UNITED STATES OF AMERICA
BEFORE THE
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
WASHINGTON, D.C.

In the Matter of **FRANK E. SMITH and MARK A. KIOLBASA** Institution-affiliated parties of FARMERS STATE BANK Pine Bluffs, Wyoming, a state-member bank	Docket No. 18-036-E-I ALJ McNeil

ORDER REGARDING ENFORCEMENT COUNSEL'S MOTION FOR SUMMARY DISPOSITION

By a submission dated August 2, 2019, Enforcement Counsel moved for summary disposition of all issues and claims presented in this administrative enforcement action.[1] Accompanying the Motion were 110 exhibits and Enforcement Counsel's Statement reflecting the facts Enforcement Counsel aver are uncontested and support a finding that judgment in Enforcement Counsel's favor is warranted.[2]

On August 22, 2019, Respondents timely filed a response in opposition to the Motion.[3] Accompanying Respondents' response was their joint Statement identifying facts that Respondents aver are both material and disputed and sixteen exhibits.[4]

Summary of Findings

Upon the following premises and determinations, Enforcement Counsel's Motion is granted in part and denied in part. Pursuant to the Reserve Board's Uniform Rules of Practice and Procedure,[5] because Enforcement Counsel is entitled to summary disposition as to certain claims only, I shall defer submitting a recommended decision as to those claims, and direct the parties to address during the hearing now set to begin on December 3, 2019 those claims not determined through summary disposition.

Through this Order, I find uncontroverted and preponderant evidence establishes that the Federal Reserve Board has jurisdiction over the parties and the subject matter of this enforcement action, as alleged in Paragraphs 1 through 4 of the Notice of Intent.

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[1] Enforcement Counsel's Motion for Summary Disposition, dated August 2, 2019.
[2] Statement of Undisputed Facts in Support of Enforcement Counsel's Motion for Summary Disposition, dated August 2, 2019.
[3] Respondents' Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss, dated August 22, 2019.
[4] Statement of Disputed Material Facts in Opposition to Enforcement Counsel's Motion for Summary Disposition, dated August 22, 2019.
[5] See 12 C.F.R. § 263.30.

Further, I find the uncontroverted and preponderant evidence establishes that as individuals and as collaborators, Respondents engaged in *misconduct*, as defined under section 8(e)(1)(A) of the FDI Act, as alleged in the Notice of Intent at Paragraphs A and B, and Paragraphs 5 through 25, 28 and 30, and Enforcement Counsel's Motion at Part V (B).

I further find that evidence regarding the *effect* of Respondents' misconduct and regarding whether Respondents acted with the requisite *culpability*, when viewed in the light most favorable to Respondents, is controverted so as to preclude summary disposition.

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Submissions Under Seal

Enforcement Counsels' Motion and Respondents' Opposition are being maintained in the record of this enforcement proceeding under seal: Enforcement Counsel's submissions were presented as sealed pursuant to 12 C.F.R. § 263.33(b),[6] upon Enforcement Counsel's determination that their submissions "contain identities of third-party individuals and customer-specific information relating to third-party individuals and entities connected to Respondent's [*sic*] misconduct," the disclosure of which "would be contrary to the public interest."[7]

[6] See Enforcement Counsel's Notice of Filing Under Seal, dated August 2, 2019.
[7] *Id.* at 1-2.

Similarly, upon submitting their response in opposition and Statement of Disputed Material Facts, Respondents jointly averred disclosure of their submissions would be "contrary to the public interest" for the "same reasons set forth by Enforcement Counsel" in their Notice of Filing Under Seal."

Without determining whether the submissions should remain under seal, Respondents' joint proposal to file under seal is approved and all such submissions responsive to Enforcement Counsel's summary disposition motion and Statement of Material Facts shall be maintained under seal.[8] This Order, however, includes no references that would warrant a non-disclosure order and as such shall be maintained in the public record of this administrative enforcement action.[9]

Nature of the Enforcement Proceeding

Through its Notice of Intent, the Board of Governors of the Federal Reserve System seeks to prohibit Respondents Frank E. Smith and Mark A. Kiolbasa from participating in any manner in the conduct of the affairs of any institution specified in 12 U.S.C. § 1818(e)(7)(a), pursuant to section 8(e) of the Federal Deposit Insurance Act, as amended (the "FDI Act"), 12 U.S.C. § 1818(e) (hereinafter Prohibition Order).[10]

The Notice alleged that while still employed by Central Bank & Trust, Lander, Wyoming (Central), Smith and Kiolbasa conspired to misappropriate Central's proprietary business information in connection with their plan to acquire an ownership interest in Commercial Bancorp, Pine Bluffs, Wyoming (Commercial), a registered bank holding company in which Farmers State Bank, Pine Bluffs, Wyoming (Farmers) is a subsidiary, and in connection with their plan to leave Central in order to take management positions at Farmers.[11]

The Two Theories of the Case: The Preclusive Effects of a State Civil Judgment, and the Uncontroverted Nature of Evidence, Independent of the Civil Judgment

Enforcement Counsel presented two core bases for judgment in their favor: first, they presented evidence of a judgment having been entered adverse to Respondents that Enforcement Counsel aver resulted from a prior adjudication in which the issues decided were identical to the issues presented in this enforcement action.[12] Enforcement Counsel aver that in jury proceedings conducted in the District Court of the First Judicial District of Wyoming,[13] judgment was entered finding that Respondents willfully and maliciously appropriated Central's trade secrets, willfully and wantonly engaged in tortious interference with a contract or prospective economic advantage of Central, and willfully and wantonly breached their fiduciary duties to Central.[14]

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[8] Enforcement Counsel has the authority, exercised in this instance, to determine whether their submission is to be maintained under seal, and do not require ALJ approval in making this determination. See 12 C.F.R. § 263.33.

[9] See 12 C.F.R. § 263.33(b), which provides that the ALJ "shall take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public." No determination has by this Order been made regarding the need to close any portion of the hearing to the public.

[10] Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, dated December 11, 2018, at 2.

[1111] *Id.* at ¶5.

[12] Enforcement Counsel's Memorandum of Points and Authorities in Support of its Motion for Summary Disposition at 30-38.

[13] Central Bank & Trust v. Frank Smith et al., Docket No. 186-671, District Court, First Judicial District of the State of Wyoming. See EC SD Ex. 8 at 1.

[14] Enforcement Counsel's Memorandum of Points and Authorities in Support of its Motion for Summary Disposition at 32, citing EC SD Ex. 79 at FRB-Farmers-005705-06.

Upon these and related findings adduced during the state civil litigation, Enforcement Counsel aver "issues decided in the Central Litigation are identical with the relevant issues presented in these proceedings and satisfy each element required for an order of prohibition under section 8(d) of the FDI Act."[15] Considered in conjunction with the averments that the state court adjudication "resulted in a judgment on the merits," that as defendants in the state court litigation Respondents were either a party or in privity with a party in the state court litigation, and that as defendants in that litigation Respondents "had a full and fair opportunity to litigate" the material issues in the state court litigation, Enforcement Counsel assert the state court judgment "should be given preclusive effect" in this federal administrative enforcement action.[16] From this, Enforcement Counsel further assert that the state court judgment "satisfies the requirements for obtaining a Prohibition Order against Respondents."[17]

The second core theory upon which Enforcement Counsel seek summary disposition is their assertion that Respondents' actions violated Wyoming's Trade Secrets Act, and upon this factual premise the material undisputed evidence establishes Respondent's misconduct constituted both a violation of law, and unsafe and unsound banking practices – either one of which would provide a sufficient basis to find misconduct under the FDI Act.[18] Under this theory, there need be no reliance on the jury's findings in the state court litigation, but instead misconduct would be identified through evidence presented through submissions in support of Enforcement Counsel's summary dismissal motion. For that motion, such evidence consists of the record in this proceeding, including exhibits offered by the parties through the summary disposition process. Evidence to be considered includes Central's internal policies for employees and Respondents' alleged breach of those policies (particularly those policies requiring honesty, integrity, loyalty, and restrictions on outside activities).[19]

Separately, Enforcement Counsel aver misconduct is shown here through such evidence establishing that Respondents breached fiduciary duties owed to Central.[20]

Apart from alleging Respondents' collective actions constituted *misconduct* (by violation of law, by engaging in unsafe banking practices, or by breaching fiduciary duties, or any combination thereof), Enforcement Counsel aver Respondents' misconduct satisfied the *effect* prong of the FDI Act upon a claim that as a result of the misconduct, either that Central suffered (or probably will suffer) either financial loss or other damage, or that Respondents received a financial gain or other benefit from their conduct. Enforcement Counsel aver the evidence establishes both loss to Central and gain by Respondents. Also, referring specifically to Respondent Kiolbasa, Enforcement Counsel aver that the effect prong would be satisfied upon a showing of Kiolbasa's misconduct while employed at Farmers – averring that as a result of Kiolbasa's conduct, Farmers has suffered or probably will suffer loss or damage, or that Kiolbasa received a financial gain or other benefit from their conduct (and Enforcement Counsel aver both are established here).[21]

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[15] Enforcement Counsel's Memorandum of Points and Authorities in Support of its Motion for Summary Disposition at 35.
[16] *Id.* at 37-38.
[17] *Id.* at 38.
[18] *Id.* at 39.
[19] *Id.* at 44.
[20] *Id.* at 50-56.
[21] *Id.* at 56-57.

With respect to Respondents' *culpability*, Enforcement Counsel aver that Respondents' misconduct evidenced either personal dishonesty, or a willful or continuing disregard for Central's safety and soundness (or a combination thereof).[22] Regarding allegations attesting to Respondents' personal dishonesty, Enforcement Counsel aver that throughout the process during which Respondents transitioned from Central and sought positions at Farmers, Respondents coordinated their efforts to copy and transfer data from Central for use by Farmers, without informing anyone at Central and without obtaining authorization for the transfers.[23] According to Enforcement Counsel, while Smith was still employed at Central, he lied to or deceived multiple Central employees on several occasions in order to "cover up the assistance he provided to Farmers," while Kiolbasa advised Smith he was downloading data to his Central computer for use at Farmers, and described steps both had taken to conceal from Central the data transfer.[24]

While the *culpability* element in a Section 8(e) enforcement action may be satisfied with either proof of personal dishonesty or a willful or continuing disregard for the institution's safety or soundness, Enforcement Counsel aver both are shown here. According to Enforcement Counsel, Respondents demonstrated a willful and continuing disregard for Central's safety and soundness by "deliberately misappropriate[ing] Central's confidential and proprietary documents" and disclosing them, along with confidential customer information, to Farmers board members and, in Smith's case, to Farmers employees.[25] Enforcement Counsel further aver Respondents represented to Farmers' board members – even before taking positions with Farmers – that they had "approached Central's customers and that the customers had agreed to move their loans from Central to Farmers, evidencing willful disregard for financial risks to Central."[26]

Beyond presenting averments of fact and legal claims in support of their summary disposition motion, Enforcement Counsel further presented arguments and factual claims pertaining to Respondent's affirmative defenses, asserting that those affirmative defenses not already waived should be rejected as not supported based on the undisputed evidence presented through the summary disposition motion.[27]

Respondents' Theories in Opposition

Respondents' Claim that the Federal Reserve Board Lacks the Authority to Commence this Enforcement Action

Respondents jointly responded to Enforcement Counsel's summary disposition motion, presenting four core arguments: First, Respondents aver that inasmuch as Respondents were employees – i.e., institution-affiliated parties – of Central, "a Wyoming nonmember state bank, at the time of the alleged conduct giving rise to the request for Prohibition," the *FDIC* and not the Federal Reserve Board has exclusive jurisdiction to regulate the alleged unsafe and unsound practices identified in the Notice of Intent.[28] Respondents aver Enforcement Counsel "concedes

[22] *Id.* at 61-72.
[23] *Id.* at 62.
[24] *Id.* at 62-63.
[25] *Id.* at 65-66.
[26] *Id.* at 66-70.
[27] *Id.* at 73-74.
[28] Respondents' Memorandum of Points and Authorities in Support of its Motion for Summary Disposition at 10.

that at the time of the alleged misconduct, Respondents were IAPs of Central and, as a result, the Board does not have the jurisdiction to seek the prohibition."[29]

Respondents' Claim that the Civil Litigation Provides No Basis for Judgment

Second, Respondents aver that collateral estoppel cannot provide a basis for judgment here because the issues decided in the Central litigation were not identical to the material issues in this enforcement action.[30] According to Respondents, the state litigation concerned harm sustained by *Central* and duties owed to *Central*, and did not determine if they engaged in an unlawful act, nor if they engaged in unsafe and unsound banking practices, nor if they breached fiduciary duties owed to *Farmers*, nor if by their actions either *Farmers* was adversely affected or Respondents benefitted.[31] Further, Respondents aver the jury in the state litigation did not determine if Respondents engaged in an unlawful act that was accompanied by a culpable state of mind; and aver that because the state court litigation is on appeal, the prior adjudication "did not result in a final judgment on the merits."[32] Further, Respondents point to a "pending settlement agreement" which, according to Respondents, "will vacate the Jury's verdict" such that the verdict will not constitute a "final determination on the merits."[33]

Respondents also aver they did not have a "full and fair opportunity to litigation the issues," because the role of an issue relevant to the second action (i.e., Respondents' ability to engage in their chosen profession) was not a foreseeable issue in the first action – specifically averring that Respondents "could not have anticipated that they would be barred from their chosen professions when they were defending against claims [in the state court litigation] seeking solely money damages".[34]

Respondents' Claim that Evidence Adduced During the Civil Litigation is Insufficient to Support an Adverse Judgment

Third, Respondents aver that even if collateral estoppel is applied to the facts that were litigated in the state court proceeding, "those facts do not constitute 'substantial evidence' of Respondents' violation of 1818(e)."[35] Elaborating on this point, Respondents aver that the facts at issue in the state court litigation do not establish they committed unlawful acts, or that the acts had an adverse effect on Farmers or its depositors, or conferred any benefits on Respondents, or that the unlawful acts identified in the state court litigation "were accompanied by a culpable state of mind".[36]

Respondents' Claim that Material Facts are Controverted, Precluding Summary Disposition

Fourth, Respondents aver that Enforcement Counsel's summary dismissal motion should be denied because "there are genuine issues of material facts in dispute" precluding summary dismissal.[37] Under the Reserve Board's Uniform Rules of Practice and Procedure, summary disposition is available only if the undisputed evidence presented through such a motion

[29] *Id.* at 13.
[30] *Id.* at 14-22.
[31] *Id.* at 18-20.
[32] *Id.* at 22-23.
[33] *Id.* at 24-25.
[34] *Id.* at 26-27.
[35] *Id.* at 27.
[36] *Id.*
[37] *Id.* at 27-28.

establishes that "[t]here is no genuine issue as to any material fact" and "[t]he moving party is entitled to a decision in its favor as a matter of law."[38] Included in the disputed facts identified by Respondents are whether Respondents actually misappropriated Central's confidential and propriety information; whether the factual claims presented by Enforcement Counsel actually identified trade secrets as defined by Wyoming law; whether there are any factual allegations establishing that Respondents misappropriated the purported confidential and proprietary information; and whether Respondents' plans to compete were lawful.[39]

Respondents also describe certain provisions of Central's employee handbook, in order to "dispute whether Respondents' alleged violations of the policies" constituted unsafe or unsound banking practices or breaches of any fiduciary duties owed by Respondents.[40] Further, Respondents assert there are material factual issues regarding whether any of their conduct "resulted in an adverse effect" on either Central or Farmers, and whether that conduct actually conferred a benefit on Respondents.[41]

Respondents also aver genuine issues of material facts remain with respect to whether either Respondent acted with the "requisite culpability" – particularly whether the undisputed evidence shows Respondents acted with personal dishonesty or with a willful or continuing disregard of Central's safety and soundness.[42]

Admitted Factual Claims

Admitted Facts Relating to Respondents' Course of Employment between Central and Farmers

Respondents Smith and Kiolbasa admitted that Farmers State Bank is a state-member bank and a subsidiary of Commercial Bancorp, Pine Bluffs, Wyoming, which they acknowledged is a registered bank holding company.[43]

Respondent Smith admitted that from April 27, 2015 to the present he has been employed by Farmers at its Pine Bluffs, Wyoming location; that throughout which time he has been Farmers' Chief Executive Officer; and that he has been both a member of its Board of Directors and a shareholder of Commercial Bancorp.[44] He admitted that prior to March 18, 2015, he was Central's Chief Financial Officer,[45] and that on June 5, 2015 he was appointed Farmers' CEO and President.[46]

Admitted Facts Relating to Efforts by Respondents to Secure Employment at Farmers

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[38] 12 C.F.R. § 263.29(a).
[39] Respondents' Memorandum of Points and Authorities in Support of its Motion for Summary Disposition at 28-44.
[40] *Id.* at 45-46.
[41] *Id.* at 46-49.
[42] *Id.* at 49-53.
[43] Answer of Respondent Frank Smith to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶¶A, 1; Answer of Respondent Mark A. Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶¶A, 1.
[44] Answer of Respondent Frank Smith to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶2.
[45] Answer of Respondent Frank Smith to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶2, 17.
[46] *Id.* at ¶17.

Respondent Kiolbasa admitted that he is employed at Farmers and is a member of the Farmers' Board of Directors as well as a shareholder of Commercial.[47] He admitted he was a branch President at Central prior to September 22, 2014,[48] then became employed at Farmers as a Loan Officer from September 22, 2014 to June 4, 2015.[49] He admitted that after receiving approval from the Federal Reserve to hold the position of Executive Vice President at Farmers, he has been employed in that position from June 5, 2015 to the present, at its location in Pine Bluffs, Wyoming; and that he also serves on Commercial's Board of Directors and is a shareholder of the holding company.[50]

Both Respondent Smith and Respondent Kiolbasa admitted they met with Farmers' Board of Directors in June 2014 (while employed at Central) for the purpose of discussing the possibility of purchasing an interest in and being employed by Farmers.[51]

Respondent Smith admitted that he sought approval from the Federal Reserve to work at Farmers as an executive officer, prior to accepting that position.[52] He further admitted contacting a prospective Farmers employee – one not related to Central – to encourage that employee to accept a position offered by Farmers (but withheld the name of this employee in his Answer).[53] In addition, Respondent Smith admitted in his Answer that while working at Central, he personally advised a Farmers cashier in preparing several call reports for Farmers.[54]

Both Respondents Smith and Kiolbasa admitted that each executed a Stock Purchase Agreement with Commercial dated March 6, 2015, averring the agreement was not executed until April 29, 2015, after receiving regulatory approval from the Federal Reserve.[55]

Admitted Facts Concerning the Migration of Central's Customers to Farmers

Respondent Kiolbasa admitted that certain customers he "managed" at Central moved their business to Farmers after he began working at Farmers – but denied having "knowledge or information sufficient to form a belief regarding" what the terms "many" or "shortly" as used in the claim in the Notice of Intent that avers: "Shortly after Kiolbasa began his employment at Farmers, many of the loans he managed while employed at Central began moving to Farmers."[56] Supplementing this admission, Respondent Kiolbasa stated "the referenced customers were friends and acquaintances of Kiolbasa most of whom had previously been customers of Wells

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[47]Answer of Respondent Mark A. Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended at *Id.* at ¶¶B, 2.
[48] *Id.* at ¶3.
[49] *Id.* at ¶¶3, 9.
[50] *Id.* at ¶¶3, 9, 17.
[51] Answer of Respondent Frank Smith to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶6; Answer of Respondent Mark A. Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended at ¶¶6, 9.
[52] Answer of Respondent Frank Smith to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶7.
[53] *Id.*
[54] *Id.*
[55] *Id.*at ¶16; Answer of Respondent Mark Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶16.
[56] Answer of Respondent Mark A. Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended at ¶11.

Fargo while Kiolbasa was employed with Wells Fargo and who had moved their business from Well [*sic*] Fargo to Central after Kiolbasa was working at Central."[57]

Respondent Smith, likewise, was unable to form a belief with respect to the meaning of "many" or "shortly" in the above-referenced allegation, but admitted that certain customers that Kiolbasa "managed" at Central moved their business to Farmers after Kiolbasa began working at Farmers.[58]

Respondent Kiolbasa averred that to the extent he received any information from Respondent Smith (as alleged in Paragraph 12 of the Notice of Intent), such information was not confidential or proprietary, but that instead it constituted payoff information that was requested and authorized by the respective customers, or was specifically requested by representatives of the Federal Reserve in conjunction with Smith's application to purchase stock in and become present and CEO of Farmers.[59] Respondent Smith averred that the only information he would have transmitted from Central to Farmers would have been payoff information requested by customers in conjunction with their requests to transfer their business from Central to Farmers.[60]

Admitted Facts Relating to the Terms of Respondents' Employment at Central

Both Respondent Smith and Respondent Kiolbasa admitted receiving the Employee Handbook issued by Central in January 2009, but averred that they did not have any agreement with the bank that prohibited them from accepting employment with a competitor or soliciting customers of Central.[61]

Both Respondents Smith and Kiolbasa admitted that Central filed a lawsuit against Farmers, Smith, Kiolbasa, and other members of Farmers' Board of Directors on September 29, 2016; that it was captioned Central Bank & Trust v. Frank Smith, et al., No. 186-671, and that it was filed by Central after a prior action that had been filed by Central in federal court had been dismissed.[62] Both Respondents further stated that they have filed appeals from the decisions of the court in the state court civil litigation.[63]

Issue Regarding the Jurisdiction of the Federal Reserve Board over Respondents

Jurisdiction over Respondents is predicated on their relationship with Farmers State Bank, which Respondents admit is a state-member bank and a subsidiary of Commercial Bancorp, Pine Bluffs, Wyoming (which they acknowledged is a registered bank holding company).[64] Respondents further admit that they each currently are employed by Farmers, with

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[57] *Id.* at ¶11.
[58] Answer of Respondent Frank Smith to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶11.
[59] Answer of Respondent Mark A. Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended at ¶12.
[60] Answer of Respondent Frank Smith to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶11.
[61] *Id.* at ¶¶13, 14, 15; Answer of Respondent Mark A. Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended at ¶¶13, 14, 15.
[62] *Id.*at ¶18; Answer of Respondent Mark Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶18.
[63] *Id.*at ¶20; Answer of Respondent Mark Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶20.
[64]See Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶¶A, B, 1-2Answer of Respondent Frank Smith to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal

Smith acknowledging his position as Farmers' CEO and President effective June 5, 2015,[65] and Kiolbasa as its Executive Vice President since that date; and with both also serving on Commercial's Board of Directors and as shareholders of the holding company.[66]

In their opposition memorandum, Respondents assert that because they were employees of Central at the time of the alleged conduct giving rise to the prohibition enforcement action, only the FDIC, and not the Federal Reserve Board, may exercise jurisdiction of this action and Respondents.[67]

Failure of Respondents to Seek Summary Disposition

At the outset, it appears necessary to properly identify the parties' submissions at this stage of the proceedings. Pursuant to a procedural order issued on January 23, 2019, the parties were provided with the opportunity to file dispositive motions,[68] through two deadlines.

The first deadline permitted Respondents to pursue certain specific legal and factual claims presented in their respective Answers: through an Order issued on January 3, 2019, Respondents were given a March 1, 2019 deadline to seek summary disposition based on the affirmative defenses of statute of limitations (their Eleventh Affirmative Defense), estoppel (their Twelfth Affirmative Defense), and a claim that "the Board of Governors waived the ability to assert the violations set forth in the Notice" of Intent (their Thirteenth Affirmative Defense).[69]

The record reflects that Respondents did not submit any motion invoking the Reserve Board's summary disposition provisions (12 C.F.R. §§ 263.29 or 263.30) within this period. The record further reflects that at the close of the discovery period, Respondents made no request to file for summary disposition relief out of time, as would be the case upon a claim that such relief could be based on information first acquired during the discovery period.[70] Accordingly, the record will reflect Respondents have waived the factual and legal claims appearing in their Eleventh, Twelfth, and Thirteenth Affirmative Defenses.

The second deadline permitted all parties to seek summary disposition on all remaining issues by not later than August 2, 2019.[71] Enforcement Counsel's Motion for Summary

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Deposit Insurance Act, as Amended, at ¶¶A, 1; Answer of Respondent Mark A. Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶¶A, 1.

[65] Answer of Respondent Mark A. Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended at ¶17.

[66] Answer of Respondent Frank Smith to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶2; Answer of Respondent Mark A. Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶¶3, 9, 17.

[67] Respondents' Memorandum of Points and Authorities in Support of its Motion for Summary Disposition at 10-14.

[68] See 12 C.F.R. §§ 263.29-30.

[69] Notice of Hearing, Scheduling Order and Supplemental Prehearing Orders, issued January 23, 2019, at 2, citing Order to Attend Scheduling Conference and Initial Prehearing Orders issued January 3, 2019 at 2.

[70] See Respondents' Response to Enforcement Counsel's Motion to Strike Portions of Respondents' Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss, or in the Alternative Motion for Leave to File a Response dated September 11, 2019, at 9-10, upon a factual claim that during a discovery deposition they took of James Echtermeyer, a supervising examiner at the Denver Branch of the Federal Reserve Bank of Kansas City on April 4,2019) Respondents "confirmed that (1) the Federal Reserve was aware of and involved in Respondents' application to obtain an ownership interest in and executive positions with Farmers, (2) the Federal Reserve communicated with Respondents during this process, including while Respondents were still employed by Central; and (3) at no time did the Federal Reserve advise Respondents that their actions were in any way improper or would subject them to enforcement action."

[71] Notice of Hearing, Scheduling Order and Supplemental Prehearing Orders at 2.

Disposition was filed on August 2, 2019, and was accompanied by a Memorandum of Points and Authorities in Support. No comparable motion was filed by that deadline by Respondents.

Respondents' submission, on August 22, 2019, included a document entitled "Respondent's Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss," accompanied by a document entitled "Respondents' Memorandum of Points and Authorities in Support of its Motion for Summary Disposition." The title to the Memorandum appears to mistakenly refer to these submissions as advancing a summary disposition motion filed on Respondents' behalf. No such motion is found in the record.

To the extent Respondents' August 22, 2019 submissions were presented as though they were proposing summary disposition in Respondents' favor, the submissions are untimely. The parties' ability to seek relief pursuant to 12 C.F.R. §§ 263.29 or 263.30 expired on August 2, 2019. Any motion seeking summary disposition was to be accompanied by the movant's statement of material facts as to which the movant contends there is no genuine issue – a statement that did not accompany Respondents' August 22, 2019 submission. Accordingly, any claim Respondents would advance seeking relief available through 12 C.F.R. §§ 263.29 or 263.30 must be deemed waived, for their failure to timely present such claim. The record thus shall reflect that, notwithstanding the title appearing in Respondents' Memorandum in support of their opposition to Enforcement Counsel's summary disposition motion, Respondents themselves have not presented a motion for summary disposition.

Respondents' Motion Seeking the Dismissal of this Enforcement Action

As noted above, Respondents' August 22, 2019 submission included a motion seeking dismissal of the enforcement action.[72] For reasons set forth more fully in an Order issued on August 27, 2019 (the contents of which are incorporated in full by this reference),[73] Respondents' Motion to Dismiss was denied. That Order was limited to determining whether the relief sought by Respondents – dismissal of the action by the ALJ – was available, and included a determination that such relief was not within the ALJ's delegated authority.[74] Upon that legal premise, the relief sought by Respondents through their Motion to Dismiss was denied.[75]

Independent of the foregoing, Respondents' Motion to Dismiss was not properly advanced, inasmuch as there was no evidence establishing Respondents' compliance with the provision requiring that the parties confer with one another as a predicate to seeking relief through motion. Extant in the record is the following procedural order:

> Before any motion is filed in this proceeding (except dispositive motions, as defined by applicable regulation), counsel for all parties shall confer in an attempt to resolve their differences. Only after such efforts have been made may counsel move for relief, and in such motion counsel shall describe in writing the efforts undertaken to resolve the matter. Any motion that does

[72] Respondent's Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss, dated August 22, 2019; Respondents' Memorandum of Points and Authorities in Support of its Motion for Summary Disposition at 10-14.

[73] Order Regarding Pending Prehearing Motions, issued August 27, 2019.

[74] See *Id.*at 2.

[75] *Id.* See also Respondents' Request for Interlocutory Review of the Court's August 27, 2019 Order Regarding Pending Prehearing Motions, dated September 6, 2019, currently pending before the Federal Reserve Board.

> not contain a certification of sufficient efforts will be subject to summary denial.[76]

Having failed to sufficiently certify their efforts to attempt to resolve their differences prior to seeking relief through motion, Respondents' Motion to Dismiss is summarily denied.

Respondents' Claim that only the FDIC has Jurisdiction to Pursue this Enforcement Action

Independent of the foregoing, the relief Respondents seek regarding the jurisdiction of the Reserve Board must be denied on the merits as not supported by either the facts or the law.

Respondents aver that the Federal Deposit Insurance Corporation is the exclusive regulatory agency with jurisdiction to seek a prohibition order against Respondents.[77] They cite in support 12 U.S.C. 1813(q)(3) for the proposition that because Respondents were institution-affiliated parties of Central, a Wyoming state nonmember bank, at the time of the alleged conduct giving rise to the prohibition request, only the FDIC has jurisdiction to regulate alleged unsafe and unsound practices "occurring at a nonmember state bank."[78]

Respondents reason that notwithstanding that they currently work at Farmers, and thus admittedly are institution-affiliated parties of Farmers,[79] "the FDIC retains jurisdiction over the alleged actions at Central pursuant to Section (8)(i)(3) Financial Institutions Reform, Recovery, and Enforcement Act [FIRREA]."[80] According to Respondents, because the FIRREA "extended the FDIC's jurisdiction over individuals who are no longer affiliated with an insured institution," it, and not the Federal Reserve, has exclusive jurisdiction of Respondents.[81]

Respondents are Affiliated with Farmers – an Insured Institution

The record reflects, however, that Respondents do not fall within the scope of the provision of FIRREA just cited, because, as Respondents acknowledge, they *are* affiliated with an insured institution – Farmers. Nothing in 12 U.S.C. 1813(q)(3), or more broadly in FIRREA, supports Respondents' proposition that by migrating to Farmers, they are subject only to the regulatory enforcement authority of regulator with authority over their *former* employer (*i.e.*, the FDIC), or that the Federal Reserve Board is precluded from maintaining a prohibition action against Respondents – who presently are admittedly IAPs employed by a financial institution over which the Federal Reserve Board has jurisdiction.

Nothing in the cases cited by Respondents warrants a contrary conclusion. In *Jameson*,[82] the court held:

> The FDIC correctly determined that FIRREA gives the FDIC enhanced jurisdiction over individuals who are no longer affiliated with an insured

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[76] Notice of Hearing, Scheduling Order and Supplemental Prehearing Orders at 5.

[77] Respondent's Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 10.

[78] *Id.*

[79] Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act at ¶¶2-3; Answer of Respondent Frank Smith to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶¶2-3; Answer of Respondent Mark A. Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended at ¶¶2-3.

[80] Respondent's Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 11.

[81] *Id.*

[82] Respondent's Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 11, citing Jameson v. Fed. Deposit Ins. Corp., 931 F.2d 290 (C.A.5 1991).

> depository institution and that this enlarged jurisdiction applies to pending cases. Sec. 905(a) of FIRREA states:
>
> (3) Notice under this section after separation from service.
>
> The resignation, termination of employment or participation, or separation of an institution-affiliated party (including a separation caused by the closing of an insured depository institution) shall not affect the jurisdiction and authority of the appropriate Federal banking agency to issue any notice and proceed under this section against any such party, if such notice is served before the end of the 6–year period beginning on the date such party ceased to be such a party with respect to such depository institution (*whether such date occurs before, on, or after August 9, 1989*) (emphasis supplied).[83]

There is no factual basis to find Respondents are "no longer affiliated with an insured depository institution,"[84] rendering Respondents' reliance on *Jameson* misplaced.

Equally significant, the allegations in the present enforcement action identify conduct attributed to Respondents occurring not only during the time they were employed by Central, but also throughout their service at Farmers. Allegations of concerted action between Smith and Kiolbasa while the latter was employed by Farmers, and then again after the former began working there, make plain the factual basis for the Reserve Board's exercise of jurisdiction over both Respondents.[85]

Further, the record reflects that the culmination of circumstances attributed to Respondents was a lawsuit naming Farmers as a defendant that allegedly benefitted from Respondents' misconduct. While the jury found that Farmers itself had not engaged in misappropriate of trade secrets or tortious interference,[86] Farmers nonetheless had to defend itself in the state litigation. To the extent Respondents' conduct leading to that lawsuit constituted unsafe banking practices, or reflected Respondents' violation of law, or involved breaches of fiduciary duties Respondents owed to Farmers, the record demonstrates that Central wasn't alone in sustaining damage: the threat of the lawsuit against Farmers as reflected in the averments contained in the Notice of Intent is a factor that gives rise to the Reserve Board's jurisdiction over such conduct.

Wheeler[87] posits no legal basis to find otherwise and does not support Respondents' argument. Offered for the proposition that an institution-affiliated party (IAP) was subject to the Office of the Comptroller of the Currency's jurisdiction because he was employed by an institution regulated by the OCC "at the time of the alleged violations,"[88] Respondents disregard the fact that as alleged in the present Notice of Intent, misconduct attributed to Respondents in

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[83] Jameson, 931 F.2d at 291.
[84] *Id.*
[85] See Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶¶10-12, 16-17, and 21-23.
[86] See SD Ex. 79 at FRB-FARMERS-005706.
[87] Respondent's Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 11, citing *Wheeler v. Office of the Comptroller of the Currency of the U.S.*, No. CIV.A.3-98-CV-2708-P, 1998 WL 872945, at *5 (N.D. Tex., Dec. 1998).
[88] Respondent's Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 12, citing Wheeler, 1998 WL 872945, at *4.

the charging document includes multiple allegations of misconduct occurring while Respondents were working at Farmers.[89]

Respondents note that conduct attributed to Respondents includes misconduct alleged to have occurred while Respondents were IAPs of Central.[90] They then cite *DLG Fin. Corp.*[91] for the proposition that "strict adherence" to the FDI Act is necessary "for orderly review of the various stages of enforcement" because "different banking agencies derive their authority to regulate unsafe and unsound banking practices specifically from their authority to regulate certain financial institutions."[92]

Apart from the circularity of the premise as presented in Respondents' Memorandum, the suggestion that the Federal Reserve Board would in some way be unable to investigate and prosecute misconduct attributed to IAPs working for Farmers because some of the misconduct involved IAPs from other financial institutions has no legal footing – certainly not from *DLG Fin. Corp*. In that case, the Fifth Circuit held that enforcement actions undertaken by both the FDIC and the Federal Reserve Bank of Dallas could not be enjoined through declaratory and injunctive actions sounding in, inter alia, tortious interference with prospective contractual and business relations.[93]

Central to the findings cited by Respondents was the determination that the regulatory process created under Section 1818 "is not to be disturbed by untimely judicial intervention" – which is the relief respondents in that case were seeking through injunction and declaratory judgment.[94] The "orderly review" at issue in *DLG* was to be performed by the enforcement agencies, absent cause shown for intervention by the judicial branch. The holding in this case does not advance Respondents' legal argument.

No different result is warranted upon considering the premises presented by Respondents from *Investment Co. Institute*.[95] Respondents offer *Investment Co*. for the proposition that "each of the three regulators only have the authority to regulate unsafe or unsound practices having adverse effects on the financial institutions falling within their regulatory powers."[96] The quoted text draws clear the distinction that while the FDIC insures the deposits of financial institutions regulated by the Federal Reserve System, the Office of the Comptroller of the Currency, and the FDIC, "[the FDIC] regulates directly only the third group."[97] Nothing presented in the cited case establishes a barrier that would prevent the Federal Reserve Board from enforcement action based on the misconduct attributed to individuals who were affiliated with institutions regulated by both it and by the FDIC.

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[89] Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶¶10-12, 16-17, 21-23.
[90] Respondent's Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 13.
[91] *Id.* at 13, citing *Bd. of Governors of Fed. Reserve Sys. v. DLG Fin. Corp*., 29 F.3d 999 (5th Cir. 1994).
[92] Respondent's Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 13, quoting DLG Fin. Corp, 28 F.3d at 999.
[93] 28 F.3d. at 997.
[94] *Id.* at 999.
[95] *Investment Co. Institute v. F.D.I.C.,* 815 F.2d 1540 (C.A.D.C., 1987).
[96] Respondent's Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 13-14, quoting Investment Co. Institute, 815 F.2d at 1542,
[97] Respondent's Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 13-14, quoting *Investment Co. Institute*, 815 F.2d at 1542, citing 12 U.S.C. § 1811, 1815.

Upon the foregoing analysis, there is no legal or factual basis related to the Reserve Board's jurisdiction over Respondents that would prevent summary disposition in Enforcement Counsel's favor against both Respondents.

Issues Regarding Collateral Estoppel

Included in Enforcement Counsel's summary disposition motion is their argument that the results of the civil lawsuit tried in Wyoming state court should have preclusive effect in this federal administrative enforcement action.[98] Enforcement Counsel present the legal premise that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case."[99]

The court in question is the District Court of the First Judicial District, Laramie County, Wyoming, and the Final Judgment relied upon by Enforcement Counsel determined the following, *inter alia*, in a judgment that was final as of April 2, 2018:

- Frank Smith and Mark Kiolbasa were found to be jointly and severally liable to Central Bank in the amount of $300,000 for misappropriation of trade secrets; and in the amount of $625,000 for tortious interference with a contract of a prospective economic advantage.[100]
- A judgment was entered in Central's favor against Frank Smith, in the amount of $205,000 for breach of fiduciary duty.[101]
- A judgment was entered in Central's favor against Mark Kiolbasa, in the amount of $93,000 for breach of fiduciary duty.[102]
- There was a judgment against Frank Smith finding willful and malicious misappropriation of trade secrets, willful and wanton tortious interference with a contract or a prospective economic advantage, and willful and wanton breach of fiduciary duty, upon which there was an award against Smith in Central's favor in the amount of $50,000.[103]
- There was a judgment against Mark Kiolbasa finding willful and malicious misappropriation of trade secrets, willful and wanton tortious interference with a contract or a prospective economic advantage, and willful and wanton breach of fiduciary duty, upon which there was an award against Smith in Central's favor in the amount of $25,000.[104]

Enforcement Counsel assert that the three elements required to obtain a prohibition order under section 8(e) of the FDI Act – misconduct, effect, and culpability – have been met through the judicial determinations made in the state court litigation.[105]

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[98] Enforcement Counsel's Motion for Summary Disposition at 30-38.
[99] *Id.* at 30, quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citing *Montana v. United States*, 440 U.S. 147, fn. 5 (1979).
[100] EC SD Ex. 79 at FRB-FARMERS-005705-06.
[101] *Id.* at 005705.
[102] *Id.*
[103] *Id.* at 005705-06.
[104] *Id.* at 005706.
[105] Enforcement Counsel's Motion for Summary Disposition at 38.

First, regarding the *misconduct* element, they assert that the allegations in the Notice of Intent – that Respondents misappropriated trade secrets and breached fiduciary duties they owed to Central – are identical to allegations litigated and determined in the Central litigation.[106]

Next, they allege the *effects* element is reflected in the Notice of Intent through allegations that Respondents' misconduct either precipitated actual or probable financial loss to Central or financial or other gain to Respondents, and that the same claims were litigated and determined in the state court action leading to the judicial finding that the awarded damages in that action based on either actual loss by Central or Respondents' unjust enrichment (or both).[107]

Third, they allege the *culpability* element under Section 8(e) as alleged in the Notice of Intent is identical to the allegations litigated in the Central litigation that led to a judgment that Respondents' misappropriation was willful and malicious, their tortious interference was willful and wanton, and that Respondents willfully and wantonly breached fiduciary duties owed to Central.[108]

Upon these premises, Enforcement Counsel assert that the issues decided in the Central litigation "are identical with the relevant issues presented in these proceedings and satisfy each element required for an order of prohibition under section 8(e) of the FDI Act."[109]

Respondents assert that the issues in the Central litigation are not identical to issues that are material to this administrative enforcement action.[110] In this action, Respondents assert, the issue is whether Respondents engaged in unsafe or unsound banking practices, where such practices are defined as an "imprudent act" that "places an abnormal risk of financial loss or damage on a banking institution."[111] Respondents aver the findings presented through the state court litigation do not support an inference that "Respondents' alleged conduct created an abnormal risk of financial loss which would threaten the financial stability of Central or Farmers."[112]

Characterizing Conduct as Unsafe or Unsound – Rejection of the Gulf Federal Standard

Initially, care should be taken to accurately reflect controlling jurisprudence regarding the definition of an "unsafe or unsound practice." Respondents' reliance on a definition that is limited to "practices with a reasonable direct effect on an association's financial soundness" – as presented in *Gulf Federal* – is misplaced.[113]

Because the requirement that an imprudent act actually pose an abnormal risk to the *financial stability* of a regulated institution is not found in the FDI Act itself, some attention must

[106] Enforcement Counsel's Motion for Summary Disposition at 33.
[107] *Id.* at 35.
[108] *Id.* at 33-34.
[109] *Id.* at 35.
[110] Respondents' Brief in Support of Their Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 15-22.
[111] *Id.* at 16, quoting *Matter of Seidman*, 37 F.3d 911, 929–30 (3d Cir. 1994).
[112] Respondents' Brief in Support of Their Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 18, citing *Seidman,* 37 F.3d at 932, and *Fed. Sav. and Loan Ins. Corp v. Bass*, 576 F.Supp. 848, 852 (N.D. Ill. 1983).
[113] Respondents' Brief in Support of Their Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 17, quoting *Fed. Sav. and Loan Ins. Corp. v. Bass*, 576 F. Supp. 848, 852 (N.D. Ill. 1983) (citing *Gulf Federal S&L v. FHLBB*, 651 F.2d 259, 264 (5th Cir. 1981)).

be paid first to the authorities that in the past have recognized such a definition (referred to here as the *Gulf Federal* standard), relied upon by Respondents.

In *Gulf Federal*, the only risks the regulators identified were "Gulf Federal's potential liability to repay overcharged interest, and an undifferentiated 'loss of public confidence' in the bona fides of Gulf Federal's operations."[114] The court in *Gulf Federal* held that the FDI Act requires Enforcement Counsel to prove by substantial and preponderant evidence the existence of practices that threaten the very stability of the depository institution.

The test was first articulated in the Third Circuit in *In the Matter of Seidman*, which held that "[t]he imprudent act must pose an abnormal risk to the financial stability of the banking institution. This is the standard that the case law and legislative history indicates we should apply in judging whether an unsafe or unsound practice has occurred." [115]

I found no authority, however, indicating that either the Board of the Federal Reserve System or the Tenth Circuit Court of Appeals has applied or approved the definition of "unsafe and unsound" banking practices articulated in *Gulf Federal* or *Seidman*.

Instead, regulators generally have applied the following definition of "unsafe and unsound" banking practices:

> Generally speaking, an "unsafe or unsound practice" embraces 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. [116]

Resorting to its review and interpretation of legislative history, the court in *Gulf Federal* rejected the construction applied by the Federal Home Loan Bank Board and restricted applications of the phrase "unsafe and unsound" practices to those practices that have a demonstrable effect on the depository institution's financial condition. [117]

There is cause, however, to reject the *Gulf Federal* legal premise relied upon by Respondents. There is no authority establishing the acceptance by either the Reserve Board or the courts in the Tenth Circuit of the *Gulf Federal* standard. To the contrary, the narrow reading of what constitutes "unsafe and unsound" banking practices articulated in *Gulf Federal* has been rejected by at least one of the banking regulators. This rejection occurred in *In the Matter of Patrick Adams*, where the Office of the Comptroller of the Currency expressly rejected the application of the narrower *Gulf Federal* standard in favor of a standard that defines "unsafe or unsound" banking practices as:

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[114] *Gulf Fed. Sav. & Loan Ass'n of Jefferson Par. v. Fed. Home Loan Bank Bd.*, 651 F.2d 259, 264 (5th Cir. 1981)

[115] *In the Matter of Seidman*, 37 F.3d 911, 928 (3d Cir. 1994)

[116] *In the Matter of Marine Bank & Trust Company* (FDIC March 19, 2013) 2013 WL 2456822, at *5.

[117] *Id. See also Johnson v. Office of Thrift Supervision*, 81 F.3d 195, 204 (D.C. Cir. 1996) ("Clearly, the fact that an act results in an "actual loss" does not, by itself, establish that the act posed an abnormal risk to the financial stability or integrity of the institution."); *First Nat. Bank of Bellaire v. Comptroller of the Currency*, 697 F.2d 674, 685 (5th Cir. 1983) ("Unsafe and unsound banking practices "encompass what may be generally viewed as conduct deemed contrary to accepted standards of banking operations which might result in abnormal risk or loss to a banking institution or shareholder") (quoting *First National Bank of Eden, South Dakota v. Department of the Treasury*, *Office of the Comptroller of the Currency*, 568 F.2d 610, 611 n. 2 (8th Cir.1978).

> 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. [118]

There is in *De la Cuesta*[119] and *Patrick Adams*[120] persuasive authority establishing that Enforcement Counsel may meet their burden of establishing that Respondents have engaged in unsafe or unsound banking practices, as that term is used in the FDI Act, by demonstrating that they have engaged in any action, or have failed to take action, in a manner that 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.[121]

Under this body of law, I find that such proof may be made through substantial and uncontroverted evidence of Respondents' misappropriation of Central's trade secrets, or of Respondents' breach of fiduciary duties owed to either Central or Farmers (or both) – because "the same act may be both an unsafe or unsound practice and a breach of fiduciary duty.[122]

Misconduct Through Breaches of Fiduciary Duties of Loyalty, Care, and Candor

Misconduct under the FDI Act may, as has already been noted, be established by a sufficient showing of unsafe or unsound practices, or by a sufficient showing that Respondents' breached fiduciary duties owed to either Central or Farmers.[123] These duties include an obligation to act in good faith and in the best interests of Central. As one financial regulator put it:

> It is now hornbook law that directors and officers of a bank have a fiduciary duty to the bank. American Bankers Association, Focus on the Bank Director, 97-125 (1984); Schlichting, Rice & Cooper, Banking Law, § 6.04 (1984). Generally, the duty requires that bank officials, such as Chairman of the Board * * *, act as prudent and diligent persons would act safeguarding the bank's property, complying with state and federal banking laws and regulations, and ensuring that the bank is operated properly. The duty is owed to the bank, and not to persons with controlling interests in the bank. It requires the proper supervision of subordinates, a knowledge of state and federal banking laws, and the constant concern for the safety and soundness of the bank. While the standard of care for bank directors and officers, like

[118] *In the Matter of Patrick Adams*, (OCC September 13, 2014) 2014 WL 8735096, at *3.
[119] *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982).
[120] *In re Patrick Adams*, 2014 WL 8735096, at *3.
[121] See also *Johnson v. Office of Thrift Supervision*, 81 F.3d 195, 204 (D.C. Cir. 1996) ("Clearly, the fact that an act results in an "actual loss" does not, by itself, establish that the act posed an abnormal risk to the financial stability or integrity of the institution."); *First Nat. Bank of Bellaire v. Comptroller of the Currency*, 697 F.2d 674, 685 (5th Cir. 1983) ("Unsafe and unsound banking practices "encompass what may be generally viewed as conduct deemed contrary to accepted standards of banking operations which might result in abnormal risk or loss to a banking institution or shareholder") (quoting *First National Bank of Eden, South Dakota v. Department of the Treasury, Office of the Comptroller of the Currency*, 568 F.2d 610, 611 n. 2(8th Cir.1978).
[122] *Michael v. F.D.I.C.,* 687 F.3d 337, 351 (7th Cir. 2012), citing *Kaplan v. U.S. Office of Thrift Supervision*, 104 F.3d 417, 421 & n. 2 (D.C.Cir.1997); *Hoffman v. FDIC,* 912 F.2d 1172, 1174 (9th Cir. 1990) (because of their inherent danger, breaches of fiduciary duty also constitute unsafe and unsound practices.)
[123] 12 U.S.C. § 1818(e)(1)(A).

> the standard of care in negligence cases, is expressed in consent terms, the nature of the duty varies according to the facts. The 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.[124]

The fiduciary 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."[125] The duty of *candor* requires a corporate fiduciary to disclose "everything he knew relating to the transaction," even "if not asked." [126] The duty of *care* requires directors and officers to "act as prudent and diligent business persons in conducting the affairs of the bank."[127]

Specifically, because they owe a duty of care:

> [D]irectors are responsible for selecting, monitoring, and evaluating competent management; establishing business strategies and policies; monitoring and assessing the progress of business operations; establishing and monitoring adherence to policies and procedures required by statute, regulation, and principles of safety and soundness; and for making business decisions on the basis of fully informed and meaningful deliberation.[128]

Respondents are Estopped from Controverting the Central Litigation Determination that Respondents Breached Fiduciary Duties Owed to Central

When examined in the light of the factual claims presented in the state court litigation,[129] I find the court's judgment against Respondents – that they misappropriated trade secrets of Central, that they were proved to have tortiously interfered with either a contract or prospective economic advantage inuring to Central, and that they breached fiduciary duties each owed to Central - provided sufficient proof, standing alone, to establish that actions attributed by the jury to Respondents constituted "misconduct" as that term is used in section 8(e) of the FDI Act, as alleged in the Notice of Intent.

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[124] *In the Matter of * * *, Individually and as an Officer and/or Director and/or Participant in the Conduct of the Affairs of * * * Bank* (Insured State Nonmember Bank), 1988 WL 583064, at *9 (FDIC).

[125] Federal Deposit Insurance Corporation, Statement of Policy Concerning the Responsibilities of Bank Directors and Officers, FIL--87--92 (Dec. 3, 1992), available at https://www.fdic.gov/regulations/laws/rules/5000-3300.html.

[126] De La Fuente II v. FDIC, 332 F.3d 1208, 1222 (9th Cir. 2003) (fiduciary duty breached by failure to disclose relevant information to bank's board of directors when it was considering a loan even though the bank's board did not ask); *Michael*, 687 F.3d at 350; *Seidman*, 37 F.3d at 935 n.34.

[127] Federal Deposit Insurance Corporation, Statement of Policy Concerning the Responsibilities of Bank Directors and Officers, FIL--87--92 (Dec. 3, 1992), available at https://www.fdic.gov/regulations/laws/rules/5000-3300.html.

[128] *Id.*

[129] See Amended Complaint in *Central Bank & Trust v. Smith et al.*, Civil No. 186-671, factual allegations at ¶¶1-3, 5, 15-33, 36-85, 87-90, 92-113; conspiracy claim at ¶¶114-119; claim of tortious interference with contract or prospective economic advantage at ¶¶120-125; claim of breach of fiduciary duty and duty of fidelity and loyalty at ¶¶126-130; claim of unjust enrichment at ¶¶156-160; cf.

For the reasons that follow, I find unpersuasive Respondents' arguments to the contrary.[130]

At the outset, it is clear that under Wyoming case law that collateral estoppel is available to preclude a party from relitigating issues that were actually and necessarily determined in a prior action:

> The doctrines of *res judicata* and collateral estoppel apply to final adjudicative determinations by administrative tribunals. *Salt Creek Freightways v. Wyoming Fair Employment Practices Comm'n*. 598 P.2d 435, 437 (Wyo. 1979); *Joelson v. City of Casper*, 676 P.2d 570, 572 (Wyo. 1984). The collateral estoppel doctrine is otherwise known as the 'issue preclusion' doctrine. *RKS v. SDM*, 882 P.2d 1217, 1221 (Wyo. 1994). The Wyoming Supreme Court has recognized estoppel is an appropriate doctrine to apply in an administrative context, since it bars relitigation of previously litigated issues. *Salt Creek Freightways*, 598 P.2d at 438 (quoting *Roush v. Roush*, 589 P.2d 841, 843 (Wyo. 1979). The Wyoming Supreme Court has further recognized since administrative decisions deal primarily with causes of action or claims, collateral estoppel is the appropriate doctrine. *Salt Creek Freightways*, 598 P.2d at 437. The collateral estoppel doctrine prevents relitigation of issues which were involved actually and necessarily in a prior action between the same parties. *Willowbrook Ranch, Inc. v. Nugget Exploration, Inc.*, 896 P.2d 769, 772 (Wyo. 1995).[131]

Thus, issues actually and necessarily litigated in the Central state court litigation will not be re-litigated here. Further, "[s]ince administrative agency decisions deal primarily with issues rather than with causes of action or claims, collateral estoppel is the appropriate preclusion doctrine."[132]

Respondents' first assertion, that the doctrine of issue preclusion cannot apply here because the issues decided in the Central litigation are not identical to the issues presented in this enforcement action, must be considered in the light cast by the foregoing authorities.[133]

Respondents assert that because the Central litigation did not determine whether Respondents should be prohibited from banking, Enforcement Counsel cannot rely on collateral estoppel.[134] I do not construe Wyoming case law so narrowly, finding instead that under the language set forth above, where the record in this administrative proceeding demonstrates that issues presented in the Federal Reserve Board's Notice of Intent were "actually and necessarily" litigated in the state court proceeding, Respondents are precluded from litigating those issues here.

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[130] See Respondents' Brief in Support of Their Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 14-27.

[131] *Rose v. Garland Light & Power Co., Wyoming Public Service Comm'n* No. 10003-CC-04-20, 2005 WL 1536274 (Apr. 25, 2005).

[132] *Slavens v. Uinta Board of County Commissioners* 854 P.2d 683, 685-86 (Wyo. 1993); *Bender v. Uinta County Assessor*, 14 P.3d 906 (Wyo. 2000).

[133] Respondents' Brief in Support of Their Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 15-22.

[134] *Id.* at 15, citing *Slavens*, supra; *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1093 (10th Cir. 2003); and *Stan Lee Media, Inc. v. Walt Disney Co.,* 774 F.3d 1292, 1297–98 (10th Cir. 2014).

I agree with Respondents' averment that the Central litigation did not determine whether Respondents' breached fiduciary duties they owed to Farmers.[135] As noted above, however, I reject as not supported by a legal or factual basis Respondents' assertion that "the only possible alleged breach of fiduciary duty appropriately before the Board is whether Respondents breached their fiduciary duties to Farmers."[136] I find, instead, that the issues determined in the Central litigation included whether Respondents misappropriated Central's trade secrets[137] – an allegation that is presented in the Reserve Board's Notice of Intent at Paragraphs A, B, 22, 25, and 28. These allegations were actually and necessarily litigated in the Central litigation.

On March 23, 2018, after a two-week trial, a jury returned a verdict finding, by a preponderance of the evidence, that Respondents: willfully and maliciously misappropriated Central's trade secrets; willfully and wantonly committed tortious interference with Central's contract or prospective economic advantage; and willfully and wantonly breached their fiduciary duties to Central.[138] As part of the Central litigation verdict, as a result of Respondents' conduct, the jury found that Central was entitled to damages of $300,000 from Respondents for the willful and wanton misappropriation of trade secrets; $625,000 from Respondents for the tortious interference with Central's contract or prospective economic advantage; $205,000 from Smith and $93,000 from Kiolbasa for the willful and wanton breach of fiduciary duties, and punitive damages of $50,000 from Smith and $25,000 from Kiolbasa. (*Id.*).

The record thus supports a finding that the issues of whether Respondents willfully and maliciously misappropriated Central's trade secrets, whether they willfully and wantonly committed tortious interference with Central's contract or prospective economic advantage; and whether they willfully and wantonly breached their fiduciary duties to Central, all have been actually and necessarily litigated in the state court proceedings, and in each instance the determinations were that Respondents had engaged in misconduct. Upon such circumstances, Enforcement Counsel is entitled to a determination that the misconduct alleged in the Reserve Board's Notice of Intent at Paragraphs A, B, 22, 25, 28 has been established, and Respondents are estopped from relitigating those findings.

Respondents Were Highly Motivated to Litigate the Issues Raised in Central that are also Raised in this Enforcement Action

Respondents further aver they "did not have a full and fair opportunity to litigate the issues."[139] In support, they aver they "could not have anticipated that they would be barred from their chosen profession when they were defending against claims seeking solely money damages in the Central litigation."[140] Respondents' reliance on *Butler*[141] is unavailing. After holding that "[i]ssue preclusion not only promotes judicial efficiency and repose but also prevents the

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[135] Respondents' Brief in Support of Their Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 19.
[136] *Id.*
[137] See Final Judgment, EC Exhibit 79 (FRB-FARMERS-005705-06); Verdict, EC Exhibit 77 (FRB-FARMERS-005638-43).
[138] See Final Judgment, EC Exhibit 79 (FRB-FARMERS-005705-06); Verdict, EC Exhibit 77 (FRB-FARMERS-005638-43).
[139] Respondents' Brief in Support of Their Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 26.
[140] *Id.* at 27.
[141] *Id.* at 26, citing *Butler v. Pollard*, 800 F.2d. at 225, presumably referring to *Butler v. Pollard*, 800 F.2d. 223 (10th Cir. 1986).

embarrassment resulting from inconsistent determinations of the same question,"[142] the Court in *Butler* stated that the "role of the issue in the second action" must be "foreseeable in the first action."[143] No further analysis regarding this generally recognized principle is presented in *Butler*.

In the case at hand, Respondents knew, or should be charged with knowing, that breaches of fiduciary duties as alleged in the Central Complaint constitute a basis for adverse enforcement actions under the FDI Act at section 8(e).[144] Nothing more is required under *Butler*, or under *Parklane Hosiery*.[145] In *Parklane*, the Court noted that "it may be unfair to a defendant [if] a defendant in the first action is sued for small or nominal damages, [because] he may have little incentive to defend vigorously, particularly if future suits are not foreseeable."[146] Those conditions do not exist here.

I find that where experienced bankers such as Respondents face claims in a state court alleging misappropriation of propriety banking information and breaches of fiduciary duties owed to their employer bank, those bankers have a significant incentive to defend vigorously in anticipation of collateral regulatory action like that presented by the Notice of Intent here. Further, not only do bankers generally have an incentive to vigorously defend, the specific bankers here did, in fact, vigorously defend claims presented in the state court litigation that are also present in this administrative enforcement action.

Relevance of Respondents' Appeal of the Central Judgment and of the Potential for Settlement

Respondents further assert that preclusion is unavailable here because the final judgment from the state civil action is on appeal, and because the jury's verdict "will likely be vacated due to a pending settlement agreement by and between the parties in the Central litigation."[147] Neither the appeal nor such a settlement would, however, compel a finding that avoids the preclusive effect of the jury's verdict and the trial court's final judgment.

Regarding the appellate status of the civil judgment, Respondents cite to *Bowen* for the proposition that a judgment "should not be afforded collateral estoppel effect if it is on appeal."[148] Acknowledging that the holding was presented as dicta and that the Wyoming Supreme Court "had not directly answered the question of whether the application of collateral estoppel should be affected by the fact that the underlying judgment was on appeal,"[149]

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[142] *Butler v. Pollard*, 800 F.2d 223, 225 (10th Cir. 1986), citing *Heyman v. Kline,* 456 F.2d 123, 130–31 (2d Cir.), cert. denied, 409 U.S. 847 (1972).
[143] *Butler*, 800 F.2d at 224.
[144] See12 U.S.C.A. § 1818(e)(1(A)(iii) authorizing enforcement action where any institution-affiliated party has, directly or indirectly, "committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty".
[145] Respondents' Brief in Support of Their Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 26, citing *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 330 (1979), (holding citing The Evergreens v. Nunan, 141 F.2d 927, 929 (2d Cir. 1944)) (denying application of offensive collateral estoppel where defendant did not appeal an adverse judgment *awarding* damages of $35,000 and defendant was later sued for over $7 million)).
[146] *Parklane Hosiery Co*., 439 U.S. at 330.
[147] Respondents' Brief in Support of Their Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 22-25.
[148] *Id.* at 23, citing *Bowen v. State, Dept. of Transp*., 245 P.3d 827 (Wyo. 2011).
[149] *Id.* at 22.

Respondents nevertheless aver that the only case cited by the *Bowen* court on this topic was *Rantz*, which held that "for the purposes of issue preclusion, a judgment that is still pending on appeal is not final."[150]

Rantz, however, provides insufficient support for Respondents here. In *Rantz*, the Colorado Supreme Court, construing Colorado common law, was asked by attorneys who had represented a client in a criminal matter whether the former client must obtain post-conviction relief before filing a malpractice claim against them.[151] The court addressed whether, if post-conviction relief has been sought and denied on the merits, the court's denial of relief may have a preclusive effect on the malpractice suit under appropriate circumstances.[152] The Court then applied Colorado Rule 54 (Civil Procedure, Judgments) to find that a judgment could be deemed final for issue preclusion purposes notwithstanding that multiple claims or parties may be involved, where fewer than all the claims have been determined.[153] Neither the factual predicates nor the legal premises applying and construing Colorado common law presented in *Rantz* apply here.

Nothing in *Bowen* suggests that a pending appeal prevents the preclusive effect of a civil judgment in the context of an administrative enforcement action. To the contrary, the *Bowen* court affirmed such preclusion on the issue in that case – *i.e.*, whether a state trooper who had administered a blood alcohol test in connection with a driving under the influence had been properly trained on the BAC instrument.[154] Finding that the driver raised the same issue in both the criminal and administrative proceedings, the court *allowed* preclusion where the appellant-driver had "a full evidentiary hearing wherein he offered evidence, examined witnesses, and made arguments."[155] Nothing in *Bowen* serves to limit the application of issue preclusion in this administrative enforcement action.

I also find unpersuasive Respondents' assertion that settlement of the claims presented in the Central litigation would render collateral estoppel unavailable.[156] Respondents cite *Van Dyke*[157] and *Lacey*[158] for the proposition that "a judgment that has been vacated through a settlement cannot be used for purposes of collateral estoppel."[159] Current jurisprudence on this point compels a contrary conclusion.

In determining whether issues that have been determined in prior litigation retain their preclusive effect following a subsequent vacatur, care must be taken to regard what led to the vacatur. In *Lacey*, the Court of Appeals determined the preclusive effect "of a judgment vacated by a trial court," not by settlement, but by the trial court's reconsideration on motion, leading the

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[150] Respondents' Brief in Support of Their Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 22, quoting *Rantz v. Kaufman*, 109 P.3d 132, 141 (Colo. 2005).
[151] *Rantz v. Kaufman*, 109 P.3d 132, 133 (Colo. 2005).
[152] *Id.*
[153] *Id.* at 141, citing *Carpenter v. Young*, 773 P.2d 561, 568 (Colo.1989) "In Carpenter, we decided that C.R.C.P. 54(b) certification was not necessary for a judgment to be deemed final for issue preclusion purposes."
[154] *Bowen v. State, Dep't of Transp.*, 2011 WY 1, ¶ 3, 245 P.3d 827, 828 (Wyo. 2011).
[155] *Id.* at 831 (Wyo. 2011).
[156] Respondents' Brief in Support of Their Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 24-25.
[157] *Estate of Van Dyke by Van Dyke v. GlaxoSmithKline*, No. 05-cv-153-j, 2006 WL 8430904 (D. Wyo. 2006).
[158] U.*S. v. Lacey,* 982 F.2d 410 (10th Cir. 1992).
159 Respondents' Brief in Support of Their Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 24, quoting Van Dyke, 2006 WL 8430904, at *4.

court to set aside its amended judgment.[160] Thus, the Court in review did not have an instance where the vacatur was the product of a settlement – but instead an instance where the prior judgment warranted judicial reconsideration. Such reconsideration gave rise to equitable principles to the effect that the prior judgment was in some measure unsound and thus should be given no preclusive power. Those equitable principles clearly have no place here, where through settlement Respondents hope to avoid the consequences of a jury's verdict and a court's judgment.

I also find unpersuasive Respondents' reliance on *Van Dyke*.[161] In *Van Dyke* (an unappealed decision of the trial court), summary judgment was held not available to the movant/plaintiff who sought preclusive effect in her wrongful death action against GlaxoSmithKline on theories of strict liability, negligence, and breach of warranty.[162] Rejecting plaintiff's attempt to draw from a verdict in a prior litigated case (the *Tobin* case), the trial court in *Van Dyke* noted that "[b]ecause of the different facts, doses, time frames, diagnoses, warnings and research, to instruct the jury that they should disregard the myriad questions surrounding the issues, and should instead assume that causation and fault have already been proven, would undoubtedly cause prejudice and confusion."[163] These factors are not present here, where the factual and legal issues determined by through the Central litigation are presented not to a jury but to an administrative tribunal.

On the point raised by Respondents, the trial court rejected preclusive effect based on the *Tobin* litigation because the *Tobin* verdict had been vacated through settlement. Offering no authority in support of the proposition, the trial court held:

> This Court denies Van Dyke's Motion for Partial Summary Judgment on the issues of causation and fault for three primary reasons. First, the *Tobin* verdict was vacated, and it is clear that a vacated judgment is deprived of its conclusive effect, which means that it cannot be used for purposes of collateral estoppel. That the *Tobin* judgment was vacated pursuant to a settlement does not make a difference, especially considering that the vacatur order stated that the verdict would be "vacated for all purposes."[164]

There was nothing in the court's determination indicating the source of authority for the court's finding – particularly, there was no showing that the legal premises applied in *Van Dyke* would apply in any other proceeding in any other jurisdiction. Without more, this determination is insufficient as a basis in law for sustaining Respondents' assertion that preclusion is not available in the present case.

Collateral Estoppel Issues are Determined by State Law in this Enforcement Action

The availability of collateral estoppel is a legal issue, one to be determined through an application of state law;[165] and neither party presented citations to state authority from Wyoming

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[160] *United States v. Lacey*, 982 F.2d 410, 411-12 (10th Cir. 1992)
161 Respondents' Brief in Support of Their Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 24.
[162] *Estate of Van Dyke by Van Dyke v. GlaxoSmithKline*, No. 05-CV-153-J, 2006 WL 8430904, at *1 (D. Wyo. Nov. 1, 2006)
[163] *Id.* at *5.
[164] *Id.* at *4.
[165] See *Abbott v. Michigan*, 474 F.3d 324, 330 (6thCir. 2007) ("Federal courts must give the same preclusive effect to a state-court judgment as that judgment receives in the rendering state.") (citing 28 U.S.C. § 1738).

determining the merits of the issue.[166] In the absence of authority from Wyoming case law, I am persuaded by the rationale presented in *Watermark Senior Living Ret. Communities, Inc. v. Morrison Mgmt. Specialists, Inc.*, 905 F.3d 421 (6th Cir. 2018). There, the Court of Appeals provided an in-depth and relevant analysis regarding whether preclusive effects may survive after a judgment is vacated due to settlement.

In *Watermark*, even though "there was no final judgment in the state case because the appellate court reversed it on different grounds and the plaintiff voluntarily dismissed his suit before the trial court decided it on remand," the Court of Appeals held that "a court's decision may remain sufficiently firm to be given preclusive effect".[167] The Court of Appeals cited with approval the following rationale:

> The subsequent settlement of a dispute after the entry of a dispositive order does not defeat finality. ... If settlement revoked the preclusive effect of an earlier judgment, this would have the effect of allowing losing parties to pay money for the option to not have the doctrine of collateral estoppel applied to them. The purpose of the doctrine—to improve the procedural efficiency of the legal system and avoid repetitive litigation of decided issues—counsels against plaintiff's argument.[168]

The same logic applies here, wherein Respondents, through settlement, seek to (presumably) pay money for the option of avoiding preclusive effects arising from the Central litigation applied in this enforcement action. This presumption is just that – a presumption – because there is presently no settlement of record, and the record is silent with respect to its terms, so we do not know whether through the terms of any potential settlement the factual findings and legal conclusions driving the Central litigation verdict are, in fact, included in the vacatur.

The Court of Appeals in *Watermark* elaborated on the reasons against an outcome that would vitiate preclusive effect, distinguishing between cases where a judgment is vacated due to post-trial judicial insight, versus a judgment vacated by a strategic settlement:

> Equitable considerations also help to explain why a principled distinction can be drawn between the potential preclusive effects of different kinds of vacated judgments. When a judgment is vacated because a court has decided that the ruling was faulty, see *Erebia*, 891 F.2d at 1215, it obviously makes no sense to treat the vacated judgment's determination of that issue as conclusive. It is similarly inappropriate to give preclusive effect to the judgment in a case that becomes moot through no fault of the party against whom issue preclusion is asserted. See *Munsingwear*, 340 U.S. at 39–40, 71 S.Ct. 104. Because "happenstance," *id*. at 40, 71 S.Ct. 104, or the unilateral actions of the opposing party, see *Azar v. Garza*, ——

[166] Enforcement Counsel's Motion for Summary Disposition at 37-38; Respondents' Brief in Support of Their Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 24-26.
[167] *Watermark Senior Living Ret. Communities, Inc. v. Morrison Mgmt. Specialists, Inc*., 905 F.3d 421, 427–29 (6th Cir. 2018)
[168] *Watermark Senior Living Ret. Communities, Inc. v. Morrison Mgmt. Specialists, Inc*., 905 F.3d 421, 427–29 (6th Cir. 2018), quoting *ChriMar Sys., Inc. v. Foundry Networks, Inc*., No. 06-13936, 2010 WL 3431606, at *2, 2010 U.S. Dist. LEXIS 89335 (E.D. Mich. Apr. 23, 2010) (Special Master Mark A. Lemley).

> U.S. ——, 138 S.Ct. 1790, 1792–93, 201 L.Ed.2d 118 (2018) (per curiam), have deprived the losing party of the opportunity to contest the underlying judgment, fairness counsels against barring that party from having a second chance to litigate the relevant issue.
>
> But the equities are otherwise when a litigant elects to settle rather than appeal after receiving an adverse judgment. In such circumstances, the losing party acquiesces in the court's decision, even if he disagrees with it. The party has had his day in court and waived his right to an appeal. See *Monat*, 677 N.W.2d at 847 (applying issue preclusion when party negotiated away its right to appeal prior to judgment in first action). That is all that fairness requires: "One bite at the apple is enough." *Emps. Own Fed. Credit Union*, 752 F.2d at 245.[169]

Here, the circumstances upon which Enforcement Counsel seek preclusive effect reflect that Respondents have had their day in court – and by settlement, presumably, will have waived their right to appeal the state court judgment. Respondents have thus been afforded "[a]ll that fairness requires." Upon these factual and legal premises, there is an insufficient basis to find that any pending settlement, even one that vacates the jury's verdict in the Central litigation, will deprive Enforcement Counsel of the ability to apply principles of collateral estoppel in order to preclude relitigation of the issues determined in that litigation.

Findings Based on Issue Preclusion and Collateral Estoppel

Upon the foregoing legal and factual premises, I find Enforcement Counsel are entitled to a finding that Respondents engaged in unsafe and unsound practices by misappropriating confidential and proprietary information, including trade secrets, of Central Bank & Trust, by conspiring together to acquire Central's confidential and proprietary information, and by aiding and abetting one another in the acquisition of such information for their use at Farmers, as alleged in Paragraphs A, 22 and 25 of the Notice of Intent.

I find the uncontroverted evidence presented through the jury's findings and the court's judgment in the Central litigation establishes by a preponderance that Respondents' action, or lack of action, was contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to Central, its shareholders, or the agencies administering the insurance funds.

Upon these findings, the record reflects that by uncontroverted preponderant evidence, Enforcement Counsel have established Respondents engaged in misconduct as that term is used in the FDI Act, as alleged in the Notice of Intent at Count I, Paragraph 25 (regarding Respondent Smith) and Count III, Paragraph 28 (regarding Respondent Kiolbasa).

Further, I find Enforcement Counsel are entitled to a finding that Respondents breached fiduciary duties owed to Central, through the misappropriation of confidential and proprietary information, including trade secrets, of Central, conspiring with one another to acquire Central's confidential and proprietary information, and by contacting Central borrowers, while at Central, to obtain their consent to transfer their loans to Farmers once Respondents were employed at Farmers, as alleged in Paragraphs B and 28 of the Notice of Intent.

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[169] *Watermark Senior Living Ret. Communities, Inc. v. Morrison Mgmt. Specialists, Inc.*, 905 F.3d 421, 427–29 (6th Cir. 2018).

Further, the record from the Central litigation establishes that as officers of Central, Respondents owed and breached the fiduciary duties of care, candor and loyalty to Central. Such evidence establishes Respondents engaged in misconduct as that term is used in the FDI Act, as alleged in the Notice of Intent at Count II, Paragraph 27 (regarding Smith) and Count IV, Paragraph 30 (regarding Respondent Kiolbasa).

These findings do not determine whether Respondents breached fiduciary duties owed to Farmers, as the Central litigation did not include any claim to that effect, nor do the findings determine the nature and extent of the effects of Respondents' misconduct, nor do they preclude the controverting of issues relating to Respondents' individual culpability. The record beyond that which derives from the Central litigation may be sufficiently uncontroverted to warrant summary disposition, but that conclusion would be based on the evidence presented in this administrative action, and not on the Court's judgment in the Central litigation.

Findings Based on the Record

Independent of the analysis urged by Enforcement Counsel whereby the outcome of the Central Bank litigation supplies a factual basis for finding misconduct on Respondents' part, the Motion for Summary Disposition also posits that undisputed material facts now in the record also provide a basis for judgment in Enforcement Counsel's favor.

Enforcement Counsel's Burden Apart from Preclusion Based on the Central Litigation

Pursuant to the Reserve Board' Uniform Rules of Practice and Procedure, the movant, when seeking summary disposition, must provide a statement of material facts as to which the movant contends there is no genuine issue.[170] The movant must support the motion with documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions (including investigatory depositions), transcripts, affidavits, and any other evidentiary materials that the movant contends supports its position.[171]

In addition to providing a statement which they contend identifies165 paragraphs of material facts not controverted in the record,[172] Enforcement Counsel included in their Motion 110 exhibits in support. These exhibits were supplemented by reports by Douglas L. Gray, Assistant Vice President, Division of Supervision and Risk Management of the Federal Reserve Bank of Kansas City, Oklahoma City Branch, each report separately evaluating documents and testimony with respect to claims against Mr. Smith and those against Mr. Kiolbasa (EC SD Ex. 4, hereafter Gray Report-Smith and EC SD Ex. 3, hereafter Gray Report-Kiolbasa).[173] Through these reports, Enforcement Counsel presented Mr. Gray's expert analysis of the evidence presented during the Central litigation. References in Mr. Gray's report included citations to transcripts of testimony from the trial and exhibits introduced during the trial, reflecting the source of the testimony and any exhibits used during the trial in conjunction with that testimony.

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[170] 12 C.F.R. § 263.29(b)(1).
[171] *Id.*
[172] Statement of Undisputed Facts in Support of Enforcement Counsel's Motion for Summary Disposition dated August 2, 2019.
[173] See, *e.g.*, Enforcement Counsel's Motion for Summary Disposition and Enforcement Counsel's Memorandum of Points and Authorities in Support of its Motion for Summary Disposition, at 65 n.304-06; 66 at n.11.

Factual Premises Established to be Uncontroverted through the FDIC's Expert Witness, Douglas L. Gray

Although his reports recognize the judgments entered in the Central litigation, Mr. Gray's opinions are not dependent upon those judgments, but instead are drawn from the evidence now in the record of this administrative enforcement action (including evidence adduced during the Central litigation). For example, Mr. Gray reported that evidence presented during the Central trial established that on July 25, 2014, Kiolbasa emailed Farmers' President, copying other Farmers board members and Smith, providing a list of potential co-investors and customers that included confidential information about twenty-one Central customers, including customers' names, loan balances, and in multiple cases, a description of the collateral on the loans and amortization terms.[174]

In support of this factual assertion, Mr. Gray cited evidence introduced during the Central litigation: first, he cited a transmission by Respondent Smith to John Gross, then Farmer's President and Board Chairman.[175] The transmission shows that on July 25, 2014, Respondent Smith provided to Mr. Gross "a listing of investors and potential customers" which included twenty-one Central customers, providing detailed information regarding each customer – including the customers' names, loan balances, and, in more than half the cases, a description of the collateral on the loans and amortization terms.[176] Mr. Gray then referred to Mr. Kiolbasa's testimony in the Central litigation: when asked whether he ever spoke with these customers about moving their loans to Farmers – to get their permission to disclose their details to Farmers – Mr. Kiolbasa answered: "I don't remember them giving me explicit permission to talk about their relationships, no."[177]

Mr. Gray's examination of the evidence adduced in the Central litigation comes as no surprise. Throughout prehearing motion practice, Respondents noted, indeed argued repeatedly, that the administrative enforcement action was based, almost entirely, on claims presented and evidence admitted in the Central litigation.[178] Through his analysis of the evidence presented in that litigation, Mr. Gray endeavored to apply his expertise to evaluate the nature of the misconduct described in that litigation, and through such evaluation offer his opinion regarding whether such misconduct reflected violations of law, unsafe or unsound practices, or breaches of fiduciary duties owed by Respondents, all of which may be cause for enforcement action under the FDI Act.

In this way, by referring to trial testimony and exhibits presented during that trial, Mr. Gray reported that the evidence presented during the Central litigation established (among other things):

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[174] Gray Report-Kiolbasa at 7, citing EC SD Ex. 35.
[175] *Id.*
[176] *Id.*
[177] *Id.* citing EC SD Ex. 9 (Trial testimony (Kiolbasa) at 592).
[178] See, e.g., Response to Central Bank & Trust's ("CB&T") Motion to Quash Respondents' Subpoena Duces Tecum at 1: "The Enforcement Action is based exclusively on a state court action in Laramie County, Wyoming, captioned Central Bank & Trust v. Frank Smith, et al., No. 186-671 (the "CB&T Litigation")."; Response to Lewis Roca Rothgerber Christie LLP's Motion to Quash Respondents' Subpoena Duces Tecum at 2 (same); Respondents' Response to Enforcement Counsel's Motion to Compel Production of Documents and Application for Issuance of Third Party Subpoenas, and to Submit a Supplemental Expert Report and Respondents' Request to Extend Discovery Deadlines at 3 (same); Respondents' Response to Enforcement Counsel's Motion to Strike Requests 3, 4, and 5 of Respondents' First Request for Production of Documents at 2.

- On October 2, 2014 and again on November 10, 2014, Kiolbasa, as a Farmers employee, emailed Smith, then still a Central employee, to request information about several Central loans that Kiolbasa was seeking to move to Farmers. Smith in response provided Kiolbasa proprietary Central information, including loan balances, rates, and terms. Through testimony at the Central litigation, Smith acknowledged that while Smith was still a Central employee, he discussed with Kiolbasa ways to convince a Central loan customer to move their loan to Farmers, using information Smith obtained from Central's computer system to support the effort.[179] Mr. Gray opined that "the nature of the November 10, 2014 emails listed above makes clear that Respondents were consulting on ways to lure Central customers to move to Farmers (for example, by saying, "what are your thoughts if we match that rate and term").[180]
- On February 13, 2015, Smith, as a Central employee, emailed Kiolbasa, then a Farmers employee, providing Central reports related to liquidity and interest rate risk. From Mr. Gray's review of the reports, he determined they contained financial information proprietary to Central.[181]
- Between September 15, 2014 and February 24, 2015, Smith, while a Central employee, provided to Kiolbasa, while a Farmers employee, forms used at Central in its banking business, including Central's loan processing form, Central's appraisal checklist form, Central's Participation Agreement form, Central's Customer Information Profile, Central's Other Real Estate listing from its general ledger (which included property addresses, book and appraised values), Central's Dormant Account Procedures, forms Central used to balance pending and holding accounts, a memo from Central's President to Central's Board regarding a lookback analysis containing bank-specific financial data and managerial information of Central.[182]

[179] Gray Report-Smith at 8, citing EC SD Ex. 45 (FRB-Farmers-004346, aka CBT Ex. 257) (email chain dated 10/2/14 where Kiolbasa wrote to Smith "Frank – I don't know if I can get these loans or not, but wanted your input before I call the customer. [D] and [K] [Z] have about $708M in total on about 4 residential properties. Their rates are 4.05, and I would try the whole "I'll match what you have." Their rates adjust in about 42 months. Of course I will only be able to book about $350M of these loans if they choose to move. I don't think they will move without us offering something more. What do you think about 48 months at 4.05%?; response dated 10/2/14 by Smith to Kiolbasa "Sure. I think we could do that. You could take two of them one is at 236,369.88 and another is $100,977.89. I've been thinking about the 6.50 loan you mentioned last night. Was that for Natalie? How long again was it? 84 months? What was the balance?"; response dated 10/2/14 by Kiolbasa to Smith "check Natalie's loan out. it is with cb&t. also, the family company is good with participating in the boobie bar. how should we split the origination? I say we throw them a bone by splitting it based on loan balance. also, john's well is junk. I think he is a little distraught"; EC SD Ex. 53 & 54 (FRBFARMERS-004363 and FRB-FARMERS-4364) (11/10/14 email from Kiolbasa to Smith "need payoffs" on two [D] [N] loans; response provided balance, accrued interest; and 11/10/14 email from Smith to Kiolbasa asking re: [J] and [S] [F] loan when the current rate expires, and response provided) EC SD Ex. 11 (Trial testimony (Smith) at 902-03, 1018-20 and 1045-46).
[180] Gray Report-Smith at 11, quoting EC SD Ex. 54 (FRB-FARMERS-004364) (11/10/14 email from Kiolbasa to Smith re: [J] and [S] [F] loan).
[181] Gray Report- Smith at 8, citing EC SD Ex. 64 ("Central Bank & Trust Liquidity Report – Three Month Cash Flow Analysis – Worse Case" dated June 30, 2014; Public Funds & Repurchase Agreements Report dated July 31, 2014, etc.);Trial testimony (Kiolbasa) at 598.
[182] Gray Report-Smith at 8-9, citing EC SD Ex. 41 (FRB-FARMERS-004305) (9/15/14 email from Kiolbasa to Smith "Where do you think Megan keeps the appraisal checklist form? Michelle asked me to get a copy."); EC SD

- Upon leaving employment at Central, Kiolbasa brought with him and delivered to Farmers certain forms and documents – including a debt service-to-credit ratio form, a commercial risk rating form, an agricultural risk rating form and a real estate valuation form – doing so without authorization from Central.[183]

Mr. Gray also offered opinion analysis establishing that Central's employment policies, introduced as evidence in the Central litigation, "are consistent with generally accepted standards of prudent banking for community banking institutions and are expected to be maintained by the board of directors and senior management at these institutions."[184] He added that "[f]ailure to adopt or abide by these policies, including those precluding outside activities for a competitor, would be inconsistent with safe and sound banking practices."[185] Through his analysis of the records presented to him,[186] Mr. Gray opined that Respondents violated Central's employment policies, engaged in unsafe and unsound banking practices, and breached fiduciary duties owed to Central.[187]

Breaching Central's Employment Policies Constituted Unsafe and Unsound Practices by Respondents and Breached Fiduciary Duties Owed to Central

Mr. Gray explained how, in his opinion, the referenced conduct constituted unsafe and unsound practices and violated fiduciary duties Respondents owed to Central. He stated that Central's policies required that information about its customers "be held in strictest confidence."[188] Central's policies included within the scope of this requirement restrictions on disclosures by means of email or telephone, the use of Central's computers to access such information, and – specific to Respondent Smith, who was Central's Customer Information

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Ex. 42 (FRB-Farmers-004306-12) (9/15/14 email from Smith to Thomas re: Is this the form you asked Mark for?); EC SD Ex. 49 (FRB-FARMERS-004353-55) (10/30/14 email from Smith to Thomas encl. Participation Sold Agreement); EC SD Ex. 52 (FRB-FARMERS-004361-62) (11/6/14 email from Smith to Thomas encl. Customer Information Profile form used at Central Bank & Trust); EC SD Ex. 6 (FRB-FARMERS-004361-62) (Von Holtum Deposition "Q: I believe your testimony is that this is a customer information profile that Central Bank and Trust purchased from LaserPro? A: Yes, that's correct. Q: To your knowledge, does the bank spend money to purchase forms such as this from LaserPro? A: Yes, we do. Q: And to your knowledge . . . would the Bank suffer adverse consequences if it provides this form free of charge to other banks? A: Yes."); EC SD Ex. 60 (FRB-FARMERS-004425-26) (1/6/15 email from Smith to Thomas encl. Central's 2014 Other Real Estate –G/L #1850); EC SD Ex. 61 (FRB-FARMERS-004427-28) (1/7/15 email from Smith to Kiolbasa & Thomas enc. Central's Dormant Account Procedures); EC SD Ex. 62 (FRB-FARMERS-004429–32) (1/8/15 email from Smith to Thomas encl. Central's ATM Clearing forms etc.); EC SD Ex. 65 (FRBFARMERS-004456-65) (2/24/15 email from Smith to Kiolbasa encl. copy of Assumption Review dated March 18, 2014, written by Thomas McCarvel, Chief Financial Officer to Smith, re: Memo on Asset-Liability Management and Central's Interest Rate Sensitivity) EC SD Ex. 11 (Trial testimony (Smith) at 1008 ("Q: And during this time you also provided Mark [Kiolbasa] and Michelle [Thomas] with a number of forms? A: That is correct. Q: And you didn't get authorization from anyone at Central Bank & Trust to do that? A: I didn't get any authorization from anyone."), and 1060-61.

[183] Gray Report-Kiolbasa at 7, citing EC SD Ex. 9 (FRB-FARMERS-000348 at 633) (Trial testimony of Kiolbasa) at 591, 603-04.

[184] Gray Report-Smith at 4; Gray Report-Kiolbasa at 5.

[185] Gray Report-Smith 4; Gray Report-Kiolbasa 5.

[186] See Gray Report-Smith at 39-40; Gray Report-Kiolbasa at 31-32.

[187] Gray Report-Smith at 11; Gray Report-Kiolbasa at 11.

[188] Gray Report-Smith at 5, citing EC SD Ex. 75 (FRB-FARMERS-005558-76 at 5562).

Security Officer – the responsibility for maintaining systems in the bank to ensure compliance with the Customer Information Security Policy.[189]

Having reviewed Central's policies and evidence regarding Respondents' conduct, Mr. Gray opined that Respondent Smith improperly disseminated "information related to Central's finances, operations, and customers, to individuals who were not Central employees at the times of such disclosures."[190] He further opined that Kiolbasa, while a Central employee, also improperly disseminated Central's financial, business, and customer information to individuals who were not Central employees.[191]

Violations of Central's Policies

As noted above, it was Mr. Gray's expert opinion that failure to adopt or abide by provisions set forth in Central's Employment Handbook "would be inconsistent with safe and sound banking practices."[192] The record further reflects that Respondents acknowledged receipt of the Central Employment Handbook at the time they began their employment at Central.[193] The undisputed evidence cited by Mr. Gray reflected that both Respondents affirmed that by acknowledging their receipt of the Handbook, they understood that it was their responsibility "to read and abide by the policies described in the Employee Handbook."[194]

Mr. Gray reported that policies in Central's Handbook require confidential treatment of financial, business, and customer information.[195] Quoting from the Handbook, Mr. Gray noted that Central's policy stated "Information regarding our customers must be held in strictest confidence" and that employees "must take care not to discuss with family, friends, neighbors, or any other person who is not an employee of the Bank, information about the Bank's finances, business plans and operations, production, facilities, customers, suppliers . . . unless you are required to do so in the normal course of your job duties."[196]

Mr. Gray opined that, based on the conduct described during the Central litigation, as reflected above, Respondent Kiolbasa discussed or disseminated information related to Central's customers to individuals who were not Central employees at the relevant times, and improperly took with him Central's proprietary forms when he left Central, thereby violating Central's policies.[197] According to Mr. Gray, while the sensitivity of the forms and data that Kiolbasa took and shared outside may vary, "all were subject to the Central Handbook, should not have been

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[189] Gray Report-Smith at 5-6, citing EC SD Ex. 63 (Central Bank & Trust, Customer Information Security Policy (Feb. 2015) (FRB-FARMERS-004435–41); EC SD Ex. 10 (FRB-FARMERS-000690 at 977) (Trial testimony of Smith).
[190] Gray Report-Smith at 7.
[191] Gray Report-Kiolbasa at 6-7.
[192] *Id.* at 5.
[193] Gray Report-Smith at 5, citing EC SD Exhibits 74; EC SD Exhibit 13 (Central Bank & Trust, Frank Smith's Acknowledgments (Feb. 24, 2009, and May 30, 2013) (FRB-FARMERS-005577 and FRB-FARMERS-004113); EC SD Exhibit 76 (Central Bank & Trust, Mark Kiolbasa's Acknowledgments (Dec. 16, 2010, and May 30, 2013) (FRB FARMERS-005580 at 5582 and 5580).
[194] *Id.*
[195] Gray Report-Kiolbasa at 5, citing Central Handbook, Confidentiality, EC SD Exhibit 75 (FRB-FARMERS-005558-76 at 5562).
[196] *Id.*
[197] Gray Report-Kiolbasa, citing references set forth above.

shared outside the bank, and in my experience, could have negatively impacted Central in the hands of a competitor."[198]

Similarly, Mr. Gray opined that based on the conduct described during the Central litigation, as reflected above, Respondent Smith violated Central's privacy policy, which provided that the resources he appropriated from Central were "the sole property of the Bank and are intended for business use."[199] After noting Smith's position as Central's Customer Information Security Officer, Mr. Gray opined that Smith "was exchanging information in violation of the same policy he was responsible for enforcing."[200]

Respondents' Duty to Act with Honesty, Integrity, and Loyalty

Beyond applying Central's policies regarding privacy and confidentiality, Mr. Gray also considered more broadly-stated policies – those requiring Central's employees to act with honesty, integrity, and loyalty. Noting that the "entire banking business is built" on customer trust, the policy requires "absolute honesty" as an incident of integrity.[201] Also, regarding loyalty, Central's policy required that employees "will be loyal to the institution with which they are associated and will on no occasion publicly dishonor either their employer or their fellow employee."[202]

Mr. Gray coupled these provisions of Central's Handbook with provisions that addressed outside activities – including requirements binding employees to provide notice and secure written consent from Central prior to accepting or performing outside work.[203] He noted in particular the requirement that employees "avoid all situations in which their personal interests conflict or appear to conflict with the Bank's interests," and avoid engaging in any activity "that would require you to disclose confidential, trade secret information belonging to the Bank."[204]

Mr. Gray opined that individually and with respect to their collective action, by engaging in efforts to facilitate the transfer of loans from Central to Farmers, and to otherwise assist Farmers, Respondents violated Central's policies regarding honesty, integrity, loyalty, and restrictions on outside activities.[205]

Specific and Uncontroverted Instances of Conduct that Breached Central's Employment Policies

Mr. Gray provided these specific instances of such violations:

- Conduct in late 2013 – where Respondents collectively began working on a plan to acquire an interest in Farmers' parent holding company, Commercial Bancorp, and to take management positions at Farmers.[206] After noting that Farmers was located "about 42 miles from Cheyenne, Wyoming, where Central had a branch,"

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[198] Gray Report-Kiolbasa at 7-8.
[199] Gray Report-Smith at 4, quoting Central Handbook, Privacy, EC Exhibit 75 (FRB-FARMERS-005558-76 at 5572)
[200] Gray Report-Smith at 12.
[201] *Id.*, citing Central Handbook, Integrity, EC SD Ex. 75 (FRB-FARMERS-005558 at 5562).
[202] *Id.*, citing Central Handbook, Loyalty EC SD Ex. 75 (FRB-FARMERS-005563).
[203] *Id.*, citing Central Handbook, Outside Employment/Activities, EC SD Ex. 75 (FRB-FARMERS-005574).
[204] *Id.* at 13, quoting Central Handbook, Outside Employment/Activities, EC SD Ex. 75 (FRB-FARMERS-005574).
[205] Gray Report-Smith at 13; Gray Report-Kiolbasa at 9.
[206] Gray Report-Smith at 13, citing EC SD Ex. 20 (FRB-FARMERS-004174-86) (1/23/14 "preliminary business plan" of Frank Smith and Mark Kiolbasa "including projections, on the purchase and expansion of the Farmers State Bank located in Pine Bluffs, Wyoming.")

Mr. Gray opined that "during the time period relevant to the conduct set forth in the Notice of Charges, Central and Farmers were competing banks."[207]

- In a December 17, 2013 email from Kiolbasa to Smith, Kiolbasa outlines a series of questions relating to their business plan, including raising the question of "at what time it would be appropriate for me to start talking to my customers" about "jump[ing]" from Central to Farmers; expressing the concern that "if I don't get the customers to jump within the first six months, I may not get them at all"; also stating that "the easy answer" about when he should start contacting his customers "is as soon as I resign"; expressing the concern that he did not "want to be over confident in the amount of loans that I can bring in. Depending on the timing and interest rates, things might go slow (at least until customers' rates start to adjust which begins in 2 years for the customer that I brought to CB&T), so it would really hurt if I got one of my $1MM relationships to move and we were only able to put $250M on the books."[208]
- In a series of email exchanges, Respondents between March 25, 2014 and June 14, 2014, reveal efforts they have undertaken to encourage Central customers to move their loans from Central to Farmers – including evidence that, in Mr. Gray's opinion, demonstrated Respondents went beyond "mere planning activities" toward a potential acquisition of Farmers, while still Central employees.[209]
- In a June 13, 2014 email to Smith, Kiolbasa reported on his discovery that the "Dropbox program" – a storage protocol created in connection with their Business Plan – stores a copy of documents associated with the Plan.[210]

As Kiolbasa rather excitedly explained to Smith:

> So I got to researching this dropbox program today. That damn thing downloads a folder to your computer that syncs with the cloud. **Everything** going into those folders is also being saved on my work computer . . . everything, even what [Farmers] is uploading!!! I'm deleting the program and putting it on my home computer. But I wanted to tell you in case you accessed it from your work computer. When you delete the program, I'm not sure if the folder also gets deleted. But if you buzz me Monday, I'll show you how to tell the path of where it is saving all the information . . . and maybe it is saving it to mine since I am the owner of the folders, but still, I don't want to get caught with our pants down on this. Imagine Bill [Von Holtum, Central's Chairman] walking into John's [Gross, Farmers Chairman and President] office with a copy of all of their info.[211]

[207] Gray Report-Smith at 14.
[208] *Id.* at 14, citing EC SD Ex. 14 at FRB-FARMERS-004115.
[209] Gray Report-Smith at 15.
[210] The record reflects that Kiolbasa set up the Dropbox account on June 10, 2014, and later that day added Smith to the account. EC SD Ex. 11 (Smith's Trial Testimony) at 949 (FRB-FARMERS-001068).
[211] Gray Report-Smith at 15, quoting EC SD Ex. 30 (FRB-FARMERS-004268) (emphasis *sic*).

Mr. Gray opined that the June 13, 2014 email evidenced that "Respondents were aware that their actions conflicted with Central's interests."[212]

In support, Mr. Gray noted that Smith testified, with respect to the June 13, 2014 email message, that he '"deleted some documents' related to the Business Plan from his Central work computer" and admitted that he thought if he were caught 'doing what [he was] doing at Central Bank & Trust [he] would have been fired . . . ."' This testimony, in Mr. Gray's opinion, "demonstrated that Smith was aware of the impropriety of his actions, and reflected dishonesty."[213]

Similarly, Mr. Gray noted that Kiolbasa's statement that he '"didn't want to get caught with our pants down' evidences that Respondents were aware that their actions conflicted with Central's interests. It also reflects dishonesty."[214]

Conduct Specific to Mr. Smith

Apart from conduct both Respondents engaged in together, evidence adduced during the trial also concerned Smith's unilateral actions. Significant in these, according to Mr. Gray, were instances where Smith, while working at Central, emailed John Gross and another Farmers director to inform them "of his discussions, on behalf of Farmers, with Federal Reserve Bank of Kansas City staff, in support of Kiolbasa's move from Central to Farmers."[215]

Mr. Gray observed that Smith's actions – encouraging Reserve Bank staff to permit Kiolbasa's move from Central to Farmers – demonstrated that Smith was "aware that he was representing the interests of Farmers to bank regulators while employed at Central," and (because such a move would leave Central without a loan officer overseeing its largest loan portfolio) such actions "on Farmers' behalf were to the detriment of his employer, Central."[216] This was coupled with evidence that during September 2014, Gross authorized Smith to speak on Farmers' behalf in support of Kiolbasa's move from Central to Farmers, which, in Mr. Gray's opinion, "resulted in Smith acting as an agent of Farmers, even though he was Central's CFO at the time."[217]

Mr. Gray also summarized Smith's trial testimony regarding his actions in September 2014, when Central's President, Carl Huhnke, discovered that Kiolbasa was working at Farmers and Central's loan payoffs were coming from Farmers.[218] Upon this discovery, Huhnke asked Smith to research Farmers – to find out who they were, and what was going on.[219]

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[212] Gray Report-Smith at 19.
[213] Gray Report-Smith at 16, quoting Smith's Trial Testimony at 952:1–19, 953:13–19, Mar. 15, 2018 (FRB-FARMERS-001032 at 1071–73).
[214] Gray Report-Kiolbasa at 11, quoting from EC SD Ex. 30 (FRB-FARMERS-004268).
[215] Gray Report-Smith at 16, citing EC SD Ex. 71 (FRB-FARMERS-004594-98)
[216] Gray Report-Smith at 16, citing EC SD Ex. 71 (9/5/14 email chain from Smith to Gross et al re: E-Mail to John Clark at Federal Reserve Applications Department) (FRB-FARMERS-004594-97 at 4594); EC SD Ex. 9 (Kiolbasa's Trial Testimony at 594:20–24), Mar. 14, 2018 (FRB-FARMERS-000348 at 636).
[217] Gray Report-Smith at 16, citing EC Exhibit 12 (Testimony of John Gross) (FRB-FARMERS-001363 at 1656:10-25).
[218] Gray Report-Smith at 17.
[219] *Id.*, citing EC SD Ex. 11 (Smith's Trial Testimony at 1028:17–1030:7, Mar. 16, 2018 (FRB-FARMERS-001032 at 1147–49).

Even though by the time of this request Smith had already signed a letter reflecting his intention to buy Farmers, and had been providing forms and information about Central to Kiolbasa for the past months in furtherance of Respondents' business plan, and had been preparing Call Reports for Farmers – despite all of these dealings having an impact on Central, Smith disclosed none of this to Huhnke in response to Huhnke's request for information about Farmers.[220]

When asked during the trial whether the reason for not disclosing this set of circumstances to Huhnke – whether "the reason is obvious. It is because it was wrong, and you would be fired for that?" Smith answered: "The reason I didn't do it is because I could not go to work at Farmers State Bank." With the next question – "Okay. And you knew you would be fired from Central Bank & Trust for doing what you were doing?" Smith answered "Yes."[221]

As noted above, Huhnke had been alerted to payoff checks arriving at Central by which loans that had originated at Central were being paid off by Farmers. Mr. Gray noted that on October 7, 2014, Smith, Kiolbasa and a former Central employee, Michelle Thomas, exchanged emails about this, discussing the fact that Central's staff "had become aware that of Thomas' employment at Farmers due to her signature on a cashier's check drawn on Farmers and payable to Central."[222]

In his review of a series of email exchangers, Mr. Gray reported that in response to this set of events, "Smith, who was then Central's CFO, tried to determine who at Central knew about the signature on the cashier's check and talked about misleading Huhnke regarding the signature, demonstrating dishonesty and an abdication of loyalty to Central."[223] Mr. Gray also noted that through this series of email exchanges, Smith told Kiolbasa that if Huhnke asked about Ms. Thomas's signature on the payoff checks, Smith would falsely report that Farmers had "hired Michelle [Thomas] as a contractor to teach [Farmers] about Sparak and loan documents."[224]

Also while still Central's CFO, Smith spent time between October 2014 and March 2015 at Farmers' offices in Pine Bluffs. According to Mr. Gray, the evidence (including Smith's own description of what services he performed there) constituted service "to a

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[220] Gray Report-Smith at 17, citing EC SD Ex. 11 (Smith's Trial Testimony at 1030:13–16, Mar. 16, 2018 (FRB-FARMERS-001032 at 1149).
[221] EC SD Ex. 11 (Smith's Trial Testimony at 1031, Mar. 16, 2018 (FRB-FARMERS-001032 at 1150).
[222] Gray Report-Smith at 17.
[223] *Id.* at 17-18, citing EC SD Exhibit 46 (FRBFARMERS-004347-48) (10/7/14 email from Smith to [Thomas] at 11:30 AM. (Subject: Oops!) "I guessed you signed the Cashier's checks from [Farmers] that paid off [Central] loans. They recognized it in Cheyenne. Trying to come up with an answer before [Central President] Carl [Huhnke] gets there today."; EC SD Exhibit 47 (FRB-FARMERS-004349) (10/7/14 email from Smith to Kiolbasa at 12:53 PM. "Mark – Who all from [Central] knows about the checks? Who called you? Frank."); EC SD Exhibit 48 (FRB-FARMERS-004350-51) (10/7/14 email from Kiolbasa to Smith at 3:43 PM. "So Peggy [a Central employee] is texting me to let me know that Kathy Brashear [a Central employee] went through the work to find those checks. She then asked Peggy what the last name was of Michelle from Lander. Peggy claims to be acting stup*id.*"); EC DC Exhibit 9 (FRB-FARMERS 000348 at 636:20-24) (From Smith to Kiolbasa at 3:51 PM. "Sounds good. I am going to tell [C]arl if he asked that [Farmers] hired Michelle as contractor to teach [Farmers] about Sparak and loan documents. She has mentioned consulting a few times and talked to Wyoming Community and Bank of Commerce about it in the past." (*Id.* at 4350-51).
[224] Gray Report-Smith at 18, citing EC SD Exhibit 48 (FRB-FARMERS-004350-51 at 4351). Note that the reference to Sparak is obscure and not clear in the present record.

competing bank," such that Smith "was disloyal to Central by acting in conflict with Central's interests, and was performing outside activities without the required prior approval by Central."[225] Even if Smith was not being compensated by Farmers for the services performed there, in Mr. Gray's opinion, "the Business Plan and other evidence shows that Smith performed these services with an expectation of financial gain once moving to Farmers."[226]

Summarizing his perceptions drawn from this exchange, Mr. Gray opined that both Smith and Kiolbasa violated Central's policies regarding honesty, integrity, and loyalty.[227] In addition, Mr. Gray opined that Respondents' active pursuit of the Business Plan, which involved acquiring an ownership interest in Farmers and which included the execution of a confidentiality agreement and meetings with Farmers directors, constituted outside activities prohibited by Central's policies, and reflected Respondents' disloyalty to Central.[228]

Engaging in Unsafe and Unsound Banking Practices not Based on Central's Employment Policies

Approaching the evidence from a separate perspective – beyond relying on Central's published employee policies – Mr. Gray offered opinions regarding whether the trial proceedings produced evidence of unsafe or unsound banking practices attributable to Respondents.[229]

Beyond references to breaches of Central's policies, Mr. Gray opined that Respondents' participation in a series of specific instances – standing alone – constituted evidence of Respondents' unsafe or unsound banking practices. Both Respondents, in Mr. Gray's opinion, were actively involved in a series of transactions intended to facilitate the transfer of loans away from Central, "directly contravening their obligations to safeguard Central's earning assets."[230]

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[225] Gray Report-Smith at19 citing EC SD Ex. 50 (FRB-FARMERS-004356–59 at 4358) (10/30/14 chat transcript between April Hughes and Smith Q by Hughes: "How was your trip?" A by Smith: "It was good. Spent two days at the bank. Got their call report done, had staff meetings, gave them homework, and was a bit of a cheerleader. It was fun."); EC SD Ex. 11 (Smith's Trial Testimony) at 1006-08, 1035-37, (FRB-FARMERS-001032 at 1155–56); Smith's Trial Testimony at 1006:4–1007:22, Mar. 16, 2018 (FRB-FARMERS-001032 at 1125–26) (assisted with the preparation of Farmers' call reports for September, December 2014 and , March and June 2015).

[226] Gray Report-Smith at 19; EC SD Ex. 20 (FRB-FARMERS-004176) ("Our proposition [as documented in the Business Plan] is to purchase [Farmers] and to open an LPO (loan production office) in Cheyenne, Wyoming. We will grow the bank's loan portfolio by $12,000,000 in quality, performing loans within the first three years, at which time a full service branch would be opened in Cheyenne.").

[227] Gray Report-Smith at 20; Gray Report-Kiolbasa at 11.

[228] Gray Report-Smith at 20; Gray Report-Kiolbasa at 11-12.

[229] Gray Report-Smith at 20.

[230] *Id.* at 16; citing EC SD Ex. 14 (FRB-FARMERS-004114–16 at 4115) (12/16/13 email from Kiolbasa to Smith re: concerns regarding the Business Plan); EC SD Ex. 22 (FRB-FARMERS-004218–21 at 4219) (3/25/14 email attaching Kiolbasa's report to John Gross reflecting his proposal to "quickly resolve all of Farmers' outstanding regulatory issues and have an immensely successful future".); EC SD Ex. 26 (FRB-FARMERS-004241–54 at 4242) (6/1/14 transmission by Kiolbasa to Farmers attaching Respondents' Business Plan); EC SD Ex. 24 (FRB-FARMERS-004236–38 at 4236) (4/10/14 email from Smith to "spring1996@yahoo.com attaching Kiolbasa's letter to Gross describing Respondents' business plan); EC SD Ex. 25(FRB-FARMERS-004239–40) (6/1/14 meeting agenda with business plan highlights, noting in the meeting agenda that Respondents' goals included "loan growth/profitability/expansion"); Kiolbasa's Trial Testimony at 535:19–536:7, Mar. 14, 2018 (FRB-FARMERS-000348 at 577–78) (reflecting that meeting involved Respondents, Thomas, and Farmers' board); EC SD Ex. 9 (Kiolbasa's Trial Testimony) at 539-40 (FRB-FARMERS-000348 at 581– 82); EC SD Ex. 12 (J. Gross's Trial Testimony) at 1506-07 (FRB-FARMERS-001363 at 1663) (when asked "if you saw one of your officers at your bank speaking with a competing bank about confirming commitments to move over customers, you wouldn't be

Mr. Gray's Credentials as an Expert

Here, it bears mentioning the credentials Mr. Gray brought to this process – particularly his deep familiarity with banking regulations, processes, and dynamics.

From the curriculum vitae which accompanied both the Smith and Kiolbasa reports, we know Mr. Gray, as Assistant Vice President of Supervision and Risk Management at the Federal Reserve Bank of Kansas City is responsible for oversight of the safety and soundness supervision program for approximately 50 state-chartered, Federal Reserve member banks (community banks) and approximately 175 bank holding companies (total assets less than $10 billion), including evaluating the adequacy of examination scoping procedures and examination planning; proving ratings and supervisory conclusions from community bank examinations and inspections; representing the Federal Reserve Bank of Kansas City in official supervisory meetings and correspondence with bankers, bank holding company officials, and representatives from other regulatory agencies; providing training related to liquidity risk management evaluations for banking regulators in other countries/jurisdictions as part of the Federal Reserve System's initiatives to support central bankers in other jurisdictions; overseeing training and development programs for Tenth District examiners and managers; and implementing the key strategic initiatives for Reserve Bank supervision.[231]

Further, between 2006 and 2015 Mr. Gray, while serving as a Managing Examiner, was responsible for daily oversight of examination activities and examiner development with activities including providing oversight of Oklahoma City community bank central points of contact for state member banks, reviewing and editing all outgoing examination reports, correspondence, and other communications with banks, bank holding companies, and other regulatory agencies, serving as the Tenth District representative to the Federal Reserve System's Market and Liquidity Risk coordinators group, which was responsible for monitoring emerging asset/liability management trends in the banking industry and recommending to Reserve Bank and Board of Governors officers supervisory responses to emerging or existing risks; and serving as an asset/liability management training course developer and instructor for examiners throughout the Federal Reserve System (teaching the course approximately 20 times in 8 years).[232]

Further, between 2000 and 2005, he served as a Community Bank Examiner, responsible for various leadership and examination assignments at community bank examinations and bank holding company inspections, including service as examiner-in-charge for examinations of state member banks with assets less than $500 million. In this capacity, he developed elevated subject matter expertise related to evaluation of interest rate risk, liquidity risk, investment securities, and Bank Secrecy Act (BSA) compliance at institutions of all sizes; provided oversight of a portfolio of bank holding companies designated as active Financial Holding Companies as defined in the Gramm-Leach-Bliley Act of 1999; served in other leadership and trainer capacities for less experienced examiners; and provided BSA training to several financial institutions and the Oklahoma Banking Department.[233]

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happy about that, would you?" answered "No, I wouldn't."); EC SD Ex. 29 (FRB-FARMERS-004262–67 at 4262); EC SD Ex. 11 (Smith's Trial Testimony) at 949 (FRB-FARMERS-001032 at 1068).

[231] Gray Report-Smith at Appendix A, 1.

[232] *Id.*

[233] *Id.* at 2.

This, plus service between 1994 and 2000 as Assistant Vice President/Supervisor/Analyst for Midland Mortgage Company of Oklahoma City, Oklahoma, his experience as a course developer for the Federal Reserve System's Principles of Asset/Liability Management training course, and his certification as a Chartered Financial Analyst in 2005, constitutes a sufficient background of both academic development and practical experience in relevant fields to qualify Mr. Gray as an expert in areas relevant to this enforcement action.[234]

Upon these credentials, and upon my review of the in-depth analysis presented through his reports, I find Mr. Gray is qualified to provide expert testimony in the fields of regulatory practice pertaining to financial institutions, including the areas of compliance with banking policies and regulations, identification of unsafe or unsound banking practices, breaches of fiduciary duties owed to financial institutions, and violations of laws (both statutes and regulations) relating to the FDI Act.

What Constitutes an Unsafe or Unsound Practice?

In determining what constitutes an unsafe or unsound practice, Mr. Gray reported as follows:

> An unsafe and unsound practice is generally defined as conduct that 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 fund."[235] Further, federal regulations that apply to federally supervised institutions lay out specific safety and soundness standards for bankers.[236]

Reflecting on the preceding report of Respondents' repeated and continued violations of Central's policies on confidentiality, privacy, integrity, loyalty, and restrictions on outside activity, and noting specifically policies against conflicts of interest, Mr. Gray opined that these violations, in and of themselves, were unsafe and unsound banking practices.[237] He explained that circumventing the internal controls presented in Central's policies jeopardized customer trust in the bank, subjecting the bank to harm – including potential financial and reputational harm, and legal risk.[238]

Respondents' Conduct was Contrary to Generally Accepted Standards of Prudent Banking Operations

Addressing Respondents' claims that Central failed to enforce these policies, Mr. Gray noted that the duties at issue here were personal to the individual employee. As he explained with respect to Respondent Smith:

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[234] *Id.* at 2-3.

[235] Gray Report-Kiolbasa at 12, quoting Financial Institutions Supervisory Act of 1966, Hearings on S 3158 Before the H. Committee on Banking and Currency, 89th Cong., 2nd Sess. 49-50 (1966) (memorandum submitted by John Horne).

[236] Gray Report-Kiolbasa at 12, citing 12 C.F.R. § 208 App. D-1 (setting forth interagency guidelines establishing standards for safety and soundness); accord, *In the Matter of Patrick Adams*, (OCC September 13, 2014) 2014 WL 8735096, at *3.

[237] Gray Report-Smith at 21; Gray Report-Kiolbasa at 12-13.

[238] Gray Report-Smith at 21; Gray Report-Kiolbasa at 13.

Smith acted contrary to generally accepted standards of prudent banking operations, regardless of whether Central properly enforced its policies, failed to adopt recommended improvements to these policies, or failed to take action against other violations of them. Evidence that Central did not actively enforce their policies, failed to adopt policy improvements, or that other Central employees beyond Respondents were also engaged in violations of Central's policies, would not constitute evidence that Smith was acting in a prudent manner or in compliance with Central's policies. Instead, Smith had an individual obligation to act in a prudent manner and comply with Central policies.[239] In my opinion, Smith's continued violations of Central's policies, as described above, circumvented Central's controls, and constituted an unsafe and unsound banking practice.[240]

Mr. Gray offered similar conclusions regarding Mr. Kiolbasa.[241] He also opined that by soliciting and obtaining confidential customer information and proprietary information of Central while employed at Farmers, Mr. Kiolbasa engaged in unsafe and unsound banking practices.[242]

Elaborating on this point, Mr. Gray opined as follows:

> Generally accepted standards of prudent banking operations preclude a bank employee from coordinating with an employee of a competing bank to obtain confidential customer and proprietary information of the competing bank. Continued efforts to do so could expose the bank where the employee works to legal liability, and thus jeopardize its safety and soundness. Here, such actions led to Central suing Farmers, resulting in significant legal expenses to Farmers.[243]

Actions that Led to the Transfer of Loans Away from Central

Further, reflecting individual actions by Smith and Kiolbasa, Mr. Gray noted three courses of conduct attributed to Respondent Smith, and two attributed to Kiolbasa, that warranted review. In each instance, Mr. Gray opined that Respondents "took improper steps to facilitate the transfer of loans away from Central, directly contravening their obligations to safeguard Central's assets."[244] He opined that Smith[245] and Kiolbasa[246] "improperly transferred

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[239] Gray Report-Smith at 22, citing Smith's Acknowledgements, dated February 24, 2009, and May 30, 2013 ("I understand that it is my responsibility to read and abide by the policies described in the Employee Handbook.").
[240] Gray Report-Smith at 22. See also Gray Report-Kiolbasa at 13, citing Kiolbasa's Acknowledgements, dated December 16, 2010, and May 30, 2013 ("I understand that it is my responsibility to read and abide by the policies described in the Employee Handbook.").
[241] Gray Report-Kiolbasa at 13-14.
[242] *Id.* at 18.
[243] *Id.* at 18, citing the Report at Section III E (discussing harm to Farmers resulting from Kiolbasa's conduct).
[244] Gray Report-Smith at 25; Gray Report-Kiolbasa at 16.
[245] Gray Report-Smith at 25, citing EC SD Ex. 45 (FRB-FARMERS-004346); EC SD Ex. 11 (Smith's Trial Testimony) at 1018-1020, 1032; EC SD Ex. 64 (FRB-FARMERS-004442–55) (2/13/15 email from Smith to Kiolbasa attaching the following: "Central Bank & Trust Liquidity Report – Three Month Cash Flow Analysis – Worse Case" dated June 30, 2014; Public Funds & Repurchase Agreements Report dated July 31, 2014, etc.); Kiolbasa's Trial Testimony at 598:2–17, Mar. 14, 2018 (FRB-FARMERS-000348 at 640); and Smith's Trial Testimony at 1008:17–22, Mar. 16, 2018 (FRB-FARMERS-001032 at 1127).
[246] Gray Report-Kiolbasa at 16, citing EC SD Ex. 42 (FRB-FARMERS-004306–12 at 4306) (9/15/14 email from Smith to Thomas attaching Central checklist form); EC SD Ex. 41 FRB-FARMERS-004305 (9/15/14 email from

Central's proprietary information or documents outside the bank, and in doing so, failed to safeguard other assets of Central."[247]

Elaborating on this point, Mr. Gray explained:

> Respondents' seeking of commitments from Central customers to invest in Farmers constitutes an unsafe and unsound practice under the circumstances. For the following reasons, Respondents' actions communicated an implied request to transfer Central loans to Farmers, in direct contravention of his responsibility to safeguard Central's (his employer's) assets.
>
> First, the success of the Central customer's investment would have been tied to the viability of the Business Plan, which included growth of Farmers' loan portfolio as an important objective. Second, the solicitation was integrally tied to the Business Plan, which called for Respondents to be co-owners and top executives at Farmers, which would naturally induce any would-be co-investor customers to consider moving their banking business to Farmers, to Central's detriment. Third, by soliciting Central customers as co-investors prior to departing Central, Respondents were telegraphing to these customers that Farmers might be a better place for them to conduct their banking, again, to the detriment of Central, their employer at the time. Thus, the mere solicitation of these Central customers as co-investors, while Respondents still worked for the bank, contained an implied request for a commitment to transfer their Central loans to Farmers, and was likely to lead to a loss of business by Central. Actions by bank officers or management that could be reasonably expected to result in a loss of business to their employer would constitute an unsafe and unsound practice, as such actions contravene generally accepted standards of prudent banking operations, and could result in abnormal risk, financial losses, and/or reputational harm to the bank.[248]

Describing the evidence presented during the trial as demonstrating Respondents' efforts to facilitate a customer's plans to move their loans from Central to Farmers, Mr. Gray noted that "[t]o the extent that bankers in senior positions of trust, such as Respondents, engage in these types of actions, they can reasonably be expected to result in a risk of loss to their employer. In this case, Respondents' actions apparently led to loss of business to their employer."[249] From the

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Kiolbasa to Smith asking where "Megan keeps the appraisal checklist form" at Central); and EC SD Ex. 9 (Kiolbasa's Trial Testimony) at 603-04(FRB-FARMERS-000348 at 645–46).

[247] Gray Report-Smith at 25; Gray Report-Kiolbasa at 16.

[248] Gray Report-Smith at 26, citing EC Ex. 11 (Smith's Trial Testimony) at 903-04 (FRB-FARMERS-000690 at 984) (Smith testified that in early 2014, while both were still Central employees, Respondents went on two or three business calls together to discuss investments in Farmers with Central customers, where Respondents would tell these customers that they were going to fix Farmers' profitability by increasing its loan portfolio, among other things.); EC SD Ex. 25 (FRB-FARMERS-004241–54 at 4245) ("There are three key managers that are critical to the accomplishment of the purchase and expansion: Frank Smith, Mark Kiolbasa, and Michelle Thomas.")

[249] Gray Report-Smith at 26.

foregoing, Mr. Gray opined that "these solicitations were contrary to generally accepted standards of prudent banking operations, and constituted unsafe and unsound practices."[250]

Breaches of Fiduciary Duties Owed to Central

In the Notice of Intent, the FDIC alleged Respondents breached the fiduciary duties of care, candor and loyalty they owed to Central; and breached the fiduciary duty of care they owed to Farmers.[251] The allegation is based on the claim that Respondents "scheme[d] to misappropriate confidential and proprietary information" for their mutual benefit and to Central's detriment.[252]

As noted above, the 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."[253] The duty of candor requires a corporate fiduciary to disclose "everything he knew relating to the transaction," even "if not asked." [254] The duty of care requires directors and officers to "act as prudent and diligent business persons in conducting the affairs of the bank."[255]

Mr. Gray opined that as a Chief Financial Officer and Central branch President, Smith owed these fiduciary duties to Central.[256] In his opinion, Smith had the obligation to be aware of bank policies and applicable statutes and regulations – and refrain from violating these.[257] Further, according to Mr. Gray, Smith had the duty to "limit the bank's risk profile by promoting compliance with bank policies, applicable laws and regulations, and generally accepted standards of prudent banking operations."[258]

In his capacity as Central's CFO and its Customer Information Security Officer, Smith had, in Mr. Gray's opinion, the "duty of care to act as an ordinary prudent business person by complying with Central's policies" and applicable statutes and regulations.[259] This duty required that Smith treat Central's financial, business, and customer information as confidential.[260]

Respondents Breached the Duty of Care Owed to Central

In Mr. Gray's opinion, both Smith and Kiolbasa breached the fiduciary duty of care owed to Central.[261] In support, Mr. Gray cited to a series of circumstances already presented, including the following:

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[250] *Id.*
[251] Notice of Intent to Prohibit at ¶¶27, 30.
[252] *Id.*
[253] Federal Deposit Insurance Corporation, Statement of Policy Concerning the Responsibilities of Bank Directors and Officers, FIL--87--92 (Dec. 3, 1992), available at https://www.fdic.gov/regulations/laws/rules/5000-3300.html.
[254] *De La Fuente II v. FDIC*, 332 F.3d 1208, 1222 (9th Cir. 2003) (fiduciary duty breached by failure to disclose relevant information to bank's board of directors when it was considering a loan even though the bank's board did not ask); *Michael*, 687 F.3d at 350; *Seidman*, 37 F.3d at 935 n.34.
[255] Federal Deposit Insurance Corporation, Statement of Policy Concerning the Responsibilities of Bank Directors and Officers, FIL--87--92 (Dec. 3, 1992), available at https://www.fdic.gov/regulations/laws/rules/5000-3300.html.
[256] Gray Report-Smith at 27.
[257] *Id.*
[258] *Id.*
[259] *Id.* at 27-28.
[260] *Id.* at 28.
[261] *Id.*; Gray Report-Kiolbasa at 21.

- The evidence adduced during the Central litigation included evidence that the Business Plan developed by Smith and Kiolbasa in late 2013 “contemplated opening a loan production office to directly compete with Central’s branch” in Cheyenne, Wyoming;
- The email Kiolbasa sent to Smith on December 17, 2013, indicated Kiolbasa’s intention to transfer the loan portfolio Kiolbasa was responsible for at Central to Farmers;
- The email Kiolbasa sent to Smith on March 25, 2014 indicated concrete steps taken by Kiolbasa and Smith to move Central’s business to Farmers;
- Testimony by Kiolbasa and documents presented during the Central litigation established that on June 1, 2014, while Smith and Kiolbasa were still working at Central, both met with the Farmers’ Board of Directors, at which time Respondents represented that they had approached Central customers “relating to a potential move of Respondents to Farmers, and had customers agree that they would move their loans from Central to Farmers.”[262]
- Smith’s trial testimony established that on June 11, 2014, Respondents entered into a Confidentiality Agreement with Farmers and Farmers’ holding company, Commercial, that thereafter while still working at Central he received Farmers’ documents marked “confidential” and thereafter Farmers “began loading some items into Dropbox,” and that Smith thereafter deleted three or four of them from his Central computer.[263]
- Testimony by both Smith and Kiolbasa established that while both were still employed by Central, they spoke with, and presented their Business Plan, to Central customers, seeking co-investors in Commercial.[264]
- Evidence that on July 25, 2014, Kiolbasa provided Farmers (through John Gross) a list of potential investors and customers, including twenty-one Central customers – including the customers’ names, loan balances, and collateral information; and further identified seventeen Central customers who told Kiolbasa they would move from Central if and when he moved banks; and that in

[262] Gray Report-Smith at 29, Gray Report-Kiolbasa at 21 citing EC SD Ex. 25 (FRB-FARMERS-004239–40 at 4239) (noting in the meeting agenda that Respondents’ goals included “loan growth/profitability/expansion”); EC SD Ex. 9 (Kiolbasa’s Trial Testimony) at 535-36 (FRB-FARMERS-000348 at 577-78) (reflecting Respondents met at Farmers with Farmers’ board and with one of Central’s customers, Mr. [K]); EC SD Ex. 9 (Kiolbasa’s Trial Testimony) at 539-40 (FRB-FARMERS-000348 at 581–82) (indicating that at the meeting Kiolbasa identified seven out of seventeen investors in Respondents’ Business Plan were Central’s customers); EC SD Ex. 12 (J. Gross’s Trial Testimony) at 1506 (FRB-FARMERS-001363 at 1663) (testimony by Mr. Gross acknowledging that in Kiolbasa’s letter (EC SD Ex. 22 (FRB-FARMERS-004218–21 at 4219) (3/25/14 email attaching Kiolbasa’s report to John Gross), Gross acknowledged that in June 2014, Respondents told Gross they had approached Central’s customers and agreed they would “move their business upon transition”).

[263] Gray Report-Smith at 29, Gray Report-Kiolbasa at 22 citing EC SD Ex. 11 (Smith’s Trial Testimony) at 949-51 (FRBFARMERS-001032 at 1068-70).

[264] Gray Report-Smith at 30, Gray Report-Kiolbasa at 22, citing EC SD Ex. 9 (Kiolbasa’s Trial Testimony) at 493-94 (FRB-FARMERS-000348 at 535–36) and EC SD Ex. 11 (Smith’s Trial Testimony) at 944-46 (FRB-FARMERS-001032 at 1063–65).

some of these instances, the customer information was sent to Farmers without the consent of the Central customers.[265]

- Evidence regarding Respondent Kiolbasa established that at least in some instances, he provided Central customer information to the Farmers board members without customer authorization.[266]
- Evidence regarding Respondent Smith established that between October 2, 2014 and February 24, 2015, while still a Central employee, Smith repeatedly provided Farmers confidential and proprietary information (in some instances by sending them to Michelle Thomas and in other instances by sending them to Kiolbasa). These included, on October 2, 2014, confidential Central loan information; on October 30, 2014, Central's Participation Agreement form; on November 6, 2014, Central's Customer Information Profile form; on November 10, 2014, detailed Central loan customer-specific information related to loan balances, rates and terms; on January 6, 2015, Central's Other Real Estate listing from its general ledger; on January 7, 2015, Central's Dormant Account Procedures protocol; on January 8, 2015, forms Central used to balance pending and holding accounts; on February 13, 2015, Central's reports related to liquidity and interest rate risk; and on February 24, 2015, c copy of a memo from Central's President to Central's Board, regarding a lookback analysis containing bank-specific financial data, long with a memo prepared for Central by an affiliate regarding modeling assumptions containing Central's bank-specific financial data.[267]

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[265] Gray Report-Smith at 30, Gray Report-Kiolbasa at 23, citing EC SD Ex. 35 (7/25/14 email from Kiolbasa to Gross attaching "a listing of investors and potential customers") (FRB-FARMERS-004287-90 at 4288); EC SD Ex. 9 (Kiolbasa's Trial Testimony) at 591 (FRB-FARMERS-000348 at 633).

[266] Gray Report-Kiolbasa at 24, citing EC SD Ex. 9 (Kiolbasa's Trial Testimony) at 591 (FRB-FARMERS-000348 at 633).

[267] Gray Report-Smith at 32, citing EC SD Ex. 45 (2/2/14 email from Kiolbasa to Smith re: Loans) (FRB-FARMERS-004346); EC SD Ex.11 (Smith's Trial Testimony) at 1018-20 (FRB-FARMERS-001032 at 1137–39); EC SD Ex.49 (10/30/14 email from Smith to Thomas re: Participation Agreement) (FRB-FARMERS-004353–55); EC SD Ex. 52 (11/6/14 email from Smith to Thomas re: Customer Information Profile request) (FRB-FARMERS-004361–62); EC SD Ex. 11 (Smith's Trial Testimony) at 1008 (FRB-FARMERS-001032 at 1127); EC SD Ex.53 (11/10/14 email from Kiolbasa to Smith re: [NC] and [NP] loans at Central) (FRB-FARMERS-004363); EC SD Ex. 54 (11/10/14 email from Kiolbasa to Smith re "Chris' loan customer) (FRB-FARMERS-004364); EC SD Ex. 11 (Smith's Trial Testimony) at 1045-46 (FRB-FARMERS-001032 at 1164–65); EC SC Ex.60 (1/6/15 email from Smith to Thomas re: ORE) (FRB-FARMERS-004425–26); EC SD Ex. 11 (Smith's Trial Testimony) at 1059-60) (FRB-FARMERS-001032 at 1178–79); EC SD Ex. 61 (1/7/15 email from Smith to Kiolbasa re: Dormant) (FRB-FARMERS-004427–28); EC SD Ex. 11 (Smith's Trial Testimony) at 1060-61(FRB-FARMERS-001032 at 1179–80); EC SD Ex. 62 (1/8/15 email from Smith to Thomas re: "forms we use for balancing pending/holding accounts) (FRB-FARMERS-004429–32); EC SD Ex. 64 (2/13/15 email from Smith to Kiolbasa re: liquidity, public funds, GAP reports) (FRB-FARMERS-004442–55); EC SD Ex. 9 (Kiolbasa's Trial Testimony) at 598 (FRB-FARMERS-000348 at 640); EC SD Ex. 66 (2/224/15 email from Smith to Kiolbasa re: ALCO Lookback) (FRB-FARMERS-004466–80); and EC SD Ex.65 (2/24/15 email from Smith to Kiolbasa re: review of assumptions)(FRB-FARMERS-004456–65). Note that in his testimony Mr. Kiolbasa stated Mr. Smith was emailing him liquidity (of public funds and GAP reports because regulators – specifically the Federal Reserve - were asking him to get them. See EC SD Ex. 9 at 598 (FRB-FARMERS-000640). According to Mr. Kiolbasa, the regulators were asking for this information because they "wanted to see how Mr. Smith's – Frank's knowledge – what kind of knowledge he had on liquidity." *Id.* at 599 (FRB-FARMERS-000641). Mr. Gray opined that "it would not be in accordance with Federal Reserve examination processes for an examiner to make such a request, particularly seeking confidential information of a bank, Central, not supervised by the Federal Reserve." Gray Report-Smith at 32.

Upon this quantum of evidence, Mr. Gray opined that Respondents failed to use appropriate care in preserving Central's information security, thereby violating confidentiality and privacy requirements presented in Central's Handbook. Further, Mr. Gray opined the evidence established that while still employed at Central, Respondents disseminated Central's proprietary and confidential information without Central's consent, for use when Respondents began working at Farmers, for the benefit of both Farmers and Respondents.[268]

Further, specific to Respondent Smith, Mr. Gray opined:

> I have concluded, based on the evidence described above, that Smith took steps to market loans in Central's loan portfolio to Farmers while working at Central, and to help Farmers, a competitor of his employer, by improperly disseminating or taking his employer's confidential and/or proprietary information to Farmers. In doing so, it is my opinion that Smith breached his duty of care to Central.[269]

Specific to Respondent Kiolbasa, Mr. Gray opined:

> I have concluded, based on the evidence described above, that Kiolbasa, while employed by Farmers, took steps to solicit and obtain confidential customer and proprietary information of Central. In doing so, it is my opinion that Kiolbasa breached his duty of care to Farmers by engaging in unsafe and unsound banking practices.[270]

Respondents Breached the Duties of Loyalty and Candor Owed to Central

Mr. Gray also opined that Respondents had breached the duties of loyalty (the prohibition against advancing personal interest at the expense of the bank) and candor (the duty to disclose everything known relating to a transaction).[271] Elaborating, Mr. Gray reported that through their efforts to market loans in Central's portfolio to Farmers, while working at Central, Respondents put their own interests above Central's interests.[272] He first incorporated the above-referenced breaches of Central's policies regarding honesty, integrity, and loyalty, as well as Central's restrictions on outside activities, in support of his opinion that these violations constituted breaches of duties of loyalty and candor Respondents owed to Central.[273]

Mr. Gray then identified specific examples related to the duties of loyalty and candor.

- First, Mr. Gray noted the previously cited evidence establishing that beginning in March 2014, Respondents sought to advance a Business Plan that provided for Respondents' move to Farmers and their attempt to convince Central loan customers to invest in Farmers.
- Next, Mr. Gray noted the July 11, 2014 Confidentiality Agreement Respondents entered into with Farmers regarding Respondents' potential acquisition of an interest in Commercial.

[268] Gray Report-Smith at 30 and Gray Report-Kiolbasa at 23, and citations therein.
[269] Gray Report-Smith at 33.
[270] Gray Report-Kiolbasa at 25.
[271] Gray Report-Smith at 34-38; Gray Report-Kiolbasa at 26-29.
[272] Gray Report-Smith at 34; Gray Report-Kiolbasa at 26.
[273] *Id.*

- Next, Mr. Gray noted that Respondents failed to disclose these actions to Central.
- Next, Mr. Gray noted the actions attributed to Smith, and those separately attributed to Kiolbasa (as described above), opining that these were dishonest and disloyal to Central – in that Respondents attempted to mislead Central's senior officials about matters that had potential adverse implications to Central's financial condition and performance – to the extent that Central's loans could move to Farmers.
- Last, Mr. Gray noted that the evidence established that Respondents misappropriated Central forms, its policies, and other proprietary documentation, by taking them to Farmers as a way to facilitate their ability to do their job at Farmers; and that they inappropriately disseminated this information for Farmers' benefit and, consequently, for their own benefit as they had plans to acquire an ownership interest in Farmers.[274]

In Mr. Gray's opinion, in doing so both Respondents sought to advance their own personal gain over serving Central.[275] Elaborating on this point, Mr. Gray observed that the success of the Central customers' investment in Respondents' Business Plan would have been tied to that Plan, and "would naturally induce any would-be co-investor customer to consider moving their banking business to Farmers, to Central's detriment."[276]

Mr. Gray elaborated on this point:

> Thus, the mere solicitation of these Central customers as co-investors, while Respondents still worked for the bank, contained an implied request for a commitment to transfer their Central loans to Farmers, and was likely to lead to a loss of business for Central. Actions by bank officers or management that could be reasonably expected to result in a loss of business to their employer, in furtherance of their conflicting interests, would constitute a breach of their duty of loyalty.[277]

This would be true, opined Mr. Gray, even if the solicitation is not to move loans, but only to invest in Commercial (and Farmers):

> Moreover, Respondents' solicitations of Central customers to be co-investors in Farmers can be reasonably viewed as a means to induce customers to commit to transfer their Central loans to Farmers, without overtly asking the customers for such commitments. This would indirectly lead to the same result as directly seeking such commitments, which is to facilitate a customer's plans to move their loans from Central to Farmers.
>
> In fact, that is what appears to have happened with respect to Respondents' Business Plan, as there is evidence that none of the would-be co-investors solicited by Respondents while they were Central employees actually invested in Farmers, but several of them moved their Central loans to

[274] Gray Report-Smith at 34-35 and references cited therein; Gray Report-Kiolbasa at 26-27 and references cited therein.
[275] Gray Report-Smith at 35; Gray Report-Kiolbasa at 27.
[276] *Id.*
[277] Gray Report-Smith at 35-36.

> Farmers. To the extent that bankers in senior positions of trust, such as Respondents, engage in these types of actions, they can reasonably be expected to result in a risk of lost business to their employer. In this case, Respondents' actions apparently led to loss of business to their employer.[278]

Upon this evidence, it was Mr. Gray's opinion that both Smith and Kiolbasa breached their duties of loyalty and candor to Central by failing to be candid with Central about their respective actions in concert with one another, and by prioritizing their respective self-interests and personal gain over Central's success.[279]

Breaches of Loyalty and Candor Specific to Smith

Further, now separately referring to Respondent Smith, Mr. Gray supplemented the bases for finding Smith violated duties of loyalty and candor.

First, he noted Mr. Smith's "failure to be candid with Central's management" about his actions in providing to Farmers (through Mr. Kiolbasa and Ms. Thomas) confidential and proprietary information belonging to Central.[280] Further in this line, Mr. Gray noted evidence establishing that Smith had "sought to dissuade Central's management from seeking to acquire a competing bank because, based on information acquired at Central, Smith thought it was an opportunity that he and Kiolbasa might wish to explore for themselves while at Farmers."[281]

Next, Mr. Gray noted evidence that established Smith "fail[ed] to disclose to Central's President information he knew about Farmers, or actions he had taken on behalf of Farmers, when Central's President asked Smith for information about Farmers."[282] According to Mr. Gray, "[t]he duty of candor required Smith to inform his employer of all relevant material facts he knew pertaining to Farmers, not solely to answer the specific questions that his management posed to him."

Last, Mr. Gray noted evidence establishing that Smith had provided services to Farmers, a competitor of Central, between September 2014 and March 2015, by assisting Farmers prepare its Call Reports and attending staff meetings at Farmers, answering questions that drew upon Smith's experience as CFO.[283]

Identifying the Harm to Central and Farmers

Two expert witnesses – Mr. Gray and Gary M. Schwartz – provided opinions regarding the harmful effects of Respondents' practices, with respect to both Central and Farmers.

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[278] *Id.* at 36, citing EC SD Ex. 11 (Smith's Trial Testimony) at 946 (FRB-FARMERS-001032 at 1065).
[279] Gray Report-Smith at 36; Gray Report-Kiolbasa at 29.
[280] Gray Report-Smith at 37.
[281] *Id.* citing SD Ex. 43 (9/29/14 email chain between Smith and Kiolbasa ("Carl [Huhnke, Central's President] said he passed on the information and Bill [Von Holtum, Central's Chairman] to see if he wanted to investigate [the opportunity]. I talked to Bill and Carl this morning and talked down the idea as much as I could.") (FRB-FARMERS-004313–14 at 4313).
[282] Gray Report-Smith at 37, citing EC SD Ex. 11 (Smith's Trial Testimony) at 1028-31 (FRB-FARMERS-001032 at 1147–50).
[283] Gray Report-Smith at 37, citing EC SD Ex. 50 (chat transcript between Smith and April Hughes et al. describing Smith's participation at banking functions conducted at Farmers) (FRB-FARMERS-4356–59); EC SD Ex. 11 (Smith's Trial Testimony) at 1006-07 ("Q: But there's no dispute you worked – you did actual work for Farmers State Bank, A: I d*id.* I assisted with some call report preparation") (FRB-FARMERS-001032 at 1125–26) and 1036-37 (FRB-FARMERS-001032 at 1155–56), 1007:23–1008:16, Mar. 16, 2018 (FRB-FARMERS-001032 at 1126–27).

First, Mr. Gray opined that "Central was exposed to, and may have experienced, reputational harm as a result of Respondents' conduct."[284]

Elaborating on the risk of reputational harm to Central implicated by Respondents' actions, Mr. Gray opined as follows:

> In my experience as a bank supervisor, a public lawsuit involving a community bank employee's misappropriation of customer information from that bank would have posed a risk of that bank's customers losing confidence in the bank's ability to safeguard their information, and had the potential to cause customers to end their relationship with the bank out of fear that their information could be transferred outside the bank without their authorization. In fact, often a banking institution's customers may become concerned about maintaining a relationship with their current banking institution when an officer or manager communicates that they are leaving employment at the bank, and seeks to convince the customer to move their banking relationship. Central's policies highlighted both the importance of maintaining the confidentiality of customer information to the competitive position of the bank, and the overall importance of customers' ability to have confidence in the bank and its employees. It is my opinion that such reputational harm was caused at least in part by Respondents' violations of Central policies, their unsafe and unsound practices, and breaches of their fiduciary duties.[285]

Further, and with respect only to Respondent Kiolbasa, Mr. Gray opined that "Farmers suffered financial harm, and was exposed to, and may have suffered, reputational harm as a result of Kiolbasa's conduct."[286] He explained that Central sued not only Respondents, but also Farmers, "and caused it to incur significant legal expenses."[287] Beyond these expenses, Mr. Gray opined that Farmers "remains at risk of potential liability to Central, pending an outstanding appeal of an initial judgment finding Farmers not liable to Central in the lawsuit."[288]

Beyond these circumstances, and more broadly stated, Mr. Gray expressed this opinion regarding the risk of harm to Farmers arising from Respondent Kiolbasa's actions:

> In my experience as a bank supervisor, a public lawsuit against a community bank involving its employee's misappropriation of customer information from a competitor would have posed a risk of the bank's customers losing confidence in the bank's ability to operate in a safe and sound manner consistent with applicable requirements. It is my opinion that such legal expenses, risk of liability, and potential reputational harm, were caused at least in part by Respondent[Kiolbasa]'s unsafe and unsound

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[284] Gray Report-Kiolbasa at 29.

[285] *Id.* at 29-30, citing Central Bank & Trust v. Smith, No. 186-671 (Wyo. 1st D. Ct., 2018), Final Judgment (Apr. 2, 2018) (FRB-FARMERS-005705).; see also Gray Report-Smith at 38-39.

[286] Gray Report-Kiolbasa at 30.

[287] *Id.* at 30, citing EC SD Ex. 78 (7/10/18 email from Smith to Mark Schofield indicating the Farmers had accrued and paid $156,421.14 since the inception of the lawsuit, and had "expensed through income $206,421.14 since the inception of the lawsuit") (FRBFARMERS-005644).

[288] Gray Report-Kiolbasa at 30.

practices, namely his improper solicitation of Central's confidential customer and proprietary information while employed at Farmers.[289]

Mr. Schwartz' Analysis of Financial Harm to Central and Benefit to Respondents and to Farmers

Also presented with respect to harm occasioned by Respondents' conduct is an expert report by Gary M. Schwartz.[290] Mr. Schwartz was retained by the Federal Reserve to review documents "and calculate harm incurred by CB&T as a result of the actions of Smith and Kiolbasa."[291] The analysis considered both benefits to Farmers and damage to Central.[292]

In completing this analysis, Mr. Schwartz drew upon his experience and expertise in the banking industry.[293] He described his qualifications in a fourteen page CV that reflected substantial technical experience in the fields related to loan reviews, due diligence reviews, organizational reviews, and general bank consulting engagements for banks ranging in size from less than $15 million to over $3 billion.

Upon my review of the credentials presented, I find Mr. Schwartz's experience and expertise is in areas that are relevant and helpful here, particularly as related to the valuation of harm to Central and benefit to Farmers occasioned by actions attributed to Respondents.

Financial Benefit to Respondents

Included in the analysis was a description of the benefits inuring to Respondents. Mr. Schwartz noted that both Respondents sought to acquire an ownership interest in Farmers. He noted that after performing due diligence and engaging in negotiations with the Farmers board and existing shareholders, a stock purchase agreement dated March 6, 2015 was executed with Farmers' holding company, Commercial Bancorp.[294] Shortly thereafter, change of control of Commercial was noted in an Interagency Notice of Change of Control dated March 9, 2015. The Notice described Smith's investment of $200,000 and Kiolbasa's investment of $500,000 in Commercial, in order for Kiolbasa to acquire 50,000 shares (a 19.04% ownership) and for Smith to acquire 20,000 shares (a 7.76% ownership).[295]

Based on these ownership percentages and as contemplated in the Interagency Notice filed in this regard, Mr. Schwartz calculated that – based on the multiple of earnings methodology described in his report – the appreciation in value of Kiolbasa's interests would be $356,767 in 2015, and $548,455 in 2016; and for Smith it would be $142,707 in 2015 and $219,382 in 2016.[296]

Financial Harm to Central

Regarding lost income to Central, Mr. Schwartz noted the loan payoffs and lost lending opportunities reflected in the record.[297] He presented amortization tables for the Direct Payoff loans based on the original promissory note terms and payoff data from loan histories. He then

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[289] *Id.*
[290] EC SD Ex. 5, supplemented on April 22, 2019.
[291] EC SD Ex. 5 at 4.
[292] *Id.*
[293] *Id.* at 6.
[294] *Id.* at 10, citing Exhibit E attached to the Report.
[295] *Id.*
[296] *Id.*
[297] *Id.* at 11.

calculated payments in accordance with loan terms or as specified in the promissory notes and rates through maturity, adjusting the outstanding balance of each loan to the amount at payoff, per the loan histories, "in order to capture accelerated payments and or additional advances."[298]

> Monthly projected future cash flows based on interest income less cost of funds were calculated for each loan from the dates the loans were paid off by FSB (Direct Payoff) through their stated maturity. The net present value (NPV) of the annual cash flows, less taxes, for each loan was calculated based on a discount rate derived from an average of CB&T's [Net Interest Margin] as found in the FDIC database for the periods December 31, 2014, December 31, 2015, December 31, 2016, and March 31, 2017. These NPV amounts are shown under column (k) at Exhibit D.19 The NPV of lost interest income, net of [Cost of Funds or COF] and taxes, for individual loans in the Related group was pulled from column (s) Exhibit C, plus the interest income earned through June 13, 2017, less COF and taxes. We reasonably assumed these loans would have been made by CB&T had the Direct Payoff relationships not been moved.
>
> The Derouchey loans at CB&T were at or near maturity at CB&T when they were refinanced via LOCs at FSB. We reasonably assumed that, but for the interference by FSB, these credits would have been renewed in one form or another at CB&T. We pulled the actual interest income as reported by FSB at Exhibit C. We then deducted the COF and taxes to arrive at total lost net interest income as reflected at Exhibit D. Additionally, no NPV discount was calculated, as all of the Derouchey LOCs were paid off at FSB as of June 13, 2017.
>
> Based on our methodology and assumptions as described above and detailed at Exhibit D for the lost income on the four loan groups, we calculated net losses incurred by CB&T of $820,939.[299]

Mr. Schwartz also calculated the benefit to Farmers, opining that Farmers realized a "total financial benefit" of $1,169,793.05.[300]

Respondents' Opposition

Also pursuant to the Board's Uniform Rules, respondents to summary disposition motions may oppose the motion.[301] In such opposition briefing – and because summary disposition is unavailable if the record includes disputed material facts – responding parties must submit a statement setting forth those material facts as to which the party contends a genuine dispute exists – and the party must support that statement with the same type of evidence required of movants, as described above.[302]

Drawing analogies from jurisprudence pertaining to summary judgment under the Federal Rules of Civil Procedure, we know Enforcement Counsel must present support as to every one of the essential elements of each of the claims on which they bear the burden of proof at the

[298] *Id.*
[299] *Id.* at 6,12.
[300] *Id.* at 8.
[301] 12 C.F.R. § 263.29(b)(2).
[302] *Id.*

hearing.[303] Further, although this tribunal must consider the evidence with all reasonable inferences in the light most favorable to Respondents for the purposes of Enforcement Counsel's Motion, as the non-movants Respondents must produce specific facts to demonstrate that a genuine issue exists for trial.[304] The non-movants must go beyond the pleadings and use affidavits, depositions, or other evidence to establish a genuine issue.[305] The mere existence of a scintilla of evidence in support of the non-movant's position is insufficient to defeat a properly supported motion for summary disposition.[306] Conclusory rebuttals by Respondents, either in their pleadings or in their supporting affidavits, are insufficient to avoid summary disposition.[307]

Respondents' Burden when Opposing Enforcement Counsel's Statement of Undisputed Material Facts

In their response in opposition, Respondents may challenge Enforcement Counsel's averments as to undisputed facts and Enforcement Counsel's assertion that the uncontroverted record permits the factual findings asserted by Enforcement Counsel – but such challenge must be based on evidence of the same quality as that required of Enforcement Counsel – specifically, the challenges must be supported by documentary evidence, with citations to the record.[308]

To the extent the averments (either those in the Statement of Disputed Facts or Respondents own affidavits in support of their Memorandum in Opposition) were conclusory allegations or unsubstantiated assertions, the averments could not preclude granting the relief sought by Enforcement Counsel.[309] To the extent the averments asserted facts not material to the issues and claims present in this enforcement action, they too could not preclude a determination on the merits. To the extent the averments were not supported by documentary evidence, any weight given to the averment must be determined by the record as a whole.

Review of Respondents' Statement of Disputed Material Facts

In their response in opposition, Respondents included a Statement of Disputed Material Facts that "generally disput[ed] the Statement of Undisputed Facts submitted by Enforcement Counsel," and offered a series of factual and legal premises.[310] Such a general claim, however, made no attempt to identify averments appearing in Enforcement Counsel's Statement of Undisputed Facts which, by Respondents' reckoning, should be treated as in dispute.

In my review of Respondents' submission of disputed material facts, the following determinations are warranted.

Claim of General Dispute

First, the averment that Respondents "generally dispute" Enforcement Counsel's statement of uncontroverted material facts is not supported by sufficient citations to the record and is given no weight.

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[303] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1444 (5th Cir.1993).
[304] *Webb v. Cardiothoracic Surgery Associates of North Texas*, 139 F.3d 532, 536 (5th Cir.1998).
[305] *Id.*
[306] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 252 (1986).
[307] *Best Buy RV's, Inc. v. Bourget's of the* S., *L.L.C.,* No. CIV.A. 07-4376, 2008 WL 1835296, at *2 (E.D. La. Apr. 23, 2008), citing *Travelers Ins. Co. v. Liljeberg Enter., Inc.*, 7 F.3d 1203, 1207 (5th Cir.1993).
[308] 12 C.F.R. § 263.29(b)(2).
[309] *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).
[310] Statement of Disputed Material Facts in Opposition to Enforcement Counsel's Motion for Summary Disposition.

Claims that Constituted Legal Averments

Second, in certain averments, the Statement of Disputed Material Facts presented legal, rather than factual, averments. That was the case with Paragraph 1, which averred:

> The Federal Reserve Board is not the appropriate Federal Banking Authority to institute and maintain this Enforcement Action since the actions which form the basis of the Enforcement Action allegedly occurred while Respondents were employed at Central Bank & Trust ("Central"), a state chartered, nonmember bank which is not regulated by the Federal Reserve. [Respondent's Opposition, at pp. 10-14.][311]

While legal claims may be presented through declarations such as these, they do not constitute a *factual* basis for denying summary disposition. Inasmuch as the foregoing is not a factual averment, it cannot constitute a basis upon which Enforcement Counsel's Motion may be defeated. The same conclusion applies with respect to Respondents' Statement No. 39, which avers Respondents "properly deleted information relating to Farmers State Bank that Respondents accidentally placed on Central's computers." Further, this averment lacked any citation to the record. Accordingly, it cannot constitute a basis upon which Enforcement Counsel's Motion may be defeated.

Factual Claims not Supported by References to the Record

Third, Respondents' Statement of Disputed Material Facts in repeated instances lacked references to the record – i.e., the averments were not supported by documentary evidence identified by references to the record.

For example, Respondents aver that "All of the actions Enforcement Counsel alleges Respondents engaged in occurred while Respondents were employees of Central. [EC's SOF, generally; EC's Motion, generally.]"[312] Without specific references to the record, no weight may be given to this averment. The averments included in Enforcement Counsel's Statement of Undisputed Facts expressly addressed conduct attributed to Respondents while they were employed at Farmers.[313] Given Respondents' failure to specify documentary evidence in support of their contrary averment, and given the concrete references supplied by Enforcement Counsel contradicting Respondents' averment, no weight can be given the claim.

Additional averments lacking reference to the record include the following:

- That both Respondents were eligible and would have received bonuses during the time prior to leaving Central.[314]
- That "Smith never provided Kiolbasa with the mortgage release form referenced in Paragraph 108 of Enforcement Counsel's Statement of Undisputed Facts, nor is there any evidence of such in the record". Respondents supported the averment by referring to Enforcement Counsel's Statement of Undisputed Facts at Paragraph 108.[315] Paragraph 108, however, does not support Respondents' averment – it

[311] *Id.* at ¶1.
[312] *Id.* at ¶2.
[313] E.g., Statement of Undisputed Facts in Support of Enforcement Counsel's Motion for Summary Disposition at ¶¶98-126, 131 and references to the record cited therein.
[314] *Id.* at ¶45.
[315] *Id.* at ¶54.

refers to Enforcement Counsel Exhibit 51, which affirmatively states that the mortgage release form had been placed on the "share drive" and includes Kiolbasa's request that Smith send the form to him. If there is evidence that Smith never provided Kiolbasa with the form, such evidence was not tendered in Respondents' Statement of Disputed Material Facts.[316]

- Respondents averred that "Contrary to Paragraph 142 of Enforcement Counsel's Statement of Undisputed Facts, Respondents did not receive any gain from moving from Central to Farmers State Bank."[317] In support of this factual claim, Respondents cited to Resp. Ex. 5 at Paragraph 11, and Respondents' Exhibit 8 at Paragraph 7. Respondents Exhibit 5 is Respondent Smith's affidavit in support of the Respondents' Memorandum in Opposition, and Paragraph 11 is a statement, unsupported by any reference to the record, that the affiant "did not receive any gain" from the move from Central to Farmers. Similarly, Respondents' Exhibit 8 is Respondent Kiolbasa's affidavit, and his statement that he did not receive any gain from the move – again, without any supporting references to the record. Self-serving factual claims that are not supported by references to the record will not constitute a basis for avoiding summary disposition.

- Respondents offered the assertions that they "took a reduction in pay" and "collectively invested $700,000 of their personal savings" by investing it at Farmers – again, without the only citation in support being their own affidavits, which lacked any reference to documentary evidence in the record.[318] Further, the amount of such investment is not a material fact in issue here, and as such the factual claim would not preclude summary disposition in Enforcement Counsel's favor.

- Respondents aver that Farmers "was not a competitor of Central during the relevant time period as Farmers was located more than forty-five (45) miles from the nearest Central Branch."[319] The averment is inapposite here – both because it does not constitute a disputed fact, and because is it one whose materiality is not established (or even mentioned) in Respondents' supporting Memorandum. While Mr. Gray's opinion referred to the distance as being material, nothing in Respondents' Memorandum addressed or challenged this opinion – beyond Respondents' unsupported and self-serving declaration. If Respondents sought to demonstrate that Farmers was not a Central competitor, they had the opportunity to do so by identifying in the record evidence (through testimony, affidavit, or documentary production) that went beyond their own unsupported and self-serving declaration. In the absence of such support, Respondents' averment is entitled to no weight.

As self-serving and unsupported assertions, none of these claims constitute a basis upon which summary disposition favoring Enforcement Counsel would be denied.

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[316] *Id.*
[317] Statement of Disputed Material Facts in Opposition to Enforcement Counsel's Motion for Summary Disposition at ¶56.
[318] *Id.* at ¶57-58, citing Respondents' Exhibits 5 (at ¶12-13), and 8 (at¶9 and 10).
[319] *Id.* at ¶5.

Factual Claims that were not Disputed

Fourth, Respondents' Statement of Disputed Material Facts also included factual averments that were not disputed – such as the averment that prior to June 5, 2015, neither Respondents were executive officers at Farmers, or that "Central is a state chartered, non-member bank."[320]

Further regarding this point, Respondents repeatedly, and inexplicably, cited Statements appearing in Enforcement Counsel's Statements of Undisputed Facts in their Statements of Disputed Material Facts. Undisputed claims that *supported* judgment in Enforcement Counsel's favor did not belong in Respondents' Statement of Disputed Material and will not constitute a basis for denying their Motion.[321]

Other averments in Respondents' Statement of Disputed Material Facts that included averments that were not disputed include the following:

- That the "majority of the forms Central alleges are confidential were not created by Central's employees" and "originated with other banks" and thereafter "Central modified them from time to time"[322]
- That Central "rarely spent time or resources updating forms."[323]
- That Central's president, Christopher Von Holton, "has been involved in banking since in or around 2009."[324]
- That mortgage documents routinely recorded by Central "do contain information such as the banks rate of interest and balance."[325]
- That in spite of Central's stated policy with respect to copyrighted information, Central "routinely obtained forms from other financial institutions and used those forms in its business".[326]
- That in late 2013, while employed at Central, Respondents "began drafting a business plan to acquire an interest in a bank. Respondents finalized the plan at the request of representatives of the Wyoming Division of Banking."[327]
- That the Wyoming Division of Banking "requested that the plan include projections."[328]
- That in late 2013, Respondents had identified Farmers State Bank as one of three potential investment options and that it "was not until sometime in May 2014, after further discussions with the Wyoming Division of Banking, as well as

[320] Statement of Disputed Material Facts in Opposition to Enforcement Counsel's Motion for Summary Disposition at ¶¶3-4.
[321] See *Id.* at ¶¶3-5, 35, 50, 54-55.
[322] See *Id.* at ¶10.
[323] *Id.* at ¶11.
[324] *Id.* at ¶12.
[325] *Id.* at ¶14.
[326] *Id.* at ¶15.
[327] *Id.* at ¶22.
[328] *Id.* at ¶23.

conversations with representatives from Farmers State Bank that Respondents chose to focus their efforts on Farmers State Bank."[329]

- That in early 2014, Respondents provided a copy of the business plan to the Wyoming Division of Banking. Respondents also provided a copy of the business plan to the Federal Reserve. Specifically, Respondents provided a copy to James Clark and James Echtermeyer in conjunction with Respondents' applications to become shareholders and employees of Farmers State Bank.[330]
- That Grady Kessler, James Clark, and James Echtermeyer routinely contacted Respondents while they were employed at Central in conjunction with the application Respondents filed with the Federal Reserve.[331]
- That at no time during the relevant time period did anyone from the Wyoming Division of Banking or the Federal Reserve advise Respondents that developing a business plan to acquire an ownership interest in another bank constituted a breach of Respondents' fiduciary duties to Central or a violation of § 1818(e).[332]
- That Respondents were still employed by Central when Kiolbasa sent Smith a list of Kiolbasa's loans at Central on July 1, 2014.[333]
- That Respondents exchanged this information to satisfy questions raised by individuals at the Wyoming Division of Banking.[334]
- That all payoff information provided by Smith or other employees of Central to Kiolbasa regarding loans which were transferred from Central to Farmers State Bank was provided after Kiolbasa had terminated his employment at Central and had begun working at Farmers State Bank.[335]
- That during the Central Litigation, Carl Huhnke, Central's former president, testified that Smith's final performance evaluation, completed approximately one month before his employment with Central was terminated, was excellent and that Smith had steered Central through difficult issues sorting out its operations.[336]
- That Kiolbasa's supervisor testified that he had done exactly what he needed to do prior to his resignation and continued to do so during the interim period between his announcement and eventual departure Central. His final review was glowing, stating Kiolbasa's biggest issue was that he worried too much about his branch.[337]
- That Respondents were free to do what they pleased with their vacation and other free time.[338]

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[329] *Id.* at ¶24.
[330] *Id.* at ¶29.
[331] *Id.* at ¶30.
[332] *Id.* at ¶31.
[333] *Id.* at ¶35.
[334] *Id.* at ¶36.
[335] *Id.* at ¶37.
[336] *Id.* at ¶46.
[337] *Id.* at ¶47.
[338] *Id.* at ¶48.

- That all of the e-mails referenced in Paragraph 90 of Enforcement Counsel's Undisputed Statement of Facts were from Smith's personal Yahoo account.[339]
- That Respondents intended to terminate their employment with Central and begin working at Farmers State Bank on September 22, 2014; Smith's employment was delayed at the request of the Federal Reserve, which was still reviewing his application.[340]

Where Respondents advanced non-disputed averments found in Enforcement Counsel's statement of undisputed facts, those non-disputed averments will not be regarded as disputed material facts that would serve as a basis for denying summary disposition in Enforcement Counsel's favor.

Presentation of Factual Claims that were not Material to Issues in Dispute

Fifth, Respondents' Statement included averments of facts not material to issues in dispute. Only disputes over facts that might affect the outcome of this enforcement action will properly preclude the entry of summary disposition. "Factual disputes that are irrelevant or unnecessary will not be counted."[341]

For example, Respondents included in their Statements of Disputed Material Facts the following averments: "There is no evidence in the record that Central copyrighted any of its forms" and "There is no evidence in the record that Central had any ownership interest in any forms it purchased or acquired from others."[342] Again, there is nothing in Respondents' Statement establishing that these are either disputed or material, and the claims do not controvert any claim presented in Enforcement Counsel's Statement of Undisputed Facts.

In their Memorandum, Respondents assert the following:

> In addition, there is no evidence to show Central took any steps to maintain the secrecy of its purported trade secrets. [EC's Motion, generally.] There is no evidence that Central labeled the information as confidential, sought to copyright the information, had an ownership interest in the information, or otherwise sought to protect the information in any manner. [Respondents' Exhibit 10 Respondents' Exhibit 10 (IAP00003192-3199, 3206-3213, 3220-3227, 3228-3235, 3236-3243, 3244-3251, 3252-3255, 3256-3259, 3260-3263, 3264-3267, 3268-3280, 3281-3284, 3298-3305, 3306-3309, 3310-3317, 3340-3343, 3344-3352; Respondents' Exhibit 12, at 35:1-23.] These facts demonstrate, at a minimum, genuine disputes of material fact as to whether Respondents engaged in unsafe and unsound banking practices and breached their fiduciary duties by misappropriating Central's confidential and proprietary information. For these reasons, the Court should deny Enforcement Counsel's Motion.[343]

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[339] *Id.* at ¶50.
[340] *Id.* at ¶53.
[341] *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).
342 Statement of Disputed Material Facts in Opposition to Enforcement Counsel's Motion for Summary Disposition at ¶¶8-9.
[343] Respondents' Memorandum of Points and Authorities in Support of Its [*sic*] Motion for Summary Disposition at 31.

The averment here, however, that Central failed to take steps to copyright documents containing trade secrets, does not materially relate to the charges presented in the Notice of Intent. Respondents offer no authority for the proposition implicit in this averment – that an employee may disregard the proprietary nature of uncopyrighted documents accessible to the employee and thereafter appropriate those documents without regard to fiduciary duties the employee owes to his or her employer. The converse of the averment makes no appearance in the factual claims presented by Enforcement Counsel, and as such this claim is not a "disputed" one – but is instead a claim that is not material to the issues presented in this enforcement action.

In sum, as reflected above, Respondents offered 59 averments said to reflect disputed material facts, all in opposition to Enforcement Counsel's Motion. To the extent the averments are not supported by reference to the record, or do not identify a disputed claim, or assert facts not material to the issues and claims present in this enforcement action, they too will not preclude a determination on the merits. To the extent the averments are not supported by documentary evidence, any weight given to the averment will be determined by the record as a whole.

Analysis of Averments Related to Material Disputed Facts

Twenty-five of the factual claims in Respondents' Statement of Disputed Material Facts actually present disputed facts that Respondents aver are supported by references to the record.[344] These are addressed here:

Paragraph 6

In Paragraph 6, Respondents do not identify a controverted fact, but instead aver that "Central's management did not consider its customers' loan amounts, rates of interest or loan balances to be confidential information because Central published this information regularly by recording mortgages containing such information in the public records."[345] In support, Respondents noted testimony from Christopher Von Holtum (Respondents' Exhibit 12, at 35:1-23), along with copies of mortgage documents that are publicly filed through the county clerk's office.[346] The factual premise appears to be that inasmuch as some of the information Central maintained in its proprietary control was shared publicly through the public title recording process used regarding real property, Central cannot and did not consider such information confidential.

That factual premise is not supported by Respondents' references to the record. The documents in the county recorder's office do indeed reflect, presumably, information gathered by Central in the course of its mortgage loan business. That such information is released through the public recording process does not, however, suggest that while the information is in Central's possession it was considered non-confidential.

Further, the testimony Respondents cite – that of Mr. Von Holtum – does not support the above factual premise and does not present a controverted fact regarding how Central maintained

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[344] See Respondents' Statement of Disputed Material Facts in Opposition to Enforcement Counsel's Motion for Summary Disposition at ¶¶6-7, 13, 16-21, 25-28, 32-34, 38, 41-44, 49, 51-52, 59.
[345] *Id.* at ¶6, citing Respondents' Exhibit 10 (IAP00003192-3199, 3206-3213, 3220-3227, 3228-3235, 3236-3243, 3244-3251, 3252-3255, 3256-3259, 3260-3263, 3264-3267, 3268-3280, 3281-3284, 3298-3305, 3306-3309, 3310-3317, 3340-3343, 3344-3352.)
[346] *Id.*

its customer information internally. Mr. Von Holtum was asked "you'd be able to see from looking at [a mortgage that's recorded in the county] who the lender was," and he responded in the affirmative.[347] The relied upon evidence states the obvious – that mortgages when filed with the county clerk's office are public records and identify Central as the mortgage lender. The references relied upon by Respondents in Paragraph 6 do not create a controverted fact concerning the material fact in issue here, which is: how Central regarded their possession of customer mortgage information while that information was in the bank.

Paragraph 7

Respondents in Paragraph 7 aver that "Central did not take any steps to label its information confidential or to otherwise protect its information it claimed was confidential. Central refused to take these steps despite recommendations from its consultants to do so" and cited in support the same references to the record as those cited in Paragraph 6.[348] Again, Respondents do not state how this factual premise controverted any fact in issue presented either in the Notice of Intent or Enforcement Counsel's Statement of Uncontroverted Facts.

Further, neither the documents on file at the county clerk's office nor the text of Mr. Von Holtum's cited testimony address in any way the existence of "recommendations from [Central's] consultants" to "label its information confidential"; and indeed, the record strongly suggests that the cited portions of the record have nothing to do with such a recommendation.

Nothing in the cited documents refers to a recommendation regarding Central's need to label its information as confidential. Even had such evidence been presented, its relevance here would be tangential at best, in that Respondents' conduct repeatedly involved misappropriating and distributing documents shown to have contained clearly proprietary information – with or without being marked as confidential.

Respondents offered no legal support for the premise that a bank must label a document as confidential in order for the document to fall within the scope of the bank's confidentiality policies. The unauthorized transfer of the documents identified by Mr. Gray, coupled with his opinion that such documents were proprietary to Central, established the noncompliant nature of Respondents' actions. Moreover, testimony cited by Respondents included that of Mr. Von Holtum, where that witness made clear the undisputed assertion that Central regarded its customer information to be confidential and proprietary:

> One of the difficult parts about pursuing new customers for a new bank are knowing what rate to quote to that customer. And with the information as important as what their current loan rate is, you would have a grave advantage in negotiating and moving that business to the new bank.[349]
>
> When asked "if another bank called you and asked you for customers'' rates, Central Bank & Trust's customers' rates, would you provide that bank that information" Mr. Von Holtum responded "No," nor has he ever given

[347] Resp. SD. Ex. 12 (Deposition of Christopher Von Holtum dated 4/11/19) at 35 .

[348] Respondents' Statement of Disputed Material Facts in Opposition to Enforcement Counsel's Motion for Summary Disposition at ¶7.

[349] EC SD Ex. 9 (Trial Testimony of Christopher Holtum) at 343.

an employee permission to share confidential customer information with a competing bank. [350]

Nothing in Paragraph 7 establishes a controverted material fact that would preclude summary disposition in Enforcement Counsel's favor.

Paragraph 13

In Paragraph13, Respondents aver that "[m]any of the forms Central claims are confidential are used throughout the banking industry and are merely a restatement of information required by banking regulations." In support, Respondents again cite to testimony from Mr. Von Holtum, although this time from the trial proceedings on March 14, 2018 (EC SD Ex. Exhibit 9, at 343-349 (FRB-FARMERS000385-391).

Respondents do not show how the averment in Paragraph 13 is either controverted or material. Further, the testimony cited in support of Paragraph 13 does not support the factual averment. Mr. Von Holtum described Central's forms within the cited pages – EC SD Ex. 343-39 – forms that were "created by our employees" and also forms that were "purchased . . . from different companies that offer that service." *Id.* at 346. He said that Central paid for the latter – and modified them "on an annual basis," adding that these help the bank be successful in its business.

This testimony did not indicate, or imply or infer, that many of the blank forms Central regarded as confidential were instead either used throughout the banking industry or merely restatements of information required by banking regulations. Even were that the case, however, the factual claims here would not create a material question of fact – given that the uncontroverted evidence established Respondents' misappropriation of both proprietary forms and customer information regardless of the form used.

Paragraphs 16 and 17

In Paragraph16, Respondents aver that Carl Huhnke, the president of Central, "was responsible for all operations of the bank," and in Paragraph 17 Respondents aver that Smith, who was the Chief Financial Officer, was "not responsible for all bank records." Both averments are supported by citation to Respondents' Exhibit 5 at Paragraph 3.

Paragraph 3 of Respondents' Exhibit 5 is Mr. Smith's affidavit in support of Respondents' opposition to Enforcement Counsel's summary disposition motion. At Paragraph 3, Mr. Smith averred that as CFO at Central, he "was not responsible for all operations of the bank and/or for all bank records."[351] This self-serving declaration is silent with respect to the responsibilities he had at the bank – and does not controvert evidence establishing the operations and records he was responsible for. Further, Paragraph 3 does not state what Respondent asserts here: it makes no mention of the role of Mr. Huhnke at Central.

Paragraph 18

In Paragraph 18, Respondents aver that "Smith never conducted annual reviews of Central's policies" and cited in support Respondent Smith's Affidavit at ¶ 4. Smith through the affidavit – again without citation to the record or any supporting evidence – avers that he never

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[350] *Id.*

[351] Resp. SD Ex. 5 at ¶3.

conducted annual reviews of Central's policies – a fact not alleged in the Notice of Intent. Respondents then state that they "intend to present evidence that, to the contrary, they were conducted at the holding company level by Tom McCarvel." Again, this averment does not relate to a material fact in issue, and is supported by no reference to the record.

Paragraph 19

In Paragraph19, Respondents aver that "Central's Employee Handbook did not prohibit outside activities or employment of its employees. Central's Employee Handbook merely stated 'expectations' and 'discouraged' full-time employees from accepting outside employment." In support, Respondents cited Central's Employment Handbook (EC SD Exhibit 75), at p. 17[352]

The factual claim here does not constitute a material fact in dispute – the handbook speaks for itself, and while Respondents may argue the impact of what is stated in the handbook, what appears in the handbook is not controverted. Equally significant is that the Notice of Intent did not allege that Central's policies prohibited outside activities of its employees, such that the averments in Paragraph 19 are not clearly material.

Outside employment is, however, addressed in Enforcement Counsel's Statement of Undisputed Facts. Specifically, Enforcement Counsel aver that while Respondents were employed at Central, "the Central Handbook set forth a policy on outside employment and activities, and it restricted employees from engaging in outside activities, particularly those that constituted actual or apparent conflicts of interest." [353]

Enforcement Counsel included in their averment, however, the policy provision holding that "if you feel that such outside employment is justified in your case, you must obtain the prior written consent of your supervisor." Inasmuch as Respondents offered no evidence indicating they requested supervisory consent, nothing in Paragraph 19 would prevent summary disposition.

Paragraph 20

In the Notice of Intent (at Paragraphs 14 and 15), the Federal Reserve Board alleged that both Smith and Kiolbasa "acknowledged in writing receiving the Handbook and agreeing to comply with the policies set forth in the Handbook."

In Paragraph 20 of Respondents Statement of Disputed Material Facts, Respondents aver that they "did not 'agree' to abide by the policies of the Central Employee Handbook. The Central Employee Handbook clearly states that it is not an 'agreement' between the parties" (citing EC SD Ex. 75 at 2 (FRB-FARMERS005559).

The reference to the record cited by Respondents is found in Central's Handbook (EC SD Exhibit 75), which again, is not controverted. Whether the terms do or do not bind Respondents is a matter of construction of the handbook – and such construction is not a factual one but a legal one.

Respondents offered no citation to the record (or legal authority, for that matter) controverting the opinion of Mr. Gray on this point, where he opined that both Respondents acknowledged that it was their responsibility to "read and abide by the policies described in the

[352] Respondents' Statement of Disputed Material Facts in Opposition to Enforcement Counsel's Motion for Summary Disposition at ¶19, citing FRBFARMERS005574.
[353] Enforcement Counsel's Statement of Facts at ¶24.

Employee Handbook" and in so doing had agreed to "comply with [] Central's policies."[354] Where the sole citation in support of Respondents' claim of *controverted* fact is not controverted – that is, where the authority supporting this claim is the handbook itself – there is no basis shown that would preclude summary disposition based on this averment.

Paragraph 21

In Paragraph 21, Respondents aver: "[t]here is no evidence in the record that Respondents received compensation for services from any other party for any activities they engaged in while Central employed Respondents."

Respondents offer no citation to support this averment. This is understandable, in that the averment alleges the absence of a fact in evidence. The Notice of Intent, however, does not allege Respondents received compensation from non-Central sources while employed at Central. The Notice includes the allegation that while still employed at Central, Smith "took several actions on behalf of and/or as an agent of Farmers,"[355] but makes no claim that has been directly addressed in Paragraph 21. Accordingly, Paragraph 21 does not controvert a material fact in issue.

Without referring to the Notice of Intent or any specific allegation therein, Respondents in Paragraph 21 indirectly raise the question of whether they benefited from Farmers while still working at Central. While averring there was no evidence of compensation from Farmers while they were working for Central, Respondents made no mention of the factual claims presented in Enforcement Counsel's Statement of Undisputed Facts related to such compensation. There is in the record evidence that had been presented to Respondents through Enforcement Counsel's Statement of Uncontroverted Facts which directly addressed the factual claim indirectly raised in Paragraph 21 – and Respondents neither recognize the evidence nor introduce evidence controverting the evidence.

As Enforcement Counsel aver in their Statement of Uncontroverted Facts, the FDIC's expert witness, Mr. Schwartz, found that in 2015 and 2016, Respondents' ownership interests in Commercial increased in value as follows: (1) Kiolbasa's interest increased by $356,767 in 2015 and by $548,455 in 2016; and (2) Smith's interest increased in value by $142,707 in 2015 and by $219,382 in 2016.[356] These gains were based on the Business Plan that Respondents had put into use while Respondents were employed at Central – at a time when Respondents were engaged in efforts to acquire an ownership interest in Commercial. During their employment at Central, Respondents received from Central salary and benefits as follows: 1) Smith received $205,570; and 2) Kiolbasa received $93,040.[357]

Inasmuch as Respondents made no attempt to controvert findings in Mr. Schwartz' report, there is no factual support for Respondents' indirect assertions in Paragraph 21.

Paragraph 25

In Paragraph 25, Respondents aver that there "is no evidence in the record that Central was looking to bring new investors into Central during the relevant time period."

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[354] See EC SD Ex. 3 (Gray Report-Kiolbasa at 12, and Ex. 4 (Gray Report-Smith at 20).
[355] Notice of Intent at ¶7; see also ¶¶12 and 19 (regarding Smith's providing Kiolbasa at Farmers with proprietary information)
[356] Statement of Undisputed Facts at ¶162, citing EC Exhibit 5 (Schwartz Report, Table 3.1, at 10).
[357] Statement of Undisputed Facts at ¶164 (citing EC Exhibit 5 (Schwartz Report, Table 4, at 12).

Nothing in the record establishes that Central's lack of efforts to bring in new investors is a relevant matter in this enforcement action. Respondents cite to no allegation in the Notice of Intent calling into question whether or not Central was "looking to bring new investors into Central". Accordingly, the averments in Paragraph 25 do not constitute controverted material facts such as would prevent summary disposition.

Paragraph 26

In Paragraph 26, Respondents aver that "[t]here is no evidence in the record that Respondents solicited Central's customers to move their business from Central to Farmers State Bank while still employed by Central."

Respondents offer this with no citation to the record, which again is not surprising because the claim is that the record contains no such evidence. The record, however, does contain uncontroverted evidence presented in Mr. Gray's reports establishing that by soliciting Central customers to become investors in Farmers while still employed at Central, Respondents acted to solicit Central's customers to move their business from Central to Farmers.[358]

Respondents elected not to address Mr. Gray's findings in their Statement of Disputed Facts, despite the factual claims presented in Enforcement Counsel's Statement of Undisputed Facts at ¶146, averring that Respondents contravened Central's policies by "the improper solicitation of Central customers".[359] Upon this undisputed evidence, there is no basis to find Paragraph 26 constitutes a basis to defeat summary disposition.

Paragraph 27

In Paragraph 27, Respondents aver that "Central did not present any testimony in the Central Litigation to substantiate Central's claim that Respondents solicited Central's customers to move their business to Farmers State Bank while still employed by Central."

Regardless of whether or not testimony was presented in the Central litigation on the point raised here, the record in this enforcement action includes Mr. Gray's uncontroverted and unrebutted determination, described above, that by soliciting Central customers to become Farmers investors, Respondents acted to solicit Central's customers to move their business from Central to Farmers.[360] The presence or absence of such testimony in the Central litigation is not a material issue of fact that would have an impact on summary disposition.

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[358] Gray Report-Smith at 26, citing EC Ex. 11 (Smith's Trial Testimony) at 903-04 (FRB-FARMERS-000690 at 984) (Smith testified that in early 2014, while both were still Central employees, Respondents went on two or three business calls together to discuss investments in Farmers with Central customers, where Respondents would tell these customers that they were going to fix Farmers' profitability by increasing its loan portfolio, among other things.); EC SD Ex. 25 (FRB-FARMERS-004241–54 at 4245) ("There are three key managers that are critical to the accomplishment of the purchase and expansion: Frank Smith, Mark Kiolbasa, and Michelle Thomas.")

[359] Citing EC Exhibit 3 (Gray Report-Kiolbasa at 3); EC Exhibit 4 (Gray Report-Smith at 3).

[360] Gray Report-Smith at 26, citing EC Ex. 11 (Smith's Trial Testimony) at 903-04 (FRB-FARMERS-000690 at 984) (Smith testified that in early 2014, while both were still Central employees, Respondents went on two or three business calls together to discuss investments in Farmers with Central customers, where Respondents would tell these customers that they were going to fix Farmers' profitability by increasing its loan portfolio, among other things.); EC SD Ex. 25 (FRB-FARMERS-004241–54 at 4245) ("There are three key managers that are critical to the accomplishment of the purchase and expansion: Frank Smith, Mark Kiolbasa, and Michelle Thomas.")

Paragraph 28

In Paragraph 28, Respondents aver that "[s]even customers who moved their business from Central to Farmers State Bank testified that Respondents did not solicit their business while Respondents were still employed by Central."[361]

Standing alone, the factual premise here – addressing a universe of seven Central customers – is insufficiently complete to controvert allegations in the Notice of Charges. The premise offers information about a finite number of customers, but is silent with respect to any other customer who may have moved their business because of solicitations by Respondents.

The Notice of Intent does not include a headcount of Central customers – be it seven or any other number – who moved their business to Farmers. Instead, the Notice alleges that Respondents met with the Farmers board on June 1, 2014 and advised the board that "they had obtained commitments from certain Central customers to move their loans to Farmers, upon execution of the contemplated transaction for Smith and Kiolbasa to acquire an ownership in Commercial."[362] The factual premise that seven of these customers moved their business but were not solicited to do so by Respondents does not controvert the factual claims found in the Notice of Intent.

Further, Respondents do not by their citations to the record support this claim.

Respondents point to testimony adduced during the Central litigation. The record cited by Respondents reflects that one of the seven Central customers, [J] [K], testified that one of his investments got its first loan from Central and that Kiolbasa has been his banker for over 15 years. The witness testified that "I've essentially followed Mark Kiolbasa as my banker from Wells Fargo to Central Bank & Trust to Farmers State Bank because of the relationship we've developed and my trust in him."[363] He described Kiolbasa as "the kind of banker who would come to your office. Let's say he had a better deal on a refi of a building or something that could lower the interest rate or change some sort of payoff or he and my wife had talked about something that maybe would be beneficial to us, I would never have to leave my office to sign the documents and give him the tax returns and the financials and whatever else he needed."[364] Although he vaguely recalled at some time considering investing in a bank, he never did so – and following Kiolbasa's advice he continues to have a trust account at Central; but once he learned that Kiolbasa was moving from Central to Farmers, [J] [K] said "I knew at some point he was moving from Central Bank & Trust to Farmers State Bank. I just wanted to make sure my loans went with him because he was my guy."[365]

Another witness in the Central Litigation, [H] [L], also had been banking at Central and that, before leaving Central, Kiolbasa informed [H] [L] he was leaving to go to Farmers.[366] During examination by Central's lawyers in the trial, she identified loan documentation she had at Central that she never authorized Kiolbasa to present to Farmers; and said she would have

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[361] Respondents' Statement of Disputed Material Facts at ¶28, citing Respondents' Exhibit 3, at 2010:6-24, 2035:15-2037:14 (FRB-FARMERS002248, 2273-2275); Respondents' Exhibit 4, at 2201:13-2202:6, 2215:25-2216:10, 2236:7-10, 2264:23-2265:8, 2336:3-10 (FRB-FARMERS002489-2490, 2503-2504, 2524, 2552-2553, 2624).
[362] Notice of Intent at ¶6.
[363] *Id.* at ¶28 citing Resp. SD Ex. 3 at 2002-03.
[364] *Id.* at 2004.
[365] *Id.* at 2008.
[366] *Id.* at 2040.

been surprised to learn he gave the loan information to Farmers in order to convince others to let him buy a bank.[367]

Another witness cited by Respondents in support of this factual averment, [W][G], testified that while working with Kiolbasa he obtained two loans; that he trusted Kiolbasa, and when he learned that Kiolbasa was leaving Central, he told Kiolbasa "if you leave, I'm following you."[368] He added that it wasn't long after Kiolbasa left Central that he moved his loans to Farmers, adding that while Kiolbasa never solicited him to move his loans over to Farmers, Kiolbasa did talk with [W][G] about investing in a bank (but [W][G] never invested).[369]

Another witness, [M] [N], testified he moved loans from Wells Fargo to Central to get "better rates,"[370] and said that before moving to Farmers Kiolbasa never asked [M] [N] to move loans from Central to Farmers[371], and that the customer did so anyway, in order to get "better terms"[372]; and, like the other customers, recalled briefly discussing with Kiolbasa the idea of investing in a bank, but [M] [N] dismissed the idea.[373]

Another witness, [S][F], testified that although she had been banking at Central and working with Kiolbasa there, she moved her loans to Farmers after one of the tellers at Farmers told her that Kiolbasa had joined Farmers.[374]

Another witness, [M][R], testified that he knew Kiolbasa from when Kiolbasa worked at Wells Fargo, and when Kiolbasa moved to Central [M][R] brought a loan from Wells Fargo to Central.[375] Shortly before Kiolbasa left Central for Farmers, [M][R] learned of the move and while Kiolbasa never asked him to move his loan to Farmers he nonetheless did so after Kiolbasa left Central.[376]

Another witness, [D][T], testified that she had loans at Central and that Kiolbasa was the banker she knew there.[377] She said that after Kiolbasa left Central, she learned that he went to Farmers, and because he was "my good friend," she moved her loans to Farmers, but he never asked that she do so.[378]

It is not clear what the above testimony relates to in this enforcement action. The Notice of Intent does not allege Respondents solicited any of Central's customers to move from Central to Farmers. By offering the averments in Paragraph 28, Respondents do not controvert a material fact in issue. Most particularly, the above testimony supports, and does not controvert, Mr. Gray's opinion that by soliciting investment in Farmers, Kiolbasa had the effect of motivating Central's customers to move their loans to Farmers.

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[367] *Id.* at 2042.
[368] *Id.* at 2194.
[369] *Id.* at ¶28 citing Resp. SD Ex. 4 at 2199-2200, 2202.
[370] *Id.* at 2212.
[371] *Id.* at 2216.
[372] *Id.* at 2217.
[373] *Id.* at 2220.
[374] *Id.* at 2236.
[375] *Id.* at 2261.
[376] *Id.* at 2264-65.
[377] *Id.* at 2230-32.
[378] *Id.* at 2334-36.

Paragraph 32

In Paragraph 32, Respondents acknowledged that Kiolbasa's March 25, 2014 draft letter to John Gross stated "these are current customers that have been approached and have agreed to move their business upon the transition". [379] The averment goes on to allege that the record reflects that by March 25, 2014, "Kiolbasa had not yet approached any of these customers to move their business to Farmers State Bank."[380]

This averment identifies no controverted material fact, as the Notice does not allege Kiolbasa approached any Central customers prior to March 25, 2014 asking that they move their loans while Kiolbasa was still employed at Central.

Paragraph 33

In Paragraph 33, Respondents aver that "[a]t the June 1, 2014 meeting with Farmers State Bank, the list of individuals presented as potential investors did include some of Central's customers. However, less than half of the individuals were Central's customers and all of them were potential as opposed to committed investors. None were identified as Central's customers."[381]

The averment creates no controversy regarding any claim in the Notice, inasmuch as the Notice does not allege that the persons who were identified in the June 1, 2014 Investor List presented by Respondents to the Farmers board were either Central customers or committed investors.[382]

Paragraph 34

In Paragraph 34, Respondents allege that "[a]t the June 1, 2014 meeting with Farmers State Bank, Respondents did not represent that they had solicited Central's customers or that Central's customers had agreed to move their loans from Central to Farmers State Bank."

The citations offered in support of this factual premise are not to testimony by either Respondent, but instead refer to testimony by Central customers who followed Kiolbasa to Farmers – thus, they offered no evidence regarding what Respondents did or did not say during the June 1 meeting. The premise thus is not supported by the references to the record that Respondents rely upon for the factual claims in Paragraph 34.

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[379] See EC SD Exhibit 23 (FRB-FARMERS-004222-35) (3/25/14 email from Smith at Central to Smith at fsmith@wyoming.com with Farmers State Bank proposal).

[380] Respondents' Statement of Disputed Material Facts at ¶32, citing Respondents' Exhibit 3 (Trial testimony of [H][L] at 2041-5-13 (FRB-FARMERS002279) ; Respondents' Exhibit 4, at 2202:2-6 (Trial testimony of [W][G]), 2216:7-10 (Trial testimony of [M][N]), 2236:7-10 (Trial testimony of [S][F]), 2264:23-2265:8 (Trial testimony of [M][R]) (FRBFARMERS002490, 2504, 2524, 2552-2553).

[381] Respondents' Statement of Disputed Material Facts at ¶33, citing EC SD Exhibit 12 (Trial testimony of Mr. Gross) at 1506-1508 (FRBFARMERS001663-1665); Respondents' Exhibit 3 (Trial testimony of [H][L]) at 2041-5-13 (FRB-FARMERS002279); Respondents' Exhibit 4 (Trial testimony of [W][G]) at 2202:2-6, (Trial testimony of [M][N]) at 2216:7-10, (Trial testimony of [S][F]) at 2236:7-10, (Trial testimony of [M][R] at2264:23-2265:8) (FRBFARMERS002490, 2504, 2524, 2552-2553).

[382] See Notice of Intent at ¶6: "At the meeting [of June 1, 2014], Smith and Kiolbasa advised the Farmers board members that they had obtained commitments from certain Central customers to move their loans to Farmers, upon execution of the contemplated transaction for Smith and Kiolbasa to acquire an ownership interest in Commercial."

Paragraph 38

In Paragraph 38, Respondents aver that "Central had no policy – written or otherwise – that required written payoff requests in conjunction with the payoff of loans."[383]

Inasmuch as there is no claim in the Notice of Intent alleging a policy that required written requests for loan payoff information, the factual premise presented in Paragraph 38 has not been shown to be material to a determination of the issues of this enforcement action.

Paragraph 40

In Paragraph 40, Respondents state that they "were not concerned about Central discovering that they were considering investing in Farmers State Bank." Rather, Respondents "were concerned that if Central knew they were considering other employment to any extent, Central would fire them."[384]

While the Respondents' statements are material, in that the statements in Respondents' affidavits provide both admissions against their interests and substantial evidence of scienter – specifically that they were aware their actions were contrary to Central's employment policies and could result in the termination of their employment – the averments in Paragraph 40 *support* the charges presented in the Notice of Intent, and do not controvert any material fact in issue.

Paragraph 41

In Paragraph 41, Respondents aver that "Smith did not handle all of Farmers State Bank's requests for payoff information for those customers who transferred their business to Farmers State Bank," and that "other employees at Central handled some of the payoff requests submitted by Farmers State Bank relating to loans customers had applied for at Farmers State Bank."[385]

Nothing in the charging document alleged Smith handled all of Farmers' requests for payoff information, and as such, the fact that other Central employees may have handled payoff requests related to the issues presented here is not a material fact in issue.

Paragraph 42

In Paragraph 42, Respondents aver that '[t]here is no evidence in the record that Smith was prohibited from providing services to others while working at Central."[386] Respondents support this averment by referring to their own affidavits (Resp. SD Exs. 5 (Smith) and 8 (Kiolbasa) – which consists of the unsupported, bald claim that they "had no written employment agreement" with Central.

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[383] Respondents' Statement of Disputed Material Facts at ¶34, citing Respondents' Exhibit 2 (Trial testimony of Carl Huhnke) at 1714:15-1715:11 (FRBFARMERS001911-1912); and Respondents' Exhibit 12 (4/11/14 deposition testimony of Christopher Von Holtum) at 32:2-33:7.]

[384] Respondents' Statement of Disputed Material Facts at ¶40, citing Respondents' Exhibit 5 (Smith Affidavit) at ¶14 Smith: "I was not concerned about Central Bank & Trust discovering that I was considering investing in Farmers State Bank. Rather, I was concerned that if Central Bank & Trust knew I was considering other employment to any extent, Central Bank & Trust were terminate my employment; Respondents' Exhibit 8, at ¶ 12 (Kiolbasa's Affidavit stating the same).

[385] Respondents' Statement of Disputed Material Facts at ¶41, citing EC SD Exhibit 11 (Trial testimony of Respondent Smith) at 1088:18-1091:3 (FRB-FARMERS001207-1210).

[386] Respondents' Statement of Disputed Material Facts at ¶42 citing Respondents' Exhibit 5 (Affidavit of Smith) at ¶ 16; Respondents' Exhibit 8 (Affidavit of Kiolbasa) at ¶ 3.]

Presumably because it was offered as a statement that evidence is lacking, Respondents did not support this averment with a citation to the record, other than their own claim that there was no employment agreement between them and Central. Respondents thus did not recognize that such evidence, notably with respect to Smith's practice of providing services to Farmers while still a Central employee, is in the record, presented in Mr. Gray's expert report. Specifically, Mr. Gray's report provides the following uncontroverted documentary evidence:

Referring to EC SD Ex. 26 (4/8/14 email from Kiolbasa to Thomas Long regarding "our business plan," re-sent from Scott Lamons to Wyneema Engstrom, et al. on June 1, 2014), Mr. Gray offered his assessment and opinion of the impact of Smith's service to Farmers Bank while still a Central employee:

> Further, by Smith providing assistance to Farmers, a competing bank, while still employed by Central, as evidenced above, Smith was disloyal to Central by acting in conflict with Central's interests, and was performing outside activities without the required prior approval of Central. Even if Smith was not compensated by Farmers or anyone else for providing such assistance, and did so outside of his normal work schedule, the Business Plan and other evidence shows that Smith performed these services with an expectation of financial gain once moving to Farmers. [Citing, *e.g.*, excerpt from the Business Plan, EC SD Ex. 26 at 5 (FRB-FARMERS-004241–54 at 4245) ("Our proposition [as documented in the Business Plan] is to purchase [Farmers] and to open an LPO (loan production office) in Cheyenne, Wyoming. We will grow the bank's loan portfolio by $12,000,000 in quality, performing loans within the first three years, at which time a full service branch would be opened in Cheyenne.").[387]

Enforcement Counsel noted these observations, embodying them in their Statement of Uncontroverted Fact at ¶155, which averred that "Smith breached is duty of loyalty to Central . . . by providing services to a competitor."[388] Respondents, presented with this assertion of undisputed facts, responded in neither their Statement of Disputed Facts or in their Memorandum in Opposition. Upon this record, there is no basis to regard the averments in Paragraph 42 as a basis for denying summary disposition.

Paragraph 43

In Paragraph 43, Respondents aver that "[t]here is no evidence in the record that Respondents were bound by an employment agreement, a non-competition agreement, or a non-solicitation agreement."[389] Again, the sole support for this premise – and like the prior paragraph this one offers a legal premise rather than a factual one – is the self-serving statement of each Respondent. The record, however, does establish – without contradiction – the binding effect of Central's employment handbook on both Respondents. As Mr. Gray opined:

> Based on my review of Central's policies, and communications and documents involving Smith, as described above, it is my opinion that Smith

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[387] Gray Report-Smith at 19.
[388] Enforcement Counsel's Statement of Undisputed Material Facts at ¶155, citing EC SD Ex. 4 (Gray Report-Smith at 4).
[389] Respondents' Statement of Disputed Material Facts at ¶43, citing Resp. SD Ex. 5 (Smith Affidavit) at ¶ 16; and Resp. SD Ex. 8 (Kiolbasa Affidavit) at ¶ 3.)

> violated Central policy. Specifically, Smith violated the honesty, integrity, and loyalty requirements in the Central Handbook, as well as the provision restricting outside activities. Smith's active pursuit of the Business Plan, which involved acquiring an ownership interest in Farmers, including the execution of a confidentiality agreement and meetings with Farmers directors, constituted outside activities prohibited by Central policy, and were disloyal to his employer, Central.[390]

Enforcement Counsel raised this assertion in their Statement of Uncontroverted Facts (at Paragraph 138, *inter alia*) but again, Respondents failed to refer to this assertion in either their Statement of Disputed Facts or their Memorandum in Opposition. Upon this record, there is no basis to regard the averments in Paragraph 42 as a basis for denying summary disposition.

Paragraph 44

In Paragraph 44, Respondents aver that there "is no evidence in the record that Smith or Kiolbasa received any compensation from any party for anything either of them did other than as an employee of Central."[391]

I find nothing in the Notice of Intent alleging either Respondent received compensation from a source other than Central, for work performed (presumably for the benefit of Farmers). Paragraph 7 of the Notice alleges Smith "took several actions on behalf of and/or as an agent of Farmers," but there is no claim in the Notice relating to the averment in Paragraph 44. Paragraph 23 of the Notice alleges Respondents "received a financial benefit from their misappropriation and use of Central's confidential and proprietary information in the form of compensation from Farmers and in the form of increased value of the stock they own in Commercial." The averment in Paragraph 44 does not address the allegation in the Notice inasmuch as it speaks only to Respondents' service as Central employees; it makes no reference to compensation by Farmers, which is not a party to this enforcement action.

Again, the factual premise here is supported solely by Respondents' individual affidavits, which make no reference to the record. The record, however, includes evidence that relates directly to the allegations in Paragraph 23 of the Notice of Intent. In his reports, Mr. Gray opined as follows:

> Further, by Smith providing assistance to Farmers, a competing bank, while still employed by Central, as evidenced above, Smith was disloyal to Central by acting in conflict with Central's interests, and was performing outside activities without the required prior approval of Central. Even if Smith was not compensated by Farmers or anyone else for providing such assistance, and did so outside of his normal work schedule, the Business Plan and other evidence shows that Smith performed these services with an expectation of financial gain once moving to Farmers.[392]

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[390] Gray Report-Smith at 20.

[391] Respondents' Statement of Disputed Material Facts at ¶44.

[392] Gray Report-Smith at 19, citing EC SD Ex. 26 (email chain ending on 6/1/14 from Scott Lamons to Wyneema Engstrom et al. transmitting Respondents' Business Plan to Farmers) (FRB-FARMERS-004241–54 at 4245) ("Our proposition [as documented in the Business Plan] is to purchase [Farmers] and to open an LPO (loan production office) in Cheyenne, Wyoming. We will grow the bank's loan portfolio by $12,000,000 in quality, performing loans within the first three years, at which time a full service branch would be opened in Cheyenne.").

Inasmuch as the averments in Paragraph 44 controvert no material facts in issue and fail to recognize or contradict evidence in the record that Respondents anticipated receiving a financial benefit from their actions, nothing in this Paragraph would prevent granting summary disposition.

Paragraph 49

In Paragraph 49, Respondents aver that representatives of the Federal Reserve "had multiple discussions with Frank Smith and Mark Kiolbasa while each of the Respondents were employed at Central" and "solicited information with respect to Central from Smith. Kiolbasa did not have access to such information.[393] The averment is silent with respect to the nature of these discussions, such that the materiality of the averment is not established.

Respondents support the averment by citing first to Kiolbasa's testimony during the Central trial, where he is questioned about a document identified as Exhibit 321 in the Central litigation, referred to as an "ALCO Lookback."[394] In this testimony, Kiolbasa stated that he obtained this document from Smith, and after printing it off, gave it to the Federal Reserve Board's lead auditor (and no one else, including no one at Farmers). He testified that the same was true with respect to a document introduced at the Central trial as Exhibits 317 and 320. There is in the Notice of Intent no mention of these exhibits, and as such the materiality of the averment is not established. Further, if these exhibits are part of the current record, Respondents had the obligation to identify them as such, but the Paragraph is silent regarding what these documents are.

Respondents also support this Paragraph's factual premises by citing to trial testimony from Mr. Smith, in which he states, without reference to any authority, that he did not believe he was harming Central in providing Farmers' staff with assistance.[395] This citation to the record neither relates to nor supports the factual premise in Paragraph 49.

Paragraph 51

In Paragraph 51, Respondents aver that "Smith was not required to advise Central where Kiolbasa was employed following his resignation from Central."[396]

The averment is not supported by any reference to the record, and posits a claim not related to or in conflict with any of the factual allegations in the Notice of Intent. Given that its materiality has not been shown and given the lack of support for the claim in the record presented, nothing in this Paragraph would prevent summary disposition.

Paragraph 52

In Paragraph 52, Respondents aver that "Smith was not responsible for assessing acquisitions and was not involved in due diligence for such transactions. Throughout his seven

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[393] Respondents' Statement of Disputed Material Facts at ¶49.
[394] *Id.* citing EC SD Ex. 10 (Trial testimony of Kiolbasa) at 710:7-712:13, 745:2-15 (FRB-FARMERS000791-793, 826).
[395] Respondents' Statement of Disputed Material Facts at ¶49, citing EC SD Ex. 11 (Trial testimony of Smith) at 1088:6-17 (FRB-FARMERS001207).]
[396] Respondents' Statement of Disputed Material Facts at ¶51.

years of employment at Central, Smith was only at one board meeting where such transactions were discussed."[397]

Smith's presence at Central's board meetings is not, however, alleged in the Notice of Intent, nor is there any claim that he was responsible for assessing acquisitions or performing due diligence reviews for acquisition transactions. As such, the materiality of the averment is not shown.

Further, the averments are supported by Smith's unsupported and self-serving statement that "he was only at one meeting where [acquisitions] were discussed,"[398] and testimony to the effect that while Smith was not on Central's board of directors, he was present at board meetings performing in the role of keeper of the minutes, having asked "to attend the board replacing the lady that took the board minutes."

Inasmuch as the factual premises in this Paragraph are not shown to be material and do not controvert any material fact, nothing in the Paragraph constitutes a basis to preclude granting summary disposition.

Paragraph 59

In Paragraph 59, Respondents aver that there "is no evidence in the record that Respondents transmitted any of Farmers State Bank's confidential information without proper authorization."[399]

There is no allegation in the Notice of Intent that Respondents improperly transmitted confidential documents maintained by Farmers. Accordingly, as the factual premises in this Paragraph are not shown to be material and do not controvert any material fact, nothing in the Paragraph constitutes a basis to preclude granting summary disposition.

Analysis of Respondents' Arguments

Respondents posit that summary judgment is not available because there are genuine issues of material fact in dispute.[400] Specifically, Respondents assert the evidence presents disputes regarding whether Respondents misappropriated Central's confidential and proprietary information;[401] whether their plans to compete were lawful;[402] whether Respondents solicited Central's customers to move their business to Farmers;[403] whether assistance Smith provided was lawful;[404] and whether violations of Central's Handbook constitute unsafe and unsound practices or violations of fiduciary duties.[405]

Respondents' contentions here are without merit. The premise that documents appropriated from Central were not copyrighted – and thus could be freely delivered by Respondents to Farmers – is a legal one, one rejected by the FDIC's expert and not controverted

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[397] *Id.* at ¶52, citing EC SD Exhibit 8 (Trial testimony of Mr. Von Holtum) at 228:15-24 (FRB-FARMERS000228); Respondents' Exhibit 5, at ¶ 7.]

[398] Resp. SD Ex. 5, at ¶7.

[399] Respondents' Statement of Disputed Material Facts at ¶59, citing

[400] Respondents' Memorandum of Points and Authorities in Support of its Motion for Summary Disposition [*sic*] at Section II D.

[401] *Id.* at II D 1 a.

[402] *Id.* at II D 1 b.

[403] *Id.* at II D 1 c.

[404] *Id.* at II D 1 d.

[405] *Id.* at II D 1 e.

by Respondents (other than by their own conclusory and self-serving opinions). Respondents do not controvert that they appropriated the documents identified during the Central trial – they contend doing so was not misappropriation because of the way the documents were maintained in Central. This contention does not present controverted facts, but rather it presents a controverted interpretation of whether such conduct was wrongful.

The premise that Respondents' actions, starting in 2013 and continuing throughout their tenure at Central, were lawful is, again, not a factual one but a legal one. The facts being applied to reach the legal conclusions, presented through Enforcement Counsel's Statement of Undisputed Material Facts and not contradicted by Respondents, include most notably those relied upon by Mr. Gray. These facts were not called into controversy by Respondents' Statement of Disputed Material Facts.

Similarly, the facts relied upon by Mr. Gray in reaching is determination that Respondents' conduct caused Central's customers to migrate to Farmers are not in dispute, and were in fact presented by Respondents themselves, in their assertion that the migration was due to loyalty to Mr. Kiolbasa. Respondents have not called into question whether Central customers moved their business from Central to Farmers. What they controvert is whether the unsolicited movement constitutes evidence of misconduct. While Respondents may challenge the conclusions reached by Mr. Gray on this point, the evidence Mr. Gray relied upon in reaching his conclusions is not disputed.

Respondents' assertion that the assistance Mr. Smith provided to Farmers was legal is not an assertion calling into question facts, but instead makes a legal argument based on uncontroverted facts – thus permitting summary disposition that determines the merits of those arguments. To the same effect, the premise that conduct attributed to Respondents constituted unsafe or unsound practices invokes a legal, not a factual, dispute.

Once Enforcement Counsel identified the factual bases in support of their motion, including those bases relied upon by the FDIC's two expert witnesses, and presented those facts as uncontroverted, Respondents had an affirmative duty to bring forward evidence that contradicted or called into question those claimed uncontroverted facts. Respondents' Memorandum and their accompanying Statement of Disputed Facts did not identify controverted facts material to these issues. Accordingly, there is no legal basis preventing summary disposition

Respondents further aver that issues of material fact remain regarding the adverse effect their conduct had on Central and Farmers. Specifically, they posit that disputes about material facts concerning whether their actions caused harm – either monetary losses or reputational harm (or both) – preclude summary disposition.[406] Further, Respondents argue they did not receive any benefit from their alleged misconduct.[407]

Support for these averments, however, has not been tendered. Respondents urge a rejection of Mr. Gray's determination that soliciting Central's customers to invest in Farmers equates to soliciting those customers to move their business.[408] The argument is not, however, based on a claim that the evidence relied upon by Mr. Gray is controverted. Instead, it is based

[406] *Id.* at II D 2 a.
[407] *Id.* at II D 2 b.
[408] *Id.* at 47.

on a premise calling into question the reasoning relied upon by Mr. Gray when using the undisputed evidence. Finding that reasoning to be both solidly supported by uncontroverted evidence and well-reasoned, I reject Respondents' argument as being without merit.

Conclusions Regarding Enforcement Counsel's Motion for Summary Disposition

Enforcement Counsel bears the burden of establishing three things in order to support the charges against Respondent: there must be misconduct, a consequent effect from the misconduct, and culpability on Respondent's part.

More formally, the FDI Act provides as follows:

> Whenever the appropriate Federal banking agency determines that
>
> (A) any institution-affiliated party has, directly or indirectly-- (i) violated (I) any law or regulation; * * * (ii) engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution; or (iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty;
>
> (B) by reason of the violation, practice, or breach described in any clause of subparagraph (A)--
>
> (i) such insured depository institution or business institution has suffered or will probably suffer financial loss or other damage;
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> (ii) the interests of the insured depository institution's depositors have been or could be prejudiced; or
>
> (iii) such party has received financial gain or other benefit by reason of such violation, practice, or breach; and
>
> (C) such violation, practice, or breach—
>
> (i) involves personal dishonesty on the part of such party; or
>
> (ii) demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution or business institution,
>
> the appropriate Federal banking agency for the depository institution may serve upon such party a written notice of the agency's intention to remove such party from office or to prohibit any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution.[409]

Under 12 C.F.R. § 263.29(a), summary disposition is appropriate if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that (1) there is no genuine issue as to any material fact; and (2) the moving party is entitled to a decision in its favor as a matter of law.

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[409] 12 U.S.C. § 1818(e)(1).

To prevail in their Motion, Enforcement Counsel must establish all three factors needed to support a prohibition order: misconduct, effects, and culpability.[410]

Conclusions Regarding Misconduct

Respondents Engaged in Unsafe and Unsound Banking Practices

Misconduct under section 8(e) includes violations of governing laws and regulations along with participation in activity deemed to be an unsafe and unsound banking practice or in breach of a party's fiduciary duty.[411] The undisputed evidence establishes that Respondents engaged in conduct that was 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.

Respondents Breached Fiduciary Duties Owed to Central and Farmers

Officers and directors of financial institutions are deemed to be fiduciaries of the institution and, as such, owe the institution duties of care and loyalty.[412] The duty of care requires directors and officers to act as prudent and diligent business persons in conducting the affairs of the bank. The duty of loyalty generally prohibits them from putting their personal or business interests above the interests of the bank, and requires that they administer the affairs of the bank with candor, personal honesty, and integrity.[413] The duty of loyalty also requires that they put the interests of the bank before their own, and not use their positions at the bank for their own personal gain.[414]

Further, "[t]he duty of candor requires 'corporate fiduciaries to "disclose all material information relevant to corporate decisions from which they may derive a personal benefit."'"[415] Officers must also refrain from self-dealing at the expense of the bank.[416]

The undisputed evidence establishes that Respondents breached the fiduciary duties of care, loyalty, and candor owed to Central.

Upon these findings, there is preponderant and uncontroverted evidence establishing Respondents' misconduct, both individually and jointly, as alleged in the Notice of Intent and as that term is used in the FDI Act.

Conclusions Regarding Effect

I agree with Respondents' assertion that the uncontroverted evidence of reputational harm to Farmers is insufficient to meet a preponderance standard, as is the record's evidence of monetary loss to Farmers. [417] The record is not clear with respect to either form of harm to Farmers, as the issue of harm to Farmers was not among those presented during the Central

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[410] *Id.*; see *Matter of Candelaria*, FDIC-95-62e, 1997 WL 211341, at *3 (Mar. 11, 1997), *aff'd sub nom. Candelaria v. FDIC*, No. 97-9515, 1998 WL 43167 (10th Cir. Feb. 3, 1998); *Matter of Leuthe*, FDIC-95-15e, 1998 WL 438323, at * 11 (June 26, 1998), *aff'd sub nom. Leuthe v. FDIC*, 194 F.3d 174 (D.C. Cir. 1999) (per curiam).
[411] 12 U.S.C. § 1818(e)(1)(A).
[412] In re Constance C. Cirino, 2000 WL 1131919 at *4 (FDIC May 10, 2000) (citing *In the Matter of Ramon M. Candelaria*, FDIC Enf. Dec. and Orders at A-2847 (1997)).
[413] *Id.* at *50.
[414] *Seidman v. Office of Thrift Supervision*, 37 F.3d 911, 933-34 (3d Cir. 1994).
[415] *Seidman*, 37 F.3d at 935 n.34.
[416] *Indep. Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164, 1168 (D.C. Cir. 1979).
[417] Respondents' Memorandum of Points and Authorities in Support of its Motion for Summary Disposition [*sic*] at 46-48 and citations to the record therein.

litigation. Harm to Central, however, has been shown by preponderant and uncontroverted evidence and thus will not be within the scope of the hearing to be held on December 3, 2019.

Similarly, notwithstanding the analyses of Mr. Gray and Mr. Schwartz, the present record is insufficient to permit a proper allocation of harm that should be attributed to Respondents, rather than the other named defendants in the Central litigation, including Farmers and its board of directors. As a result, summary disposition is not available with respect to the extent and nature of the effects of Respondents' misconduct versus harm caused by the misconduct of Farmers and members of its board of directors. Thus, while no further evidence will be considered regarding whether Respondents engaged in misconduct as alleged in the Notice of Intent, the parties shall be permitted to present evidence regarding the allocation of harmful effects occasioned by Respondents' misconduct versus harm brought about by Farmers and its board of directors.

Conclusions Regarding Culpability

Charges in the Notice of Intent include allegations of both personal dishonesty and either a willful or continuing disregard for the safety and soundness of either Central or Farmers. In answering these charges, Respondents aver, *inter alia*, that their delivery of Central's documents was, in part, "specifically requested by representatives of the Federal Reserve in conjunction with Smith's application to purchase the stock in and to become president and chief executive officer of Farmers."[418] As preponderant and uncontroverted evidence on this point is not present in the record, a determination of Respondents' culpability will depend, in part, on whether Respondents' acquisition of Central's documents was in response to requests by the Reserve Board's examiners, as alleged by Respondents. Determining this issue will require additional evidence.

Enforcement Counsel are Entitled to Partial Summary Disposition

Under the Reserve Board's Rules of Practice and Procedure, if I determine that a party is entitled to summary disposition as to certain pending claims but not all claims, I should proceed to hearing on the matters not determined by summary disposition and defer until after such hearing the submission of a Recommended Decision as to those claims for which summary disposition is appropriate.[419]

Such is the case here, where from the record now before me I find Enforcement Counsel is entitled to partial summary disposition in favor of the Reserve Board. The parties are advised that those claims presented in the Notice of Intent alleging Respondents engaged in misconduct as that term is used in the FDI Act, will be addressed in the recommended decision filed at the conclusion of the hearing. As such, the scope of the hearing shall be limited to claims other than those concerning Respondents' misconduct – that is, the hearing shall address only those claims concerning the effects of Respondents' misconduct and Respondents' culpability, as those terms are used in the FDI Act.

[418] Answer of Kiolbasa at ¶12; Answer of Smith at ¶12.

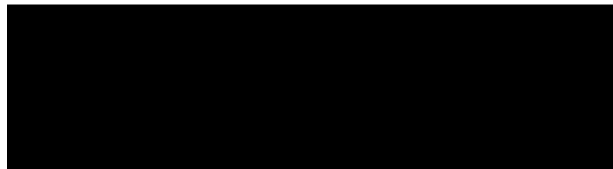
[419] 12 C.F.R. § 263.30 provides: If the administrative law judge determines that a party is entitled to summary disposition as to certain claims only, he or she shall defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the administrative law judge has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

Supplemental Prehearing Order

Upon the above-stated premises, the parties are directed to submit supplemental prehearing statements recognizing the limited scope of the hearing now set for December 3, 2019. Those statements will be timely if filed by not later than November 5, 2019. Motions, including motions in limine, will be timely if filed by not later than November 12, 2019, with responses to such motions due not later than November 19, 2019.

SO ORDERED.

Date: October 24, 2019



Christopher B. McNeil
Administrative Law Judge
Office of Financial Institution Adjudication

CERTIFICATE OF SERVICE

On October 24, 2019, I served the foregoing Order Regarding Enforcement Counsel's Motion for Summary Disposition, by electronic mail upon the following persons:

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Office of the Executive Secretary

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