and Adam Tate, two of his employees with minimal assets and no previous experience in commercial real estate.

Jason Harbison and Adam Tate

At this time, Tate and Harbison worked for Respondent—Harbison provided property management services for FWBII-H such as lawn mowing and landscaping through his company Roundfire Solutions, LLC ("Roundfire Solutions"), while Tate was a contract employee—and both lived for free in housing that Respondent owned.[143] Neither Tate nor Harbison had significant

[142] *See id.* at 913:10-22.

[143] *See* Harbison Tr. 10:14-24 (stating that "I had a guy that helped mow the grass sometimes and I had the guy that did, like, cleaned out apartments after people had moved out"), 11:13-14 (stating that "free rent was part of my compensation package"); EPF ¶ 148.

financial assets: Tate had a net worth of $20,000 and an adjusted gross income of $27,000, according to a contemporaneous personal financial statement and his 2014 tax return, respectively, while Harbison had a negative net worth of $190,000 and an adjusted gross income of $62,000.[144] When asked during his testimony whether he felt he was creditworthy to qualify for a $1.25 million loan, Harbison replied, "Absolutely not."[145] The Bank's Senior Loan Officer Mike Williams, who had known Tate and Harbison all their lives, agreed, testifying that he had significant concerns about their ability to repay such a large loan based on the state of their finances.[146] And CEO Whitney Stringer stated that she "couldn't imagine [] the two of them . . . being able to ever obtain a $1.2 million loan from any other bank, let alone pay it."[147]

Respondent Directs Harbison and Tate to Purchase the Carmi Warehouse

Nevertheless, the record is clear that in mid-December 2015, Respondent approached Harbison and Tate and asked them to obtain financing from the Bank for the purchase and leaseback of the Carmi Warehouse.[148] Harbison testified that Respondent assured him that there would not be a problem getting financing for the transaction because of Respondent's position at

[144] *See* EPF ¶ 204. Updated personal financial statements completed by Tate and Harbison in March 2016 reflected a negative net worth for *both* individuals, with Harbison's having increased from negative $190,000 to around negative $244,000 without taking into account his liability as guarantor for the 618 Holdings loan. *See* EX 328 (March 1, 2016 personal financial statement of Jason Harbison); EX 333 (March 17, 2016 personal financial statement of Adam Tate). Harbison's updated personal financial statement reported a total annual income of approximately $110,000, which examiners observed derived exclusively from a contract between FWBII-H and Roundfire Solutions. *See* EX 314 (2016 ROE) at 55-56. Examiners further noted that because "the level of operating expense for Roundfire Solutions was not provided[,] . . . the amount of income from the company available to service debt obligations of Mr. Harbison could not be calculated." *Id.* at 55.

[145] Harbison Tr. 20:25-21:5. Tate was not called as a witness by either side.

[146] *See* Williams Tr. 655:20-656:17.

[147] Stringer Tr. 62:15-17.

[148] *See* Harbison Tr. 15:21-24 ("[Respondent] said . . . I need you to do me a favor, this deal would help me out a lot. And then we were introduced to the Evergreen property, and this all happened really fast."), 22:16-19 ("Q: Did Mr. Bonan tell you to go to Grand Rivers for the loan for the 618 Holdings property? A: Yeah, I was told to go meet with Grady, so yes."); Gaskins Tr. 65:15; Winters Tr. 60:18-23; Bonan Tr. 822:19-23 ("I was working on Evergreen and with Gary and trying to get debt paid down. . . . [A]nd so I simply offered [the Carmi property] to Jason and Adam at the time to say do you guys want to buy this.").

the Bank.[149] Although there is no indication that Respondent ever threatened the two individuals, the undersigned credits Harbison's testimony that he felt pressured to agree to the deal and that he feared consequences if he did not comply. Moreover, Harbison's explanation of why he went along with the transaction is both credible and consistent with the testimony of other witnesses regarding Respondent's personality and vindictive nature:

> A: I'd say mostly because of leverage. I was living in an apartment owned by Bill. I was—he was my sole source of income in this economic desert that is Southern Illinois. . . . And so I thought the FDIC or somebody would stop it. *I thought there was no way that it would get approved and that would keep me from having to anger him or disappoint him and tell him no*, and it would just, oh, we tried, sorry, you know, I tried to help every way I could but, you know, and then the loan went through. And then we—you know, and then we closed, and so maybe Bill was right.
>
> Q: What do you think Mr. Bonan would have done if you declined the transaction, if you refused to do the 618 Holdings transaction?
>
> A: I mean, fired me, told me I needed to move out, whatever. I mean there would have been a consequence in my opinion.[150]

Harbison also noted, and the undersigned likewise credits, that the fact that Respondent was his landlord and boss and that "[his] parents banked at Peoples," where Respondent had significant influence, created an unequal power dynamic between Respondent and Harbison that "made it hard for me to stand up for myself and say no."[151]

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[149] *See* Harbison Tr. 48:10-24 (relaying that Respondent told him that "it would be okay," which he interpreted to mean "that the loan will get approved and everything" because Respondent owned the Bank); EC-PSD-6A (Transcript of July 30, 2018 Interview of Jason Harbison by the FDIC Office of the Inspector General ("July 2018 Harbison Tr.") at 0047862 (recalling that Respondent told the two of them beforehand that this would be "a good deal for everybody" and that the Bank would not "screw [them] over" on the loan because Respondent was "in charge of the Bank").

[150] Harbison Tr. 21:11-22:5 (emphasis added); *see also* EC-PSD-6A (July 2018 Harbison Tr.) at 0047874 (stating that Respondent is "a petty vindictive human being. I mean I've watched it just in other, in other areas. You know there are people that get fired, other people that cross him on a business deal.").

[151] Harbison Tr. 46:15:22 (also stating that "at the time when we started this relationship, when I started this relationship with Bill, we were never on level footing"); *see also id.* at 45:14-18 ("[After the transaction,] I felt like I was misled. I felt like there was leverage used against me to do—to get me to do things that I normally wouldn't have done.").

In any event, Harbison and Tate agreed to the transaction and agreed to have a company formed in their name that would be the entity on the loan and lease documents. Other than choosing the name of the company and visiting the warehouse property once before the sale, Harbison testified that he and Tate had no involvement with the transaction, no input into the deal structure, or even any knowledge of the transaction terms until the day of closing.[152] Everything was done for them by Bank employees at Respondent's direction.[153]

The 618 Holdings Loan Request

On or before December 17, 2015, Respondent directed Gaskins to prepare a loan request on behalf of Harbison and Tate to purchase the Carmi Warehouse from Evergreen Properties for $1.25 million.[154] The loan request was made in the name of 618 Holdings, a newly formed LLC. Winters then emailed Bank attorney Patrick Hunn—who had previously been involved in setting up Respondent's prospective purchase and leaseback of the Carmi Warehouse through FWBII Holdings[155]—to ask if he could prepare documents for the formation of 618 Holdings "asap."[156] She added, "[t]hey are the ones who are going to be buying evergreen now (don't ask)."[157] Hunn testified that he was surprised that Harbison and Tate would now be purchasing the warehouse rather than Respondent, "due to their financial status or lack thereof."[158]

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[152] *See id.* at 19:8-20.

[153] *See id.* at 19:13-14; EPF ¶¶ 158-164.

[154] *See* EPF ¶ 159; Resp. Opp. SOF at 16-17.

[155] *See* JX 1 (Joint Stip.) ¶¶ 15-16.

[156] EX 268 (email chain including December 18, 2015 email from K. Winters to P. Hunn); *see also* EX 265 (email chain including December 18, 2015 emails from K. Winters to P. Hunn) (asking Hunn to revise the draft purchase agreement and loan paperwork to replace FWBII Holdings as the borrower with "[a] TBD LLC"). Hunn understood that this was done at Respondent's direction. *See* Hunn Tr. 337:13-15. When Hunn spoke to Respondent and asked to be compensated for the work he was doing for Harbison and Tate, Respondent told Hunn "to just do the work that [he] was instructed to do and not worry about compensation." *Id.* at 341:4-11.

[157] EX 268 (email chain including December 18, 2015 email from K. Winters to P. Hunn). The subject header of the email that Winters sent to Hunn was "Adam and Jason," making it clear who Winters was referring to.

[158] Hunn Tr. 338:12-14; *see also id.* at 338:20-339:2 (noting that "it was extremely odd" for Harbison and Tate to be "involved in the purchase of a $1.25 million property" given their lack of assets).

On December 18, 2015, Winters emailed Gaskins to ask him to review and revise the loan write-up for the 618 Holdings loan as well as a proposed $400,000 loan to Harbison personally, stating: "I am not sure what [Respondent] wants it to say so I figured you may have a better idea. Also he wants these sent out today so no pressure or anything LOL."[159] After receiving revisions from Gaskins, Winters emailed Respondent and asked him to "[p]lease review the write up for Adam and Jason to purchase Evergreen. Please let me know if I need to make any changes."[160]

Later that day on December 18, 2015, Winters sent the Bank's directors a $1.25 million loan request on behalf of Harbison and Tate's yet-to-be-formed company, with Harbison and Tate serving as sole guarantors.[161] In the same email, Winters also provided the directors with a $600,000 loan request for Harbison's other company, Roundfire Solutions, to purchase investment properties.[162] Neither the Roundfire Solutions loan request nor the 618 Holdings loan request showed any cash flow analysis for those entities or otherwise that would justify the loans in question.[163] Instead, the Roundfire Solutions request merely stated that "[a]dequate cash flow" was a strength of the loan application, while recording that Harbison (who was listed as guarantor) had a negative net worth in the tens of thousands of dollars.[164] The 618 Holdings loan request, meanwhile, stated without support that the company—which, as a reminder, did not yet exist—

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[159] EX 269 (December 18, 2015 email from K. Winters to G. Gaskins).

[160] EX 271 (December 18, 2015 email from K. Winters to F. Bonan II).

[161] *See* JX 1 (Joint Stip.) ¶ 25; EX 272 (December 18, 2015 email from K. Winters to Bank board members attaching loan request write-ups).

[162] *See* EX 272 (December 18, 2015 email from K. Winters to Bank board members attaching loan request write-ups) at 1, 2-15. This appears to be a revision of the $400,000 loan request for Harbison circulated among Winters, Gaskins, and Respondent earlier that day.

[163] *See id.* at 2-15 (Roundfire Solutions loan request, with pages entitled "Cash Flow Analysis," "Global Cash Flow Analysis," and "Financial Statement" left blank), 16-29 (same for 618 Holdings loan request).

[164] *See id.* (Roundfire Solutions loan request) at 2 (also stating that "[t]he purchase price for the investment properties is $500,000.00" and that "Jason is borrowing an additional $100,000.00 for repairs and remodel").

had $1.4 million in assets and $1.25 million in liabilities for a net worth of $150,000.[165] It then noted that these numbers were "[p]rojections only."[166]

Both Hunn and Winters testified that Respondent wanted the 618 Holdings loan request approved quickly. Winters stated that "[t]his loan needed to close as soon as possible, from my understanding."[167] She further recalled that Respondent urged her to call the other board members and get their votes on the loan, stating that this was not the usual practice but that Respondent "wanted approval faster."[168] According to Winters, the loan was ultimately approved before the purchase agreement between 618 Holdings and Evergreen was signed, which "was not normal."[169] And Hunn stated that on the day he discovered that FWBII Holdings would no longer be purchasing the Carmi Warehouse, "there was now all of a sudden a rush to get this loan done through this new 618 Holdings."[170]

Harbison and Tate's Creditworthiness

One disputed material fact that was identified at the summary disposition stage is whether Respondent had a reasonable basis to believe that Tate and Harbison were creditworthy at the time that he was pushing for approval of the loan to 618 Holdings.[171] The record now confirms that Respondent knew or should have known, and better than most, that his two employees did not have anything approaching the financial wherewithal or demonstrated repayment capacity to qualify for a $1.25 million loan.

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[165] *See id.* (618 Holdings loan request) at 16.
[166] *Id.*
[167] Winters Tr. 70:6-7.
[168] *Id.* at 85:22-86:8.
[169] *Id.* at 99:13-100:9.
[170] Hunn Tr. 339:14-17; *see id.* at 338:4-6.
[171] *See* MSD Order at 14.

Certainly others at the Bank knew and understood that Harbison and Tate were not good credit risks for a loan of that size. In addition to Hunn, Stringer, and Williams, whose concerns are detailed above, CFO Gaskins stated that he knew that Harbison and Tate "were not very strong at the time as far as credit approval"[172] and recognized further that neither of them would "have the financial capacity if called upon to support the loan to 618 Holdings."[173] The undersigned also credits the testimony of Senior Loan Officer Williams that he believed Respondent did not ask him to be involved with the 618 Holdings loan because Respondent knew that Williams would not have approved the loan in light of "the lack of financial worth of [Tate and Harbison]."[174] As he explained further, "I knew of no way where 618 Holdings was going to generate sufficient revenue to meet payments. . . . I just had concern with this size of a loan with these, with the quality of borrowers being these two individuals."[175] If the meager state of Harbison and Tate's finances, lack of net worth, and inability to repay a $1.25 million loan was common knowledge among these people, then it is extremely implausible that Respondent, an experienced banker and loan officer who knew how much Harbison and Tate took home every month because he was the one who determined their salary, did not possess that knowledge as well.

Respondent contends that he was misled into believing that Harbison and Tate were good credit risks because Winters provided him with outdated and inaccurate information regarding the two individuals' credit scores.[176] He further claims that had he known the scores that credit rating bureaus had actually assigned Harbison in particular in December 2015, it would have caused

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[172] Gaskins Tr. 74:22-23.

[173] *Id.* at 75:18-76:9.

[174] Williams Tr. 660:3-4; *see id.* at 658:20-660:5.

[175] *Id.* 660:12-19.

[176] *See* Winters 81:9-82:18, 180:5 (testifying that she "looked at the wrong document" and provided Respondent with an old credit report in which Harbison's score was 664, rather his more recent scores of 520, 533, and 560); *see also* Bonan Tr. 831:18-25; EXs 263, 264 (December 2015 credit reports for Harbison and Tate); EX 374 (June 2015 credit report for Harbison).

issues because "[t]hose are horrible. That's a person with horrible credit."[177] Finally, Respondent suggests, although does not state outright, that if Winters had given him an accurate credit score for Harbison, he would no longer have believed that the 618 Holdings loan "was a good loan."[178]

This argument is unavailing for Respondent on multiple fronts. First, Respondent did not ask Winters for Tate and Harbison's credit scores until December 22, 2015, four days after the 618 Holdings loan request had been provided to the rest of the Bank board and well after Respondent had already inveigled Tate and Harbison into being part of the transaction.[179] Any suggestion by Respondent that he would have brought the process to a halt at that stage had he discovered that one of the two had poor credit simply does not hold water, given the urgency with which he viewed consummation of the transaction.

Second, Respondent knew or should have known that Harbison and Tate would not be qualified for a $1.25 million loan even with perfect credit scores, given their life situations. Even if Respondent mistakenly believed Harbison's credit score to be higher than it was, he was under no such misapprehension regarding, for example, Harbison's negative net worth or the individuals' modest salaries and lack of any significant assets or discernible cash flow that would conceivably enable them, as guarantors of the 618 Holdings loan, to make any of the necessary payments of principal and interest if required, without being dependent on Evergreen's rent.[180] While credit scores may be useful to measure, as Respondent puts it, an individual's past propensity to "pay

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[177] Bonan Tr. 832:3; *see also id.* at 829:15-18 (stating that information about Harbison and Tate's credit scores was "important" because "[i]t would tell me if they pay their debts or not").

[178] *See id.* at 832:11-16 ("Q: Were you aware of these credit scores at the time you were telling other people at Grand Rivers that you thought this was a good loan? A: No, and I actually repeated those credit scores that Kassie gave me to many other people that 'They had good credit. Kassie Winters told me.'").

[179] *See* EX 290 (email chain including December 22, 2015 email from F. Bonan II to K. Winters).

[180] This is especially true because the terms of the loan as drawn up post-approval envisioned a massive balloon payment on the remainder of the loan's balance following five years of monthly payments of approximately $7,753. *See* EX 310 (January 7, 2016 Promissory Note) at 1 (stating that "Borrower will pay this loan in 60 regular payments of $7,752.94 each and one irregular last payment estimated at $1,132,163.12.").

their debts or not,"[181] they say nothing about whether that individual has the capacity to do so in the future if the payments on the debt they owe are particularly large relative to their means.

Finally, Respondent's suggestion that knowledge of Harbison's true credit score would have made a difference in whether he supported the 618 Holdings loan is, to put it charitably, directly at odds with the core of his litigation position and other testimony in this matter—namely, that 618 Holdings was a better credit risk than Evergreen and that Harbison and Tate's inability to personally make loan payments was ultimately irrelevant due to the structure of the transaction.[182] Respondent cannot claim that it would have mattered to him that Harbison had "horrible credit" while also professing that 618 Holdings was in "[b]etter shape than Evergreen [was] in" because Evergreen's negative net worth was larger than that of Harbison and Tate.[183] And, indeed, the fact that Respondent was not only seeking approval for the $1.25 million 618 Holdings loan request in December 2015 but also a separate $600,000 loan to be personally guaranteed by Harbison succinctly underscores how little importance Respondent appeared to place on Harbison's personal financial capacity and ability to repay the Bank.[184]

It is important to emphasize, again, that even Harbison did not think that he and Tate were qualified for the 618 Holdings loan.[185] Harbison testified, moreover, that neither he nor Tate would have been personally capable of making the $7,753 monthly payments that the terms of the loan

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[181] Bonan Tr. 829:18.

[182] *See* Parts VI(A)(1) at pp. 80-94 *infra*.

[183] Bonan Tr. 920:11; *see id.* at 925:20-23 ("[A]t the time I think Evergreen had a net worth of about a negative million dollars. So the negative net worth that Adam Tate had and that Jason Harbison had were so much better than what Evergreen had.").

[184] The $600,000 loan to Roundfire Solutions was approved by the Board in late December 2015, although Stringer indicated that the loan was never funded following concerns expressed by examiners. *See* EX 266 (package including December 22, 2015 and December 23, 2015 emails from J. Campbell, L. Phelps, and G. Gaskins voting yes on loans including Roundfire Solutions loan); Stringer Tr. 81:6-12 (noting that examiners "did not want us to fund the Roundfire Solutions loan"), 83:7-11 (stating that the Roundfire Solutions loan "hadn't funded").

[185] *See* Harbison Tr. 20:25-21:5.

required, had they needed to do so.[186] And Harbison stated that he agreed to the transaction only with the expectation that someone would step in and stop it: "Yeah, that someone would loan Adam Tate and I that amount of money at that point in our lives and it [would] just be okay. I was so sure that it wasn't going to happen that when it did, I guess Bill knows more than I do, you know. I was wrong."[187] The undersigned therefore finds that Respondent could not have reasonably believed at the time that Tate and Harbison were capable of repaying a $1.25 million loan, given the significant evidence to the contrary that, in the words of CEO Stringer, "these individuals 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."[188]

The Board Approves the Loan

On December 23, 2015, the Bank's Board of Directors approved the 618 Holdings loan, even though 618 Holdings still did not yet exist as a legal entity.[189] Respondent initially voted to approve the loan, but then informed Winters that he would abstain from the vote because Harbison and Tate were his employees.[190] Of the other four board members, CFO Gaskins, Lucas Phelps, and Jake Campbell voted yes by email, while CEO Stringer did not vote.[191]

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[186] *See id.* 33:12-23. Respondent testified that Harbison was lying about not being able to afford the monthly payment, although he offered no credible evidence or support for his assertion and the undersigned gives it no weight. *See* Bonan Tr. 925:20-926:12 ("Q: Well, if I represent to you if Mr. Harbison said he couldn't, you would have no reason to doubt what he said, would you? A: I don't believe him.").

[187] Harbison Tr. 42:9-13; *see also id.* at 21:16-20 ("I thought the FDIC or somebody would stop it. I thought there was no way it would get approved and that would keep me from having to anger him or disappoint him.").

[188] Stringer Tr. 133:1-4.

[189] *See* JX 1 (Joint Stip.) ¶ 30.

[190] *See id.* ¶ 27. Regardless of Respondent's abstention, the record reflects his dominant influence on the ultimate vote tally. *See*, *e.g.*, Winters Tr. 72:22-73:2 ("Bill was the one helping to push through this loan.").

[191] *See* EX 266 (package including December 22, 2015 and December 23, 2015 emails from J. Campbell, L. Phelps, and G. Gaskins voting yes on loans including 618 Holdings loan). Stringer stated that "at that time we very seldom had meetings to discuss the loans. They were mainly sent out via email for approval." Stringer Tr. 60:6-7.

Gaskins testified that although he did not believe that Harbison and Tate had the ability to repay the loan, he voted to approve it because he was told to do so by Respondent: "It was a plan and order passed down to me from Mr. Bonan to— . . . It was a plan Mr. Bonan relayed to me and it was my responsibility to present the request and to vote in favor of the request."[192] Gaskins added, and the undersigned credits, that he believed he "would have been removed" from the Bank's board by Respondent if he had not voted yes.[193]

Before voting to approve the 618 Holdings loan, Campbell expressed a number of reservations regarding, among other things, the true value of the Carmi property,[194] the lack of demonstrated cash flow for 618 Holdings,[195] and Evergreen's ability to make its lease payments on the warehouse given the downturn in the oil industry.[196] Campbell testified that he ultimately voted yes on the loan because the Evergreen loans would not have been included in the merger with PNB but the 618 Holdings loan would.[197] Nevertheless, Campbell stated that if he had known that the Evergreen Drilling loan was at nonaccrual status at PNB and had been classified as

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[192] Gaskins Tr. 76:15-20.

[193] *Id.* at 76:21-77:2.

[194] *See* EX 273 (email chain including December 19, 2015 email from J. Campbell to L. Phelps) ("The purchase of Evergreens yard has the appraisal listed at $1,250,000. I don't think it is worth $300,000, especially with the current oil, coal, and ag depression that this area is in. The 5 year lease doesn't mean anything because the lessee is in a cash flow bind."). The undersigned notes that Phelps, Botsch, and bank examiners all raised similar questions regarding the adequacy of the appraised value of the Carmi Warehouse. *See id.* (email chain including December 19, 2015 email from L. Phelps to J. Campbell) ("Yes I agree. I questioned the Evergreen valuation too."); Botsch Tr. 288:2-8 ("[W]e discussed the fact that 618 Holdings was, the building they are buying, I said it was probably worth $350,000. Evergreen overpaid for it. They also bought that from a client of mine, so I knew the building very well. It was not going to bring $1.25 million."); EX 346 (September 2016 Joint Visit Report of Grand Rivers Bank) at 26 (identifying several concerns with the appraisal and suggesting that "impairment may be significantly understated" on the 618 Holdings loan relationship as a result); EPF ¶ 251 (summarizing these concerns).

[195] *See* EX 284 (email chain including December 22, 2015 email from J. Campbell to F. Bonan II, W. Stringer, L. Phelps, and G. Gaskins) at 2 ("Will this throw up problems for the FDIC since there is nothing in the paperwork showing sufficient, or any cash flow to pay for this?").

[196] *See id.* ("What are the details of the 5 year lease? That lease is only as good as the company leasing it and the oil business as a whole is not looking good at all.").

[197] *See* Campbell Tr. 397:13-22, 399:4-6 (agreeing that "the merger ultimately drove [his] vote for the loan").

substandard at the time of his approval of the 618 Holdings loan, he would have voted no "[n]otwithstanding [his] merger concerns."[198]

The sole director not to vote to approve the loan was CEO Stringer, who discussed her concerns about it with Campbell and Senior Loan Officer Williams.[199] Asked why she didn't express those concerns more widely to the other board members, Stringer testified that "they would have all reported back to Bill and I likely would have been fired."[200] Stringer also stated that she abstained from the vote rather than voting no, because a no vote would have prompted Respondent to fire her "as there had been discussion between Mr. Bonan and another employee about firing me on previous accounts."[201] The undersigned finds it credible that Stringer reasonably feared reprisal and believed she would have been fired if she had voted against the 618 Holdings loan, given similar testimony from Gaskins, Harbison, and Hunn over the course of the hearing.[202]

The Purchase and Leaseback of the Carmi Warehouse

On January 7, 2016, the purchase and sale agreement and lease agreement for the Carmi Warehouse were executed between Evergreen Properties and 618 Holdings.[203] Harbison and Tate were not involved in negotiating the terms of the purchase and had no input in its structure, nor

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[198] *Id.* at 401:12-19.

[199] *See* EX 277 (email chain including December 22, 2015 email from W. Stringer to J. Campbell) at 1 (responding to a question about whether she has voted on the loans yet by writing, "No, and I'm not comfortable with it."); Williams Tr. 657:24-25 (stating that he and Stringer "were both very concerned about the credit, about going forward with 618 Holdings").

[200] Stringer Tr. 129:3-6.

[201] *Id.* at 64:16-22; *see also id.* at 67:3-7 ("I had concerns about the borrowers and the repayment of the loan, and I had a fiduciary responsibility to do what was right for the Bank. So I didn't respond. I felt like if I responded with a no, even though I didn't think the loan was worthy of a yes vote, I thought I'd be fired.").

[202] *See* Gaskins Tr. 76:21-77:2; Harbison Tr. 21:11-22:5; Hunn Tr. 329:18-330:16. In addition to stating that he had personally suffered negative consequences for not explicitly following Respondent's directions, Hunn noted that his predecessor as Bank general counsel, Alanna Sosenko, had been fired because she disagreed with Respondent on a legal issue. *See* Hunn Tr. at 330:9-16 ("Mr. Bonan didn't like the fact that we were giving opinions as opposed to just taking directions, and Ms. Sosenko would challenge certain directives that were given and Mr. Bonan didn't like that and so it got to the point where he fired her.").

[203] *See* EX 308 (Purchase and Sale Agreement); EX 309 (Lease Agreement).

did Respondent tell them anything about the details of the transaction after they agreed.[204] Harbison testified, in fact, that the first time he saw the transaction terms and structure was "at the closing table."[205] The only change made by Harbison at that time was to steadily escalate Evergreen's lease payments following the initial eighteen-month period, in order to incentivize the company "to purchase the property back from us."[206] This was done out of a concern that otherwise Tate and Harbison "would not make money on the deal."[207]

Overall, the transaction was structured as follows:

- The 618 Holdings loan was funded in the amount of $1,262,109.75.[208]
- From these proceeds, PNB received approximately $358,000 and the Bank received approximately $638,000, sufficient to pay off the first and second mortgage liens, respectively, that Evergreen Properties owed them on the Carmi Warehouse.
- $150,000 of the remaining loan proceeds was placed in an escrow account at the Bank to be automatically applied to the first eighteen months of lease payments made by Evergreen Properties to 618 Holdings, which would then use those payments to itself make monthly loan payments of $7,753 to the Bank.[209]
- $100,000 was given to Evergreen Properties to be used for operational expenses.[210]

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[204] *See* Harbison Tr. 16:24-17:1 ("Q: So did Mr. Bonan discuss the terms of the transaction with you? A: No."); *see also id.* at 19:5-15, 22:12, 27:11-13.

[205] *Id.* at 17:1-2.

[206] *Id.* at 17:3-5.

[207] EC-PSD-6 (June 27, 2022 Declaration of Jason Harbison ("Harbison Decl.")) ¶ 7(d).

[208] As the Parties note, this amount was "$12,109.75 more than the Board had authorized," a discrepancy that is not explained in the record. JX 1 (Joint Stip.) ¶ 32.

[209] The lease agreement provides that Evergreen's rent for the first eighteen months would be $8,250 monthly, rather than $7,753, another discrepancy that the record does not explain. *See* EX 309 (Lease Agreement) at 1, 4.

[210] *See* JX 1 (Joint Stip.) ¶ 33; *see also* EX 302 (January 3, 2016 email from F. Bonan II to G. Gaskins and P. Hunn) ("Work on closing evans deal Friday. I want Scott [Collins] to know that the Evans want to keep 100,000 to operate on. So you and he can figure out how much each bank is getting.").

It was Harbison's understanding that Evergreen intended to purchase the property back from 618 Holdings when the price of oil returned to normal.[211] He noted that if he had not changed the agreement at closing to add the escalating lease schedule, "[t]here's no reason for them to buy the property back," and he and Tate would have had no incentive to enter into the transaction.[212] Following closing, Tate and Harbison continued to have no interaction with Evergreen or involvement with the loan payment process itself, as Bank personnel handled everything:

> Kassie at the bank continued to make payments to the bank whenever payments were due and we really kind of just forgot about it. . . . We didn't do anything with the loan, as far as like we didn't collect rent from Evergreen, we didn't make the payments to the bank. The bank did all that. . . . We never touched a rent check, deposited a rent check. I never wrote a payment check for the loan, none of that.[213]

The record reflects that, other than the eighteen-month lease payment reserve, the ability of 618 Holdings to pay its monthly loan payment of $7,753 was entirely dependent on Evergreen Properties making its lease payments.[214] Evergreen Properties, in turn, depended upon income from Evergreen Drilling's operations in order to make its lease payments to 618 Holdings.[215] Ultimately, then, the repayment of the 618 Holdings debt to the Bank hinged on Evergreen Drilling's financial health after the eighteen-month lease reserve was exhausted, rather than on any capacity of 618 Holdings or its guarantors to pay the debt themselves.[216]

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[211] *See* Harbison Tr. 17:11-16.

[212] *Id.* at 34:7-21. The undersigned notes that even as amended, Tate and Harbison would not have seen any benefit from the deal for 18 months at the earliest, raising further questions about whether they would have chosen to enter into the transaction of their own volition absent leverage or pressure from Respondent.

[213] *Id.* at 41:7-22; *see also id.* at 42:14-21.

[214] *See* EPF ¶ 201.

[215] *See id.*

[216] *See* EX 314 (2016 ROE) at 55 ("[T]he loan proceeds used to fund the lease payment reserve account are currently making loan payments."); *see also* Bonan Tr. 922:10-19 (agreeing "that the primary repayment source for this loan aside from the prepaid lease payment was going to be . . . Evergreen Drilling and their ability to pay lease payments back to 618 Holdings after the prepaid lease account was exhausted").

To summarize the state of affairs following the funding of the 618 Holdings loan and the execution of the purchase and leaseback transaction of the Carmi Warehouse:

PNB cleared away $358,000 of debt from Evergreen Properties, a troubled borrower having significant cash flow issues whose financial health was dependent on the continued operations of Evergreen Drilling, an entity in the midst of an industrywide downturn whose loans PNB had previously classified as substandard and placed on nonaccrual status.[217]

The Evergreen Entities made progress on their agreement to pay down PNB debt in exchange for an extension on Evergreen Drilling's loans with that bank while reducing their debt load with both PNB and Grand Rivers. Evergreen Properties (and the Evanses) received $100,000 in operating expenses and an 18-month period of prepaid lease payments to ride out the downturn while continuing to use the Carmi Warehouse as the headquarters for Evergreen Drilling.

Respondent achieved success on his primary motivations at that time—in the words of Gaskins, to "move the debt from [PNB]" and to "help Abbey out,"[218] or more charitably to help Evergreen sell assets and reduce its debt to both banks consistent with the plan devised by Respondent in the fall of 2015. Respondent managed this without taking on personal financial risk and debt by purchasing the Carmi Warehouse himself, as he had previously planned.

Grand Rivers traded in its $638,000 second lien position on the Carmi Warehouse for a $1.25 million mortgage loan backed by the same property, the appraised value of which multiple Bank directors had seriously questioned.[219] The Bank also exchanged its existing loan relationship

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[217] *See* JX 1 (Joint Stip.) ¶ 6.

[218] Gaskins Tr. 25:4-10.

[219] *See* EX 273 (email chain including December 19, 2015 email from J. Campbell to L. Phelps) at 1 ("The purchase of Evergreens yard has the appraisal listed at $1,250,000. I don't think it is worth $300,000, especially with the current oil, coal, and ag depression that this area is in."); *id.* (email chain including December 19, 2015 email from L. Phelps to J. Campbell) ("Yes I agree. I questioned the Evergreen valuation too."); *see also* EX 346 (September 2016 Joint Visit Report of Grand Rivers Bank) at 26 (identifying several concerns with the appraisal and suggesting that "impairment may be significantly understated" on the 618 Holdings loan relationship as a result).

with Evergreen Properties as borrower and Gary Evans as guarantor for newly-formed 618 Holdings, a company with no assets and guarantors with negative net worth whose ability to make payments on the loan depended entirely on lease payments from a financially troubled tenant. On the other hand, because that tenant's situation was so "dire" (according to Respondent)[220] that PNB was refusing to assume its loans in any proposed merger of the two banks, Grand Rivers theoretically benefited in that the 618 Holdings loan, unlike the Evergreen Properties loan, could go to PNB if and when the proposed merger ever were to take place.[221]

Jason Harbison and Adam Tate, through their new company, assumed $1.25 million in debt that they had no discernible way of repaying, and for which they would be personally liable if Evergreen Properties was unable to make lease payments at any point following the exhaustion of the 18-month lease reserve account. Harbison and Tate only stood to benefit from this transaction if, at the end of the eighteen months, (1) Evergreen regained its cash flow and continued to lease the Carmi property from them under the escalated payment schedule suggested by Harbison; (2) Evergreen regained its cash flow and decided to purchase the property back from them at an amount that allowed them to make a profit; or (3) Evergreen failed but Harbison and Tate were able to find a separate tenant for the property at a profitable lease schedule or a separate purchaser at a profitable price. In any other scenario—if oil prices did not rebound after eighteen months, for example, and no company was willing to purchase or lease the warehouse for a sufficient amount, 618 Holdings would be unable to repay the loan and the Bank would be left holding the bag.

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[220] EX 34 (email chain including August 16, 2015 email from F. Bonan II to K. Botsch).

[221] *See* Wallace Tr. 768:14-769:1 ("[T]he sale of the property to 618 Holdings would have given Grand Rivers a saleable asset which it wouldn't have had prior to the sale. . . . It was no longer an Evergreen loan, so it may have been something that Peoples was willing to purchase in connection with the merger and/or acquisition of Grand Rivers."). Putting aside why PNB would necessarily have viewed a loan with inadequate guarantors and whose repayment was entirely dependent on Evergreen as any better than one of the existing loans to Evergreen, it was never clearly explained on the record why the Evergreen loans staying with the Bank's holding company after the merger and being serviced there by PNB would have a negative consequence for the Bank, whose interests would now be presumably aligned with PNB as part of the newly merged entity.

The 2016 Examination and its Aftermath

FDIC examiners Mathias Floersch and Reuben Cash raised questions about the 618 Holdings loan and a separate $50,000 unsecured loan to Harbison during the examination of the Bank by the FDIC and IDFPR beginning in January 2016.[222] On February 9, 2016, Floersch, Cash, and other examiners participated in a discussion with Gaskins, Stringer, and Williams about these two loans.[223] In that discussion, Gaskins and the others repeatedly named Respondent as the one who had originated the 618 Holdings loan and conceived of the idea to establish the $150,000 lease reserve account from which payments would be made for Evergreen's rent for the first eighteen months of the loan's term.[224] Gaskins also acknowledged that Evergreen Drilling's operations would be "the source of repayment" for the 618 Holdings loan, stating further that he was not aware of any other loans that funded lease payments in reserve in this manner.[225]

Following the February 9, 2016 meeting, Examiner Floersch classified the outstanding balance of the 618 Holdings loan—at that time, $1,262,000—as substandard.[226] Floersch stated in the 2016 ROE that this 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 establish[ed] to make loan payments, the lack of collateral protection, and the questionable ability of Evergreen Properties to generate sufficient income to pay lease

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[222] *See* EPF ¶ 208; Floersch Tr. 443:10-14 (stating that Floersch and another examiner "decided it would be good to look at some of the unsecured credits" and chose the $50,000 Harbison loan and from there the 618 Holdings loan to examine).

[223] *See* EPF ¶ 209; EX 368R (Revised Declaration of Mathias Floersch) ("Floersch Report") ¶ 4. The undersigned observes that according to contemporaneous notes of the meeting by Examiner Cash, the Roundfire Solutions loan adverted to *supra* was also a subject of discussion. *See* EX 320 (2/9/16 meeting notes) at 3 (referencing "the Roundfire Solutions credit" and stating that Floersch highlighted problems with that loan: "Harbeson [sic] has no net worth, the structure of Roundfire makes no sense. This is at a minimum, substandard.").

[224] *See* EX 320 (2/9/16 meeting notes); EPF ¶ 209; EX 368R (Floersch Report) ¶ 4.

[225] *See* EX 320 (2/9/16 meeting notes) at 1, 2. Williams likewise stated at the meeting and in his testimony that he had never "seen commercial loans where the loan proceeds have indirectly funded a principal and interest reserve account." Williams Tr. 662:9-20; *see* EPF ¶ 215; EX 320 (2/9/16 meeting notes) at 2.

[226] *See* EPF ¶ 211; EX 314 (2016 ROE) at 56.

payments."[227] Floersch therefore recommended that the Bank place the loan on nonaccrual status until full repayment of principal and interest could be reasonably assured.[228]

Throughout these proceedings, Respondent has asserted that the 618 Holdings loan was structured as it was in order to give Evergreen, one of the Bank's larger loan relationships, time to get back on its feet while it weathered the oil industry's financial downturn.[229] Respondent points specifically to the lease payment reserve account as an appropriate way to "guarantee[] that the loan would be repaid on time for at least 18 months."[230] According to Respondent, the purchase and leaseback of the Carmi Warehouse "was designed to provide Evergreen Drilling and its associated companies the opportunity to become more financially stable, while at the same time protecting the Bank by having 18 months of loan payments in escrow."[231] Respondent thus represents that, as a result of the transaction structure, the Bank was protected "regardless of Tate and Harbison's personal ability to pay the loan."[232]

As described further in Part VI(A)(1) at pp. 86-94 *infra*, however, the undersigned credits the hybrid fact and expert testimony (and related reports) of Examiners Cash and Floersch that, far from protecting the Bank, the structure of the 618 Holdings loan—and how that structure was

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[227] EX 314 (2016 ROE) at 56; *see* EPF ¶ 211; EX 325 (email chain including February 18, 2016 email from W. Stringer to F. Bonan II) (stating that examiners "[s]aid we financed 1st 18 months of lease payments, a structure that they have not seen before. 2 borrowers that cannot support the debt if lease payments aren't made, and the ability for the lease payments is questionable. Questioned collateral value. Borrowers did not have a down payment and didn't bring anything to the table on this deal.").

[228] *See* EPF ¶ 211; EX 314 (2016 ROE) at 56.

[229] *See*, *e.g.*, R Br. at 40 ("The goal was to put Evergreen in a position where they could ride out the storm at least until the 2016 elections, which is when Grand Rivers believed the oil market would rebound."), 44 ("The 618 Holdings loan was made precisely because Evergreen was struggling and about to go out of business. The loan was structured so that Evergreen could remain in its headquarters and stay in business.").

[230] R Br. at 26.

[231] Answer ¶ 75 (asserting that "if Evergreen Drilling and its associated companies did not become more financially stable within 18 months, 618 Holdings could sell the Carmi property to pay off the loan from the Bank").

[232] R-BIO at 9; *see also*, *e.g.*, R Br. at 41 ("The very structure of the loan was designed to *protect* the financial stability of Grand Rivers.") (emphasis in original).

implemented—in fact foreseeably increased risk to the Bank in multiple ways.[233] For example, to the extent that the 618 Holdings loan was intended "to allow Evergreen to begin to generate cash through operations or allow 618 Holdings to sell the Carmi Warehouse without a loss to the Bank," the loan file lacked "basic analyses of repayment capacity," including cash flow analysis and other necessary information for both Evergreen and 618 Holdings, and otherwise did not conform to the requirements of prudent loan workout practices or the criteria for restructured troubled debt.[234] Moreover, the examiners explained that loan payments being made through the lease payment reserve account masked the loan's quality by keeping it artificially current for the first eighteen months of its term, making it difficult "to assess the true repayment ability of [618 Holdings]."[235] And Floersch and Cash emphasized that the Bank taking on additional debt as a result of this transaction—not only the $358,000 previously held by PNB, but a further $250,000 between the escrow and operating expenses—effectively "marginalized the Bank's collateral position," reducing "the realizable value sufficient to discharge the debt" and jeopardizing the Bank's ability to liquidate it in case of default.[236]

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[233] *See* EX 368R (Floersch Report) ¶¶ 6-11; EX 369R (July 5, 2022 Hybrid/Expert Witness Statement of Reuben Cash) ("Cash Report") ¶¶ 9-16.

[234] EX 369R (Cash Report) ¶ 15 (noting that "there was no documentation showing how Evergreen could achieve positive cash flow and 618 Holdings could repay the Bank (such as pro forma financial statements forecasting how Evergreen proposed to achieve positive cash flow within 18 months" or "a plan forecasting how the Bank's commercial real estate collateral, the Carmi Warehouse, could be sold after 18 months without a loss to the Bank"); *see also id.* ¶¶ 13-14; EX 314 (2016 ROE) at 54, 55 (stating that "[c]urrent income information [for Evergreen Drilling] was not located in the loan files" and that the lack of financial information for Evergreen Properties left examiners "unable to determine if the company has the financial capacity to pay the lease payments to 618 Holdings").

[235] Cash Tr. 597:24-598:9; *see* EX 368R (Floersch Report) ¶ 6 (stating that the escrow account served to "skew or distort for 18 months any possible warning signs of potential credit losses involving the Bank's loan to 618 Holdings that would otherwise appear in the Bank's delinquent loan report"); Floersch Tr. 455:17-456:3 ("[W]ith the payments being made by the reserve account, you lose the ability to monitor the current nature of it. . . . There was no evidence, be it a current financial statement or income statement on Evergreen Properties, to let us . . . know that the payments could continue to be made once the [reserve account] was exhausted.").

[236] EX 368R (Floersch Report) ¶ 8; *see* Cash Tr. 582:25-583:3 (stating that "the margin of collateral was unusually high and that's the direct result of the borrowers and the purchasers of the commercial real estate not bringing cash or equity to the transaction").

On April 7, 2016, the Bank placed the 618 Holdings loan on nonaccrual status and made a loan impairment allocation that it later adjusted following a September 2016 visit by FDIC and IDFPR examiners.[237] On April 20, 2016, Respondent resigned from his positions at the Bank and the holding company, and Gaskins and Campbell followed suit.[238] Following these resignations, the Grand Rivers board consisted of Stringer, Williams, and Brent Clark.[239]

One last note regarding this time period: On April 15, 2016, representatives of PNB visited the Bank to conduct a loan review as due diligence in connection with the proposed merger.[240] Among other things, the PNB team concluded as a result of this review that Harbison—who Respondent seemingly believed was creditworthy enough as a guarantor for the Bank to lend him seven figures to purchase the Carmi Warehouse—did not "reasonably qualify for unsecured credit" even on a $50,000 loan.[241]

Current Status of the Property and the Loan

In January 2017, the Bank applied the remaining funds in the lease payment reserve account to the outstanding balance of the 618 Holdings loan and charged off $500,000 from that loan amount.[242] Following the charge-off, 618 Holdings defaulted on the loan—which remained in nonaccrual and had a balance of $668,519[243]—"and acquiesced to the use of a deed-in-lieu to avoid foreclosure, conveying the Carmi Warehouse to the Bank."[244] Brent Clark testified that the

[237] *See* JX 1 (Joint Stip.) ¶ 34.

[238] *See* EX 314 (2016 ROE) at 80.

[239] *See id.*

[240] *See* EPF ¶ 245; Stringer Tr. 91:18-25.

[241] EX 337 (materials including April 15, 2016 memorandum entitled "Loan Summaries" from T. Visintine and K. Gansauer to F. Bonan Sr.) at 7.

[242] *See* EX 352 (2017 Joint Report of Examination of Grand Rivers Community Bank) ("2017 ROE") at 71; JX 1 (Joint Stip.) ¶ 34; *see also* EX 347 (October 25, 2016 letter from Grand Rivers to FDIC) at 44 (noting that "it is the bank's intent to move the balance of the escrow account to the loan balance to lessen the bank's nonaccruals").

[243] *See* EX 351 (January 2017 loan review by ProBank Austin) ("ProBank Austin Loan Review") at 21-22.

[244] JX 1 (Joint Stip.) ¶ 34 (stating that the Bank then wrote down the value of the property by an additional $13,760). In a deed-in-lieu, "[t]he Bank gets possession and control of whatever the said property is." Clark Tr. 737:18-19.

Bank board believed a deed-in-lieu was appropriate because "the guarantors had no assets that we were aware of, a negative net worth, and no perceivable way to earn that type of cash flow to service that type of debt."[245]

According to Mike Williams, the warehouse was ultimately leased to "an oil and gas servicing company based out of Erie, Pennsylvania" called Reliant Oil Service, and the lease payments were $1,500 to $2,000 per month.[246] At the time that Williams left the Bank in December 2018, the highest offer it had received when trying to sell the property was $300,000 from Reliant (an offer that the Bank rejected).[247]

Likewise, when Stringer left the Bank in November 2022, the best offer it had received for the property was $500,000, which the Bank rejected because it would had to have taken "further charge-downs which it couldn't afford at the time."[248] Clark related that the Bank still owns the Carmi Warehouse as an Other Real Estate Owned (OREO) property.[249]

H. <u>The Release of the Rig 23 Collateral</u>

Evergreen owned several self-propelled oil drilling rigs used to carry out their business as of the fall of 2015, including most notably a Cabot 900 series model referred to as Rig 23 and a Service King 775 model known as Rig 24. The record reflects that Rig 23 was significantly more valuable than Rig 24, with an internal PNB email chain in August 2015 valuing the former at $5.8

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[245] Clark Tr. 737:24-738:4; *see also* Williams Tr. 677:10-25 (explaining that the Bank "saw no recovery from [Harbison and Tate] either short term or, you know, in the next five years," and felt the best option was to "[e]ither liquidate [the warehouse] or try to get somebody to lease the property, get some cash flow coming back"); Harbison Tr. 44:10-18 (choosing to do the deed-in-lieu because he "wasn't in the financial position to pay the note or to get it refinanced").

[246] Williams Tr. 678:7-25.

[247] *See id.* at 679:3-13. In its January 2017 loan review of the 618 Holdings and Harbison loans, compliance firm ProBank Austin stated that the Bank believed that the Carmi property "is now worth only $750,000 but has no validation of this value in the collateral file." EX 351 (ProBank Austin Loan Review) at 21. ProBank Austin agreed that the 618 Holdings loan was substandard and recommended that a new appraisal be ordered. *See id.* at 22.

[248] Stringer Tr. 102:20-103:5.

[249] Clark Tr. 745:11-12; *see* Stringer Tr. 103:5 (noting that the property is "currently being leased").

million compared to $1.9 million for the latter.[250] In October 2015, Respondent emailed others at PNB stating that Rig 23 was now worth $2.6 million "in this market."[251] He further noted that Evergreen, having sold Rig 24 (about which more below), was "actively trying to [sell]" Rig 23, which he anticipated would happen by the end of the year.[252]

The Bank Acquires a PMSI in Rig 23

The evidence shows that in January 2013, the Bank obtained a purchase money security interest ("PMSI") in Rig 23 as collateral for a $490,000 loan to Evergreen Drilling.[253] Bank officer Don Nave testified that a PMSI gives the Bank "first lien priority of that rig as collateral ahead of anyone else."[254] To secure a piece of equipment with a PMSI, "[t]he note, collateral security agreement, and [Uniform Commercial Code ("UCC")] filing should all have the statement 'Purchase Money Security Interest,' along with the specific details of the collateral."[255] Thus, a search of UCC financing statements (or "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

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[250] *See* EX 30 (email chain including August 13, 2015 email from C. Zimmerman to F. Bonan Sr.) (reflecting the value of Rig 23 as $5.8 million and Rig 24 as $1.9 million); Bonan Tr. 870:15-25.

[251] EX 180 (October 27, 2015 email from F. Bonan II to C. Zimmerman, S. Collins, F. Bonan Sr., and H. Bonan).

[252] *Id.*; *see also* EX 45 (September 15, 2015 email from A. Evans to F. Bonan II, S. Collins, and K. Botsch) ("[W]e still have a buyer making arrangements to come see Rig 23. We have it priced at $2.6 million.").

[253] *See* EPF ¶¶ 262-265. As discussed further in Part VI(B)(2) *infra*, one disputed question of fact identified at the summary disposition stage was whether Rig 23 was a titled vehicle subject to the motor vehicle codes of Illinois and Indiana such that the Bank's security interest in the rig had not been properly perfected. *See* MSD Order at 25-26, 64-67. The undersigned agrees with Enforcement Counsel that Respondent "provided no credible evidence that the Cabot 900 was a titled vehicle" at the hearing, while the evidence offered by Enforcement Counsel suggests that "the Bank had asked for a certificate of title for the Cabot 900 and was told it was equipment and did not have a title." EC Reply at 21, 22; *see* Nave Tr. 177:18-22 (also stating that he never got "any information at any time while . . . at Grand Rivers that indicated that the Cabot 900 was a titled vehicle"). Accordingly, the undersigned finds that because Respondent, both at the summary disposition stage and at hearing, "failed to produce Rig 23's certificate of title and [] provided no evidence that Rig 23 was ever registered as a vehicle in Indiana, which was the applicable jurisdiction," EC Reply at 21, he has failed to meet his burden of proof on the issue.

[254] Nave Tr. 180:21-22; *see also* Winters Tr. 144:8-22.

[255] Nave Tr. 176:9-11.

of the security interest.[256] In this instance, the Bank 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.[257] It is relevant to these proceedings that the file number for the Illinois UCC-1 statement is 17906194.[258]

In contrast to a PMSI, a UCC-1 blanket lien gives the creditor a security interest in all of the assets that a borrower has in the event of default, but at a lower priority. As Nave explained,

> It's not uncommon to have blanket liens filed on equipment. And blanket liens act like a net. They try to collect security interest on all equipment that's owned and purchased in the future. With a [PMSI], what you're doing is stating that this loan is for this one specific piece of equipment and it will take a priority over blanket liens as a [PMSI] for that one piece of equipment.[259]

The existence of a blanket lien held by a creditor in a given jurisdiction would also be discoverable in a UCC-1 search.[260] Here, PNB held its own security interest in Rig 23 "through a prior blanket UCC lien securing all of its loans to Evergreen Drilling," but this interest was "subject to the Bank's $490,000 PMSI," which took priority over PNB's lien.[261]

In June 2013, the Bank's then-CEO, James Stroud, prepared an additional $89,000 loan to Evergreen Drilling that was also secured by its PMSI in Rig 23.[262] In May 2014, Respondent directed Nave, as loan officer on the Evergreen Drilling credits, to consolidate the two loans.[263] The Bank's executive loan committee approved this consolidation, which advanced a further

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[256] *See id.* at 176:16-177:14; *see also* EX 55 (email chain including September 30, 2015 email from S. Collins to C. Zimmerman) (results of UCC-1 searches for the Evergreen Entities in Illinois and Indiana).

[257] *See* EX 8 (Indiana UCC-1 financing statement); EX 10 (Illinois UCC-1 financing statement).

[258] *See* EX 10 (Illinois UCC-1 financing statement).

[259] Nave Tr. 175:20-176:3; *see also* Winters Tr. 144:14-145:4.

[260] *See* Winters Tr. 144:9-13; *see also* EX 55 (email chain including September 30, 2015 email from S. Collins to C. Zimmerman) at 43, 45 (UCC-1 blanket liens held by PNB in Indiana and Illinois on assets of Evergreen Drilling).

[261] Notice ¶ 15; Answer at 6.

[262] *See* EPF ¶¶ 264-266.

[263] *See* EC-OPP-13 (August 29, 2022 Declaration of Donald Nave ("Nave Decl.")) ¶ 7; EPF ¶ 269.

$126,000 to Evergreen Drilling "for expenses" per the terms of the loan request, and the consolidated loan was issued on May 8, 2014.[264] The loan request and promissory note for the new $640,500 loan reflected that it was secured by a "Cabot 900 series self propelled Drilling Rig," specifically identifying the file number of the Bank's Illinois UCC-1 statement for Rig 23.[265] Despite Respondent's contention that the May 2014 consolidation acted to extinguish the Bank's PMSI in Rig 23, then,[266] the undersigned finds that the PMSI was alive and well—and the sole piece of collateral on the Bank's Evergreen Drilling loan—as of the fall of 2015.

PNB Seeks Release of the Bank's Rig 23 Interest

In or around September 2015, PNB loan officer Scott Collins, who worked closely with Respondent at that bank on the Evergreen loan relationship, contacted the Bank to request that it release its security interest in the Rig 23 collateral. According to Mike Williams, then the Bank's Senior Loan Officer, Collins claimed without evidence that "the Bank had a lien on the wrong rig."[267] Williams then referred the matter to Don Nave, as the individual who had "put the loan together [and] perfected the lien,"[268] When Collins spoke with Nave, he "repeated[ly] demand[ed] that [the Bank] release the PMSI in the Cabot 900 without payment," but refused to explain why he believed the Bank's security interest was invalid.[269] On September 1, 2015, Nave provided

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[264] EX 15 (May 6, 2014 Commercial Loan Application) at 1; *see* EPF ¶ 268.

[265] *See* EX 15 (May 6, 2014 Commercial Loan Application) at 1 ("Collateral #1: Cabot 900 series self propelled Drilling Rig"); EX 17 (May 8, 2014 Promissory Note) at 3 ("Borrower acknowledges this note is secured by Commercial Security Agreement dated January 9, 2013 and securing UCC file #17906194."); *see also* R-MSD-D (exhibit showing both documents).

[266] *See* R Br. at 52-53; *see also* Part VI(B)(2) *infra* at p. 126 & n. 573; MSD Order at 67-69 (rejecting Respondent's argument that the refinancing of the Bank's Evergreen Drilling loans in May 2014 acted as a novation that terminated its PMSI in Rig 23).

[267] Williams Tr. 679:24-25.

[268] *Id.* at 680:25-681:1; *see also* Nave Tr. 188:12-13 ("Scott [Collins] called me and told me that we were not in a first lien position [on Rig 23] and I contended that we were.").

[269] EC-OPP-13 (Nave Decl.) ¶ 16; *see also id.* ¶¶ 10, 15 ("At no time did Collins ever give me an explanation why he thought GRCB's PMSI in Evergreen Drilling's Cabot 900 was invalid."); Nave Tr. 188:15-20 ("I asked for his reasoning and he never gave it to me.").

Collins with evidence of the PMSI by email.[270] Nave then refused to release the Bank's PMSI in Rig 23 unless the Bank "was paid the full amount of its lien pursuant to the UCC-1 on file with the Illinois and Indiana Secretaries of State."[271]

On September 30, 2015, Collins requested and received from PNB personnel the emailed results of UCC-1 searches on the Evergreen Entities in Illinois and Indiana.[272] These UCC-1 results revealed that the Bank had a PMSI in a Cabot 900 series drilling rig—that is, Rig 23—on file in those states, and prominently featured the file number for the Bank's Illinois UCC-1 filing in the first attachment to the email.[273] The search also showed that "the Bank did not have a blanket UCC relating to the Evergreen Companies in either Illinois or Indiana," nor did it have any kind of security interest in any other Evergreen rig.[274]

On October 1, 2015, Nave was terminated from his position at the Bank.[275] When asked about the circumstances related to his firing, Nave recalled an instance around thirty days earlier, or in early September, in which Respondent called him and angrily "cussed [him] out."[276] Nave suggested in his August 2022 declaration that he "knew [his] employment was at risk" when he refused PNB's request to release the Bank's PMSI in Rig 23,[277] although he does not specifically draw a connection between that refusal and his subsequent termination. Nevertheless, it is true that the timing of Nave's recollection of Respondent's angry and profanity-filled phone call does align

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[270] *See* EPF ¶ 271; EXs 39, 40 (September 1, 2015 emails from D. Nave to S. Collins attaching copies of the relevant promissory notes and commercial security agreement).

[271] EC-OPP-13 (Nave Decl.) ¶ 16.

[272] *See* EX 55 (September 30, 2015 email chain attaching UCC-1 search results).

[273] *See id.* at 1 (first email attachment is "UCC Search – Evergreen Drilling IL.pdf"), 3 (Bank's Illinois UCC-1 filing #17906194 for a "Purchase Money Security Interest in a Cabot 900 Series Self Propelled Drilling Rig"), 46 (same for Indiana); *see also* Nave Tr. 192:2-194:21.

[274] EPF ¶ 272; *see* EX 55 (September 30, 2015 email chain attaching UCC-1 search results) at 2, 4, 10, 23, 29, 37, 42 (no other Grand Rivers UCC filings in connection with Evergreen Entities).

[275] *See* EC-OPP-13 (Nave Decl.) ¶ 18.

[276] Nave Tr. 196:15-197:1 (stating that "I did not expect to be talked to like that, did not deserve that").

[277] EC-OPP-13 (Nave Decl.) ¶ 17.

with the point at which Nave testified that he told Collins that he would not be releasing the Bank's security interest in the rig without adequate compensation. Nave also testified that before leaving the Bank, he "went straight to Grady's office" and "told him, 'Whatever you do, do not release that UCC [for the Bank's PMSI in Rig 23] unless you get a check.'"[278] Nave stated that he told Gaskins this "because he would be the one it would fall on to do that" once Nave was gone.[279]

Evergreen Pledges Rig 23 to PNB "Free and Clear"

There is a curious incident that, although ill-sketched out on the record, nonetheless deserves to be mentioned here. On November 3, 2015, as part of the agreement negotiated for the extended maturity dates of PNB's two Evergreen Drilling loans (*supra* at pp. 23-24), Evergreen promised to pledge to PNB "additional collateral to secure said loans" that would be "free and clear of all liens and encumbrances," as set forth in Exhibit A of that document.[280] It is undisputed that among the collateral listed in Exhibit A to be pledged to PNB was Rig 23, a Cabot 900 series drilling rig.[281] One problem: Evergreen had no power to pledge "free and clear" title to Rig 23 to PNB in this manner at that time, because—despite Collins's efforts—the Bank still had a PMSI on Rig 23 that took precedence over any other claims or liens. Respondent's counsel suggests that Rig 23's inclusion on this list was a "mistake," but does not offer any basis for this supposition, and the Parties do not develop the matter further.[282] Lacking a fuller record, the undersigned notes

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[278] Nave Tr. 197:11-16; *see* EC-OPP-13 (Nave Decl.) ¶ 19.

[279] Nave Tr. 197:21-24; *see id.* at 197:18-20 (stating that he wanted to warn Gaskins about the release of Rig 23 "[b]ecause the Bank would have lost its collateral. It would have had no, nothing to fall back on and probably would have taken a loss.").

[280] EX 198 (Extension Agreement) at 1, 2.

[281] *See id.* (Extension Agreement, Ex. A) at 13 (line item for "Rig 23," a "[r]efurb 2013 Cabot 900"); *see also* JX 1 (Joint Stip.) ¶ 48 ("In return for PNB's extension of the maturity dates on the two Evergreen Drilling loans, . . . Evergreen Drilling promised to pledge new collateral set out on Exhibit A free and clear of all liens and encumbrances. Rig 23 was one of the pieces of Evergreen Drilling equipment listed and described on Exhibit A.").

[282] *See* Botsch Tr. 311:24-312:10 ("Q: There should have been no reason Rig 23 was mentioned on this agreement? A: No. Because it was not free and clear. . . . Q: Mistakes happen in banking, correct? A: Yes, mistakes happen in everything."). In his testimony, Respondent claimed that Exhibit A was merely a list of Evergreen's assets rather

only that if it *was* a mistake, then it was a mistake that operated to advance the interests of Evergreen and PNB at the expense of the Bank—much like Collins's unsupported assertion two months earlier that the Bank's PMSI was defective and should be released, and much like the ostensibly inadvertent release of the Bank's interest in Rig 23 ten days later in connection with Evergreen's sale of Rig 24, to which this order now turns.

The Sale of Rig 24

On September 14, 2015, as part of its plan to liquidate assets and pay down its debt to PNB, Evergreen Drilling entered into a Letter of Intent with U.S. Energy Exploration Corporation ("U.S. Energy") for the sale of its Service King 775 series drilling rig known as Rig 24.[283] The next day, Abbey Evans emailed Respondent and others at PNB with the signed Letter of Intent, noting that a nonrefundable deposit for 10 percent of the purchase price—approximately $156,000—had been wired into the Evergreen Drilling account that morning.[284]

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.[285] 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."[286] Evergreen Drilling then 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

than collateral that it was pledging to PNB as part of the Extension Agreement, *see* Bonan Tr. 892:5-19, but standing alone this claim is contradicted both by the document's plain text and by Respondent's own counsel.

[283] *See* JX 1 (Joint Stip.) ¶ 35.

[284] *See* EX 45 (September 15, 2015 email from A. Evans to F. Bonan II, S. Collins, and K. Botsch).

[285] *See* EX 122 (October 9, 2015 email chain including email from D. Boyer to G. Evans).

[286] RX 40 (signed copy of Rig Purchase Agreement) § 3.1(c).

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."[287]

A complete copy of the Rig Purchase Agreement includes two attachments, Appendix A and Exhibit C, that are central to the events at issue here.[288] Appendix A identifies the drilling rig being sold as a "2010 Service King – SK 775 Series," which is the model number for Rig 24.[289] Nowhere else in the document is Rig 24 described or identified.[290] Exhibit C, by contrast, purported to be the list of all existing liens and encumbrances on Rig 24 that needed to be released before closing so that "good and marketable title" to the rig could be conveyed.[291]

The Bank did not have, and at no prior point had ever had, any kind of security interest in Rig 24, whether as a PMSI or as part of a blanket lien on Evergreen Drilling assets—the only loan that Evergreen Drilling had with the Bank at this time was the consolidated loan issued in May 2014 and secured only by Rig 23.[292] Moreover, anyone performing a UCC-1 search in Illinois and Indiana on liens held related to Evergreen assets, as Collins had done for PNB at the end of September 2015,[293] would have known that the Bank did not have any blanket liens on Evergreen Drilling (or any Evergreen Entities) or any liens on Rig 24 specifically.

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[287] *Id.*; *see also id.* § 2.4 (providing that "Escrow Agent shall hold all funds received from Buyer on account of this Agreement until such time as Company [has] fully satisfied its obligations herein including, but not limited to, Company's obligation set forth in paragraph 3.1(c) below to provide Buyer with satisfactory proof of the satisfaction or release of all liens and encumbrances covering the Assets").

[288] *See id.* at 18-19 (Appendix A), 23 (Exhibit C).

[289] *See id.* at 18.

[290] *See id.* at 5 (providing that "the Company shall sell, assign, transfer and deliver to Buyer, and Buyer shall purchase and acquire from the Company the drilling rig, together with all the drilling machinery and equipment listed on Appendix A, hereto (the 'Rig').").

[291] *See id.* §§ 2.4, 3.1(c) (identifying Exhibit C as setting forth liens and encumbrances to be released); *see also id.* at 23 (Exhibit C).

[292] *See* EX 88 (October 7, 2015 email chain between G. Gaskins and K. Winters) (Gaskins: "Can you check to see if we have Rig 24 as current collateral?" Winters: "This doesn't list a rig number it says Cabot 900 series self-propelled drilling rig. . . . They only have the one loan with us and it has a balance of 557,024.05").

[293] Gaskins testified that Scott Collins handled the Rig 24 transaction on behalf of PNB. *See* Gaskins Tr. 87:16-18.

Despite these facts, Exhibit C to the Rig Purchase Agreement listed one security interest held by PNB and one security interest held by Grand Rivers that needed to be satisfied before free and clear title on Rig 24 could be conveyed and the escrow agent could release the remainder of the purchase price. The interest held by PNB was recorded as having been "filed with the Indiana Secretary of State at Filing No. 2011000556370";[294] this is duly reflected in the UCC-1 search performed by PNB on September 30, 2015.[295] The Rig 24 interest putatively held by Grand Rivers, by contrast, is listed as "filed with the Illinois Secretary of State at File No. 017906194"[296]—and this, of course, is the Bank's Illinois PMSI in Rig 23.

The Banks Take Steps to Identify and Release Their Collateral

The record does not explain why the Bank's Rig 23 security interest would be identified as a lien and encumbrance in documents pertaining to Rig 24. Nor was testimony elicited that shed any light on who drafted Exhibit C and included this erroneous information—although presumably it must have been someone at PNB or Evergreen, as the two entities involved in this transaction that were best in position to compile a list of Rig 24's liens and encumbrances. To the extent that the explanation is simple error, perhaps the most likely culprit is someone working from a UCC-1 search (whether the one performed by PNB or otherwise) who saw that Grand Rivers had a PMSI in an Evergreen drilling rig but neglected to double-check which one.[297] We will never know.

In any event, the confusion was compounded from the first: immediately following the transmission of the signed Sale and Purchase Agreement on October 9, 2015, Abbey Evans

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[294] RX 40 (signed copy of Rig Purchase Agreement) at 23 (Exhibit C).

[295] *See* EX 55 (September 30, 2015 email chain attaching results of UCC-1 search) at 45; *see also* EPF ¶ 286 (noting that this entry on Exhibit C "described PNB's blanket UCC-1 securing all of Evergreen Drilling's equipment").

[296] RX 40 (signed copy of Rig Purchase Agreement) at 23 (Exhibit C).

[297] *Compare* EX 55 (September 30, 2015 email chain attaching UCC-1 search results) at 3, 41 (reflecting that Grand Rivers holds a "Purchase Money Security Interest in a Cabot 900 Series Self Propelled Drilling Rig") *with* RX 40 (signed copy of Rig Purchase Agreement) at 18 (stating that drilling rig being sold is a "2010 Service King – SK 775 Series").

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 Exhibit C. If at all possible, can we please get this done today?"[298] Respondent then forwarded Evans's email to Gaskins and Collins and instructed them to "[g]et these releases to Gary."[299] But while the copy of the Rig Purchase Agreement provided to PNB and Grand Rivers on that date included Exhibit C, it did not likewise include Appendix A—in other words, someone reading that copy who was unfamiliar with the transaction would see the file numbers of the UCC-1s that supposedly needed to be released by each bank, but not the model or rig number of the rig being sold.[300]

The resulting potential for crossed wires is evident from Gaskins's response to Respondent at 5:16 that evening, fifteen minutes after Bonan had directed him to release the security interest reflected in Exhibit C. Gaskins told Respondent, pertinently, that "[o]ur UCC-1 is not a blanket it is just on this specific rig," stating that he could prepare the termination but that he first "need[ed] the attachments to confirm its same equipment and same wording in ucc and purchase agreement. I can take care of it right now."[301] Respondent then replied, "[s]he said she just emailed you."[302] Gaskins testified that he never followed up and confirmed this information.[303]

Instead, Gaskins reached out to Winters within the hour, forwarding Exhibit C and stating that he needed "this security interest released/terminated."[304] He then added later that evening,

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[298] EX 122 (October 9, 2015 email chain including email from A. Evans to F. Bonan II).

[299] *Id.* (October 9, 2015 email chain including email from F. Bonan II to G. Gaskins and S. Collins).

[300] *See* Winters Tr. 159:5-8 ("I wasn't sure what Rig 24 was at any point. I just knew what the UCC number that they had listed in the purchase agreement, was the UCC I had in file."); *see also* EPF ¶¶ 283-284; EX 129 (email chain including October 10, 2015 email from C. Zimmerman to F. Bonan II) ("I will need to get a specific list with the appendix A and release the specific collateral associated with the rig since we don't want to release the blanket we don't have the Appendix [and] once we get it we can get the release together").

[301] EX 124 (October 9, 2015 email chain including email from G. Gaskins to F. Bonan II).

[302] *Id.* It is a reasonable assumption that the "she" in question is Abbey Evans, although no testimony was elicited on this score.

[303] *See* Gaskins Tr. 116:17-22.

[304] EX 126 (email chain including October 9, 2015 email from G. Gaskins to K. Winters).

"***Not sure we had this as collateral but he wants it released if we do.*** They are selling it. I'll find out more do we just file a ucc release?"[305] As shall be seen from the record evidence, it is clear that Winters and Gaskins were acting under Respondent's supervision and direction at every step, as they sought to secure the release of collateral that the Bank did not, in fact, possess.

Meanwhile, PNB was making its own preparations. On October 14, 2015, PNB officer Clytie Zimmerman emailed Scott Collins and Respondent at his PNB email address, attaching an unrecorded UCC Financing Statement Amendment for Indiana that would, when filed, remove Rig 24 from the scope of PNB's blanket lien on Evergreen Drilling assets.[306] By this point, PNB had received Appendix A from Evergreen, which would be filed with this amendment as a way to specify that the collateral being released was a Service King 775 drilling rig.[307] Zimmerman stated that once the balance of the Rig 24 purchase price was released from escrow and applied to Evergreen Drilling's loan at PNB, the bank could file this release.[308]

On the morning of October 16, 2015, Respondent emailed Gaskins, directing him to "[g]ive me a call" and indicating that it "has to do with abbeys release."[309] Less than an hour later, Winters sent two emails attaching unfiled UCC-3 termination statements for the Bank's interest in Rig 23. One email, to Respondent, Abbey Evans, and April Reicken of Evergreen Drilling, attached a statement which, when filed, would terminate the Bank's Illinois PMSI (file number 17906194) that was listed in Exhibit C.[310] The other, sent only to Respondent at his PNB email address,

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[305] EX 128 (email chain including October 9, 2015 email from G. Gaskins to K. Winters) (emphasis added).

[306] *See* EX 134 (October 14, 2015 email from C. Zimmerman to S. Collins and F. Bonan II attaching UCC Financing Statement Amendment and Appendix A); *see also* EPF ¶¶ 298-299.

[307] *See* JX 1 (Joint Stip.) ¶ 39; EPF ¶ 295; *see also* EX 134 (October 14, 2015 email from C. Zimmerman to S. Collins and F. Bonan II) at 2 (referencing "Attached Appendix A" as the collateral to be deleted), 4 (Appendix A).

[308] *See* EX 134 (October 14, 2015 email from C. Zimmerman to S. Collins and F. Bonan II) at 1.

[309] EX 141 (October 16, 2015 email from F. Bonan II to G. Gaskins); *see* Gaskins Tr. 94:17-18 (stating that Respondent "is referring to the release of collateral from Grand Rivers Community Bank").

[310] *See* EX 143 (October 16, 2015 email from K. Winters to F. Bonan II, A. Evans, and A. Riecken attaching unrecorded Illinois UCC-3 termination statement).

contained an unfiled termination statement for the Rig 23 PMSI held by the Bank in Indiana.[311] When asked why she sent a termination statement for Indiana when only Illinois was required under the terms of the Rig Purchase Agreement, Winters explained:

> Based on the previous email that Grady had sent me on the 9th, when I pulled the file, there were two UCCs filed referencing the collateral for Evergreen Drilling's loan. One was filed in the State of Illinois, one was filed in the State of Indiana. . . . [Respondent] wanted the security interest released and terminated. If I didn't terminate the one in Indiana as well as the one they requested in Illinois, they would not have that piece of equipment free and clear.[312]

Notably, Respondent did not question why Winters was providing termination statements for Illinois and Indiana when the Rig Purchase Agreement required only the Bank's release of a security interest in Illinois. This testimony also evinces a consistent belief by Winters, who lacked contrary information and has stated that she was not familiar with the rig number nomenclature used by Evergreen, that the UCC-1 filing listed in Exhibit C that she was being asked to release was associated with Rig 24.

Just after noon on that same day, Abbey Evans emailed Denny Boyer of U.S. Energy, attaching the unrecorded Indiana UCC Financing Statement Amendment from PNB and both of the unrecorded Illinois and Indiana UCC-3 termination statements that Winters had earlier provided.[313] Evans told Boyer that "all the required documents per the escrow and purchase agreement" were attached and stated that "[t]he only thing holding us up is a one line email stating your approval of releasing the funds from escrow."[314]

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[311] *See* EX 142 (October 16, 2015 email from K. Winters to F. Bonan II attaching unrecorded Indiana UCC-3 termination statement).

[312] Winters Tr. 118:18-119:6.

[313] *See* EX 140 (email chain including October 16, 2015 email from A. Evans to D. Boyer, F. Bonan II, S. Collins, et al.). Winters testified that the Bank's Indiana termination statement had only been sent to Respondent and that she did not know how Abbey Evans received it. *See* Winters Tr. 122:17-123:5.

[314] EX 140 (email chain including October 16, 2015 email from A. Evans to D. Boyer, F. Bonan II, S. Collins, et al.).

It is worth noting here that although Section 3.1(c) of the Rig Purchase Agreement contemplated that any liens and encumbrances on Rig 24 would "be removed by application of all or a portion of the purchase price at closing,"[315] in fact the Bank was not receiving any compensation for the putative release of its Rig 24 security interest. Instead, the amount being held in escrow as proceeds of the Rig 24 sale, approximately $1.4 million, would be going in full to PNB to be applied to Evergreen debt at that bank, with the exception of $160,000 of the proceeds that would be received by Evergreen Drilling.[316] Referring to his statement to Respondent on October 9, 2015 that he would wait to file the Bank's UCC-3 termination statement "until payment is received," Grady Gaskins testified that it was initially his understanding that Grand Rivers would receive some money in connection with the Rig 24 transaction, but that this understanding changed when he spoke to Scott Collins and learned "that Peoples National Bank would receive the funds from the sale."[317] Even if the Bank did have a security interest in Rig 24 that needed to be released before the rig could be freely conveyed to U.S. Energy, then, there was seemingly no incentive for the Bank to release that interest if it was not receiving anything in return.

When asked about this at hearing, Respondent remarkably claimed that Grand Rivers was not being compensated for the security interest it was being directed to release in connection with the Rig 24 transaction because it had no security interest to release:

> Q: And you were more concerned about Peoples getting the 1.262 million dollars—
>
> A: Because I knew Grand Rivers Bank had no interest in Rig 24.
>
> Q: Grand Rivers weren't getting anything?
>
> A: That's right.

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[315] RX 40 (Rig Purchase Agreement) § 3.1(c).

[316] *See* JX 1 (Joint Stip.) ¶ 46 (noting that the $160,000 to Evergreen Drilling would "cover the costs of moving Rig 23 from Texas to the Carmi Warehouse and preparing it for sale").

[317] Gaskins Tr. 90:2-14; *see* EX 124 (October 9, 2015 email chain including email from G. Gaskins to F. Bonan II).

Q: It was all Peoples?

A: They had no interest in Rig 24.[318]

The logical lacunae between this statement and Respondent's repeated demands and pressure exerted on Gaskins and Winters "for Rig 24 to be released," as he acknowledged that he had done in testimony just moments before, are explored further *infra*.[319]

The Rig 24 Transaction is (Mostly) Consummated

Having received unrecorded terminations of what purported to be Rig 24 security interests from PNB and Grand Rivers, Denny Boyer authorized the wire transfer of $1,262,790—all but $140,000 of the escrowed amount—to PNB on October 16, 2016.[320] In exchange, U.S. Energy transport trucks picked up Rig 24 and its drilling machinery and equipment from the Carmi Warehouse.[321] However, despite Respondent's assurances to Boyer that the UCC termination statements would be recorded when U.S. Energy's wire transfer was received by PNB, neither the Bank nor PNB took further steps to record those terminations at that time.[322]

On November 11, 2015, April Riecken of Evergreen Drilling emailed Boyer, copying Respondent and others, to inform him that all components of Rig 24 had left the Carmi Warehouse and to request that the remaining $140,000 be released from escrow as a result.[323] Boyer replied that "Peoples Bank needs to follow through with the paper work they promised in order for any money to be released," noting that he had called Respondent multiple times "and left messages but

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[318] Bonan Tr. 908:8-14.

[319] *Id.* at 906:15.

[320] *See* EPF ¶¶ 309-310.

[321] *See id.* ¶¶ 306-307.

[322] *See* EX 239 (email chain including November 16, 2015 email from D. Boyer to A. Riecken, F. Bonan II, et al.) ("It appears the original UCC filing statements that were sent to escrow were never acted upon. . . . They were supposed to file when the initial money was released nearly a month ago. Bill Bonan assured me he would file this when the initial money was received."); EPF ¶ 308.

[323] *See* EX 216 (November 11, 2015 email chain including 2:35 pm email from A. Riecken to D. Boyer, F. Bonan II, et al.).

he has never returned any of my calls."[324] In response, Riecken stated that she would contact PNB and have them "expedite your [UCC]-1 release and get that to you as soon as possible."[325] On November 12, 2015, PNB filed its UCC Financing Statement Amendment with the State of Indiana, terminating its interest in Rig 24.[326] Upon receiving proof of this, Boyer thanked Riecken and stated, "If we can get Grand Rivers Bank UCC Release we should be finished."[327]

The Rig 23 Collateral is Released

The same day that PNB finally released its Rig 24 interest, Respondent emailed Winters inquiring about "the loans and balances associated with Gary evans and evergreen drilling [sic]" that were being held by the Bank.[328] Winters responded twenty-nine minutes later—apologizing for the delay—to report that the Evergreen Entities had two loans with Grand Rivers, one to Evergreen Properties that was secured by the Carmi Warehouse (discussed in detail *supra*) and one to Evergreen Drilling that was "secured by a UCC on a drilling rig and equipment."[329] When Respondent inquired further about other collateral, Winters stated that "[u]nfortunately" this was all the Evergreen collateral that the Bank held.[330] Respondent then stated, "[w]e have a pmsi on one rig," which Winters promptly confirmed: "***Yes a Cabot 900 series drilling rig.***"[331]

Respondent was thus informed on November 12, 2015, in no uncertain terms, that the Bank did not hold any blanket lien on Evergreen assets and that the only Evergreen drilling rig that was

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[324] *Id.* (November 11, 2015 email chain including 3:08 pm email from D. Boyer to A. Riecken, F. Bonan II, et al.).

[325] *Id.* (November 11, 2015 email chain including 3:15 pm email from A. Riecken to D. Boyer, F. Bonan II, et al.).

[326] *See* JX 1 (Joint Stip.) ¶ 51; EX 223 (email chain including November 12, 2015 email from A. Riecken to D. Boyer, F. Bonan II, et al.).

[327] EX 223 (email chain including November 13, 2015 email from D. Boyer to A. Riecken, F. Bonan II, et al.).

[328] EX 226 (November 12, 2015 email chain including 11:23 am email from F. Bonan II to K. Winters).

[329] *Id.* (November 12, 2015 email chain including 11:52 am email from K. Winters to F. Bonan II).

[330] *See id.* (November 12, 2015 email chain including 12:35 pm email from F. Bonan II to K. Winters and 1:09 pm email from K. Winters to F. Bonan II).

[331] *Id.* (November 12, 2015 email chain including 1:10 pm email from F. Bonan II to K. Winters and 1:11 pm email from K. Winters to F. Bonan II) (emphasis added); *see also id.* (7:55 pm email from F. Bonan II to K. Winters) (replying, "OK. That is what we have a PMS on.").

secured as collateral with a PMSI was a Cabot 900 series, not a Service King 775. As noted previously, the record reflects that (contrary to his hearing testimony) Respondent was very familiar at this time with which Evergreen rig numbers were associated with which models—evidenced, among other things, by an October 27, 2015 email in which Respondent refers repeatedly to Rig 23 as being "the Kabat [sic] 900."[332] Therefore, if Respondent was not already aware that the Bank had no security interest in Rig 24—blanket or otherwise—that would need to be released for U.S. Energy to have free and clear title to that rig, there can be no doubt that he was so informed following his correspondence with Winters that day.[333]

If this were not enough, April Riecken's email to Respondent and Collins on the morning of November 13, 2015 should dispel with the notion that Respondent could reasonably have believed there was anything for the Bank to release in connection with this transaction. Forwarding Boyer's email seeking the "Grand Rivers Bank UCC Release," Riecken solicited Respondent's input as to how to complete the impossible task that Boyer had requested:

> 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.[334]

Respondent had therefore been told again, and unambiguously, that the Bank did not hold any security interest in Rig 24. He also knew, based on his colloquy with Winters the previous day,

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[332] EX 180 (October 27, 2015 email from F. Bonan II to C. Zimmerman, S. Collins, F. Bonan Sr., and H. Bonan); *see also supra* at n. 31 (providing additional examples of Respondent using rig numbers, including referring to Rig 23 as a "Kabat 900" in the handwritten Plan for Evergreen and distinguishing between Rig 23 and Rig 24 on multiple occasions).

[333] *See* Bonan Tr. 896:12-16 ("Q: So Ms. Winters told you on the 12th of November that the only collateral, the only UCC the Bank had was on a Cabot 900 with a Purchase Money Security Interest. A: Yeah, I took that to mean that we did not have Rig 24 as collateral."), 906:3-5 ("I knew that Grand Rivers Bank did not have Rig 24 as collateral. I verified that with Kassie saying that the only one we had a PMSI on was Rig 23.").

[334] EX 233 (email chain including November 13, 2015 email from A. Riecken to F. Bonan II and S. Collins) (emphasis added).

that the only Evergreen UCC-1 release that the Bank could conceivably provide to anyone was that of a "Cabot 900 series drilling rig," which he knew that Rig 24 was not. And he understood that the Bank's PMSI on the Cabot 900—Rig 23—was the only collateral the Bank held on its Evergreen Drilling loan, the $550,000 balance of which would be left unsecured should that collateral somehow be released.[335]

Nonetheless, when Respondent received Boyer's email stating that a UCC release from Grand Rivers was necessary to complete the Rig 24 transaction, he did not correct Boyer—telling him, for example, "actually, our interest is in a different rig, so Rig 24 is already all yours!"—or seek clarification from any of the parties involved. Nor did he express any curiosity as to how the Bank could file termination papers to release a security interest that he knew did not exist, or pause to consider what the possible risk of consequences might be to the Bank's genuine PMSI if he acceded to Riecken's request to send "a recorded UCC-1."

Instead, Respondent forwarded Boyer's email to Gaskins and Winters without comment, an action that Winters—reasonably, in this Tribunal's view—understood to mean "that he wanted me to record, as quickly as possible, the Indiana and Illinois Form UCC-3 terminations that I forwarded to him in October."[336] Then, when Riecken emailed at 11:00 that morning noting that "there is no collateral for rig 24 at Grand Rivers" and asking for guidance, Respondent did not reply; rather, he forwarded that message to Gaskins and Winters less than two minutes later, commanding them to "[g]et this bulkshit [sic] done this morning. Do you understand me."[337]

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[335] *See* EX 226 (November 12, 2015 email chain between F. Bonan II and K. Winters) (Winters telling Bonan that the current balance of the Evergreen Drilling loan was "secured by a UCC on a drilling rig and equipment," that the loan was not cross-collateralized, and that "[u]nfortunately that is all we have").

[336] EC-OPP-14 (August 30, 2022 Declaration of Kassie Ledbetter Winters ("Winters Decl.")) ¶ 9; *see also* Winters Tr. 127:5-24; EX 231 (email chain including November 13, 2015 email from F. Bonan II to G. Gaskins and K. Winters).

[337] EX 233 (email chain including November 13, 2015 emails from A. Riecken to F. Bonan II et al. at 11:00:54 am and from F. Bonan II to G. Gaskins and K. Winters at 11:02 am).

Through that email, as Respondent himself has testified, he "directed for Rig 24 to be released."[338] Which raises the natural question: if Respondent knew, as he did, that the Bank had no security interest in Rig 24 that could conceivably be released, then what did he believe that he was asking Gaskins and Winters to do? Whatever it was, it is clear that Respondent wanted it done quickly—according to Gaskins, "that morning [Respondent] sent the emails he was also sending text messages and calling the bank very adamant to get it done right away."[339] Winters also interpreted the communications from Respondent as an "adamant request for us to get it done immediately."[340] And Winters recalled that Respondent "was very aggressive and intimidating," stating that she was concerned—again, reasonably so, based on record evidence—that he "would become angry with me" if she did not process the termination statements.[341] Moreover, because Winters was not familiar with the rig numbers and had not, as far as the record reflects, seen Appendix A, she had no reason—unlike Respondent—to believe that the UCC-3 termination statements for a Cabot 900 series drilling rig did not relate to Rig 24.[342]

Fifteen minutes after receiving Respondent's email, Winters emailed Riecken and Boyer, attaching what she identified as "the recorded copy of the UCC termination in Indiana" and "the working copy" of "the UCC termination for IL."[343] She further stated that "as soon as it is received

[338] Bonan Tr. 906:15.

[339] Gaskins Tr. 96:9-13.

[340] Winters Tr. 129:24-130:1.

[341] EC-OPP-14 (Winters Decl.) ¶ 9; *see also* Winters Tr. 22:6-8 ("When he wanted something, he wanted it right then and he wanted it without question."); Hunn Tr. 345:12 ("Everything with Mr. Bonan was an emergency."); Nave Tr. 196:8-10 ("Q: Did you feel comfortable asking questions of him if you didn't understand a request he had made? A: No.").

[342] This is particularly true because, as Winters has averred, Respondent never indicated to her that the UCC-3 termination statements that she had provided him in October 2015 were inapplicable to Boyer's request or should otherwise be corrected or changed. *See* EC-OPP-14 (Winters Decl.) ¶¶ 6, 10.

[343] RX 46 (November 13, 2015 email chain including 11:18 am email from K. Winters to A. Riecken, D. Boyer, F. Bonan II, and G. Gaskins).

I will forward the [recorded UCC-3 Illinois termination] to you."[344] Attached to Winters' email were UCC forms terminating the Bank's Indiana and Illinois interests in Rig 23.[345]

Respondent, who was copied on Winters' email, sent a reply shortly thereafter that was directed at Riecken: "April. ***This is what you need.*** Let me know if you need anything else from me."[346] When Riecken thanked Respondent for "working so fast to get this to us," Respondent replied, "No problem. Just so you know these docs are bullshit."[347] Respondent's hearing testimony regarding this statement is worth relating in full, bearing as it does on the inherent contradiction in Respondent's stated position here:

> Q: What did you mean by that, Mr. Bonan?
>
> A: ***That Grand Rivers Bank did not have a lien on Rig 24*** and that Evergreen was selling Rig 24 so that Grand Rivers shouldn't even have been in that transaction.
>
> Q: Did you ever tell Mr. Boyer that? You were the one talking to him from Grand Rivers and Peoples?
>
> A: He was not a customer of mine. I did not know him. April was a customer, April worked for Evergreen who was a customer of mine who I was familiar with. I spoke with Denny Boyer maybe twice in my life.
>
> Q: ***But you knew early on that Rig 24 was not collateral over at Grand Rivers.***
>
> A: ***That's right.***
>
> Q: Why didn't you tell Mr. Boyer that? You say hey pal—
>
> A: ***Well, I told him that I was getting the UCC released that he requested.*** That's what I kept telling him.
>
> Q: But there weren't any UCCs to be had at Grand Rivers. They didn't have Rig—

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[344] *Id.*

[345] *See id.* at 3 (Indiana termination), 4 (working copy of Illinois termination).

[346] EX 232 (November 13, 2015 email chain including 11:20 am email from Respondent to A. Riecken et al.) (emphasis added).

[347] *Id.* (November 13, 2015 email chain including 11:27 am email from Respondent to A. Riecken et al.).

> A: ***That's what he was telling me, that in order for the sale to be done that they had to have a release from Grand Rivers Bank on Rig 24.***
>
> Q: And you were Chairman of the Board at Grand Rivers.
>
> A: Yes.
>
> Q: Didn't you want to inquire and find out, get to the bottom of it was—
>
> A: ***I knew that Grand Rivers did not have Rig 24 as collateral. I verified that with Kassie saying that the only one we had a PMSI on was Rig 23.*** Rig 23 was not being sold. I did not think this had anything to do to pertain to Grand Rivers Bank; I thought it only had pertained to PNB.
>
> Q: But if Grand Rivers only had a UCC on Rig 23, the Cabot 900, and Kassie records terminations—
>
> A: I'm being told by—
>
> Q: —she, she's just released the Bank's collateral. You knew that at the time.
>
> A: That's not what I knew. That's not what I understood. That's not what I directed. ***I directed for Rig 24 to be released.***[348]

At the time that Respondent was informing April that "these docs are bullshit" because the Bank never had an interest in Rig 24, he was aware that Winters had recorded a UCC-3 termination in Indiana but had as yet provided only a "working copy" of the termination statement for Illinois. In other words, Winters had provided Respondent, once more, with UCC terminations that he has testified that he knew did not relate to Rig 24, and that he had reason to know, and should have known, related to Rig 23. Someone with Respondent's knowledge and in Respondent's position exercising a modicum of care could have interceded at that point before the Illinois termination was recorded, thus possibly salvaging the situation to at least some degree. But despite recognizing that Winters was somehow filing genuine UCC-3 termination statements in connection with a fictitious Rig 24 security interest for which there should have been no genuine UCC-3 termination

[348] Bonan Tr. 905:3-906:15 (emphases added).

statements to file, Respondent again did nothing, and the forms terminating the Bank's Illinois and Indiana interest in Rig 23 were filed and recorded on November 13, 2015.[349]

Respondent's Conflicting Positions

As the exchange quoted above demonstrates, Respondent's testimony regarding what he knew and believed over the course of the Rig 24 transaction is variable and not always internally consistent. For much of his testimony, Respondent maintained that he was aware that there was no interest in Rig 24 that could be released by the Bank but still ordered his Bank subordinates to release Rig 24, a stance that is less than coherent on its own terms. Largely on redirect examination from his counsel, Respondent then changed his story, claiming that he had believed that the Bank had a blanket lien on Evergreen Drilling that was in junior position to PNB and "that should have never been filed"—which not only does not comport with his earlier testimony but is also contradicted by what Respondent was told repeatedly at the time.[350]

A few examples of the shifting sands of Respondent's story should suffice. To begin with, Respondent emphasized at multiple points of the hearing that he knew that the Bank did not have any lien on Rig 24 that was capable of being released.[351] At the same time, Respondent directed Gaskins from the beginning of the transaction to "get these releases to Gary,"[352] and he testified that when Winters sent him, on October 16, 2015, what she represented to be "a copy of the original

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[349] *See* EX 234 (November 13, 2015 email to K. Winters attaching acknowledgment of terminations).

[350] Bonan Tr. 944:8-9; *see* EPF ¶ 334 ("Bonan II claims he believed the Bank had a blanket lien on Rig 24 based on conversations with US Energy. . . . However, Bonan II was told by both Gaskins on October 9, 2015 and by Winters on November 12, 2015 that the Bank only had a PMSI on the Cabot 900.").

[351] *See*, *e.g.*, Bonan Tr. 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."), 855:4-8 ("Q: And what did you take it to mean when [Riecken] says even though there is no collateral for Rig 24, he still wants a recorded UCC-1? What is she talking about? A: That Grand Rivers Bank did not have Rig 24 as collateral for any loan.").

[352] EX 124 (October 9, 2015 email chain including email from F. Bonan II to G. Gaskins).

UCC-3 that will be filed online to terminate our UCC with Evergreen Drilling,"[353] that Winters had attached "a release on Rig 24."[354]

> Q: So although you don't know what's being terminated, you know Ms. Winters has just sent you an unrecorded termination of a Financing Statement of collateral of Grand Rivers Community Bank pertaining to Evergreen Drilling. Is that correct?
>
> A: Yeah, I assumed it was a release on Rig 24.
>
> Q: You assumed it was a release on Rig 24?
>
> A: I never looked at this attachment until I just looked at it in front of you.[355]

Likewise, Respondent stated that when he commanded Gaskins and Winters to "[g]et this bulkshit done" on the morning of November 13, 2015, he was telling them "to release Rig 24."[356] These two positions—that Respondent knew the Bank did not have any kind of interest in Rig 24 yet still believed that the Bank could file something releasing Rig 24—are fundamentally incompatible.

Perhaps recognizing this, Respondent also testified, primarily but not exclusively on redirect, that it was his contemporaneous understanding that the Bank had a junior blanket lien on Evergreen Drilling assets that, for whatever reason, it should not have had—and this was what was being released. Respondent explained it as follows:

> So we were being told – or I was being told that Grand Rivers Bank had a second UCC by the buyer. And so . . . I understood at the time that we had, that there was a junior or there was a second position on a UCC that Grand Rivers Bank had but that should have never been filed. And . . . there was never any, Rig 24 was never supposed to be collateral for any loan or debt at Grand Rivers Community Bank.[357]

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[353] EX 142 (October 16, 2015 email from K. Winters to F. Bonan II entitled "Evergreen UCC Termination").

[354] Bonan Tr. 880:20-21.

[355] *Id.* at 880:12-25.

[356] *Id.* at 855:18-19; *see* EX 233 (email chain including November 13, 2015 email from F. Bonan II to G. Gaskins and K. Winters).

[357] Bonan Tr. 944:4-11; *see id.* at 944:18-20 ("I believed what was being released then was a general subordinated UCC – or subordinate, not subordinated – subordinate UCC that had no value.").

Thus, when Denny Boyer emailed on November 13, 2015 that the transaction would be finished "[i]f we can get Grand Rivers Bank's UCC released,"[358] it is Respondent's contention that he believed the UCC release that Boyer referred to was "[t]he junior one on Rig 24."[359]

There are several holes in this logic, and the undersigned does not find Respondent's testimony credible. For one, Respondent has acknowledged that he was told by both Gaskins and Winters before any release was filed that the Bank did not possess any kind of blanket lien related to Evergreen.[360] In addition, if there *had* been a blanket lien, then Respondent should have understood that the right approach to releasing the Bank's interest in Rig 24 would not have been a UCC-3 termination statement of the kind that Winters provided, but a UCC-1 financing statement amendment removing the rig from the collateral covered under the blanket lien, exactly as PNB was doing at the time.[361] Finally, if Boyer was telling Respondent that a subordinate lien existed that Respondent knew "was never approved in any of the write-ups,"[362] it is implausible that Respondent would have simply taken Boyer's word for it rather than pursuing the matter or, at the very least, opening an email attachment from Winters to examine the UCC termination statement that she was proposing to file—particularly when Respondent knew that the Bank *did* have a PMSI on a different rig that was the sole collateral for its Evergreen Drilling loan.

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[358] EX 233 (email chain including November 13, 2015 email from D. Boyer to A. Riecken, F. Bonan II, et al.).

[359] Bonan Tr. 854:9-11.

[360] *See id.* at 872:23-873:1 (agreeing that Gaskins told him on October 9, 2015 "that the Bank, Grand Rivers, did not have a blanket lien on any rig"), 896:12-16 (agreeing that Winters told him on November 12, 2015 "that the only [Evergreen Drilling] collateral, the only UCC the Bank had was on a Cabot 900 with a Purchase Money Security Interest").

[361] *See* EX 129 (email chain including October 10, 2015 email from C. Zimmerman to F. Bonan II) ("I will need to get a specific list with the appendix A and release the specific collateral associated with the rig since we don't want to release the blanket"); EX 134 (October 14, 2015 email from C. Zimmerman to S. Collins and F. Bonan II attaching UCC Financing Statement Amendment and Appendix A).

[362] *See* Bonan Tr. 850:3-8 ("Q: You shouldn't have had, even had a backup second lien in place on Rig 24? A: That's right. Q: Why not? A: Because that was never approved in any of the write-ups. We had just simply that PMSI as our collateral which was Rig 23.").

In their post-hearing briefing, Respondent's counsel persistently characterizes the release of the Rig 23 collateral as "a comedy of errors" or "[a] series of mistakes" by individuals other than Respondent, stemming primarily from the erroneous inclusion of the Bank's Rig 23 security interest in Exhibit C of the sale agreement for Rig 24.[363] They assert without evidence that the "opaque" reference to Rig 23 in Exhibit C was "[u]nbeknownst to anyone at the time," as if the filing number was a series of random digits that appeared from nowhere and just happened to correspond with the Bank's recorded PMSI.[364] And they state that "[t]he release of Grand Rivers' security interest in Rig 23 was not part of a secret plan by [Respondent], nor would any such plan make sense given that [Respondent] was a shareholder of Grand Rivers and would have had no reason to cause a Grand Rivers loan to become unsecured."[365]

Whether or not Rig 23 was referenced in Exhibit C out of error, however, and regardless of the responsibility borne by Gaskins and Winters when acting as they did with the information they had, two things are clear: First, it cannot be denied that the Bank's PMSI in Rig 23 was an inconvenience and potential impediment to Evergreen's efforts to sell that rig—its most valuable—and further pay down its debt with PNB following the sale of Rig 24.[366] Second, despite the confusion engendered by Abbey Evans's failure to provide the Bank with Appendix A or any

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[363] *See* R Br. at 1 ("a comedy of errors that started with the erroneous reference in the Rig 24 purchase agreement to Grand Rivers' UCC filing for Rig 23 and ended with Winters and Gaskins assuming that the UCC termination statements they prepared and filed pertained to Rig 24"); 8 ("[a] series of mistakes"), 11 (inclusion of Rig 23 filing number "was clearly a mistake by whoever prepared Exhibit C to the Agreement"); R Reply at 1 ("the comedy of errors that caused Rig 23's release"), 24 ("a one-time mistake").

[364] R Br. at 9.

[365] *Id.* at 2.

[366] *See* EX 180 (October 27, 2015 email from F. Bonan II to C. Zimmerman, S. Collins, F. Bonan Sr., and H. Bonan) ("Kabat 900. Worth in this market. $2,600,000. They are aggressively trying to sale now. Feel this will happen by end of year. . . . They are actively trying to sale the Kabat 900. They have a goal by the end of the year to sale. Worst case. Dump it would be a price of 2,200,000. This would [lower] debt to almost $4,000,000."); *see also*, *e.g.*, JX 1 (Joint Stip.) ¶ 46 (noting that $160,000 of the Rig 24 proceeds would go "to Evergreen Drilling to cover the costs of moving Rig 23 from Texas to the Carmi Warehouse and preparing it for sale").

other documentation identifying the rig being sold as a Service King 775,[367] there can be no doubt that Respondent—by his own admission, and as reflected by the record evidence—understood which rig was being sold and knew that the Bank should not have had any security interest in that rig, blanket or otherwise, that should have been necessary to release.[368] Respondent was also involved in the transaction for both the Bank and PNB, in addition to being personally close to Abbey Evans, a multi-faceted vantage point that should and would have afforded him a perspective that his subordinates did not necessarily have.[369] Thus, while the release of the Rig 23 collateral may ultimately have been an avoidable mistake on the part of Kassie Winters (albeit one made under pressure and at Respondent's direction), the undersigned finds that reasonably prudent oversight by Respondent at any point between mid-October to mid-November 2015 would have significantly lessened the chances of that mistake occurring.[370]

The Release is Discovered and the Loan Charged Off

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.[371] Winters testified that Mike Williams discovered that the loan was unsecured during

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[367] *See* EX 126 (email chain including October 9, 2015 email from A. Evans to S. Collins forwarding email entitled "Signed Purchase & Sale - Exhibit C - Bill of sale Combined"); EX 127 (signed copy of Rig Purchase Agreement including Exhibit C but not Appendix A); *see also* EX 88 (October 7, 2015 email chain between G. Gaskins and K. Winters) (Gaskins: "Can you check to see if we have Rig 24 as current collateral?" Winters: "[The UCC] doesn't list a rig number it says Cabot 900 series self-propelled drilling rig. . . . They only have the one loan with us and it has a balance of 557,024.05"); Winters Tr. 159:5-8 ("I wasn't sure what Rig 24 was at any point. I just knew what the UCC number that they had listed in the purchase agreement, was the UCC I had in file.").

[368] It should also be noted that Respondent, unlike Winters or Gaskins, *did* have a copy of Appendix A at his disposal and could have provided it to his Bank subordinates for the avoidance of all doubt. *See* EX 45 (September 15, 2015 email from A. Evans to F. Bonan II, S. Collins, and K. Botsch) (attaching Letter of Intent between Evergreen Drilling and U.S. Energy as well as Appendix A).

[369] *See* Hefner Tr. 526:8-18 (opining that Respondent "was on both sides of this transaction and that there was definitely information in those emails that showed the difference between the two rigs. . . . He should have known that there was a difference and that Rig 23 that the Bank had as collateral was not the rig being sold and therefore the release should not have been made.").

[370] *See also* Part VI(B) *infra*.

[371] *See* EPF ¶ 331; Answer ¶ 115.

the joint examination in early 2016, when he "pulled an updated UCC search" for Evergreen and "realized that the UCC had been released for this loan."[372] Winters stated that when Williams inquired, she told him that she had released it "[b]ecause [Respondent] told me to."[373] Winters then attended a meeting with Respondent, Stringer, Williams, and other bank personnel in which she confessed that she had accidentally released the Bank's Rig 23 interest.

According to Stringer and Winters, Respondent was uncharacteristically calm upon learning that Winters had caused the Evergreen Drilling loan to become unsecured.[374] Respondent then suggested that, to address the situation, the Bank could "reach out to Scott Collins at Peoples and request a new UCC-1 filing that would be a blanket behind [PNB's] existing UCC."[375] Consistent with this suggestion, the Bank ultimately obtained a new blanket lien for the Evergreen Drilling loan in March 2016 that was subordinate to the blanket lien already held by PNB.[376] Thus, seven months after Collins had represented to Williams and Nave without any evidence that the Bank's interest in Rig 23 was not a valid PMSI and should be in second lien position behind PNB,[377] that scenario came to pass as reality.

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[372] Winters Tr. 134:10-14.

[373] *Id.* at 134:16-18.

[374] *See* Stringer Tr. 107:19-20 (stating that she "was taken back by Mr. Bonan's lack of reaction"); Winters Tr. 135:22-136:6 (recalling that Respondent's "[e]xtremely calm" reaction surprised her "[b]ecause normally when something like that happens, by direct or mistake, he didn't react well to situations where things went wrong. So he didn't seem concerned about the situation at hand."); *see also* Bonan Tr. 857:13-16 (asserting that he was calm because "we had examiners in the bank[,] [w]e had the FDIC making other accusations that were not true against me, so that was not the biggest issue that I had at the time.").

[375] Winters Tr. 136:13-15; *see also* Stringer Tr. 107:21-25 ("Q: And did Mr. Bonan give directions to anybody after hearing this information? A: To take a blanket lien on Evergreen and Gary Evans, get Gary to sign the document to make sure that [the Bank was] in second position only behind Peoples National Bank.").

[376] *See* EX 335 (email chain including March 28, 2016 email from K. Winters to A. Evans stating that "the Bank is "taking a second lien position behind Peoples National Bank on their UCC"); *see also* EXs 331, 334 (documentation of new blanket lien); EX 336 (April 12, 2016 email from K. Winters to Bank board) ("I am requesting ratification of a recent Change in Terms that was prepared for Evergreen Drilling, LLC. . . . The new security agreement reflects a Blanket UCC1 that was filed on 3/25/2016. This allowed us to obtain additional collateral for this loan and take a 2nd place behind PNB's first blanket lien.").

[377] *See* Nave Tr. 188:12-13 ("Scott [Collins] called me and told me that we were not in a first lien position [on Rig 23] and I contended that we were.").

On June 6, 2016, following Respondent's resignation, Keith Botsch related the request of Gary Evans to Stringer, Williams, and Clark—the new Bank board—for the Evergreen Drilling loan to be put on interest-only status.[378] The Bank ultimately charged off that loan in the amount of $489,268 in early January 2017.[379]

VI. Analysis

Having made its factual findings, this Tribunal now addresses the questions of law relevant to whether, and to what extent, Enforcement Counsel has shown by a preponderance of the evidence that Respondent has engaged in actionable misconduct, triggered some applicable effect, and demonstrated a requisitely culpable state of mind sufficient for the imposition of a prohibition order under 12 U.S.C. § 1818(e) and the assessment of a $105,000 second-tier civil money penalty under 12 U.S.C. § 1818(i). The undersigned also considers the appropriateness of this civil money penalty amount in light of the mitigating factors set forth in 12 U.S.C. § 1818(i)(2)(G).

A. The 618 Holdings Loan

Enforcement Counsel argues that Respondent's role in conceiving of, structuring, and effectuating the 618 Holdings loan constituted a breach of his fiduciary duties and an engagement in actionably unsafe or unsound banking practices that caused loss to the Bank and was undertaken with personal dishonesty and continuing and willful disregard for the Bank's safety and soundness.[380] For the reasons discussed below, the undersigned agrees that Enforcement Counsel has demonstrated the requisite elements of misconduct, effect, and culpability in connection with Respondent's conduct regarding the 618 Holdings loan.

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[378] *See* EX 339 (June 6, 2016 email chain principally between K. Botsch and W. Stringer, M. Williams, and B. Clark); EPF ¶ 346.

[379] *See* EPF ¶ 347; Stringer Tr. 111:14-24; Clark Tr. 736:25-737:6.

[380] *See* EC Br. at 24-38 (misconduct), 39-40 (effect), 40-45 (culpability).

1. Misconduct

Respondent makes three principal arguments as to why his actions in connection with the 618 Holdings loan did not constitute actionable misconduct, either as a breach of his fiduciary duty to the Bank or as unsafe or unsound banking practices. First, Respondent argues that engineering the loan to 618 Holdings was effectively the best of two bad options, as the alternative (he says) would have been to let Evergreen fail.[381] Second, Respondent contends that the 618 Holdings loan benefited the Bank because 618 Holdings, and Harbison and Tate, "were a better credit risk" than the Evergreen Entities.[382] Third, Respondent claims that the creditworthiness of Tate and Harbison is in some sense beside the point, because the 618 Holdings loan was prudently structured to ensure that it would be paid from the lease reserve for the first eighteen months, after which time either Evergreen would have the capacity and cash flow to make its rent payments itself (in which case 618 Holdings could simply apply those monthly payments to its loan) or 618 Holdings could sell the Carmi Warehouse, whether to Evergreen or another purchaser, and pay back its loan with the proceeds.[383] These and Respondent's other misconduct-based arguments are considered below.

Respondent Presents the Bank's Options as a False Binary

The most common refrain in Respondent's briefing and from his counsel during the hearing is the notion that the Bank was faced with a stark choice in late December 2015 between lending $1.25 million to Adam Tate and Jason Harbison or watching as Evergreen went out of business.

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[381] *See*, *e.g.*, R Br. at 44 (arguing that "Grand Rivers was not in a position to be picky when it came to mitigating its risk of loss on the Evergreen loans. It had to pick one of two options, neither of which was perfect."); *see also id.* at 38 (stating that "[w]hen faced with two choices, the prudent banker is going to pick the choice that is better for the Bank compared to the alternative") (internal quotation marks and citation omitted).

[382] *See*, *e.g.*, *id.* at 18 n.3 ("Although 618 Holdings was a better credit bet than Evergreen Drilling, 618 Holdings didn't have the financial resources to make a down payment on the loan."), 42 ("[A]lthough Tate and Harbison were far from the perfect borrowers, they were a better credit risk compared to Evergreen.").

[383] *See*, *e.g.*, *id.* at 40 ("The goal was to put Evergreen in a position where they could ride out the storm. . . . [D]uring the 18-month period of time, either hopefully the oil industry turns around and Evergreen gets back on its feet and everybody's happy and maybe they buy the property back," or else "if a year in nothing's turning around Harbison and Tate can always sell the property.").

As Respondent tells it, the 618 Holdings loan was "the only viable alternative" to "letting the Evergreen Entities default on their loans at Grand Rivers."[384] He goes on to describe the Bank's "two options" during that period:

> Option A involved letting Evergreen Drilling default and go out of business. Option B involved keeping Evergreen Drilling in business at least through the next election cycle, when everyone believed oil and gas prices would rebound and when everyone hoped that the Evergreen entities would be able to purchase the headquarters back from 618 Holdings.[385]

In truth, of course, the Bank's options at this time were not nearly so binary. Indeed, one can accept Respondent's framing yet not conclude that the aim of Option B—keeping Evergreen in business—necessitated a $1.25 million loan to a newly formed entity owned by two of Respondent's employees with no real assets of their own and no independent ability to pay the money back. Even if some transaction or concession was necessary to keep Evergreen afloat during the industry downturn, there is no reason why the 618 Holdings loan specifically was "the only viable alternative." As we have seen, Respondent had obtained financing from Carrollton Bank and was on the verge of purchasing the Carmi Warehouse himself through FWBII Holdings before backing out at the final stage for reasons that he has not credibly articulated.[386] Had it occurred, this transaction—call it Option C—would have allowed Evergreen to stay in business just as well as the loan to 618 Holdings was supposed to do, and benefit PNB and the Bank in the bargain.[387] By his own admission, too, Respondent had just made $2.4 million in profit on "the Clayton

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[384] *Id.* at 27; *see also*, *e.g.*, R Reply at 16 (asserting that Enforcement Counsel expert Floersch "would not even analyze whether *the alternative to the 618 Holdings loan (defaulting the Evergreen Entities)* would have been worse for Grand Rivers") (emphasis added).

[385] R Br. at 2-3.

[386] *See* Part V(F) *supra* at pp. 27-31.

[387] *See* Bonan Tr. 911:12-16 (referring to the $150,000 in collateral in the Carrollton Bank deal as "prepaid rent"), 912:17-913:2 (agreeing that the deal would have paid off the existing mortgages at Grand Rivers and PNB and "would have been beneficial to both banks").

building sale" in the fall of 2015—whatever else may be said *infra* regarding the relative creditworthiness of Evergreen and 618 Holdings, it seems surpassingly likely that Respondent was a better credit risk than either.[388] Yet Option C is missing from Respondent's calculus.

Setting Respondent himself aside, what about other borrowers? As Respondent's counsel highlights in their post-hearing brief, Respondent testified at the hearing that "very, very recent to [the 618 Holdings loan]," Evergreen had received an offer from a different energy company to buy the Carmi Warehouse for $1.5 or $1.6 million.[389] Given Respondent's apparent belief that the warehouse "had a lot of value" and would be easy for Tate and Harbison to sell, if necessary, in eighteen months,[390] there is no reason why the Bank could not have made some genuine attempt to find a willing and creditworthy borrower for such a purchase—one that would be willing to lease the property back to Evergreen—in late December 2015 once Respondent decided not to proceed with the Carrollton Bank transaction.[391] Let us call this Option D.

What else? Respondent's brief also highlights the possibility of restructuring the debt of a troubled borrower to "try to help the borrower stay in business."[392] Grady Gaskins agreed during his testimony that "[w]hat you want is . . . to come up with a restructuring plan that will allow the borrower to succeed financially so that they, in turn, can go ahead and fully perform on the loan

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[388] EX 205 (email chain including November 2, 2015 email from F. Bonan II to C. Dickey) at 3 ("I don't know if anyone has told you but I have had a hell of a year this year. My part that came to me after debt on the Clayton building sale was 2.4 million."); *see also* EX 215 (email chain including November 11, 2015 email from F. Bonan II to C. Dickey) (stating that "[m]aking those first 24 months in payments will not be any problem at all for me").

[389] Bonan Tr. 796:14-20.

[390] *Id.* at 796:9-13 ("It was a well-known piece of property in Carmi. It's on a major highway. It's in a fantastic location. I have driven by this property all my life, so I knew it very well. I was very comfortable; I really thought it had a lot of value, you know.").

[391] Respondent also knew that Botsch and Campbell—both veterans of the oil and gas industry—had shown interest in purchasing the property earlier that fall, *see id.* at 813:5-15, and yet there is no indication that Respondent considered them, or anyone other than Harbison and Tate, as prospective candidates to approach about the transaction.

[392] R Br. at 38 (quoting Bonan Tr. 791:4-11); *see also id.* at 37-38.

from the bank."[393] It is thus fair to say that the 618 Holdings loan essentially functioned as an informal restructure of Evergreen's troubled debt.[394] But there are more formal methods of troubled debt restructuring or prudent commercial real estate loan workouts that are the subject of guidance by federal financial regulators that the Bank could have availed itself of rather than loaning $1.25 million to 618 Holdings, and these can, collectively, be Option E.[395]

There were at least five options for the Bank, then, rather than two:

- Option A: Let Evergreen fail.
- Option B: Finance the sale of the Carmi Warehouse to an uncreditworthy borrower that has no independent ability to generate cash flow and must rely on a built-in lease payment reserve for its monthly loan payments; the Bank trades in its $638,000 second lien position for a $1.25 million first position.
- Option C: Respondent finalizes his paperwork and purchases the Carmi Warehouse himself, financed through Carrollton Bank; the Bank is not involved other than having its Evergreen Properties loan paid off.
- Option D: Finance the sale of the warehouse to a different, creditworthy borrower; there is no indication that Evergreen, Respondent, or the Bank ever explored this option at all.
- Option E: Formally treat the Evergreen loans as restructured troubled debt and do a workout in accordance with prudent loan practices.

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[393] Gaskins Tr. 148:10-13; *see* R Br. at 37.

[394] *See infra* at pp. 90-94.

[395] *See* EX 1 (FDIC Policy Statement on Prudent Commercial Real Estate Loan Workouts); EX 386 (Interagency Supervisory Guidance on Troubled Debt Restructuring); *see also* EX 369R (Cash Report) ¶ 15; Cash Tr. 572:19-573:4, 581:3-18, 591:12-22, 593:15-594:3.

According to Respondent's expert Gary Schwartz, the sale-leaseback transaction between Evergreen and 618 Holdings is "one tool a lender can use in a loan workout scenario as a means of freeing up equity and generating liquidity,"[396] and Respondent asserts that this is "precisely what [he] tried to accomplish with the 618 Holdings loan."[397] Schwartz goes on, however, to state that while "[t]his restructure was an attempt to provide a problem borrower with additional cash flow and reduce its debt through the sale-leaseback transaction," such transactions are only "***one of the many options available to a bank and the borrower in these types of workout situations***."[398] Likewise here, there is no reason why the Bank "had to pick one of two options, neither of which was perfect,"[399] and it was only Respondent's decision not to pursue the transaction himself and to instead present Harbison and Tate as the only lending options that placed the Bank in a false dilemma and effectively offloaded risk from himself to the Bank.[400] Respondent cannot frame the situation as a choice between keeping your valuables in a burning building (Evergreen) or moving them to the poorly constructed, tinder-filled building next door (618 Holdings) if there are places they can be moved to that are safer than both.

Harbison and Tate Were Not Creditworthy Borrowers

Another of Respondent's frequent assertions is that the 618 Holdings loan was prudent because 618 Holdings—and Tate and Harbison as individuals—were "a stronger credit bet compared to Evergreen."[401] Even notwithstanding Respondent's seemingly belated recognition

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[396] RX 11R (Expert Report of Gary Schwartz) ("Schwartz Report") at 6.

[397] R Br. at 37.

[398] RX 11R (Schwartz Report) at 7 (emphasis added).

[399] R Br. at 44.

[400] Recall also that Respondent had previously expressed reluctance at making an interest-only concession to Evergreen on its loans at PNB, out of concern that doing so would "for sure be a trouble debt restructure" and would cause the loans to be classified as "substandard." EX 19 (email chain including January 28, 2015 email from F. Bonan II to K. Botsch).

[401] R Br. at 39; *see also*, *e.g.*, *id.* at 3, 5, 18 n.3, 25-26, 37, 38, 42; R Reply at 12.

that Harbison was "a person with horrible credit," however, this assertion does not withstand the barest scrutiny.[402] Most fundamentally, it is unclear how 618 Holdings could be a better credit risk than Evergreen when 618 Holdings was "fully reliant on Evergreen's operations to fund the lease obligations which then fund[] repayment of the Bank."[403] 618 Holdings simply did not have an independent source of cash flow other than Evergreen, and Respondent never adequately addresses this point.[404] Evergreen, by contrast, was an established business with assets, led by someone who, as Respondent put it, "had the history . . . [and] the knowledge . . . [and] had been in the oil and gas business for 40 years."[405] While Evergreen's creditworthiness and cash flow was projected to improve with improved market conditions,[406] the same was not true for 618 Holdings, which had demonstrated no capacity to make the $7,753 monthly payments, either at the time of the loan or in the future, save being used as a vehicle for the Bank to pay itself via the lease reserve.

As for Harbison and Tate individually, the undersigned credits the testimony of Enforcement Counsel's hybrid fact-expert witness Mathias Floersch that he "very seldom" sees guarantors with a negative net worth, since those guarantors would not "provide much support to

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[402] Bonan Tr. 832:3.

[403] Cash Tr. 598:15-16. While Respondent's counsel attempted to make hay at the hearing from the fact that FDIC examiner Floersch's write-up for the 618 Holdings loan did not compare the relative creditworthiness of 618 Holdings and Evergreen, *see* Floersch at 475:15-477:10, such a comparison is in a sense immaterial: any factors that made Evergreen a bad credit risk also made it a poor idea to premise the creditworthiness of 618 Holdings solely on the ability of Evergreen to make its lease payments. Likewise, Jake Campbell's testimony that knowledge of Evergreen's ailing business "would make Tate and Harbison an even more likely choice," Campbell Tr. 414:12-415:1, is illogical at its heart, given that the future performance of the 618 Holdings loan was intrinsically dependent on the strength of Evergreen's financial condition.

[404] Respondent contends in his reply that "the loan to 618 Holdings allowed the entity to purchase the Carmi Warehouse, giving it the capacity to generate revenue," R Reply at 5, but this argument is circular at best. Moreover, Respondent's blithe statement that "if Evergreen was not making the lease payments to 618 Holdings as agreed[,] . . . Tate and Harbison could have sought other lessees or devised other uses for the property that would have generated revenue," *id.* at 5-6, in addition to being baldly speculative, merely underscores the lack of any documentation of future cash flow analyses in the 618 Holdings loan paperwork. *See infra* at pp. 88-89, 91-92.

[405] Bonan Tr. 791:13-19.

[406] *See* Botsch Tr. 299:19-300:4 (affirming that Gary Evans "had ridden waves, ups and downs before" in his decades in the oil and gas industry, and agreeing that the only thing keeping Evergreen from financial success was that "they were beholden to the falling price of oil").

repayment of the debt," and that loans backed by such guarantors would usually result in a "substandard or worse classification."[407] Not even Harbison believed that he should have been given the 618 Holdings loan or that he and Tate had any personal ability to afford the monthly payments.[408] FDIC examiners and officials at PNB both questioned Harbison's ability to pay back even a $50,000 unsecured loan.[409] In short, and as previously detailed at Part V(G) at pp. 38-42, then, Harbison and Tate were in no way qualified for the $1.25 million 618 Holdings loan, and Respondent knew or should have known that at the time.

The 618 Loan Structure was Imprudent and Foreseeably Risky

The final recurring theme in Respondent's briefing on the 618 Holdings issue is that the 618 Holdings loan terms (as devised and championed by Respondent) were prudently structured to accomplish the goal of helping Evergreen regain its footing while protecting Grand Rivers from additional risk that might arise from the transaction.[410] The undersigned concludes that this is wrong on multiple fronts.

It is important, first, to note that the conclusions of examiners on "matters pertaining to their special expertise,"[411] including the extent to which "a particular practice poses a safety and soundness concern" or constitutes the breach of a fiduciary duty owed to a financial institution, are generally entitled to significant deference before this Tribunal.[412] One such type of conclusion

[407] Floersch Tr. 454:5-13.

[408] *See* Harbison Tr. 20:25-21:5, 33:12-23.

[409] *See* Floersch Tr. 444:4-8 (noting that the unsecured $50,000 loan to Harbison raised concerns on its own because "[h]e showed $190,000 negative net worth. He showed limited income. It's not typical that a borrower [like] that would be lent funds in an unsecured relationship."); EX 337 (materials including April 15, 2016 memorandum entitled "Loan Summaries" from T. Visintine and K. Gansauer to F. Bonan Sr.) at 7 (finding that Harbison did not "reasonably qualify for unsecured credit" on $50,000 loan).

[410] *See*, *e.g.*, R Br. at 3 ("[Respondent] simply did what every prudent banker should—he made efforts to improve a struggling borrower's cash flow issues and ability to pay back loans to the bank."), 40 ("[T]he structure of the loan gave Evergreen 18 months to get back on its feet.").

[411] *In the Matter of Pinchus D. Raice*, No. 14-119k, 2017 WL 2118816, at *6 (Mar. 21, 2017) (FDIC final decision).

[412] *In the Matter of Steven J. Ellsworth*, Nos. AA-EC-11-41 & -42, 2016 WL 11597958, at *13-14 (Mar. 23, 2016) (OCC final decision); *see In the Matter of Bank of Louisiana*, No. 17-0086k, 2019 WL 5823884, at *7 (May 28,

is whether a bank officer has acted prudently or whether a given action is contrary to generally accepted standards of prudent banking operation.[413] Therefore, examiner opinions on the prudency of the terms and structure of the 618 Holdings loan shall be entitled to deference "unless shown to be arbitrary and capricious or outside a 'zone of reasonableness.'"[414]

Respondent argues as a blanket matter that the conclusions offered by FDIC examiners in this case should be disregarded as arbitrary, capricious, and unreasonable because they assertedly "make no logical sense and indicate serious misunderstanding of the transactions at issue."[415] The undersigned finds that the examiners' conclusions are reasonable and that Respondent's objections are without merit. Further, it is unnecessary to address Respondent's characterizations of examiner testimony on a point-by-point basis—the undersigned comfortably concludes that Respondent's actions were unsafe or unsound and constituted breaches of his fiduciary duty to the Bank, for the reasons detailed in the sections below, with or without giving deference to the examiners' opinions.

2019) (FDIC final decision) ("Th[e] exercise of informed judgment on the part of commissioned examiners is entitled to deference, and should not be disregarded in the absence of compelling evidence that it is without rational basis.") (quoting *Sunshine State Bank v. FDIC*, 783 F.2d 1580, 1583 (11th Cir. 1986)); *cf. Brickner v. FDIC*, 747 F.2d 1198, 1202 (8th Cir. 1984) (concluding that federal banking agencies should be accorded "substantial discretion" in determining the scope of fiduciary duty under 12 U.S.C. § 1818, given the agencies' "extensive experience with the duties and responsibilities of bank officers and directors").

[413] *See infra* at Part VI(A)(1)(a) (breach of fiduciary duty), Part VI(A)(1)(b) (unsafe or unsound banking practices). In his reply brief, Respondent quotes examiner Cash as testifying on cross-examination that "saying a course of action that a prudent banker may or may not have taken is not within my scope." R Reply at 18 (quoting Cash Tr. 595:15-16). A plain reading of this testimony in context reveals that it was an overbroad statement made in response to a hypothetical question in which Respondent's counsel suggested that the only choices the Bank had were to make the 618 Holdings loan or let Evergreen go out of business and then directed examiner Cash to choose between those options. *See* Cash Tr. 594:25-595:3 ("Q: If the alternative to the 618 Holdings loan was the Evergreen Entities going out of business, do you believe a prudent banker would go forward with the 618 loan or let the Evergreen Entities go out of business?"). As noted above, those were not the only options. Examiner Cash's inartful response to this hypothetical does not negate the rest of his testimony and expert opinion detailing the ways in which the 618 Holdings loan was originated and structured imprudently based on his examiner experience, nor does it change the fact that "[t]he expression of expert judgment as to whether a given set of facts represents an unsafe or unsound practice is very much within the competence of [bank examiners]." *Patrick Adams*, 2014 WL 8735096, at *36.

[414] EC Reply at 6 (quoting *Sunshine State Bank*, 783 F.2d at 1584); *accord* R Reply at 15.

[415] R Reply at 16.

Suffice to say, however, that Respondent's objections are largely dressed-up legal argumentation rather than any evidence of examiner "misunderstanding."[416]

The undersigned will therefore give deference to the examiners' conclusions regarding the terms and structure of the 618 Holdings loan. Specifically, examiners Floersch and Cash noted a number of ways in which they believed the loan was imprudent and was substandard at the time that it was made:

<u>The loan file lacked any documentation of repayment ability.</u> The loan files for 618 Holdings and the Evergreen Entities—and, the undersigned notes, the 618 Holdings loan request—did not contain current financial information for those entities or a meaningful credit analysis supporting the repayment ability of 618 Holdings,[417] something that Respondent should have ensured before bringing the 618 Holdings loan to the Bank board and advocating for its approval. Floersch opined that Respondent's origination of the 618 Holdings loan "without determining the

[416] For example, Respondent complains that examiners Cash and Floersch characterized the 618 Holdings loan as "a troubled or restructured debt" even though it "was a new loan to a new borrower" and "the facts are clear that the Evergreen entities and 618 Holdings are distinct entities that are not related to each other." R Reply at 16, 17. To the extent that Respondent is claiming that the 618 Holdings loan was not a restructuring of Evergreen's debt or did not serve the purpose of a loan workout, he is contradicted by his own litigation position and his own expert. *See* RX 11R (Schwartz Report) at 6-7 ("Sale-leaseback scenarios are one tool a lender can use in a loan workout scenario as a means of freeing up equity and generating liquidity. . . . This restructure was an attempt to provide a problem borrower with additional cash flow and reduce its debt."); R Br. at 37 ("That's precisely what [Respondent] tried to accomplish with the 618 Holdings loan."). On the other hand, to the extent that he asserts that the 618 Holdings loan and purchase-leaseback transaction should not fall under the purview of the supervisory guidance on restructured troubled debt and prudent commercial real estate loan workouts referenced at the hearing and in Enforcement Counsel's briefs, this is quintessentially a matter on which the conclusions of bank examiners are entitled to deference. Finally, considering that the evidence is clear that Respondent exhorted Harbison and Tate to form 618 Holdings in order to alleviate the debt load on Evergreen and give that company an opportunity to withstand its financial troubles, it is disingenuous to claim that this was "a new loan to a new borrower" as if that makes a meaningful difference to whether Respondent acted prudently in directing the approval of that loan.

[417] *See* EX 368R (Floersch Report) ¶ 11; EX 369R (Cash Report) ¶ 9 ("As noted in the 2016 ROE, current income information for Evergreen was not in the Bank's loan files. . . . Evergreen's weakened capacity to generate cash flow from operations to fund Evergreen Properties' lease payment obligations to 618 Holdings raised the distinct possibility of payment default."); EX 314 (2016 ROE) at 55 (stating that the lack of financial information for Evergreen Properties left examiners "unable to determine if the company has the financial capacity to pay the lease payments to 618 Holdings"); EX 272 (December 18, 2015 email from K. Winters to Bank board members attaching loan request writeups) at 16 (618 Holdings loan request).

financial ability of the Evergreen Entities [] to support and make lease payments to 618 Holdings . . . was an imprudent banking practice that jeopardized the liquidation of the debt."[418]

The loan improperly increased the Bank's margin on the collateral. As structured, the 618 Holdings loan added $250,000 in additional debt to the Bank's collateral while also transferring the balance of PNB's $358,000 mortgage on that collateral from PNB to the Bank. Floersch opined that "[a]dding more debt to the Bank's collateral reduced the realizable value sufficient to discharge the debt," thereby improperly marginalizing the Bank's collateral position.[419]

The lease reserve structure hid the borrowers' inability to repay. Cash and Floersch both stated that the 18-month lease reserve being applied to the 618 Holdings loan payments improperly masked the borrower's repayment capacity and prevented examiners from having an accurate picture of the risk of delinquency or default.[420] Floersch opined that "[t]he use of a lease reserve account, as structured by [Respondent], to pay the principal and interest monthly loan payments for 618 Holdings . . . was an imprudent and improper banking practice."[421]

In response to the examiners' opinions, Respondent offered an analogy as to why the lease reserve structure was appropriate and did not skew the borrower's payment history:

> If ***any borrower***, without the bank's knowledge, opened a savings account and decided to specifically set aside the funds in the account to make automatic monthly payments on a loan, the loan would be performing as planned with no allegations that such an account improperly 'skews' the payment history. The lease payment reserve

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[418] EX 368R (Floersch Report) ¶ 11; *see* EX 369R (Cash Report) ¶ 9 ("To appropriately assess 618 Holdings' credit risk to the Bank, the financial capacity of Evergreen, the primary repayment source for the 618 Holdings loan[,] had to also be assessed.").

[419] EX 368R (Floersch Report) ¶ 8.

[420] *See id.* ¶ 6 ("[U]sing this improper structure would skew or distort for 18 months any possible warning signs of potential credit losses involving the Bank's loan to 618 Holdings that would otherwise appear in the Bank's delinquent loan report."); EX 369R (Cash Report) ¶ 10 (stating that the lease reserve structure operated to "keep the loan's payment status artificially 'current'").

[421] EX 368R (Floersch Report) ¶ 7; *see also* EX 369R (Cash Report) ¶ 10 ("[T]he Bank's loan to 618 Holdings was inappropriately structured by the use of loan proceeds from the Bank's loan to 618 Holdings to fund the $150,000 lease escrow account which was to be used to fund principal and interest payments on the loan for 18 months.").

> was money that would otherwise have gone to Evergreen Properties, yet it was specifically held back in a Grand Rivers account to guarantee that the lease payments would be made.[422]

This analogy misses the point. The examiners opined, and the undersigned agrees, that the concern with the lease reserve account is that it acts to obscure the repayment ability of the borrower, 618 Holdings, once the 18-month period of escrowed payments comes to an end. There is no question of the *borrower* putting money aside for future loan payments—the money that is paying the monthly lease payment and being funneled to pay the 618 Holdings loan originates either from Grand Rivers or from Evergreen. It is not coming in any meaningful sense from 618 Holdings' own coffers, because those coffers are and have been empty. But the regular payments from the lease reserve being applied to principal and interest for the borrower contrives to give the impression, in the Bank's loan reports, that the borrower has been paying and will be able to continue to pay after the 18-month reserve period is over, which was not at all the case.

<u>The loan restructured troubled debt but failed to conform to prudent workout practices.</u> The purpose of the 618 Holdings loan, by Respondent's own admission, was "to structure the transaction so that the Bank would be protected for the first 18 months of the loan, during which time either Evergreen would become financially stable or the Carmi Property could be sold without a loss."[423] Respondent's expert himself stated that "***[t]his restructure*** was an attempt to provide a problem borrower with additional cash flow and reduce its debt."[424] Grady Gaskins likewise testified that the 618 Holdings loan amounted to "a restructuring plan that will allow [Evergreen] to succeed financially so that they, in turn, can go ahead and fully perform on the loan from the

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[422] R Br. at 43 (emphasis added).

[423] EX 369R (Cash Report) ¶ 12 (quoting (rejected) RX 149 (Opinion Testimony of Frank William Bonan II) at 5-6); *see also* Cash Tr. 597:4-598:2 (stating that this statement is consistent with what he was told by Gaskins during the 2016 examination); R Br. at 40 ("The goal was to put Evergreen in a position where they could ride out the storm at least until the 2016 elections, which is when Grand Rivers believed the oil market would rebound.").

[424] RX 11R (Schwartz Report) at 6 (emphasis added).

bank."[425] And Respondent has argued in his briefing that in effectuating the 618 Holdings loan, he "simply did what every prudent banker should—he made efforts to improve a struggling borrower's cash flow issues and ability to pay back loans to the bank."[426] In other words, the 618 Holdings loan was about Evergreen, and 618 Holdings was incidental.

Because the loan's purpose was to assist a troubled borrower, Cash opined that both the 618 Holdings loan and the Evergreen loans should have been treated as restructured troubled debt in accordance with prudent loan workout practices.[427] Loan workouts and troubled debt restructures are subject to specific regulatory guidance, reporting requirements, and risk management principles that have specific consequences for the bank and the borrower, which Cash opined should have been, but were not, followed here.[428] Among other things, Cash noted that, under Respondent's direction, Grand Rivers "did not have any management infrastructure to identify, control and manage the complexity of the workout involving 618 Holdings and Evergreen,"[429] as it should have done, and that there were no "basic analyses of repayment capacity" as required by troubled debt restructure supervisory guidance:

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[425] Gaskins Tr. 148:10-13; *see* Cash Tr. 580:24-581:2 (recalling that Gaskins told examiners that the 618 Holdings loan was designed to "help [Evergreen] sell assets and pay down debt").

[426] R Br. at 3.

[427] *See* Cash Tr. 572:19-573:4, 580:15-581:2, 591:12-22; *see also* EX 369R (Cash Report) ¶ 13 ("If the structure of the loan to 618 Holdings sought by Bonan II was to give Evergreen 18 months to begin to generate cash through operations or allow 618 Holdings to sell the Carmi Warehouse without a loss to the Bank, the loans to both Evergreen and 618 Holdings should have been portrayed as [restructured troubled debt] at the time of the 2016 examination.").

[428] *See* Cash Tr. 573:1-4 (noting that "if a loan is identified as a troubled debt restructuring, there are additional reporting and actions that we would expect on behalf of bank management"); *see also* EX 369R (Cash Report) ¶¶ 13-16; EC Reply at 10-11 (noting that "a debt restructuring must improve collectability of the loan in accordance with a reasonable repayment schedule" and "loan workouts must support the ultimate collection of principal and interest") (citing EX 1 (FDIC Policy Statement on Prudent Commercial Real Estate Loan Workouts); EX 386 (Interagency Supervisory Guidance on Troubled Debt Restructuring)).

[429] EX 369R (Cash Report) ¶ 15; *see also* EX 1 (FDIC Policy Statement on Prudent Commercial Real Estate Loan Workouts) at 3 (providing that "[a]n institution's risk management practices for renewing and restructuring [commercial real estate] loans should be appropriate for the complexity and nature of its lending activity and should be consistent with safe and sound lending practices and relevant regulatory reporting requirements").

> [T]here was no documentation showing how Evergreen could achieve positive cash flow and 618 Holdings could repay the Bank (such as pro forma financial statements forecasting how Evergreen proposed to achieve positive cash flow within 18 months). There was also not a plan forecasting how the Bank's commercial real estate collateral, the Carmi Warehouse, could be sold after 18 months without a loss to the Bank. In my experience as an FDIC examiner and CPA, I expect an FDIC insured bank working with a troubled commercial borrower to have these types of basic analyses of repayment capacity in the loan files.[430]

Cash also opined that "[t]o be consistent with prudent workout practices, efforts undertaken by [Respondent] to structure the loan to 618 Holdings . . . should have evidenced his consideration of how the Bank's position would be improved by advancing $250,000 of 'new money' despite the absence of a clear plan for repayment, and . . . new borrowers [] who lacked the financial capacity to repay a $1.25 million loan."[431] He added that "[w]ithout a clear path to repayment, and with the loan files lacking current financial information, [Respondent's] structure for managing the Evergreen relationship for 18 months lacked appropriate consideration of the Bank's interests to receive repayment in full from 618 Holdings."[432] The undersigned credits these opinions in all respects.

Moreover, Respondent's assertion that the 618 Holdings loan structure was in the best interests of the Bank hinges far too much on the prospect of the Carmi Warehouse being sold at the end of the 18 months, either to Evergreen or to another entity if Evergreen's financial prospects had not improved:

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[430] EX 369R (Cash Report) ¶ 15; *see also* EX 386 (Interagency Supervisory Guidance on Troubled Debt Restructuring) at 4 ("A [troubled debt restructure] designation means the loan is impaired for accounting purposes. . . . [A] well-documented assessment of the cash flows available to service the modified loan and the extent of any collateral protection and guarantor support should be performed to form the basis for determining whether an adverse credit risk grade or classification is warranted.").

[431] EX 369R (Cash Report) ¶ 16.

[432] *Id.*; *see also* Cash Tr. 598:3-9 ("[O]ne of the principles of a prudent loan workout is being able to assess the payment performance of a borrower. And so with this payment reserve account, funding payments on behalf of the borrower, it's not possible to assess the true repayment ability of this borrower, and that's the concern.").

> Everyone understood that during the 18-month period of time, either hopefully the oil industry turns around and Evergreen gets back on its feet and everybody's happy and maybe they buy the property back, or if a year in nothing's turning around Harbison and Tate can always sell the property.[433]

There are obvious flaws with this argument, not least that the Bank's chance of avoiding default if Evergreen had not regained its footing by the end of the lease reserve period rests on sheer speculation that the uncreditworthy guarantors of the $1.25 million loan, who were uncreditworthy at the time it was made, would be able to find a different buyer for a sufficient sale price in time to make the Bank whole. This would be an imprudent plan to paper over the patent inability of the borrower to make loan payments even if there had not been reason to doubt the appraised value of the Carmi Warehouse in the fall of 2015.[434] With the benefit of hindsight, too, the idea of Harbison and Tate recouping close to $1.25 million by selling the warehouse after 18 months seems utterly fantastical, considering that the highest offer the Bank has received for the property since it came into its possession has been $500,000.[435]

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[433] R Br. at 40 (internal quotation marks and citation omitted).

[434] *See* EX 273 (email chain including December 19, 2015 email from J. Campbell to L. Phelps) ("The purchase of Evergreens yard has the appraisal listed at $1,250,000. I don't think it is worth $300,000, especially with the current oil, coal, and ag depression that this area is in. The 5 year lease doesn't mean anything because the lessee is in a cash flow bind."); *id.* (email chain including December 19, 2015 email from L. Phelps to J. Campbell) ("Yes I agree. I questioned the Evergreen valuation too."); Botsch Tr. 288:2-8 ("I said [the warehouse] was probably worth $350,000. Evergreen overpaid for it. They also bought that from a client of mine, so I knew the building very well. It was not going to bring $1.25 million."); EX 346 (September 2016 Joint Visit Report of Grand Rivers Bank) at 26 (identifying several concerns with the appraisal and suggesting that "impairment may be significantly understated" on the 618 Holdings loan relationship as a result).

[435] *See* Stringer Tr. 102:20-103:5; *see also* Williams Tr. 679:3-13 (noting that when he left the Bank in December 2018, the Bank had not received any offers on the Carmi Warehouse higher than $300,000). In his reply, Respondent expands Harbison and Tate's prospective options for making money off the property beyond its sale, stating that the two individuals, if necessary, "could have sought other lessees or devised other uses for the property that would have generated revenue." R Reply at 5-6. But this argument falls at two hurdles: (1) if Evergreen could not make lease payments on the warehouse, then it is foreseeable that others in the oil and gas industry would also have difficulty, making it difficult for Harbison and Tate to do as Respondent now suggests; and (2) such a plan presupposes that 618 Holdings could not only generate revenue by renting or otherwise using the Carmi property, but generate *enough* revenue to pay their $7,753 monthly payments—possibly a tall order, as the next tenant after Evergreen appears to have paid only $1,500 to $2,000 per month for their lease. *See* Williams Tr. 678:7-25.

It is perhaps most illustrative of the imprudency of the loan structure that anyone, no matter how poor a credit risk, would have served the same purpose as Harbison and Tate, as Respondent conceived of the transaction. That is, if the ability of 618 Holdings to repay the loan amount did not matter in Respondent's planned transaction—because the loan payments were being made through the lease reserve for the first 18 months and the warehouse could simply be leased or sold thereafter—then Harbison and Tate's presence in the transaction, and their own credit histories and repayment capacities as guarantors, was truly inessential. A bankrupt baby could have taken their place and had a company formed in its name, and Respondent's plan to aid Evergreen and reduce its debt at PNB could have proceeded apace. The baby would not even need a bank account: Respondent did not ask Harbison and Tate to put a single dollar down, compared to the minimum $100,000 in down payment that Carrollton Bank had required from a creditworthy borrower with significant assets.[436] Viewed in that light, it is starkly evident that the best interests of Grand Rivers were nowhere near the forefront of Respondent's mind when devising, directing, and effectuating the 618 Holdings loan.

a. Breach of Fiduciary Duty

As Chairman of the Grand Rivers board, Respondent owed the Bank fiduciary duties of loyalty and of care, both of which Enforcement Counsel contends have been breached by Respondent's conduct in connection with the 618 Holdings loan.[437] The fiduciary duty of care

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[436] *See* EX 205 (email chain including November 2, 2015 email from F. Bonan II to C. Dickey) at 3 ("I don't know if anyone has told you but I have had a hell of a year this year. My part that came to me after debt on the Clayton building sale was 2.4 million.").

[437] *See* EC Br. at 35-38. Although Respondent asserts that Illinois law should govern the claim for breach of fiduciary duty here, *see* R Br. at 34, that is not the case: the FDIC Board has held that "[t]he fiduciary duties of institution-affiliated parties . . . for the purposes of section 8(e) of the FDI Act are established by Federal law." *In the Matter of Michael D. Landry and Alton B. Lewis*, No. 95-65e, 1999 WL 440608, at *15 (May 25, 1999) (FDIC final decision), *aff'd on other grounds sub nom*. *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000); *see also*, *e.g.*, *In the Matter of Neil M. Bush*, No. AP 91-16, 1991 WL 540753, at *5 (Apr. 18, 1991) (OTS final decision) ("The federal government as regulator and insurer . . . may establish a regulatory and common law of fiduciary duties that does not depend on the location of the institution."); *Brickner*, 747 F.2d at 1202 (noting that "[t]he concept of fiduciary

obligated Respondent at all times "to act in good faith and in the best interests of the Bank."[438] Discharging this duty requires diligence, prudence, and honesty in carrying out a bank officer's responsibilities, as well as "the proper supervision of subordinates . . . and the constant concern for the [bank's] safety and soundness."[439] Further, "[b]ecause of their unique position as safekeepers of depositors' money, directors or officers of depository institutions owe a greater duty to the bank than directors of other types of entities."[440] And "[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."[441]

The undersigned concludes that Respondent breached his fiduciary duty of care in connection with the 618 Holdings loan in multiple respects. As detailed throughout this Decision, by engineering the purchase-leaseback of the Carmi Warehouse through the loan to 618 Holdings, Respondent demonstrably advanced the interests of Evergreen and PNB with scant regard for those

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duty may, in differing circumstances, require fiduciaries to exercise varying degrees of vigilance and care. The FDIC has special expertise in the banking area, and extensive experience with the duties and responsibilities of bank officers and directors."). Respondent cites the Supreme Court's *Atherton* decision as support for his position, *see* R Br. at 34, but that case is inapposite—as Enforcement Counsel points out, *Atherton* concerned, in relevant part, whether state law should govern actions brought by the FDIC in its capacity as receiver against directors and officers of a failed institution under a separate statutory provision, 12 U.S.C. § 1821(k). *See Atherton v. FDIC*, 519 U.S. 213, 226-229 (1997); EC Reply at 14-15. The FDIC as receiver succeeds to "all rights, titles, powers, and privileges of the insured depository institution," 12 U.S.C. § 1821(d)(2)(A), and as such is a "separate and legally distinct entity" from the FDIC as insurer and regulator. *Miller v. FDIC*, 738 F.3d 836, 838 n.1 (7th Cir. 2013). *Atherton* therefore has no bearing on the question of fiduciary duty claims in Section 1818 enforcement actions. *Atherton*, 519 U.S. at 225 ("[H]ere, . . . the FDIC is acting only as receiver of a failed institution; it is not pursuing the interest of the Federal Government as a bank insurer.").

[438] *Michael Sapp*, 2019 WL 5823871, at *14; *accord Smith & Kiolbasa*, 2021 WL 1590337, at *15 ("Officers and directors of depository institutions have a strict fiduciary duty to act in the institution's best interests.") (internal quotation marks and citation omitted).

[439] *In the Matter of Larry B. Faigin and John J. Lannan*, Nos. 11-252e, -254k, -269e, & -270k, 2015 WL 9855325, at *81-82 (December 15, 2015) (FDIC final decision) (internal quotation marks and citation omitted); *see also In the Matter of Tonya Williams*, No. 11-553e, 2015 WL 3644010, at *9 (Apr. 21, 2015) (FDIC final decision) ("Bank officers have a duty to act diligently, prudently, honestly, and carefully in carrying out their responsibilities.") (internal quotation marks and citation omitted).

[440] *Faigin & Lannan*, 2015 WL 9855325, at *82.

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

of the Bank, in a manner that foreseeably increased the Bank's risk.[442] All record evidence supports the testimony of Grady Gaskins that Respondent's primary motivations during the fall and winter of 2015 were to "move [Evergreen's] debt from [PNB]" and to "help Abbey out,"[443] and the Bank was merely a vehicle for this scheme, left worse off than before. Respondent claims that his actions reflect "a desire to protect the bank from a large borrower who was perilously close to defaulting on its loans,"[444] but the collectability of the 618 Holdings loan was precariously balanced on the strained back of that very same borrower, while lessening the risk exposure of PNB should that "perilously close" borrower happen to default.[445] Respondent therefore did not act with the best interests of the Bank in mind or with "constant concern for the [Bank's] safety and soundness" in this regard.[446]

Beyond this, the undersigned agrees with Enforcement Counsel that Respondent also "breached his duty of care to the Bank by failing to act prudently and diligently in structuring the 618 Holdings loan."[447] Among other things, and in line with the examiners' conclusions above, Respondent failed to ensure that the loan files for Evergreen and 618 Holdings contained current financial information and appropriate analyses of repayment ability and future cash flow for both entities consistent with prudent workout practices for a transaction designed to help a troubled

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[442] *See*, *e.g.*, Part V(G) *supra* at pp. 47-48 (summarizing the effect of the 618 Holdings loan on the Evergreen Entities, PNB, Grand Rivers, Respondent, and Harbison and Tate); *see also* 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.").

[443] Gaskins Tr. 25:4-10.

[444] R Reply at 22.

[445] *See* EC Br. at 38 (observing that, as a result of the 618 Holdings loan, "PNB was paid $358,309, eliminating its lien on the Carmi Warehouse," while the Bank itself "paid out $250,000 in new money, increased the Bank's maximum risk from $637,681 to $1,262,109.75, and loaned more money than the appraised value of the property").

[446] *Faigin & Lannan*, 2015 WL 9855325, at *82 (internal quotation marks and citation omitted).

[447] EC Br. at 37.

borrower regain its footing by increasing its liquidity and reducing its debt.[448] Respondent also did not adequately consider how the nature of the lease reserve structure might obscure the repayment ability of 618 Holdings (and the financial health of Evergreen) and provide the Bank and its regulators with an inaccurate picture of the loan's risk of default or delinquency over the first eighteen months.[449] As a "highly unusual structure" that neither examiners nor Bank officials had ever seen in that form before,[450] the lease reserve triggered a heightened duty of care "to investigate, verify, clarify, and explain," none of which Respondent showed any interest in doing in his roles as architect of the transaction and Chairman of Grand Rivers.[451]

The undersigned further concludes that Respondent breached his fiduciary duty of care by presenting 618 Holdings to the Bank as the only lending option for the Carmi Warehouse despite being in position to know that Harbison and Tate were unqualified to be the borrowers or guarantors on such a loan.[452] As has been amply detailed, Respondent had no reason to believe that Harbison and Tate could make the $7,753 monthly payments if called upon to do so, and every

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[448] *See* RX 11R (Schwartz Report) at 6-7; *see also* EX 369R (Cash Report) ¶ 15 (noting that the loan files lacked "basic analyses of repayment capacity," that "there was no documentation showing how Evergreen could achieve positive cash flow and 618 Holdings could repay the Bank (such as pro forma financial statements forecasting how Evergreen proposed to achieve positive cash flow within 18 months," and that there was no "plan forecasting how the Bank's commercial real estate collateral, the Carmi Warehouse, could be sold after 18 months without a loss to the Bank"); *In the Matter of Steven D. Haynes*, Nos. 11-370e & -371-k, 2014 WL 4640797, at *11 (July 15, 2014) (FDIC final decision) (finding breach of fiduciary duty when bank officer failed "to ascertain the borrower's ability to repay prior to approving a loan").

[449] *See*, *e.g.*, EX 368R (Floersch Report) ¶¶ 6-7.

[450] Cash Tr. 571:18-23 ("[T]hat was a highly unusual structure that caught my attention in seeing that that lease payment reserve account had been established to essentially fund loan payments on that other loan, the 618 Holdings loan."); *see also*, *e.g.*, EX 369R (Cash Report) ¶ 11 (stating that "[r]eserves are sometimes used to fund interest payments while a borrower is improving a property, but not loan principal reduction or recurring business operating expenses like lease payments"); Williams Tr. 662:9-20 (testifying that he had never "seen commercial loans where the loan proceeds have indirectly funded a principal and interest reserve account").

[451] *Faigin & Lannan*, 2015 WL 9855325, at *82 (duty of care is greater for complex transactions and for bank directors with significant authority) (internal quotation marks and citation omitted).

[452] *See* EX 368R (Floersch Report) ¶ 10 (opining that Respondent's "origination of the loan to 618 Holdings, whose guarantors provided nominal support to the borrower, was an imprudent banking practice that jeopardized the liquidation of the debt"); *see also* Part VI(A)(1) *supra* at pp. 88-94.

reason not to believe it.[453] There were other options available, including Respondent himself using his millions in recent real estate profits and putting a pen to the already-completed paperwork for his own purchase of the warehouse, but he did not do that.[454] Instead, Respondent, as Grand Rivers Chairman, caused the Bank to loan $1.25 million to two individuals who transparently lacked the means to pay it back. This, alone, is a clear breach of his duty of care.

Enforcement Counsel contends that Respondent breached his fiduciary duty of loyalty, in addition to his duty of care, "when he directed a loan that benefited Evergreen and PNB, but placed greater risk at the Bank."[455] The undersigned agrees. As the FDIC Board has held, "[t]he duty of loyalty requires directors and officers to administer the affairs of the bank with candor, personal honesty, and integrity. They are prohibited from advancing their own personal or business interests, or those of others, at the expense of the bank."[456] And, quoting the Seventh Circuit, the FRB has identified ""[s]elf-dealing, conflicts of interest, [and] even *divided loyalties*" as being "inconsistent with" a banker's fiduciary responsibilities towards their institution.[457]

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[453] *See*, *e.g.*, Gaskins Tr. 75:18-76:9 (testifying that he knew at the time that Tate and Harbison did not "have the financial capacity if called upon to support the loan to 618 Holdings"); Williams Tr. 660:12-19 ("I knew of no way where 618 Holdings was going to generate sufficient revenue to meet payments. . . . I just had concern with this size of a loan with these, with the quality of borrowers being these two individuals."); Stringer Tr. 62:15-17 (testifying that she "couldn't imagine [] the two of them . . . being able to ever obtain a $1.2 million loan from any other bank, let alone pay it"); Harbison Tr. 42:9-13 (testifying that he did not believe "that someone would loan Adam Tate and I that amount of money at that point in our lives and it just be okay. I was so sure that it wasn't going to happen").

[454] *See* Part VI(A)(1) *supra* at pp. 80-84.

[455] EC Br. at 38. While Enforcement Counsel further argues that Respondent's duty of loyalty was breached by the failure to disclose material information regarding Evergreen to the Grand Rivers board prior to the approval of the 618 Holdings loan, *see id.* at 36-37, the undersigned does not find it necessary to decide that issue in light of the numerous other ways that Respondent breached his fiduciary duties.

[456] *Faigin & Lannan*, 2015 WL 9855325, at *82 (internal quotation marks, citation, and emphasis omitted).

[457] *Smith & Kiolbasa*, 2021 WL 1590337, at *15 (quoting *Michael v. FDIC*, 687 F.3d 337, 351 (7th Cir. 2012)) (emphasis added).

Here, Respondent owed fiduciary duties of loyalty to both Grand Rivers and PNB, and therefore "could not favor one bank over the other as to a common borrower."[458] It also goes without saying that Respondent could not favor the interests of Evergreen or any other borrower over the interests of Grand Rivers. In this instance, however, and as described *supra*, the evidence consistently shows that not only did Respondent have divided loyalties, but that over the course of the fall and winter of 2015—and through the 618 Holdings loan—he acted to advance the interests of Evergreen (and the Evanses) and PNB over the best interests of the Bank.[459] As a result, the undersigned concludes that Respondent breached his fiduciary duty of loyalty as well.

b. Unsafe or Unsound Practices

Having determined that the Section 1818 misconduct element has been satisfied already through Respondent's breaches of the duties of care and loyalty he owed to the Bank, the undersigned now turns to Enforcement Counsel's argument that Respondent's actions in connection with the 618 Holdings loan amounted to an engagement in unsafe or unsound banking practices.[460] In this sense, too, does Respondent's role in the conception and approval of the 618 Holdings loan constitute statutory misconduct.

The undersigned notes, to begin with, that the FDIC Board has held that "[b]ecause of their inherent danger, breaches of fiduciary duty also constitute unsafe and unsound practices."[461] Considering that Enforcement Counsel has already proven that Respondent has breached his fiduciary duties, the inquiry can therefore arguably stop there. Nevertheless, in a sufficiency of caution, the undersigned will analyze Respondent's conduct through the lens of the Horne

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[458] EC Br. at 35; *see* Bonan Tr. 942:1-3 (agreeing that he "[wasn't] supposed to favor one bank over the other" while serving in his dual roles).

[459] *See* Part V(G) *supra* at pp. 47-48.

[460] *See* EC Br. at 29-35.

[461] *Michael Sapp*, 2019 WL 5823871, at *13.

Standard, to determine whether it can be considered unsafe or unsound practices as a standalone matter under that rubric as well.[462]

To recall, the Horne Standard—as adopted by the FDIC and OFIA's other constituent agencies—defines the scope of unsafe or unsound banking practices for purposes of Section 1818 to 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."[463] Drawing support from a Sixth Circuit dissent, Respondent contends that "an 'unsafe or unsound practice' must involve more than just an isolated action, as a 'practice' necessarily 'includes a connotation of repetition (of habitual acts).'"[464] Not only is this novel theory at odds with the "any action[] or lack of action" language of the Horne Standard, which has been treated as authoritative by courts and the federal banking agencies, but Respondent's plan to sell the Carmi Warehouse to reduce Evergreen's debt, his conception and execution of the structure of the 618 Holdings loan and the purchase-leaseback transaction, his securing Harbison and Tate to act as borrowers, his push for the Bank board to approve the loan, and his demonstrated lack of prudence throughout all of that are in no sense "an isolated action" in any event.

Actionably unsafe or unsound practices are those that pose "a reasonably foreseeable undue risk to the institution," which has been interpreted by the banking agencies and the D.C. Circuit to mean an "increased risk of some kind."[465] Enforcement Counsel offers numerous reasons

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[462] *See* Part III *supra* at pp. 8-9 (addressing Horne Standard).

[463] *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*, *e.g.*, *Donald Watkins,* 2019 WL 6700075, at *7 (applying Horne Standard); *Patrick Adams*, 2014 WL 8735096, at **8-24 (discussing Horne Standard in detail).

[464] R Br. at 44 (citing *Calcutt*, 37 F.4th at 355 (Murphy, J., dissenting)).

[465] *Patrick Adams*, 2014 WL 8735096, at *5; *accord Blanton*, 909 F.3d at 1172 (internal quotation marks and citation omitted).

why Respondent's actions relating to the 618 Holdings loan were unsafe and unsound, many of which mirror the conclusions that the undersigned has already made.[466] Giving appropriate deference to the conclusions of the FDIC's examiners,[467] and in line with her conclusions regarding Respondent's breach of his fiduciary duties, the undersigned now concludes that, at the very least, Respondent causing a $1.25 million loan to be made to a borrower with no assets and with guarantors who he knew or should have known were uncreditworthy; adding $250,000 in new money secured by the same collateral, the appraised value of which had been questioned, and taking on an additional $358,000 in existing debt; without any analysis of repayment ability or future cash flow or other appropriate documentation; using a structure in which the loan payments of this uncreditworthy borrower were dependent—following an initial period in which the balance of the loan was being artificially paid by the bank itself—on the operations of a struggling entity whose loans Respondent's other bank (which benefited from this transaction) had recently deemed substandard; for the purposes of advancing the interests of entities other than the bank that approved the loan; in a manner that foreseeably increased the risk exposure of that bank and left it in a worse position—that all of this is an unsafe or unsound banking practice contrary to generally accepted standards of prudent operation.

2. <u>Effect</u>

Having placed the 618 Holdings loan on nonaccrual status in the spring of 2016 following the examiners' classification of the loan as substandard for the reasons articulated above, the Bank then charged off $500,000 from the loan's balance in January 2017.[468] At the summary disposition

[466] *See* EC Br. at 30, 31-32, 33.

[467] *See Patrick Adams*, 2014 WL 8735096, at *36 (noting that "[t]he expression of expert judgment as to whether a given set of facts represents an unsafe or unsound practice is very much within the competence of bank examiners]").

[468] *See* Part V(G) *supra* at pp. 52-53. After 618 Holdings defaulted on the loan and acquiesced to a deed-in-lieu, Grand Rivers subsequently wrote down the value of the property by an additional $13,760. *See* JX 1 (Joint Stip.) ¶ 34.

stage, the undersigned concluded that this charge-off constituted actionable bank loss for the purposes of Section 1818 and held that "to the extent that Respondent's conduct ultimately 'caused' the Bank to charge off the loan and incur this loss . . . the statutory effect prongs have been satisfied."[469] The undersigned further held that disputed questions of material fact existed that precluded a determination of causation at that stage, including "Respondent's role in the Bank's approval of the 618 Holdings loan" and "whether the loan itself was imprudently risky at the time it was made"—questions that have since been resolved (significant, and yes).[470]

Respondent now argues that he is not responsible for any loss borne by the Bank as a result of the charge-off because (1) he did not vote in favor of the loan's approval, and (2) he played no part in "decid[ing] to call the loan before the lease reserve was exhausted."[471] To put it in the words of Section 1818(e), Respondent contends that the Bank's loss on the 618 Holdings loan did not occur "by reason of" his conduct, but rather the conduct of others.[472]

Before turning to the merits of Respondent's arguments, however, the undersigned addresses Respondent's threshold claim that "[t]he FDIC recently conceded" during its briefing of the Sixth Circuit's *Calcutt* decision before the Supreme Court, that it had previously committed "legal error in evaluating causation" in Section 1818 proceedings by not requiring proximate causation to be established between the conduct and the alleged loss.[473] This is wrong; the FDIC

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[469] MSD Order at 60; *see also In the Matter of Harry C. Calcutt III*, Nos. 12-568e & 13-115k, 2020 WL 847520, at *16 (Dec. 15, 2020) (FDIC final decision) ("[L]oan charge-offs represent a loss to the bank as a matter of law."), *aff'd*, *Calcutt*, 37 F.4th at 330 ("The charge-off on the loan to Bedrock Holdings, which was part of the Bedrock Transaction, is an effect under [Section 1818]."), *rev'd and remanded on other grounds*, 598 U.S. 623 (2023); *In the Matter of James L. Leuthe*, Nos. 95-15e & -16k, 1998 WL 438323, at *15 (June 26, 1998) (FDIC final decision) ("The charge-off requirement has been held as a matter of law to result in loss to the Bank.").

[470] MSD Order at 61; *see also* Parts V(G) and VI(A)(1) *supra* at pp. 34-38, 42-44 (Respondent played significant role in the loan's approval), 86-94 (loan was imprudently risky from its origination).

[471] R Br. at 53; *see also id.* at 4.

[472] 12 U.S.C. § 1818(e)(1)(B).

[473] R Br. at 4, 50; *see* R Reply at 19.

made no such concession. In the briefing quoted by Respondent, counsel for the FDIC was simply summarizing the holding of the court below as part of the procedural history of the case.[474]

In *Calcutt*, the Sixth Circuit held that the "by reason of" language of 12 U.S.C. § 1818(e) required a showing of proximate cause, and further concluded that the FDIC Board had not properly applied that standard in that case.[475] Rather than remanding, though, the court of appeals affirmed the FDIC Board's decision based on its own *de novo* determination that proximate cause had been established.[476] Finding that this *de novo* determination was improper, the Supreme Court then reversed, remanding with instructions that the case be sent "back to the FDIC for further consideration of petitioner's case."[477] In so doing, the Supreme Court did not express any view regarding the correctness of the Sixth Circuit's holding on proximate causation.

Respondent argues that Enforcement Counsel errs by not applying the proximate causation standard articulated in *Calcutt* to the present factual record.[478] But *Calcutt* is a Sixth Circuit case, and it is not binding in an action like this one where the financial institution in question is located in the Seventh Circuit.[479] Unless and until the FDIC Board holds that proximate cause is required in all Section 1818 enforcement actions brought by the agency, Enforcement Counsel is justified in relying on previous decisions of the federal banking agencies and relevant circuits regarding the

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[474] *See* Brief for the Respondent, *Calcutt v. FDIC*, No. 22-714, 2023 WL 2815448 (Apr. 3, 2023), at *8 ("The court [of appeals] held that the phrase 'by reason of' in Section 1818(e)(1)(B) 'mandates proximate causation,' and that the Board had failed to apply a proximate-causation standard. . . . The court of appeals [then] concluded that a remand to the Board was unwarranted, notwithstanding the Board's legal error in evaluating causation.").

[475] *See Calcutt*, 37 F.4th at 329-330.

[476] *See id.* at 330-332.

[477] *Calcutt*, 598 U.S. at 629.

[478] *See* R Br. at 50-51; R Reply at 19-20.

[479] *See* n. 23 *supra*.

Section 1818 effect elements, whether or not the standard of causation applied in those cases is precisely coextensive with *Calcutt*'s conception of proximate cause.[480]

Regardless, the undersigned finds that causation has been established here for purposes of Section 1818(e) even under the standard Respondent proposes.[481] For proximate cause to be shown, Respondent states that the misconduct in question must "be a substantial factor in producing the injury if the injury was reasonably foreseeable at the time of the wrongful act"[482]—or, as Respondent also frames it, that "the risk of loss [from the misconduct] must be reasonably foreseeable."[483] As detailed *supra*, it was reasonably foreseeable that an imprudently structured $1.25 million loan to unqualified borrowers might increase the Bank's risk exposure, be classified as substandard, and ultimately require some portion of the loan balance to be charged off as a loss. Indeed, the Sixth Circuit in *Calcutt* held that the respondent there had proximately caused a $30,000 charge-off on one of the Bedrock Transaction loans at issue in that case, because he had "participated extensively in negotiating and approving the Bedrock Transaction."[484]

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[480] *See* Brief of Respondent FDIC, *Calcutt v. FDIC*, No. 20-4303, 2021 WL 2525744 (6th Cir. June 16, 2021) (noting that the FDIC Board "has consistently interpreted the 'by reason of' language in § 1818(e) as requiring a causal 'nexus' between the misconduct and harm, or that harm was reasonably foreseeable") (citing cases).

[481] Neither Respondent nor the Sixth Circuit in *Calcutt* appear to differentiate between 12 U.S.C. § 1818(e) and 12 U.S.C. § 1818(i) for causation purposes, even though *Calcutt*'s holding was premised on specific language in Section 1818(e)—the phrase "by reason of"—that does not appear in Section 1818(i). *See Calcutt*, 37 F.4th at 329 ("Because [Section 1818(e)] requires that a bank's loss or potential loss, or a party's benefit, occur 'by reason of' the misconduct, it mandates proximate causation."); *compare* 12 U.S.C. § 1818(e)(1)(B) (causation if an applicable effect occurs "by reason of" the party's misconduct) *with* 12 U.S.C. § 1818(i)(2)(B)(ii)(II)-(III) (causation, *inter alia*, if the party's misconduct "*causes or is likely to cause* more than a minimal loss to [the] depository institution" or "*results in* pecuniary gain or other benefit to such party") (emphases added). Thus, even if one were to accept that the phrase "by reason of" connotes a proximate causation standard, the same would not necessarily be true for the language in Section 1818(i)—and the undersigned is unaware of any authority, whether from the OFIA agencies or otherwise, indicating that Sections 1818(e) and 1818(i) should be governed by different causation standards, as *Calcutt*'s premises would suggest. The undersigned takes no position on this issue.

[482] R Br. at 49 (internal quotation marks and citation omitted). Respondent also asserts that, under *Calcutt*, proximate cause "requires a finding of a threat of bank stability," R Reply at 19, but this is plainly incorrect: not only did this aspect of *Calcutt* arise under its discussion of unsafe or unsound practices (i.e., misconduct), rather than proximate causation (i.e., effect), *see Calcutt*, 37 F.4th at 326, but the undersigned has already explained that *Calcutt* is not dispositive on this issue and, in fact, is directly contradicted by binding agency precedent. *See* n.23 *supra*.

[483] R Br. at 50 (internal quotation marks and citation omitted).

[484] *Calcutt*, 37 F.4th at 330.

Here, Respondent declares that he bears no responsibility for the loss to the Bank because he "merely proposed the loan to the voting committee" and did not vote in favor of the loan's approval.[485] According to Respondent, "[a]ny loss in connection with the 618 Holdings loan" should therefore be cast not on him, but on "the actual voting members who made the decision to approve the loan."[486] This argument is not persuasive.

It is abundantly clear from the record that Respondent was the architect of the 618 Holdings loan request, its driving force, and its principal advocate, as well as the single person most responsible for the board's decision to approve the loan as structured. Respondent devised the plan to assist Evergreen that included the sale of the Carmi Warehouse; persuaded Harbison and Tate to obtain financing for the purchase of the warehouse from Evergreen in furtherance of that plan; provided the terms and structure of the loan and the related purchase-leaseback transaction, which the borrowers did not even see until closing; directed Gaskins to prepare a loan request on behalf of Harbison and Tate in the name of 618 Holdings (a company created at Respondent's direction as well, with the Bank's attorney drafting incorporation papers at his behest); and arranged for Gaskins to present the loan to the Bank's board and to vote in favor of its approval.[487] As in *Hendrickson v. FDIC*, where the Seventh Circuit held that an IAP's facilitation of a bank client's money laundering activities resulted in a loss to the bank,[488] and *Calcutt*, in which the Sixth Circuit found proximate causation where the IAP had negotiated and approved the transaction that led to bank loss from a loan charge-off,[489] Respondent here not only "proposed the loan to the voting

[485] R Br. at 53. Respondent fails to mention, of course, that he initially did vote to approve the 618 Holdings loan, only abstaining belatedly on the grounds that Tate and Harbison were his employees. *See* JX 1 (Joint Stip.) ¶ 27.

[486] R Br. at 53.

[487] *See* Part V(G) *supra* at 34-38, 42-44.

[488] *See Hendrickson v. FDIC*, 113 F.3d 98, 103 (7th Cir. 1997) (holding that, for purposes of causation, it was sufficient to establish that an IAP's actions "facilitated" the conduct resulting in the harm even if it was one of many causes).

[489] *Calcutt*, 37 F.4th at 330.

committee," but also directly conceived of, structured, and orchestrated the transaction such that it would be approved by the Bank's board.

Even beyond Respondent's specific actions, the record reflects that his dominant influence at the Bank and his intimidating and vindictive management style resulted in the majority of the Grand Rivers board approving the 618 Holdings loan, despite several board members having expressed significant concerns about aspects of the transaction. Grady Gaskins testified that he approved the loan *even though he did not think that Harbison and Tate had the ability to repay it*, because he was directed to do so by Respondent—and that he believed he "would have been removed" from the board if he had not voted yes.[490] Jake Campbell raised questions about the lack of proper loan documentation, the speculative cash flow of the borrower, and the "very favorable appraisal" of the collateral, yet voted for the loan anyway because Respondent convinced him to do so.[491] Lucas Phelps, the third board member to vote to approve the loan, had no prior banking experience and was viewed as someone who did not "know the correct questions to ask upon a loan approval" and "who would vote yes without a whole lot of questions."[492] And Whitney Stringer, who opposed the loan's approval, chose to limit who she spoke to about her concerns and ultimately voted to abstain because she feared reprisal from Respondent if she had expressed more direct opposition.[493] All in all, it was clear to the Bank's board that Respondent not only wanted the 618 Holdings transaction approved, but expected them to approve it.

Respondent's other argument, that he is not responsible for loss attributable to the 618 Holdings loan because he is not the one who charged it off, similarly fails. From the moment of

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[490] Gaskins Tr. 76:15-77:2.

[491] EX 284 (December 22, 2015 email chain including email from J. Campbell to Bank board); *see* EX 294 (December 23, 2015 email chain from F. Bonan II to Bank board); Gaskins Tr. 397:13-22, 399:4-6.

[492] Winters Tr. 59:5-6, 172:23-173:3; *see also* EX 314 (2016 ROE) at 7 (noting that Phelps "voted affirmatively on every measure or loan presented by or under the direction of [Respondent]").

[493] *See* Stringer Tr. 64:16-22, 67:3-7, 129:3-6.

the loan's approval, it was foreseeable that some portion of it would need to be charged off: Examiners Cash and Floersch recognized the many issues with the structure of the loan and how that structure was implemented during their examination beginning in January 2016, and classified the loan as substandard no more than two months after its approval.[494]

Nor does it matter that it was the Bank rather than Respondent who charged off the loan. Respondent himself recognizes that "acts or omissions need not be the sole cause of the bank's losses," as long as they are "a substantial factor" and the risk of loss was "reasonably foreseeable at the time of the wrongful act."[495] And the FDIC Board has made it clear that a respondent in a Section 1818 enforcement action "cannot escape liability simply because others have contributed to the bank's loss as well."[496]

As the undersigned observed at the summary disposition stage, "if it was Respondent's conduct that led the Bank to approve a substandard loan for which a charge-off was later deemed

[494] *See* Part V(G) *supra* at pp. 49-52; *see also* EX 314 (2016 ROE) at 56 (noting that the 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 establish[ed] to make loan payments, the lack of collateral protection, and the questionable ability of Evergreen Properties to generate sufficient income to pay lease payments"); EX 325 (email chain including February 18, 2016 email from W. Stringer to F. Bonan II) (stating that examiners "[s]aid we financed 1st 18 months of lease payments, a structure that they have not seen before. 2 borrowers that cannot support the debt if lease payments aren't made, and the ability for the lease payments is questionable. Questioned collateral value. Borrowers did not have a down payment and didn't bring anything to the table on this deal.").

[495] R Br. at 49 (internal quotation marks and citation omitted).

[496] *Michael Sapp*, 2019 WL 5823871, at *15; *see also*, *e.g.*, *Landry*, 204 F.3d at 1139 (IAP responsible for misconduct causing loss even if "others may have been more guilty"); *In the Matter of Jeffrey Adams*, No. 93-91(e), 1997 WL 805273, at *5 (Nov. 12, 1997) (FDIC final decision) (noting that "multiple factors, and individuals, may contribute to a bank's losses" without absolving respondent of liability). Interpreting a related statutory provision in *In the Matter of Grant Thornton LLP*, the OCC likewise concluded that an independent auditor had caused actionable loss to a bank through its issuance of an unqualified audit opinion, even though it was the bank's actions in response to the opinion that arguably were more directly responsible for any loss suffered. *In the Matter of Grant Thornton LLP*, Nos. AA-EC-04-02 & -03, 2006 WL 5432171, at *25 (Dec. 29, 2006) (OCC final decision) (noting that under the auditor's theory of causation, "conduct of independent contractors could never be the cause of a loss or other adverse effect for purposes of [the applicable statute], because it would always be the financial institution's acts or omissions that led to the loss to, or adverse effect on, the bank"), *vacated on other grounds sub nom. Grant Thornton LLP v. OCC*, 514 F.3d 1328 (D.C. Cir. 2008).

necessary, then it may fairly be said that he caused the Bank loss for purposes of Section 1818."[497] It does not matter if Respondent was no longer at Grand Rivers when the charge-off occurred and played no part in the decision to charge off the loan—if an IAP originates an imprudent loan, thereby exposing their institution to a reasonably foreseeable risk of loss, causation cannot be premised on whether or not the IAP themself is on hand to remediate that risk. The undersigned therefore concludes that the effect element of Section 1818(e) has been met.

3. Culpability

Before a Section 1818(e) prohibition order is merited for the engagement in unsafe or unsound banking practices or a breach of fiduciary duty, the federal banking agency must demonstrate that the respondent acted with either personal dishonesty or willful or continuing disregard for the safety and soundness of the institution in question.[498] Each of these statutory elements requires some "showing of scienter"—that is, evidence not merely of the misconduct, but of an intentionality or recklessness to the charged individual's state of mind.[499] Evidence that the respondent's conduct was merely negligent is not sufficient.[500]

Here, Enforcement Counsel argues that Respondent's misconduct in connection with the 618 Holdings loan was actionably culpable in all three statutory respects.[501] While there is some evidence of personal dishonesty and continuing disregard, as discussed below, the undersigned concludes that the evidence most clearly shows that Respondent acted with a willful disregard for the safety and soundness of Grand Rivers when he contrived to engineer the Bank's approval of

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[497] MSD Order at 61.
[498] *See* 12 U.S.C. § 1818(e)(1)(C).
[499] *Faigin & Lannan*, 2015 WL 9855325, at *83.
[500] *See id.*
[501] *See* EC Br. at 40-42 (personal dishonesty), 42-45 (willful and continuing disregard).

an imprudently structured $1.25 million loan to an unqualified borrower with uncreditworthy guarantors for the benefit of Evergreen and PNB.

Generally speaking, "[w]illful disregard is deliberate conduct that exposes the bank to abnormal risk of loss or harm contrary to prudent banking practices."[502] Most of this formulation is familiar as the Horne Standard for unsafe or unsound practices: "deliberate" conduct that is unsafe or unsound, then, constitutes willful disregard. Moreover, conduct is "deliberate" merely if it is intentional rather than "technical or inadvertent."[503] In other words, the respondent need only be "aware of [their] conduct" or lack thereof; they need not have knowledge that the conduct in question was wrongful at the time they were engaging in it.[504] Quintessentially, willful disregard exists when a respondent "deliberately and consciously takes part in an action that evidences utter lack of attention to an institution's safety or soundness" or demonstrates "a willingness to turn a blind eye to the institution's interests in the face of known risk."[505]

As has been described at length, Respondent deliberately embarked on a course of action, in originating and advocating for the 618 Holdings loan, that he had reason to understand would leave Grand Rivers worse off than before. His conduct throughout this episode evidenced a distinct lack of regard or attention for Grand Rivers' interests and its safety and soundness. There can be no suggestion that his choice to direct the approval of a substandard loan that paid off PNB and assisted Evergreen at the expense of Grand Rivers was "technical or inadvertent"; he understood the loan structure, he knew or should have known how unqualified the borrowers were, and he nevertheless proceeded "in the face of known risk" to the Bank. This is willful disregard.

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[502] *Michael Sapp*, 2019 WL 5823871, at *16.

[503] *Douglas Conover*, 2016 WL 10822038, at *26.

[504] *Id.* at *24 (noting that "willfulness does not require a showing that Respondent was aware of the law").

[505] *Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995); *accord Donald Watkins*, 2019 WL 6700075, at *8; *see also Faigin & Lannan*, 2015 WL 9855325 ("An IAP cannot claim ignorance by turning a blind eye to obvious violations of his statutory and fiduciary duties.").

On the other hand, the undersigned declines to conclude on the present record that Respondent acted with continuing disregard or with personal dishonesty in connection with the 618 Holdings loan. Continuing disregard is "conduct which has been voluntarily engaged in over a period of time with heedless indifference to the prospective consequences,"[506] and although there is no specific minimum length that a respondent must be heedlessly indifferent in order for their disregard to be "continuing" for purposes of culpability, a review of previous matters in which that threshold has been met reveals periods of misconduct longer than the several weeks at issue here.[507] Likewise, it is unclear from the record that Respondent sufficiently evinced "a disposition to lie, cheat, or defraud; untrustworthiness; lack of integrity; misrepresentation of facts and deliberate deception by pretense and stealth; or want of fairness or straightforwardness"[508]—the touchstones of personal dishonesty—specifically with regard to the 618 Holdings loan. Certainly, Respondent was untruthful to Carrollton's loan officer about his reasons for not proceeding with his own purchase of the Carmi Warehouse,[509] and used his dominant authority at the Bank to strong-arm the loan's approval, but there is little indication that Respondent lied to the Board or sought deliberately to deceive them, or Harbison and Tate, in the process.[510] The undersigned thus concludes that only willful disregard as to the 618 Holdings loan has been shown by a preponderance of the evidence.

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[506] *Faigin & Lannan*, 2015 WL 9855325, at *83.

[507] *See*, *e.g.*, *Donald Watkins*, 2019 WL 6700075, at *9 (continuing disregard where misconduct took place "repeatedly . . . between July 2010 and November 2012"); *Steven Ellsworth*, 2016 WL 11597958, at *17 (continuing disregard where misconduct "involved repeated acts over more than a year"); *Dodge v. OCC*, 744 F.3d 148, 161 (D.C. Cir. 2014) (affirming holding of continuing disregard when the respondent "exposed the Bank and its depositors to substantial risk . . . on multiple occasions over several reporting periods").

[508] *Tonya Williams*, 2015 WL 3644010, at *10 (internal citation omitted).

[509] *See* Bonan Tr. 914:23-916:1; Part V(F) *supra* at p. 31-32.

[510] The undersigned is not persuaded that Enforcement Counsel has shown that Respondent consciously withheld material information regarding the Evergreen Loan Relationship from the Grand Rivers board in a manner that demonstrates personal dishonesty on that score. *See* EC Br. at 40.

4. Section 1818(i)

The undersigned has concluded that Respondent has breached his fiduciary duties of care and loyalty and caused more than minimal loss to the Bank in connection with the 618 Holdings loan. As a result, the statutory elements for the assessment of a second-tier civil money penalty under 12 U.S.C. § 1818(i) have been met as well as the elements for a 12 U.S.C. § 1818(e) prohibition order.[511]

B. The Release of the Rig 23 Collateral

Enforcement Counsel argues that a prohibition order and civil money penalty against Respondent are also warranted on the basis of the Bank's release of its Rig 23 collateral in November 2015.[512] Here, again, the undersigned finds that Respondent's conduct exhibited far more regard for the interests of PNB and Evergreen than it did for the interests of the Bank.

1. Misconduct

According to Enforcement Counsel, 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.[513] The undersigned agrees.

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[511] *See* Part III *supra* at pp. 7-8 (elements of Section 1818(i)). As noted previously in n. 24, Enforcement Counsel did not develop its assertion that Respondent's conduct constituted *recklessly* unsafe and unsound banking practices as to the 618 Holdings loan, as necessary for that prong of Section 1818(i). As also noted, the undersigned additionally rejects Enforcement Counsel's unsupported assertion that Respondent's "actions relating to the release of Rig 23, his attempt to refinance, in part, PNB's loan to Evergreen Drilling at the Bank through Bentley Operating, and his [] orchestration of the 618 Holdings loan were 'part of a pattern of misconduct'" for purposes of 12 U.S.C. § 1818(i)(2)(B)(ii)(I). EC Br. at 59; *see* Part IV *supra* at n. 25. Regardless, the elements of Section 1818(i) are met here by Respondent's breach of fiduciary duty causing more than a minimal loss to the Bank.

[512] *See* EC Br. at 45-58.

[513] *See id.* at 52-53 (recklessly unsafe or unsound), 53-56 (breach of fiduciary duty).

a. Breach of Fiduciary Duty

At no point over the course of the sale of Rig 24 did Respondent exhibit "the proper supervision of subordinates" or "the constant concern for [Grand Rivers'] safety and soundness" required of him as a fiduciary of the Bank.[514] Indeed, and as discussed in much greater detail in Part V(H) *supra*, the record reflects that had Respondent been mindful of the Bank's interests to even a minimal degree while facilitating the transaction between Evergreen and U.S. Energy in the fall of 2015, it is likely that the Bank's PMSI in Rig 23 would not have been terminated and the Bank's loan to Evergreen Drilling would not have been left unsecured. Respondent, unique among Grand Rivers personnel, had access to full information regarding the details of the Rig 24 sale, not only through his role at Grand Rivers but as PNB's principal in the transaction and as someone who had been intimately involved in the state of Evergreen's debt to both banks over the preceding months.[515] Only Respondent at Grand Rivers had knowledge of which rig numbers corresponded to which rigs and possession of Appendix A, the lone document that identified the rig being sold as a Service King 775. Respondent knew, and was told repeatedly, including on the morning that he "directed for Rig 24 to be released,"[516] that the Bank had no security interest in such a rig, nor did it have any kind of blanket subordinate interest in Evergreen assets. He also knew, and was also told, that the Bank *did* have an interest in another rig, a Cabot 900—Rig 23—that was the Bank's only collateral securing its $550,000 loan to Evergreen Drilling.

The terms of the Rig Purchase Agreement required Grand Rivers to release its interest in Rig 24, an interest that Respondent knew the Bank did not possess. Exhibit C to that agreement,

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[514] *Faigin & Lannan*, 2015 WL 9855325, at *82 (internal quotation marks and citation omitted); *see* Part V(H) *supra* at pp. 59-73 (describing sale of Rig 24 and release of Bank's interest in Rig 23).

[515] *See* EX 180 (October 27, 2015 email from F. Bonan II to C. Zimmerman, S. Collins, F. Bonan Sr., and H. Bonan).

[516] Bonan Tr. 906:15.

drafted by someone at PNB or Evergreen, nevertheless somehow listed an Illinois filing number for Grand Rivers' purported interest in that rig and stated that it needed to be released for the transaction to be consummated. At any point between October 9, 2015—when Respondent, already in possession of Appendix A, is confirmed to have received Exhibit C—and November 13, 2015—when Respondent, by his own admission, pressured his subordinates Grady Gaskins and Kassie Winters to "[r]elease Rig 24"[517]—Respondent could have brought this seeming impossibility to the attention of the involved parties, informing them that the Bank had no interest to release and that the transaction could proceed without the Bank's involvement. At any point after October 13, 2015, when Winters emailed Respondent copies of unrecorded termination statements for security interests in Illinois and Indiana that had been filed in January 2013—the same as Rig 23[518]—Respondent could have taken a single step to confirm with his subordinates what it was, in fact, that the Bank would be releasing if it had no interest to release.[519] And certainly at some point on November 12, 2015, when Winters told Respondent that the Bank's only Evergreen Drilling collateral of any kind was a Cabot 900 rig,[520] or the morning of November 13, 2015, when April Riecken emphasized that the Bank had no collateral in Rig 24, Respondent could have pushed back in any way on the apparent belief by U.S. Energy that the deal would not be done without a release from Grand Rivers. Instead, focused solely on the funds that PNB would

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[517] Bonan Tr. 855:18-19.

[518] *See* EC Reply at 13 (noting that "both unrecorded UCC-3 terminations emailed to Bonan II identified that the security interests being terminated were recorded by the Bank in early January 2013, the filing dates of its PMSI financing statements for Indiana and Illinois").

[519] *See* Bonan Tr. 880:12-20 ("Q: So although you don't know what's being terminated, you know Ms. Winters has just sent you an unrecorded termination of a Financing Statement of collateral of Grand Rivers Community Bank pertaining to Evergreen Drilling. Is that correct? A: Yeah, I assumed it was a release on Rig 24.").

[520] As always, it is important to underscore that—contrary to his hearing testimony—Respondent knew well at the time that Rig 23 was a Cabot 900, in contrast to Rig 24, which was a Service King 775. *See*, *e.g.*, EX 180 (October 27, 2015 email from F. Bonan II to C. Zimmerman, S. Collins, F. Bonan Sr., and H. Bonan) (referring to Evergreen rigs by number and by model); *see also* Part V *supra* at n. 31 (additional examples).

receive once the transaction was complete (and indifferent to the prospect of Grand Rivers receiving any compensation for its own part in the deal),[521] Respondent not only did not question anything, but he angrily and immediately ordered Winters and Gaskins to release an interest that he knew did not exist—an order that Winters interpreted as a command to file the unrecorded termination statements that she had sent to Respondent a month prior, regarding a rig with which she was unfamiliar beyond the filing number on Exhibit C, and to which he had raised no objections and asked nothing further. Throughout the transaction, in short, Winters had only some of the puzzle pieces, while Respondent had the whole puzzle but never bothered to open the box or even show his subordinates the picture on the lid.

The undersigned concludes that Respondent thus breached his fiduciary duty of care regarding the Rig 23 release in the following ways:

First, Respondent not only failed to properly supervise his subordinates, but acted in such a way towards those subordinates as to make their accidental release of the Rig 23 interest foreseeably more likely. When Riecken emailed him on November 13, 2015 informing him that "[e]ven though there is no collateral for rig 24 at Grand Rivers[,] Denny still wants a recorded UCC-1,"[522] Respondent did not take any time to evaluate the state of affairs or inquire with Evergreen or U.S. Energy or the appropriate personnel at the Bank about what "a recorded UCC-1" on a nonexistent security interest might look like, nor did he consider the potential consequences for the Bank in acceding to this request. Instead, he immediately pressured Gaskins and Winters to do the thing that he knew or should have known could not be done, placing them in an impossible

[521] *See* Bonan Tr. 908:8-14 ("Q: And you were more concerned about Peoples getting the 1.262 million dollars— A: Because I knew Grand Rivers had no interest in Rig 24. Q: Grand Rivers weren't getting anything? A: That's right.").

[522] EX 233 (email chain including November 13, 2015 email from A. Riecken to F. Bonan II and S. Collins).

position without the benefit of the information he possessed.[523] This alone is a breach of Respondent's fiduciary duty.

Among other things, Respondent also breached his fiduciary duty of care in this manner by failing to question why Winters had sent him unrecorded UCC-3 terminations for security interests in Illinois and Indiana when the Rig Purchase Agreement specified only an Illinois UCC.[524] While Respondent attempts to explain this away by saying that he "assumed" that what Winters had given him "was a release on Rig 24" because he "never looked at this attachment until [he] just looked at it in front of" Enforcement Counsel at the hearing,[525] this is simply more evidence of derelict supervision—particularly since, as detailed in Part V(H) *supra* at pp. 73-74, he could not have both assumed that Winters had given him a release on Rig 24 and simultaneously understood (as he repeatedly claims he did) that such a release was not possible. Even a small amount of diligence in the face of this apparent paradox would have served the interests of the Bank by alerting Winters that the UCC-3 termination statements she had provided were actually for Rig 23, but Respondent either did not recognize the contradiction or did not care.[526]

Second, 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[527]—to act, that is, "with the care an ordinarily prudent person in a like position would exercise under similar circumstances."[528]

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[523] *See* Bonan Tr. 906:3-4 ("I knew that Grand Rivers Bank did not have Rig 24 as collateral."), 906:15 ("I directed for Rig 24 to be released.").

[524] *See* EX 143 (October 16, 2015 email from K. Winters to F. Bonan II, A. Evans, and A. Riecken attaching unrecorded Illinois UCC-3 termination statement); EX 142 (October 16, 2015 email from K. Winters to F. Bonan II attaching unrecorded Indiana UCC-3 termination statement).

[525] Bonan Tr. 880:12-25.

[526] As Enforcement Counsel puts it, "Winters had sent Bonan II unrecorded terminations, and his only action, thereafter, was to instruct her to file them." EC Reply at 14.

[527] *Faigin & Lannan*, 2015 WL 9855325, at *82 (internal quotation marks and citation omitted).

[528] *Michael*, 687 F.3d at 350-51 (internal quotation marks and citation omitted).

The greater the scope of authority, the broader the duty, and here Respondent had authority to effectuate the transaction on behalf of PNB as well as Grand Rivers.[529] Respondent "had access to all of the relevant information—indeed, he was the only person at the Bank aware of the entirety of the Rig 24 sale transaction and in contact with each of Evergreen Drilling, U.S. Energy, the escrow agent, and PNB."[530] In that capacity, Respondent could and should have served as a conduit to ensure that all parties to the transaction were on the same page and had an accurate understanding of, for example, whether the Bank had any kind of security interest in the rig being sold and whether any kind of release was actually necessary from that bank as a result. All it would have taken was passing along to Denny Boyer or Abbey Evans (who should have known already) the information that the Bank had no interest in Rig 24, supported if necessary by the results of a UCC-1 search of the kind that Scott Collins had performed for PNB at the end of that September.[531] Conversely, Respondent never communicated to Winters and Gaskins his apparent understanding that Boyer believed the Bank to have some kind of blanket subordinate interest in Evergreen that covered Rig 24 and that needed to be released—had he done so, they could have disabused him of that notion in even clearer terms than Winters did on November 12, 2015.[532] Enforcement Counsel states that Respondent "directed Bank staff to release collateral before determining whether the Bank was obligated to release its collateral,"[533] but it is worse than that: Respondent knew that Grand Rivers was not obligated to release any collateral, yet directed his subordinates there to

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[529] *See* EX 216 (November 11, 2015 email chain indicating that Respondent was responsible for the transaction on behalf of PNB); *see also Faigin & Lannan*, 2015 WL 9855325, at *82 ("The greater the authority of the director or officer, the broader the range of his duty.") (internal quotation marks and citation omitted).

[530] EC Br. at 53; *see also* EPF ¶¶ 300-310, 338.

[531] *See* EC Br. at 55 (arguing that "[w]hen Bonan II did not review documentation or failed to challenge or investigate US Energy's claim that the Bank had a security interest in Rig 24, he breached his duty of care").

[532] *See* EX 226 (November 12, 2015 email chain including emails from K. Winters to F. Bonan II confirming multiple times that the only Evergreen collateral held by the Bank was the Carmi Warehouse on a loan to Evergreen Properties and "a Cabot 900 series drilling rig" on a loan to Evergreen Drilling).

[533] EC Reply at 5.

release the collateral anyway in order to placate a party to the transaction who was under the mistaken impression that the Bank had collateral in Rig 24 to release.[534]

Third, Respondent did not act "in a manner reasonably believed to be in the [B]ank's best interest" over the course of the Rig 24 sale, as his fiduciary duty of care to the Bank obligated him to do.[535] The lack of compensation for the Bank in exchange for the release of its collateral is but one example: even if the Grand Rivers had had a Rig 24 security interest, whether as a PMSI or as part of a blanket subordinate lien securing an Evergreen loan, Respondent's order to Gaskins and Winters to (in his words) "release Rig 24" would have resulted in the Bank losing something of value in exchange for nothing at all. The Rig Purchase Agreement expressly contemplated that liens and encumbrances on Rig 24 would "be removed by application of all or a portion of the purchase price at closing,"[536] but there is no evidence that Respondent ever sought to advance the Bank's interests under this provision or expressed any concern about the possibility that the Bank would be releasing collateral without being paid for it—or, indeed, had the Bank's interests in mind to any degree. (For an example of a Grand Rivers employee properly discharging their fiduciary duty to the Bank, compare Respondent's conduct to that of Bank loan officer Don Nave—who, when pressed by Scott Collins to release the Bank's interest in Rig 23, responded that he would not be doing so unless the Bank was fully compensated for the loss of collateral.)[537] To

[534] *See* Bonan Tr. 905:16-18 ("Q: Why didn't you tell Mr. Boyer that [the Bank did not have an interest in Rig 24]? You say hey pal— A: Well, I told him that I was getting the UCC releases that he requested. That's what I kept telling him."); *see also* R Reply at 25 (claiming that Respondent was "simply pacifying a buyer that someone at Grand Rivers would do what needed to be done to finalize the sale of Rig 24").

[535] *Steven Ellsworth*, 2016 WL 11597958, at *17; *see also Smith & Kiolbasa*, 2021 WL 1590337, at *15 ("Officers and directors of depository institutions have a strict fiduciary duty to act in the institution's best interests.") (internal quotation marks and citation omitted).

[536] RX 40 (Rig Purchase Agreement) § 3.1(c).

[537] *See* EC-OPP-13 (Nave Decl.) ¶ 16 (refusing to release the Bank's PMSI in Rig 23 unless the Bank "was paid the full amount of its lien pursuant to the UCC-1 on file with the Illinois and Indiana Secretaries of State").

the contrary, Respondent's focus was on the compensation due to PNB, which would be receiving virtually all of the proceeds from the Rig 24 sale.[538]

In that vein, the undersigned concludes that Respondent breached his fiduciary duty of loyalty in addition to his fiduciary duty of care. Reviewing the record, there is no fair conclusion other than that concern for the interests of Evergreen and PNB in the fall of 2015 led Respondent to be—at best—inattentive to his responsibilities as a fiduciary of Grand Rivers.[539] Given the level of control exerted by Respondent over the Evergreen Loan Relationship at both banks, moreover, the undersigned finds it implausible that Respondent would not have been aware of PNB's efforts to get Grand Rivers to release its interest in Rig 23 or Evergreen's subsequent pledge of Rig 23 as collateral to PNB free and clear of all liens and encumbrances.[540] It is reasonable to wonder how much Respondent's divided loyalties affected his ability to bear Grand Rivers' interests in mind; certainly the ultimate outcome of the Rig 24 sale—including, but not only, the Bank's unnecessary release of Rig 23, leaving PNB with first position on that collateral—benefited PNB and Evergreen at the Bank's expense, much in the way the 618 Holdings loan did.[541] If the inclusion of information pertaining to the Bank's Rig 23 security interest in the Rig 24 purchase agreement was truly error, it was a convenient one for PNB, and the best that may be said for Respondent's role in the matter is that he was too focused on Evergreen and PNB to discharge his duties to the Bank with the diligence, care, and loyalty they required.

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[538] Respondent's testimony that he was not focused on Grand Rivers' lack of compensation because he "knew [it] had no interest in Rig 24," Bonan Tr. 908:10, is a logical merry-go-round already discussed in Part V(H) *supra* at pp. 61-66.

[539] *See Smith & Kiolbasa*, 2021 WL 1590337, at *15 (noting that "conflicts of interest [and] divided loyalties are inconsistent with fiduciary responsibilities") (quoting *Michael*, 687 F.3d at 351).

[540] *See* Part V(H) *supra* at pp. 56-59.

[541] *See* EC Br. at 56 (noting that "as with the 618 Holdings loan, Bonan II's actions [in connection with the Rig 23 release] only benefited Evergreen Drilling and PNB, but placed significantly greater risk on the Bank. . . . [T]he [Rig 24] sale resulted in nearly $1.2 million being paid to PNB while the Bank converted the fully secured loan to Evergreen Drilling into an unsecured credit with $549,495 outstanding to a troubled borrower.").

Respondent marshals several arguments for why he did not breach his fiduciary duties to the Bank in connection with Rig 23, none of which are availing. To begin with, Respondent argues broadly that his duty to supervise subordinates does not extend to "menial task[s] that should easily be handled by lower-level employees," such as "drafting financing statements" or "confirming collateral referenced by serial number."[542] He asserts that "[i]n his position as Chairman of Grand Rivers, it would be wholly inefficient and unreasonable to expect [Respondent] to review all filings made by employees."[543] And he cites an Eleventh Circuit case, *Doolittle v. NCUA,* for the proposition that "[a] banker ordinarily 'cannot be held to have breached his fiduciary duty simply because his underlings failed to follow his orders.'"[544]

Respondent's argument is specious. Gaskins and Winters were no mere underlings, but the Bank's CFO and Head of Loan Operations, tasked by Respondent with effectuating a million-dollar transaction that Respondent viewed as "critical" to the financial health of Evergreen and its ability to pay down its debt at PNB.[545] Further, the tasks being performed were not "menial," but rather a core component of the transaction's terms. Grand Rivers was being asked to release its interest in the rig being sold. Insofar as Winters understood, this was the rig identified in Exhibit C of the Rig Purchase Agreement; the file numbers corresponded, and the Bank did not have any other rigs as collateral.[546] But the evidence shows that Respondent knew better: he knew the model of the rig for sale, information Winters did not have, and he knew the Bank had no interest it could release in that rig. He also knew that the PMSI that the Bank *did* possess, in a different rig, was its

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[542] R Reply at 25.

[543] R Br. at 2.

[544] *Id.* at 35 (quoting *Doolittle v. NCUA*, 992 F.2d 1531, 1537 (11th Cir. 1993)).

[545] *See* Bonan Tr. 848:23-25 ("[I]t was critical for Gary [Evans] to sell this rig. It was critical for Evergreen to sell this rig to pay down debt. . . . They were in a place where they had to pay down debt, so the sale of that rig was critical during that time period.").

[546] *See* Winters Tr. 159:5-8 ("I wasn't sure what Rig 24 was at any point. I just knew what the UCC number that they had listed in the purchase agreement, was the UCC I had in file.").

only collateral on a $550,000 loan. And he had been provided with UCC-3 termination statements for his review which, had he only reviewed them, would have made it clear to him that the Bank was poised to release its interest in the wrong rig. To be sure, Respondent is not expected "to review all filings made by employees," but it is not asking too much for him to notice here that he has been given termination statements for Indiana and Illinois, for example, when the UCC interest ostensibly requiring release is only in Illinois; when the Bank's only collateral on its Evergreen Drilling loan was recorded in both of those states; and when there is no reason for any terminations on any Bank UCCs to be filed in the first instance.

Moreover, *Doolittle* is inapposite: as Enforcement Counsel observes, the bank official in that case "instructed a loan supervisor to not make any more commercial loans to a credit union member" and "took steps to prevent further escalation of the situation," but "the loan supervisor ignored the instructions."[547] Here, by contrast, Winters is following Respondent's instructions, but the instructions themselves are impossible—something that Respondent has reason to know and that Winters does not. The undersigned agrees with Enforcement Counsel that "[u]nlike the officer in *Doolittle*, [Respondent] took no affirmative steps to supervise Gaskins and Winters and he did not attempt to explain to them that he wanted them to release a lien on a rig that he knew had no connection to the Bank."[548]

As for Respondent's contention that he "expects his employees to handle the tasks that are part of the responsibilities of their employment, not his, correctly,"[549] this hands-off approach is a far cry from the micromanaging, controlling style on display from Respondent throughout the record in regard to his multiple businesses, from determining which junior employees in properties

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[547] EC Reply at 15 n.17; *see Doolittle*, 992 F.2d at 1537.
[548] EC Reply at 15.
[549] R Reply at 27 (emphasis omitted).

owned by him but managed by others should be getting $1/hour raises[550] to directing Gaskins and Whitney Stringer to visit a new Bank branch to "[t]ime how long it takes to open an account and tell those dumb mother fuckers exactly what to do."[551] The managerial restraint described in Respondent's brief is uncharacteristic at the very least, and describes a trust felt by Respondent in his subordinates' actions that is otherwise absent from the record. Likewise, Respondent protests that "if Winters and Gaskins were confused, they should have followed up and asked [him] to clarify what he wanted,"[552] but the force of this suggestion as a reasonable course of action to have expected at that time is belied by testimony by Winters, Gaskins, and others that Respondent was—to put it lightly—not receptive to requests for clarification.[553]

Respondent next argues that Winters and Gaskins have admitted that the release of Rig 23 was their mistake for which they bear full responsibility.[554] This is irrelevant to the question of fiduciary duty. Whether or not the filing of the "wrong" UCC-3 statements—wrong in quotation marks because Respondent has never identified what the "right" statements that Winters could have filed are—was ultimately a mistake by Winters, it was one that Respondent was in position to correct or at least check to some extent, and yet he did not lift a finger. As the FDIC Board has held, a respondent in a Section 1818 enforcement proceeding "cannot escape liability by pointing the finger at his subordinate, even if the subordinate or subordinates in following the instructions

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[550] *See* EX 43 (September 14, 2015 email chain including email from F. Bonan II to G. Gaskins, D. O'Bright, and A. Sosenko) at 3 ("The person assisting Chaurdas with eldorado gets named manager and get 1.00. West city girl is named manager and gets a 1.00 increase. Herrin girl named manager and given $1.00.").

[551] EX 24 (June 11, 2015 email from F. Bonan II to G. Gaskins and W. Stringer).

[552] R Br. at 35.

[553] *See*, *e.g.*, Gaskins Tr. 167:4-7 ("In my experience with him when he gives a direction he wants it done exactly how he has told it to be done and any changes he's—he is—doesn't—that doesn't sit well with him."); Winters Tr. 22:3-8 ("[Respondent was] demanding and aggressive. . . . When he wanted something, he wanted it right then and he wanted it without question."); Nave Tr. (stating that he did not feel comfortable asking Respondent for clarification if he did not understand a request).

[554] *See* R Br. at 15-17.

of [the respondent as their superior] contributed to the losses and also engaged in the violative conduct."[555] Winters was unquestionably following Respondent's instructions here, as she reasonably interpreted them with the information that she had.

Respondent also makes much of the fact that "Gaskins acknowledged that, as CFO of Grand Rivers, he had a fiduciary duty to protect Grand Rivers and that 'part of that duty would be to make sure that the bank is not releasing . . . the wrong collateral on a loan."[556] But surely any duty held by Gaskins in this regard applied with equal if not greater force to Respondent, should he have had reason to question whether a release of collateral would be in the Bank's best interests, as he did here. Respondent knew that the Bank had a security interest in Rig 23 and no interest in Rig 24; it was his duty to take some affirmative step to ensure that the UCC releases that were seemingly being filed for a nonexistent security interest did not somehow impact the interest that the Bank actually held.

Finally, Respondent claims that he is absolved from responsibility because "Rig 24 is the only rig mentioned in the emails" that he forwarded to Gaskins and Winters on the morning that Rig 23 was released, thereby showing that "when [Respondent] said 'get this bulkshit done,' Winters understood that [Respondent] was referring to a release of Rig 24."[557] If anything, however, this statement neatly demonstrates how Respondent breached his fiduciary duty that day. Respondent's brief (and his testimony) says that he was directing "a release of Rig 24," but no such thing could have been achieved by Gaskins or Winters, because—as Respondent, but not Gaskins or Winters, knew and understood at that time—the Bank did not have any interest in Rig

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[555] *Michael Sapp*, 2019 WL 5823871, at *13.

[556] R Br. at 35 (quoting Gaskins Tr. 117:13-22).

[557] *Id.* at 11; *see also id.* at 31 ("Rig 24 was the only rig discussed or referenced in the emails [Respondent] forwarded to Winters and Gaskins. When [Respondent] instructed Gaskins and Winters to 'get this bulkshit done,' he was referring to releases for Rig 24.").

24 that could be released. Respondent was demanding that his subordinates do something that they did not know could not be done. This is a circle that fundamentally cannot be squared: Respondent cannot simultaneously acknowledge that he was directing Winters and Gaskins to release an interest that he knew was nonexistent and then claim that he was acting prudently by doing so.

Perhaps recognizing this, Respondent's reply brief doubles down on two alternate explanations for what he was asking Gaskins and Winters to do. First, Respondent states that when Gaskins told him, on October 9, 2015, that "[o]ur ucc-1 is not a blanket it is just on this specific rig,"[558] this representation satisfied his duty to investigate further because "[h]e had no reason to supervise more fully at this point."[559] To the extent that Respondent is here suggesting that he had some reason to believe that the Bank *did* have an interest in Rig 24 because Gaskins told him so, that is patently nonsensical and contradicts Respondent's testimony and his consistent litigation position.[560] Second, Respondent claims that he was simply "mistaken in his understanding that Grand Rivers had some sort of blanket lien, junior, or other security interest (because *he was hearing from people within and outside the bank* that Grand Rivers did)."[561] But Respondent, of course, has offered no evidence or testimony that anyone from inside the Bank ever told him that Grand Rivers had a blanket lien or junior interest that covered Rig 24—indeed, Gaskins and Winters told him precisely the opposite.[562] And it is of course worth noting that if Respondent had based his understanding of what collateral the Bank had on the unsupported representations of a

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[558] EX 124 (October 9, 2015 email chain including email from G. Gaskins to F. Bonan II).

[559] R Reply at 30.

[560] Furthermore, in a world where Respondent somehow genuinely did believe this, a prudent individual in his position with the best interests of the Bank in mind would have followed up with Gaskins once Winters informed him that the only rig that the Bank had an interest in was Rig 23, to clear up the contradictory information.

[561] R Reply at 32 (emphasis added).

[562] *See*, *e.g.*, EX 124 (October 9, 2015 email chain including email from G. Gaskins to F. Bonan II) ("Our ucc-1 is not a blanket it is just on this specific rig"); EX 226 (November 12, 2015 email chain in which Winters tells Respondent that the only Evergreen Drilling collateral the Bank has is on "a Cabot 900 series drilling rig").

third party that were contradicted by what he was being told by his own personnel, this would likely constitute a breach of Respondent's fiduciary duty by itself.

b. Recklessly Unsafe or Unsound

Enforcement Counsel contends that Respondent's conduct in connection with the Rig 23 release was not just unsafe or unsound—a threshold met by Respondent's breach of his fiduciary duties, as previously discussed[563]—but recklessly so, which is one way to satisfy the misconduct element for the assessment of a second-tier civil money penalty under Section 1818(i).[564] Conduct is "reckless" for these purposes "when it is done in disregard of, and evidencing a conscious indifference to, a known or obvious risk of substantial harm."[565] In the *Blanton* case, for example, the D.C. Circuit affirmed the OCC's determination of recklessly unsafe or unsound practices where the IAP "was aware of the risk posed by [his misconduct] but took only perfunctory steps to mitigate [that] risk."[566]

Here, Respondent took no steps at all to mitigate the obvious risk posed by his indifference to the Bank's best interests over the course of the Rig 24 transaction: namely, that because his subordinates lacked the information he possessed that the rig being sold was not the rig the Bank held as collateral, and because Respondent himself did not adequately supervise the process or properly communicate with either his subordinates or outside parties, it was foreseeable that the Bank's actual security interest in Rig 23 would be jeopardized when Respondent demanded that Gaskins and Winters release what he knew to be an imaginary interest in Rig 24.

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[563] *See Michael Sapp*, 2019 WL 5823871, at *13 ("Because of their inherent danger, breaches of fiduciary duty also constitute unsafe and unsound practices.").

[564] *See* EC Br. at 52-53; Part III *supra* at pp. 7-8 (elements of Section 1818(i)).

[565] *Patrick Adams*, 2014 WL 8735096, at *49 (internal quotation marks and citation omitted).

[566] *Blanton*, 909 F.3d at 1175.

That is, despite being told by individuals at Grand Rivers and at Evergreen "that the Bank did not have an interest in Rig 24, and knowing the Bank was getting no proceeds for the sale," Respondent "never challenged US Energy's assertion" that a Bank release was necessary or otherwise "investigate[d] the validity of its claim,"[567] instead letting Winters file UCC-3 termination statements that he had multiple opportunities to review and would have seen, with even a perfunctory glance, related to a genuine security interest held by the Bank. And because he knew, furthermore, that the only such security interest on Evergreen Drilling assets represented the Bank's only collateral on a $550,000 loan, Respondent's conduct exhibited "a conscious indifference to[] a known or obvious risk of substantial harm" and therefore constituted recklessly unsafe or unsound banking practices.

2. Effect

The Bank's release of its Rig 23 security 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.[568] Enforcement Counsel argues that Respondent's misconduct in connection with the Rig 23 release therefore caused financial loss to the Bank—or, in the alternative, made it probable that the Bank would suffer loss—sufficient to satisfy the effect elements of Section 1818.[569]

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[567] EC Br. at 48.

[568] *See* EPF ¶¶ 345 (junior lien position), 346 (financial woes), 347 (charge-off); *see also* Stringer Tr. 111:14-24; Clark Tr. 736:25-737:6.

[569] *See* EC Br. at 56-57, 59.

In response, Respondent advances four arguments as to why his actions did not cause loss or risk of loss to the Bank relating to the release of Rig 23: (1) the Bank never properly perfected its PMSI in Rig 23 at the time of its making; (2) even if the Bank had a properly perfected security interest in Rig 23 sometime before its release, that security interest was lost when the Bank consolidated its Evergreen Drilling loans in May 2014; (3) the Bank still believes it has a Rig 23 security interest that was not released; and (4) it was the negligence of other IAPs, and not Respondent's own acts or omissions, that caused the release of Rig 23.[570] The undersigned finds Respondent's arguments unpersuasive and agrees with Enforcement Counsel that the effect element of Section 1818 has been satisfied.

At the summary disposition stage, the undersigned concluded as a matter of law 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 purporting to grant Grand Rivers a PMSI in Rig 23,"[571] not least because the paperwork for the refinanced loans expressly references the January 2013 PMSI on Rig 23 as collateral for the consolidated loan[572]—something that Respondent's brief never mentions.[573] The undersigned therefore rejects Respondent's renewed novation argument.

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[570] *See* R Br. at 51-53; R Reply at 23-24.

[571] R Br. at 53.

[572] *See* MSD Order at 67-69; EX 15 (May 6, 2014 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 section titled "COLLATERAL," that "this Note is secured by Commercial Security Agreement dated January 9, 2013 and securing UCC file #17906194"); *see also* R-MSD-D (exhibit showing both documents).

[573] Respondent suggests that "[i]n considering whether there has been a novation as opposed to a simple renewal, courts consider the 'degree to which the original obligation of the debtor has changed and, to some extent . . . any additional consideration which was conveyed by the debtor to the creditor." R Br. at 52 (internal citation omitted) (ellipses in original). He then notes that the consolidated loan included an additional $126,000 to Evergreen Drilling, reduced the interest rate that Evergreen had to pay, and extended the maturity date of the loans being consolidated "by over three years." *Id.* at 52-53. Yet all of these things only support the conclusion that no novation occurred—as the undersigned observed in the MSD Order, it would make no sense for a loan that provided additional monies and *more favorable terms* across-the-board to the borrower to "have the effect of *decreasing* the

With respect to Respondent's argument that the Rig 23 PMSI was never properly perfected because it was a titled vehicle, the undersigned identified several disputed questions of material fact at the summary disposition stage, including "whether and where Rig 23 was titled; whether the Bank's interest in Rig 23 was noted on any certificate of title for Rig 23; and whether the nature of Evergreen Drilling's use of Rig 23 subjected it to regulation under Indiana's vehicle code."[574] The undersigned further noted that Respondent had thus far failed to produce Rig 23's certificate of title or otherwise produce any evidence that Rig 23 was ever registered as a vehicle in Indiana, which was the applicable jurisdiction.[575]

At the hearing, Respondent proffered the report and testimony of his expert Steven Wallace—incorrectly identified in Respondent's post-hearing brief as his other expert, Gary Schwartz—"that the carrier/chassis of Rig 23 was a titled vehicle subject to perfection under the motor vehicle codes in Illinois and Indiana."[576] Relying on the opinion of Wallace, Respondent now declares that Enforcement Counsel "was required to present evidence that Grand Rivers properly noted its security interest [in Rig 23] on a certificate of title" to "prove that Grand Rivers had a properly perfected security interest."[577] The undersigned does not credit Wallace's conclusion that Rig 23 was a titled vehicle because, as Enforcement Counsel notes, "he based this

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amount of collateral identified to secure that debt." MSD Order at 69 (emphasis in original). Incidentally, Respondent's brief on this point contains a significant factual error. He states that the May 2014 loan operated to "consolidate[] the January 2013 loan with another non-PMSI loan, the June 2013 loan," R Br. at 52, but this is plainly not true: the June 2013 loan, just like the January 2013 loan, was expressly secured with a PMSI on Rig 23. *See* EX 14 (June 21, 2013 Commercial Loan Application) at 1 (identifying the loan type as "Commercial Secured" and listing a "Cabot 900 series self-propelled Drilling Rig" as collateral); EX 40 (September 1, 2015 email from D. Nave to S. Collins attaching June 27, 2013 Promissory Note) at 3 (stating, in section titled "COLLATERAL," that "Borrower acknowledges this Note is secured by the following collateral described in security instrument listed herein; described in a Commercial Security Agreement dated January 9, 2013").

[574] MSD Order at 67.

[575] *See id.* at 65 (finding that "Indiana law governs whether the Bank's interest in Rig 23 was perfected by the Bank's initial filing of its UCC financing statement," and that "[u]nder Indiana's Vehicle Code, a security interest in a vehicle . . . is perfected when it is filed with the Indiana Bureau of Motor Vehicles"); *see also id.* at 64-67.

[576] R Br. at 51 (citing RX 52 (Expert Report of Steven Wallace ("Wallace Report") at 2).

[577] *Id.*

conclusion solely on a photograph of an unidentified Cabot 900 bearing an Oklahoma license plate."[578] As was the case at the summary disposition stage, Respondent provided no evidentiary foundation to establish that the rig in this photograph was Rig 23, nor why—if it was—the photograph would support Respondent's contention that the Bank's security interest should have been, but was not, recorded on a certificate of title in Indiana or Illinois.[579] Neither did Respondent offer any certificate of title for Rig 23, any reason to believe that Wallace or Respondent himself had ever reviewed any certificate of title for Rig 23,[580] or any evidence that the nature of Evergreen's use of Rig 23 subjected it to regulation under the Indiana motor vehicle code,[581] as the MSD Order required for a finding in Respondent's favor on these questions of fact.[582]

By contrast, Enforcement Counsel presented testimony from Bank officer Don Nave, who indicated that the Bank had asked for a certificate of title for Rig 23 and was "told it was equipment and it did not have a title."[583] Moreover, the June 2017 Order of Replevin proffered by Enforcement Counsel, which established PNB's priority interest in Evergreen Drilling's personal

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[578] EC Reply at 22; *see also* RX 39 (photograph of Cabot 900 rig with Oklahoma plates).

[579] *See* MSD Order at 66 ("Indiana law provides that the Indiana Bureau of Motor Vehicles is only authorized to issue a certificate of registration for vehicles that have been titled in Indiana. Respondent's photograph suggests that Rig 23 was not titled in Indiana, and thus any efforts by the Bank to record the lien on Rig 23's certificate of title with the Indiana Bureau of Motor Vehicles would have been fruitless."); *see also* EC Reply at 21 n. 30 (noting further that Wallace's expert report "does not explain . . . why an Oklahoma license plate on the Rig in the photograph required a title from Indiana").

[580] *See* RX 52 (Wallace Report) at 2 (stating only that "I have seen photographic evidence that the carrier or chassis is a titled vehicle subject to perfection under the motor vehicle codes of Illinois and/or Indiana"); Wallace Tr. 770:23-771:9 (agreeing that the photograph in RX 39 was the "photographic evidence that the carrier or chassis is a titled vehicle" to which his report referred).

[581] *See* MSD Order at 66-67 (finding that "Enforcement Counsel highlights evidence in the record that Rig 23 was often transported using other vehicles, suggesting that the extent of its operation on roadways may not have called for registration under Indiana law, and therefore it may not have been subject to the requirement that liens be recorded on the certificate of title").

[582] *See id.* at 67 (denying Respondent's motion for summary disposition on the issue of whether the Bank properly perfected its security interest in Rig 23 because he did not offer evidence supporting a conclusion that Rig 23 was a titled vehicle subject to perfection under the motor vehicle codes of Illinois or Indiana).

[583] EC Reply at 22; *see* Nave Tr. 177:18-22 (also stating that he never got "any information at any time while . . . at Grand Rivers that indicated that the Cabot 900 was a titled vehicle").

property, differentiated between titled vehicles and equipment, and specifically listed Rig 23 as equipment.[584] All in all, the undersigned agrees with Enforcement Counsel that Respondent has "provided no credible evidence that [Rig 23] was a titled vehicle" and has accordingly failed to meet his burden of proof on that issue.[585]

Respondent also argues that the Bank did not suffer a loss from the release of its security interest in Rig 23 because it "believes it still has a security interest in Rig 23."[586] In support of this statement, Respondent points to an unspecified filing in *Grand Rivers Community Bank v. Evergreen Energy, L.L.C., et al.*, Case No. 2017-LM-28 (2nd Judicial Circuit, State of Illinois), in which the Bank purportedly alleged that it had a priority interest in that rig as of September 2022.[587] This argument is misguided. It is irrelevant what representations are made by the Bank for purposes of advancing its litigation position in an action apparently seeking to resolve the existence, validity, and priority of competing interests in Rig 23 in the present day. Rather, what matters for Section 1818 is whether the Bank in fact suffered a loss or probable loss as a result of the filing of the UCC-3 termination statements for the Bank's interest in Rig 23 in November 2015—or, as Respondent puts it, whether his misconduct was "a substantial factor in producing [an] injury" that was "reasonably foreseeable at the time of the wrongful act."[588] Here, it was reasonably foreseeable that "[t]he conversion of a previously secured credit to an unsecured credit, due to [Respondent's] misconduct, [would] create[] significant risk of loss to the Bank"—loss that manifested in the Bank's $489,268 charge-off of the Evergreen Drilling loan in January 2017.[589]

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[584] *See* EC Reply at 22; EX 354 (Order of Replevin) at 5.

[585] EC Reply at 21; *see also* n. 253 *supra*.

[586] R Br. at 51.

[587] *See id.* (citing RX 275 (September 7, 2022 Response to Peoples National Bank, N.A.'s Combined Motion and Memorandum of Law to Dismiss Grand Rivers Community Bank's Petition for Relief from Judgment) at 2).

[588] *Id.* at 49 (internal quotation marks and citation omitted).

[589] EC Br. at 57; *see Calcutt*, 2020 WL 847520, at *16 ("[L]oan charge-offs represent a loss to the bank as a matter of law."), *aff'd*, 37 F.4th at 330 ("The charge-off on the loan to Bedrock Holdings, which was part of the Bedrock

Finally, Respondent argues that "any losses sustained by Grand Rivers in connection with the Rig 23 release were caused by the negligence of Gaskins and Winters," rather than by Respondent himself.[590] But the law is clear that "multiple factors, and individuals, may contribute to a bank's losses,"[591] and an IAP may be held responsible for misconduct causing bank loss even if "others may have been more guilty."[592] In this instance, while Winters was responsible for erroneously filing the UCC-3 termination statements that caused the Bank's interest in Rig 23 to be released, she did so at the direction of Respondent, and under his ostensibly watchful eye.[593] The undersigned has already detailed numerous ways in which Respondent's conduct was a substantial factor in the Rig 23 release,[594] but two more examples will suffice:

First, when Gaskins emailed Respondent on October 9, 2015 to tell him that the Bank's "ucc-1 is not a blanket it is just on this specific rig," he added that he "***[j]ust need[s] the attachments to confirm its same equipment and same wording in ucc and purchase agreement***."[595] Respondent had received a copy of Appendix A three weeks earlier and could have provided it to Gaskins at this point, informing him that the rig being sold was a Service King 775.[596] That information would have been crucial, because Gaskins had asked Winters two days prior whether Grand Rivers had Rig 24 as current collateral, and he was told that she did not know

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Transaction, is an effect under [Section 1818]."); *James Leuthe*, 1998 WL 438323, at *15 ("The charge-off requirement has been held as a matter of law to result in loss to the Bank.").

[590] R Br. at 53.

[591] *Jeffrey Adams*, 1997 WL 805273, at *5.

[592] *Landry*, 204 F.3d at 1139.

[593] *See Michael Sapp*, 2019 WL 5823871, at *13 ("Respondent cannot escape liability by pointing the finger at his subordinate, even if the subordinate or subordinates in following the instructions of their superior (Respondent) contributed to the losses and also engaged in the violative conduct.").

[594] *See* Parts V(H) and VI(B)(1) *supra* at pp. 67-73, 111-125.

[595] EX 124 (October 9, 2015 email chain including email from G. Gaskins to F. Bonan II) (emphasis added).

[596] *See* EX 45 (September 15, 2015 email from A. Evans to F. Bonan II, S. Collins, and K. Botsch) (attaching Letter of Intent between Evergreen Drilling and U.S. Energy as well as Appendix A).

the rig number, but that the Bank's collateral was a "Cabot 900 series self-propelled drilling rig."[597] Thus, if Gaskins had possessed Appendix A when Winters emailed him later on October 9 about the UCC releases for Rig 24 and stated, "Not sure we had this is collateral but he wants it released if they do,"[598] he would have known for certain that the rig for sale was not the same rig that the Bank held as collateral and could have communicated that to Winters, thereby avoiding any real possibility of the Rig 23 release mistakenly being filed. Instead, despite having the attachment Gaskins was looking for, Respondent did not pass along Appendix A in response to Gaskins's email seeking confirmation that the UCC and the Rig Purchase Agreement were referring to the "same equipment," nor did he ever provide that document to Gaskins or Winters, permitting Gaskins's misconception that the Bank had a UCC on "this specific rig" to persist and setting the stage for disaster because his subordinates lacked the information he possessed.

Second, on October 16, 2015, Respondent directed Gaskins to call him in relation to "abbeys release."[599] Less than an hour later, Winters sent two emails to Respondent—one of which copied Abbey Evans—attaching unfiled UCC-3 termination statements for the Bank's security interest in Rig 23.[600] While there is no testimony regarding the contents of the phone conversation between Respondent and Gaskins, it may reasonably be inferred that the call was the impetus for the transmission of the termination statements from Winters to Respondent. Again, unlike Respondent, there is no indication in the record that Gaskins or Winters had seen Appendix A at this or any point. Yet Respondent, by his own admission, never opened the attachments containing

[597] EX 88 (October 7, 2015 email chain including email from K. Winters to G. Gaskins).

[598] EX 128 (email chain including October 9, 2015 email from G. Gaskins to K. Winters).

[599] EX 141 (October 16, 2015 email from F. Bonan II to G. Gaskins); *see* Gaskins Tr. 94:17-18 (stating that Respondent was "referring to the release of collateral from Grand Rivers Community Bank").

[600] *See* EX 143 (October 16, 2015 email from K. Winters to F. Bonan II, A. Evans, and A. Riecken attaching unrecorded Illinois UCC-3 termination statement); EX 142 (October 16, 2015 email from K. Winters to F. Bonan II attaching unrecorded Indiana UCC-3 termination statement).

the termination statements or otherwise communicated with Winters regarding their contents.[601] As a result, when Respondent forwarded Boyer's email seeking the "Grand Rivers Bank UCC Release" to Gaskins and Winters on November 13, 2015 with the command to "[g]et this bulkshit done this morning. Do both of you understand me,"[602] Winters had no basis to believe anything other than that the documents that she had sent Respondent for his review, and at his request, a month earlier were the appropriate ones to file.[603] These examples, as well as the others detailed previously, demonstrate that Respondent played a substantial and active role in causing the Rig 23 interest to be released, which in turn caused the Bank loss, thus satisfying the effect element of Section 1818(e).

3. <u>Culpability</u>

Enforcement Counsel argues 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 . . . 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.[604] The undersigned agrees with Enforcement Counsel.

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[601] *See* Bonan Tr. 880:12-25 ("Q: So although you don't know what's being terminated, you know Ms. Winters has just sent you an unrecorded termination of a Financing Statement of collateral of Grand Rivers Community Bank pertaining to Evergreen Drilling. Is that correct? A: Yeah, I assumed it was a release on Rig 24. . . . I never looked at this attachment until I just looked at it in front of you.").

[602] EX 233 (email chain including November 13, 2015 email from F. Bonan II to G. Gaskins, K. Winters, and A. Riecken).

[603] *See* Winters Tr. 118:24-119:22 ("Q: [W]hy then did you create this document? A: His— he wanted the security interest released and terminated. . . . Q: But why did you send it to Mr. Bonan and not Mr. Gaskins? A: Honestly, I do not know. . . . Probably at his request, would probably be my only reason for just sending it to him.").

[604] EC Br. at 57. Enforcement Counsel also argues briefly that the combination of misconduct relating to the 618 Holdings loan and the Rig 23 release constituted continuing disregard on the part of Respondent "over the course of months in the fall of 2015," *id.* at 58, but Enforcement Counsel offers no support for the proposition that continuing disregard can comprise multiple distinctly different instances of misconduct—in this case, indifference to the Bank's interests leading to the release of Bank collateral on one loan in November 2015 and imprudent behavior in connection with a separate loan in December 2015—and the undersigned need not decide the issue.

As a reminder, an IAP acts with willful disregard when, through their unsafe or unsound misconduct, he or she "deliberately and consciously takes part in an action that evidences utter lack of attention to an institution's safety or soundness" or demonstrates "a willingness to turn a blind eye to the institution's interests in the face of known risk."[605] Here, Respondent did not at any point during the Rig 24 transaction appear to be bearing the Bank's interests in mind, and the undersigned concludes that the standard for willful disregard is easily met.

The undersigned will not presume to draw conclusions regarding the contents of Respondent's mind during the relevant period, but this much is unmistakable from the record: Respondent knew—and testified that he knew, repeatedly—that the Bank did not hold any security interest in Rig 24. Respondent also knew that the Bank *did* have a security interest in Rig 23 that served as the only collateral for its loan to Evergreen Drilling. Finally, Respondent knew that his subordinates, at his express direction, would be releasing *some* security interest held by the Bank relating to *some* rig owned by Evergreen. Yet, despite there being only one rig that could conceivably have been released, Respondent did not inquire further.

All of the dots were there to connect; a prudent bank chairman with the interests of Grand Rivers in mind need simply have picked up a pencil—or, in this case, a phone, and communicated with Evergreen and U.S. Energy to clear up the matter: The Rig Purchase Agreement requires the Bank to release its security interest in Rig 24. However, the Bank does not have a security interest in Rig 24—here are the UCC-1 search results to prove it. Therefore, the Rig Purchase Agreement is in error, and there is no need for the Bank to release anything in order for U.S. Energy to have free and clear title to the rig and the transaction to be completed.

[605] *Cavallari*, 57 F.3d at 145; *accord Donald Watkins*, 2019 WL 6700075, at *8.

Instead of conveying this, however, or taking even a single step to ensure that the Bank's actual security interest in Rig 23 would not be accidentally released as a result of the impossible-to-fulfill request being made by U.S. Energy, Respondent hectored his subordinates into acting with urgency to release whatever rig it was that they had the ability to release—regardless of the reasonably foreseeable risk to the Bank that this entailed. Respondent had more information than Kassie Winters and better information than Denny Boyer, and yet was seemingly content to let Boyer's misconception go uncorrected—even as it was jeopardizing a transaction that Respondent deemed "critical" for Evergreen—while allowing Winters to believe that the unrecorded UCC-3 termination statements she had provided Respondent in October 2015 were the ones that needed to be filed in response to his demand to "release Rig 24" a month later.[606] In so doing, and through his other misconduct described in Part VI(B)(1) *supra*, Respondent turned a blind eye to the Bank's interests in the face of known risk, thereby acting with willful disregard for the safety and soundness of Grand Rivers and satisfying the culpability element of Section 1818(e).

4. Section 1818(i)

Because the undersigned concludes that Respondent has breached his fiduciary duties of care and loyalty and engaged in recklessly unsafe or unsound banking practices in a manner that caused the Bank to suffer more than a minimal loss, the misconduct and effect elements for the assessment of a second-tier civil money penalty under 12 U.S.C. § 1818(i) have been met with respect to the issue of the Rig 23 release.

C. Respondent's Other Arguments

Respondent makes a number of additional arguments in his post-hearing brief regarding, *inter alia*, the timeliness of this action, the inherent structure of administrative enforcement actions

[606] Bonan Tr. 855:18-19 ("Q: What were you directing [Gaskins and Winters] to do? A: Release Rig 24.").

before OFIA ALJs, the constitutionality of the appointment process for ALJs and for FDIC Board members, his right to a jury trial under the Seventh Amendment, and whether or not he was properly served with the Notice of Charges.[607] All of these arguments were considered and rejected by the undersigned at the summary disposition stage, and they are hereby preserved for review by the FDIC Board should Respondent choose to assert them once more.[608]

D. Civil Money Penalty

Before assessing a civil money penalty, the federal banking agencies are bound to consider the appropriateness of the amount being assessed in light of five mitigating factors: (1) the size of the respondent's financial resources; (2) the respondent's good faith; (3) the gravity of the respondent's violation; (4) the history of any previous violations; and (5) "such other matters as justice may require."[609] With respect to the $105,000 civil money penalty sought by Enforcement Counsel in this matter, the Parties have made submissions adverting to these factors and to the thirteen interagency factors that financial institution regulatory agencies must also weigh in conjunction when determining a civil money penalty amount.[610] Considering the Parties' submissions, assessing the relevant factors, and for the reasons given below, this Tribunal recommends to the FDIC Board that $105,000 is an appropriate monetary penalty for Respondent's misconduct in this case.

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[607] *See* R Br. at 57-66.

[608] *See* MSD Order at 39-42 (holding that the FDIC's adjudication structure does not impermissibly allow the FDIC to act as both prosecutor and judge), 42-44 (holding that the FDIC's discovery rules do not violate Respondent's right to due process), 44-46 (holding that Respondent was properly served), 47-50 (holding that this proceeding does not violate Respondent's Seventh Amendment rights), 50-51 (holding that the FDIC Board's removal protections do not warrant dismissal of this action), 51-53 (holding that OFIA ALJs are not unconstitutionally protected from removal), 53-56 (holding that this action is not barred by the applicable statute of limitations).

[609] 12 U.S.C. § 1818(i)(2)(G).

[610] *See* EC Br. at 59-60; EX 361 (Expert Report of Traci L. Hefner) ("Hefner Report") at 4-6 (in support of $105,000 civil money penalty); R Br. at 55-56 (in opposition to $105,000 civil money penalty).

The purpose of a civil money penalty "is to deprive the violators of any financial benefit derived as a result of the violations, provide a sufficient degree of punishment, and [act as] an adequate deterrent to the respondents and others from future violations of banking laws and regulations."[611] The interagency guidance regarding the assessment of civil money penalties further states that "in cases where the violation, practice, or breach causes quantifiable, economic benefit or loss," a civil money penalty amount that merely recompenses the loss or strips the violator of their benefit will be insufficient "to promote compliance with statutory and regulatory requirements."[612] Rather, "[t]he penalty amount should reflect a remedial purpose and should provide a deterrent to future misconduct."[613] The undersigned will address each of the five mitigating factors in turn, bearing in mind the punitive, deterrent, and remedial goals that civil money penalties are intended to achieve.

1. Respondent's Financial Resources

The Parties have jointly stipulated that Respondent "has the financial ability to pay a civil money penalty in an amount up to and including the respective [$105,000] civil money penalty set forth in the Notice."[614] This factor therefore does not warrant mitigation of the penalty amount sought in this matter.

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[611] *In the Matter of Richard D. Donohoo and Craig R. Mathies*, Nos. 92-249c & b *et seq.*, 1995 WL 618673, at *27 (July 5, 1995) (FDIC final decision); *see also Long v. Bd. of Gov. of the Fed. Res. Sys.*, 117 F.3d 1145, 1154 (10th Cir. 1997) (civil money penalties provide banking agencies with "the flexibility [they] need[] to secure compliance" with the relevant banking laws and to "serve as deterrents to violations of laws, rules, regulations, and orders of the agencies") (internal quotation marks and citation omitted).

[612] Civil Money Penalties Interagency Statement, 63 Fed. Reg. 30226-02, 1998 WL 280287 (adopting Federal Financial Institutions Examination Council's Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies (June 3, 1998)) ("Interagency CMP Policy").

[613] *Id.*

[614] JX 1 (Joint Stip.) ¶ 60.

2. **Respondent's Good Faith**

The mitigating factor of good faith, in the undersigned's view, encompasses both good faith shown (or not shown) in the course of a respondent's misconduct as well as any showing of good faith made by a respondent, for example through willing cooperation or genuinely expressed regret and responsibility for their actions, during the agency's investigation and the enforcement proceedings themselves. Such an interpretation provides an incentive for respondents to be forthcoming and cooperative through the investigative and enforcement process. That interpretation also lessens the duplicative effect that a finding of personal dishonesty or willfulness or a conscious engagement in misconduct might otherwise have on this mitigating factor—otherwise, no showing of good faith sufficient to mitigate an assessed penalty could ever be made in most cases before this Tribunal.

Here, Respondent's contradictory, inconsistent, self-serving, and generally non-credible testimony during the hearing, as detailed at pages 12-13 *supra* and throughout this Decision, did not demonstrate any good faith that might mitigate the amount of an appropriate civil money penalty. In particular, Respondent's claim not to recognize his own handwriting, when he had already stipulated earlier in the action that the document in question had been written by him, is reflective of—in the undersigned's view—an intent to obscure the facts set before this Tribunal rather than any genuine desire to tell his side of the story in a forthcoming way. Likewise, Respondent's statement that he did not know the numbers of Evergreen's rigs at the time of the Rig 24 sale was contradicted by so much record evidence that the only reasonable conclusion to be drawn is that Respondent was consciously seeking to bolster his litigation position rather than testify truthfully and with candor. The same may be said for Respondent's choice to stand by his representation to Carrollton Bank loan officer Chris Dickey—that he backed out of the Carmi

Warehouse purchase because he did not get along with the warehouse owner—when the representation was clearly untrue and he had admitted as much in a prior sworn statement, and when it was contradicted by his own testimony earlier in the day.[615] This kind of reflexive and pointless recalcitrance surfaced repeatedly during Respondent's testimony and, when combined with a lack of any expressed regret or responsibility for the consequences of his actions or understanding of the nature of his misconduct, does not lend itself to a finding of good faith. The undersigned also notes that Respondent's brief does not seek to argue that the civil money penalty amount should be mitigated on good faith grounds.

3. <u>Gravity of the Violation</u>

In her report, Enforcement Counsel expert Traci Hefner opined that the civil money penalty amount sought by the FDIC is appropriate due to Respondent's high positions of authority at both Grand Rivers and PNB and his use of the former to favor the latter.[616] The undersigned must agree that Respondent's breach of his fiduciary duties of loyalty and care to Grand Rivers in a way that consistently served to advance the interests of another bank at Grand Rivers' expense adds a level of gravity to Respondent's misconduct that must be taken into consideration. The fact that Respondent's actions similarly benefited a significant borrower at both banks, one of the principals of which Respondent was engaged in a romantic relationship with during the relevant period, at the Bank's expense is also notable. The undersigned therefore concludes that this factor weighs in favor of the civil money penalty amount that the agency seeks.

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[615] *Compare* Bonan Tr. 816:19-817:16 (testifying that he pulled out of Carrollton Bank purchase because "Abbey and I had gone on a date or two during that time period, so I was afraid of the close appearance of it," and because "there was a lot going on") *with* 914:23-916:1 (maintaining that it "was an accurate statement" to say that he did not purchase the warehouse because he and the property owner could not get along).

[616] *See* EX 361 (Hefner Report) at 6.

4. History of Violations

Enforcement Counsel did not present any evidence of a history of previous violations. This criterion thus serves as a potential mitigating factor for the civil money penalty amount.

5. Such Other Matters as Justice May Require

Neither party invokes this factor in their post-hearing briefing with respect to the assessment of a civil money penalty, and the undersigned therefore does not consider it as a mitigating factor.

Overall, having considered the Parties' relatively cursory submissions regarding the appropriateness of the civil money penalty amount being assessed in light of the five statutory mitigating factors,[617] and with the deterrent purpose of civil money penalties in mind, the undersigned concludes that the $105,000 civil money penalty sought by Enforcement Counsel is appropriate based on the lack of good faith exhibited by Respondent and the gravity of the violation, in addition to Respondent's undisputedly sufficient financial resources.

VII. Conclusion and Recommended Order

For all of the reasons above, the undersigned finds that the statutory elements for a prohibition order under 12 U.S.C. § 1818(e) have been met in this action. Specifically, the undersigned concludes that Respondent's actions in connection with the 618 Holdings loan and Grand Rivers' release of its Rig 23 collateral constituted a breach of the fiduciary duties of care and loyalty that Respondent owed that institution, as well as the engagement in unsafe or unsound banking practices; that this misconduct demonstrated willful disregard for the safety and soundness of Grand Rivers; and that Grand Rivers suffered loss as a result. With respect to the release of Rig

[617] Both parties advert briefly to the thirteen interagency factors that financial institution regulatory agencies must also weigh when determining a civil money penalty amount, *see* Interagency CMP Policy, 1998 WL 280287, but they do not discuss the factors in any detail, and accordingly this Tribunal need not address them.

23, the undersigned also concludes that Respondent's unsafe or unsound conduct met the threshold for recklessness under 12 U.S.C. § 1818(i). And the undersigned concludes that Section 1818(i)'s elements for a second-tier civil money penalty have been met as to both the 618 Holdings loan and the Rig 23 release, that no mitigation is warranted, and that $105,000 is an appropriate monetary penalty for Respondent's misconduct in this case.

In accordance with 12 C.F.R. § 308.28, the undersigned therefore recommends that the FDIC Board enter a prohibition order against Respondent and assess a second-tier civil money penalty in the amount of $105,000 in consequence of Respondent's misconduct. The record of this proceeding will be transmitted to the Board in conjunction with this Recommended Decision, as well as a certified index of the administrative record and a certified index of exhibits.

SO ORDERED.

November 20, 2023

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication

CERTIFICATE OF SERVICE

On November 20, 2023, I served a copy of the foregoing **Recommended Decision** upon the following individuals via email:

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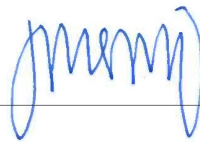

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