UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

In the Matter of: **BIAGIO MAFFETTONE**, Former Vice President and Home Mortgage Area Manager Citizens Bank, N.A. Providence, Rhode Island	OCC Docket No.: AA-EC-2020-38

ORDER NO. 11: GRANTING IN PART AND DENYING IN PART
ENFORCEMENT COUNSEL'S MOTION FOR PARTIAL SUMMARY DISPOSITION

The Office of the Comptroller of the Currency ("OCC") commenced this action against Respondent Biagio Maffettone ("Respondent") on May 7, 2020, filing a Notice of Charges ("Notice") that seeks an order of prohibition and the imposition of a second-tier civil money penalty against Respondent pursuant to 12 U.S.C. §§ 1818(e) and (i). The Notice alleges that Respondent, in his capacity as Vice President and Home Mortgage Area Manager ("Area Manager") of Citizens Bank, N.A. ("the Bank"), engaged in actionable misconduct by impermissibly soliciting and receiving secret cash payments from a subordinate in connection with the subordinate's origination of mortgage loans based on referrals by Respondent. *See* Notice ¶¶ 26-54. Enforcement Counsel for the OCC ("Enforcement Counsel") now moves for partial summary disposition on the grounds "that the statutory elements for the prohibition and civil money penalty actions are satisfied as a matter of law by the undisputed material facts in this case." February 5, 2021 Brief in Support of Motion for Partial Summary Disposition ("Motion") at 1; *see generally* Enforcement Counsel's Statement of Undisputed Material Facts ("SOF").

For the reasons set forth below, the undersigned will recommend the partial grant and partial denial of Enforcement Counsel's Motion. Specifically, the undersigned concludes that the undisputed material facts of the case establish that Respondent breached the fiduciary duty of loyalty he owed to the Bank and received personal financial gain as a result of this conduct. The elements of misconduct and effect needed for the entry of a prohibition order under 12 U.S.C. § 1818(e) and the assessment of a second-tier civil money penalty under 12 U.S.C. § 1818(i) have therefore been satisfied. The undersigned finds that resolution of the remaining issues on which Enforcement Counsel seeks summary disposition, including the satisfaction of the culpability element of Section 1818(e), is presently premature.

I. Summary Disposition Standard

The OCC's Uniform Rules of Practice and Procedure ("Uniform Rules") provide that summary disposition on a given claim is appropriate when the "undisputed pleaded facts" and other evidence properly before this tribunal demonstrates that (1) "[t]here is no genuine issue as to any material fact," and (2) "[t]he moving party is entitled to a decision in its favor as a matter of law."[1] A genuine issue of material fact is one that, if the subject of dispute, "might affect the outcome of the suit under the governing law."[2] The summary disposition standard "is similar to that of the summary judgment standard under Rule 56 of the Federal Rules of Civil Procedure."[3] Thus, when determining the existence of a genuine factual dispute, all evidence must be evaluated "in the light most favorable to the non-moving party."[4] That means that this tribunal must "draw

[1] 12 C.F.R. § 1929(a).

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

[3] *In the Matter of William R. Blanton*, No. OCC AA-EC-2015-24, 2017 WL 4510840, at *6 (OCC July 10, 2017), *aff'd on other grounds*, *Blanton v. OCC*, 909 F.3d 1161 (D.C. Cir. 2018).

[4] *Scott v. Harris*, 550 U.S. 372, 380 (2007).

‘all justifiable inferences’ in the non-moving party’s favor and accept the non-moving party’s evidence as true,” although “mere allegations or denials” will not suffice.[5]

Any party moving for summary disposition of all or part of the proceeding must submit, along with such motion, “a statement of the material facts as to which the moving party contends there is no genuine issue.”[6] A party that opposes summary disposition, moreover, must likewise “file a statement setting forth those material facts as to which he or she contends a genuine dispute exists.”[7] In both cases, the enumeration of material facts “must be supported by documentary evidence [in] the form of admissions in pleadings, stipulations, depositions, transcripts, affidavits, [or] any other evidentiary materials that the . . . party contends support [its] position.”[8] Here, in response to Enforcement Counsel’s Statement of Undisputed Material Facts, Respondent has filed what he styles as a Counterstatement of Material Facts (“CSOF”), which the undersigned will construe as appropriate as a statement setting forth, or otherwise evidencing, the material facts that Respondent avers to be in dispute, pursuant to the Uniform Rules.

II. Background and Summary of Facts

The following is drawn from the parties’ pleadings, from Enforcement Counsel’s Statement of Undisputed Material Facts, and, where there appears to be some genuine dispute, from Respondent’s Counterstatement and its attendant exhibits. Respondent was hired by the Bank

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[5] *Heffernan v. Azar*, 417 F. Supp. 3d 1, 7 (D.D.C. 2019) (quoting *Anderson*, 477 U.S. at 248, 255).

[6] 12 C.F.R. § 1929(b)(2).

[7] *Id.*

[8] *Id.* The undersigned notes that both Enforcement Counsel and Respondent support their respective statements of fact with, *inter alia*, selective excerpts of deposition testimony. *See*, *e.g.*, Enforcement Counsel Exhibit (“EC Ex.”) PSD-003 (excerpted testimony of Biagio Maffettone); Respondent Exhibit (“Resp. Ex.”) H (excerpted testimony of Matthew Jablonski). This offers an incomplete picture of the factual record and risks omitting helpful context for the parties’ assertions. ***In the future, both parties are directed to provide full transcripts of any deposition relied upon as an exhibit***, as well as full and unexcerpted copies of any document likewise so used. If a document is too lengthy to be useful if attached in full, then the party shall attach the pertinent section, with all pages included sequentially, and shall be prepared to provide the full document upon request. (Deposition transcripts should be provided in full in any event.)

as a Producing Sales Manager in 2015, in which capacity he received personal commissions based on his own origination of individual mortgage loans. *See* Notice ¶¶ 6-7; Respondent's May 27, 2020 Answer ("Answer") ¶¶ 6-7. In June 2017, Respondent was formally promoted to the role of Area Manager, a "non-producing" supervisory position in which he was no longer permitted to originate loans himself or receive commission on new loans that he originated.[9] *See* SOF ¶¶ 2, 10; Answer ¶ 9. Instead of being paid commission, Respondent's terms of employment as Area Manager provided that he would receive (in addition to a base salary) an "override" payment corresponding to a percentage of all loans originated by loan officers who reported to him ("subordinates").[10] *See* Notice ¶ 10; Answer ¶ 10.

Before formally assuming the position of Area Manager, Respondent also was required to assign all mortgage loans that he was in the process of originating at the time of his transition ("active pipeline loans") to one of his subordinates. *See* SOF ¶ 3; Resp. Ex. B (Maffettone Dep. 20:5-24). Respondent and the Bank agreed on a transitional plan to compensate Respondent for his active pipeline loans that had not yet become final as of May 31, 2017. *See* SOF ¶¶ 4-5; Answer ¶¶ 21-22. Under this transition plan, Respondent would be paid full commission on any active pipeline loans that were finalized ("closed") by June 16, 2017. *See* SOF ¶ 6; CSOF ¶ 8. For pipeline loans that closed on or after June 17, 2017, Respondent would receive 75 percent of the

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[9] Respondent contends that from January 2017 until his formal promotion in June 2017, he "was expected to perform the roles and responsibilities of both the Area Manager and the Producing Sales Manager positions," including continuing to "originat[e] loans in his name and receiv[e] commissions on those loans." CSOF ¶¶ 4, 5; *see* Answer at 3. The undersigned finds that this fact, even if true, is not material as to whether Respondent was precluded from originating loans once he left the role of Producing Sales Manager in June 2017. Moreover, to the extent that Respondent suggests that he could have originated loans in his name as Area Manager had he chosen to do so, *see* Answer at 3 (averring that loan origination as Area Manager was not "required"), the undersigned finds that this stance is contradicted by the record evidence. *See* EC Ex. PSD-003 at 8-9 (Maffettone Deposition ("Dep.") at 40:5-41:7) (agreeing that the Bank "would not allow [Respondent] to originate loans in [his] name as an area manager").

[10] *See* EC Ex. PSD-002 (June 27, 2017 Letter from Amy Fitzgerald to Biagio Maffettone) ("Offer Letter") at 1; EC Ex. PSD-008 (2017 Home Mortgage Retail Sales Non-Producing Incentive Plan Incentive Grids) at 2.

commission, and the subordinate loan officer to whom Respondent had assigned the loan would receive the remaining 25 percent.[11] *See* SOF ¶ 6; CSOF ¶ 8.

<u>The Referral Arrangement</u>

Upon his formal promotion to Area Manager, Respondent assigned all mortgage loans in his active pipeline to his subordinate, Loan Officer Matthew Jablonski ("Jablonski"). *See* SOF ¶ 9; CSOF ¶ 9. In addition, Respondent provided Jablonski with a handwritten list of real estate agent contacts "whom Respondent deemed to be part of his 'book of business.'" SOF ¶ 11; *see* CSOF ¶¶ 11-13. Respondent and Jablonski then entered into a private arrangement ("the referral arrangement") whereby agents from that list would make mortgage loan referrals to Jablonski, and Jablonski would pay Respondent for each referral that resulted in a Bank-funded mortgage loan. *See* SOF ¶¶ 12-13; *see also* CSOF ¶ 11 (describing the arrangement as one in which Respondent "referred Mr. Jablonski his realtor contacts and loans and the two split the fee from the loan originations").[12] The referral arrangement began around the summer of 2017 and continued until sometime in 2018.[13] *See* SOF ¶¶ 11, 18; CSOF ¶ 15. It is also clear that the referral arrangement

[11] For additional details, *see* EC Ex. PSD-002 (Offer Letter) at 1-2. It appears undisputed that "[t]he Bank made the transition plan payments through its official payroll system." SOF ¶ 7 (citing EC Ex. PSD-003 (Maffettone Dep. at 26:14-26:23). It likewise seems clear, from the details of Respondent's Offer Letter, that that the Area Manager "override" payment made periodically to Respondent would not include compensation from any of the active pipeline loans that were the subject of the transition plan and on which he could therefore have received commission. *See* EC Ex. PSD-002 (Offer Letter) at 2; SOF ¶ 8.

[12] Respondent avers that he entered into the referral arrangement "[a]gainst his better judgment" and at the instigation of Jablonski. CSOF ¶ 11; *see id.* ¶ 10. Whatever the truth of this, because Respondent indisputably and admittedly participated in the arrangement, however reluctantly, the undersigned finds that these averred facts are immaterial to the disposition of the issues presently before her.

[13] Respondent adverts to a switch in apportionment "from 75/25 to 50/50" that occurred "[i]n or about October 2017," *id.* ¶ 10, but it is unclear (and immaterial for present purposes) whether this refers to a change in how commissions were apportioned *within* the referral arrangement (*i.e.*, that Respondent and Jablonski began their private arrangement with a 75/25 split and later increased Jablonski's share), or is merely stating that the active pipeline transition plan approved by the Bank involved a 75/25 split, and the referral arrangement split commissions equally from the start. The excerpts of Respondent's deposition provided by Enforcement Counsel suggest that the 75/25 split applied only to the active pipeline transition plan, *see* EC Ex. PSD-002 (Maffettone Dep. 26:14-23, 33:6-9), but a conclusive determination cannot, and need not, be made on the existing record.

pertained to newly originated mortgage loans—that is, loans that were not in Respondent's active pipeline at the time of his formal transition to the position of Area Manager.[14]

There is one salient point of order in this regard: Respondent seeks to characterize the referral arrangement as simply a continuation of the transition plan under which Respondent received a 75 percent commission for any active pipeline loans closed by Jablonski after mid-June 2017. *See* CSOF ¶ 10 (averring that Jablonski "requested that the arrangement continue with the caveat that the fee splitting percentage that was initially set by Citizens Bank be changed from 75/25 to 50/50"). Respondent's deposition testimony, certainly, appears to conflate the active pipeline transition plan and the subsequent referral arrangement between Respondent and Jablonski to split commission on newly originated loans.[15] For the avoidance of doubt, and without imputing facts not averred by Enforcement Counsel regarding the apportionment of commissions, the undersigned finds that there is undisputed evidence that Respondent's private referral arrangement with Jablonski is entirely distinct from, and unrelated to, the active pipeline transition plan agreed upon by the Bank as part of Respondent's promotion.[16]

In all, pursuant to the referral arrangement, Mr. Jablonski made cash payments to Respondent totaling approximately $50,000. *See* SOF ¶¶ 14-15; CSOF ¶ 21; Answer ¶ 65. These payments from Jablonski were not recorded in the Bank's payroll system and were typically made

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[14] *See, e.g.*, SOF ¶¶ 5, 13; EC Ex. PSD-002 (Offer Letter), Ex. A (listing Respondent's active pipeline loans as of May 31, 2017); EC Ex. PSD-005 (July 22, 2019 letter from Respondent's previous counsel to Enforcement Counsel) ("15-Day Response Letter") (distinguishing between Respondent's "existing pipeline" at the time of his promotion and later originations).

[15] *See* Resp. Ex. B (Maffettone Dep. 18:43-21:11) (stating, among other things, that Respondent and Jablonski "had a split arrangement that was preapproved by Citizens Bank," and then using the term "split arrangement" to refer interchangeably to the active pipeline transition plan described in "the formal offer letter from Citizens Bank" and the subsequent private referral arrangement between Respondent and Jablonski).

[16] In particular, the undersigned rejects Respondent's implication that the referral arrangement between Respondent and Jablonski was, as a factual matter, "preapproved" by the Bank, *id.*, or that it otherwise flowed naturally and consequently from the active pipeline transition plan.

outside of the Bank building in which Respondent had his office or otherwise off Bank premises. *See* SOF ¶ 15; CSOF ¶ 21. Furthermore, during the time that Respondent was receiving these cash payments, he was also receiving Area Manager "override" payments based in part on the loans being originated by Jablonski, thus being "compensated twice on [those] loans." SOF ¶ 17; *see also* Answer ¶ 54.

Although Respondent contends in the instant briefing that he "never attempted to conceal the arrangement," CSOF ¶ 16, he admits in his deposition testimony that he "was not candid with the [B]ank" and that he did not disclose the existence of the arrangement to the Bank or to anyone else, including his own assistants who kept loan-related spreadsheets tracking the referring agent.[17] EC Ex. PSD-003 (Maffettone Dep. 32:4-22); *see* CSOF ¶ 17. Therefore, it is undisputed that Respondent did not bring the referral arrangement to the Bank's attention and that he had no reason to believe that the Bank was otherwise aware of the arrangement. *See* SOF ¶ 16.

Despite his ascension to the non-producing role of Area Manager, Respondent avers that, in addition to providing referrals from agents, he "performed work to help close the loans" that were being originated by Jablonski based on those referrals.[18] CSOF ¶ 20. Respondent states that both he and Jablonski "interacted with referral sources," and that he "was highly involved in the escalation of the loans and moving them through the pipeline." *Id.* Respondent further avers that he and one of his assistants in fact did "a majority of the work" on some of the loans in question. *Id.* (citing exhibits). Because Enforcement Counsel does not adduce any facts to the contrary, *see*

[17] Respondent adduces several facts in support of his contention that the arrangement was not affirmatively concealed, including that he "openly held weekly pipeline meetings" with Jablonski and Respondent's two assistants at which loans subject to the arrangement were among those reviewed, CSOF ¶ 16, and that spreadsheets listing those loans and tracking referrals were kept on a Bank computer and sent through the Bank's email system, *id.* ¶¶ 17-18. The undersigned addresses these points in more detail in Part IV.D *infra*.

[18] Based on the current factual record, it is unclear the extent to which the work adverted to here by Respondent was work that he would not normally perform on loans being originated by other subordinates in the course of his duties as Area Manager.

generally SOF, the undersigned finds, for purposes of Enforcement Counsel's motion, that Respondent performed some level of substantive work, as Area Manager, on the loans that were subject to the referral arrangement.[19]

The Bank Investigation

After becoming aware of the referral arrangement in the Fall of 2018, the Bank initiated an internal investigation, interviewing Jablonski and seeking to interview Respondent. *See* SOF ¶ 19; CSOF ¶ 24; Answer ¶¶ 58, 60-61. On October 25, 2018, one day before an interview with Bank investigators, Respondent submitted an immediately effective resignation. *See* SOF ¶ 19; CSOF ¶ 24; Answer ¶¶ 60-62. On February 15, 2019, the Bank's Conduct Office completed its review and report of the circumstances surrounding the referral arrangement, which was submitted to Bank executives and to regulatory agencies, including the OCC. *See* EC Ex. PSD-013 (Conduct Office Report) at 1. Among other things, the report concluded that Respondent's conduct "constituted egregious violations of multiple Bank policies." *Id.*; *see* SOF ¶ 20; CSOF ¶ 27. The report also concluded that the nature of the violations did not give rise to "any opportunity for customer harm," given the structure of the Bank's loan origination compensation plan. EC Ex. PSD-013 (Conduct Office Report) at 4; *see* CSOF ¶ 25.

The Instant Action

The OCC commenced these proceedings against Respondent on May 7, 2020, alleging that the referral arrangement detailed above amounted to an illegal kickback scheme and otherwise constituted actionable misconduct under 12 U.S.C. §§ 1818(e) and 1818(i). *See* Notice ¶¶ 15-16. In particular, the Notice alleged that, in participating in the referral arrangement, Respondent

[19] Respondent makes no representation that the Bank was aware of any substantive work that Respondent was doing on these loans above and beyond his normal duties as Area Manager, and the undersigned will presume for present purposes that the Bank was not so aware, given Respondent's admission that he did not disclose the existence or nature of the referral arrangement to the Bank or anyone else.

(1) violated the law, including 18 U.S.C. § 215(a)(2) and 12 U.S.C. § 2607(a); (2) engaged in unsafe or unsound practices in conducting the Bank's affairs; and (3) breached his fiduciary duty to the Bank. *See id.* ¶¶ 64-65. With respect to the effect and (as applicable) culpability elements of the relevant statutes, described further below, the Notice alleged that Respondent received financial or pecuniary gain or other benefit as a result of his alleged conduct; that the conduct involved personal dishonesty on the part of Respondent; that Respondent demonstrated a willful or continuing disregard for the Bank's safety or soundness; and that Respondent's conduct was part of a pattern of misconduct. *See id.*

Following discovery, Enforcement Counsel has moved for partial summary disposition of its claims against Respondent. Specifically, Enforcement Counsel contends that the undisputed material facts of the case establish that Respondent (1) violated 12 U.S.C. § 2607(a), *see* Motion at 9-14; (2) breached his fiduciary duties of care and loyalty to the Bank, *see id.* at 14-23; (3) received personal gain as a result of this misconduct, *see id.* at 23-24; and (4) demonstrated personal dishonesty, *see id.* at 24-26.[20] Enforcement Counsel further contends that disposition of these issues will perforce support its claims for a prohibition order under 12 U.S.C. § 1818(e) and the assessment of a second-tier civil money penalty under 12 U.S.C. § 1818(i). *See id.* at 6.

<u>III. Elements of Sections 1818(e) and 1818(i)</u>

To merit the entry of a prohibition order against an institution-affiliated party ("IAP") under 12 U.S.C. § 1818(e),[21] as the OCC seeks here, an agency must prove the separate elements of misconduct, effect, and culpability. The misconduct element may be satisfied, among other

[20] Enforcement Counsel thus does not seek summary disposition at this time on its claims that Respondent violated 18 U.S.C. § 215(a)(2), that he engaged in actionably unsafe or unsound practices, that he demonstrated a willful or continuing disregard for the Bank's safety or soundness, or that his conduct was part of a pattern of misconduct. *See* Motion at 5 (enumerating "certain peripheral facts [that] remain in dispute" regarding these claims).

[21] The undersigned finds that Respondent is an IAP of the Bank as that term is defined in 12 U.S.C. § 1818(u).

ways, by a showing that the IAP has (1) "violated any law or regulation," (2) "engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution," or (3) "committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty."[22] The effect element may be satisfied, in turn, by showing either that the institution at issue thereby "has suffered or probably will suffer financial loss or other damage," that the institution's depositors' interests "have been or could be prejudiced," or that the charged party "has received financial gain or other benefit."[23] And the culpability element may be satisfied when the alleged violation, practice, or breach either "involves personal dishonesty" by the IAP or "demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution."[24]

The imposition of a second-tier civil money penalty under 12 U.S.C. § 1818(i) also requires the satisfaction of multiple elements. First, the agency must show misconduct, which can take the form of a violation of "any law or regulation,"[25] the breach of "any fiduciary duty," or the reckless engagement "in an unsafe or unsound practice in conducting the affairs" of the institution in question.[26] Second, the agency must show some external consequence or characteristic of the IAP's alleged misconduct, likewise generally termed "effect" in past decisions issued by the Comptroller of the Currency ("Comptroller"): (1) that it "is part of a pattern of misconduct"; (2) that it "causes or is likely to cause more than a minimal loss to such depository institution"; or

[22] 12 U.S.C. § 1818(e)(1)(A).

[23] *Id.* § 1818(e)(1)(B).

[24] *Id.* § 1818(e)(1)(C).

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

[26] *Id.* § 1818(i)(2)(B)(i).

(3) that it "results in pecuniary gain or other benefit to such party."[27] Moreover, before any civil money penalty can be assessed upon satisfaction of these elements, the agency must take into account the appropriateness of the amount of penalty sought when considered in light of certain potentially mitigating factors, including the "good faith of the . . . person charged" and "the gravity of the violation."[28]

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

IV. Argument and Analysis

Enforcement Counsel argues that the undisputed facts of the referral arrangement constitute a violation of the kickback prohibition of 12 U.S.C. § 2607(a) and a breach of Respondent's fiduciary duties of care and loyalty to the Bank, either of which would satisfy the misconduct elements of Sections 1818(e) and 1818(i). *See* Motion at 9-14 (violation of kickback prohibition), 16-19 (breach of duty of loyalty), 19-23 (breach of duty of care). Enforcement Counsel also argues

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[27] *Id.* § 1818(i)(2)(B)(ii). *See Blanton*, 2017 WL 4510840, at *16 (referring to this as the statute's "effect" prong).

[28] 12 U.S.C. § 1818(i)(2)(G); *see also In re Sealed Case (Administrative Subpoena)*, 42 F.3d 1412, 1416 (D.C. Cir. 1994) ("In assessing money penalties, Congress requires [banking] agencies to consider several mitigating factors."); *accord, e.g.*, *Blanton*, 2017 WL 4510840, at *27.

that Respondent has indisputably received personal gain as a result of the referral arrangement, *see id.* at 23-24, and that the manner in which the arrangement was conducted evinces personal dishonesty on Respondent's part, *see id.* at 24-26, thus satisfying the effect and culpability elements, respectively, of the operative statutes.

In response, Respondent contends that the referral arrangement does not meet the definition of a kickback or unearned fee under 12 U.S.C. § 2607(a), because the statute does not apply to arrangements between co-workers and because the fees paid to Respondent were not "unearned." *See* February 25, 2021 Memorandum of Law in Opposition to Enforcement Counsel's Motion for Partial Summary Disposition ("Opposition") at 8-11. Respondent also argues that there cannot be a breach of fiduciary duty if there was no reasonably foreseeable risk to the institution, as there assertedly was not here, *see id.* at 11-12, and if Respondent neither treated the loans that were subject to the arrangement differently nor otherwise failed to perform his duties as Area Manager, *see id.* at 12-15. In addition, Respondent asserts that a determination of culpability is inappropriate at this stage, because "serious and material questions of fact" exist as to whether his conduct demonstrated personal dishonesty as opposed to mere poor judgment. *Id.* at 16. And Respondent maintains that mitigating factors should be considered, including the "de minimis"[29] nature of Respondent's personal gain from the arrangement, that would preclude the assessment of a second-tier civil money penalty. *See id.* at 18-21. The undersigned considers each argument in turn.

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[29] Opposition at 19. Beyond contending that his personal gain was "de minimis," Respondent does not otherwise dispute that he benefited financially as a result of the referral arrangement. As discussed further *infra* at 23, because neither Section 1818(e) nor Section 1818(i) places a bottom limit on the amount of personal financial or pecuniary benefit necessary to trigger those statutes' respective "effect" elements, *see* 12 U.S.C. §§ 1818(e)(1)(B), 1818(i)(2)(B)(ii), the undersigned finds that the undisputed facts establish the requisite "effect" for an order of prohibition and the assessment of a second-tier civil money penalty.

A. <u>The Undisputed Material Facts Do Not Establish a RESPA Violation</u>

The Real Estate Settlement Procedures Act ("RESPA") provides, in relevant part, that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person."[30] 12 U.S.C. § 2607(a). Here, the undersigned agrees with Enforcement Counsel that "[t]here is no dispute that Respondent had an agreement or understanding that mortgage loans would be referred to Jablonski for origination and settlement." Motion at 10. It is also undisputed that Jablonski made cash payments to Respondent based on this agreement or understanding. *See* Answer ¶ 53. The basic elements of Section 2607(a) are thus met.

Furthermore, and contrary to Respondent's contention, the undersigned finds that Section 2607(a) does not only govern scenarios where a referral fee is given to or received by a *third party*; referral arrangements between co-workers that occur outside the formal structures of the work environment, as indisputably happened here, are equally within the statute's scope. Nevertheless, the undersigned cannot conclude at this stage that a RESPA violation has occurred: Respondent asserts, and Enforcement Counsel does not dispute, that he performed work on the loans being originated by Jablonski in addition to facilitating their referral, and Section 2607 arguably does not prohibit payments made pursuant to referral arrangements where actual services are performed. *See* 12 U.S.C. § 2607(c)(2). For this reason, and as discussed in more detail below, the undersigned denies Enforcement Counsel's motion for summary disposition on this claim.

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[30] Real estate "settlement services" encompassed by this statute include "service[s] provided in connection with . . . the origination of a federally related mortgage loan." 12 U.S.C. § 2602(3).

1. Section 2607(a) Encompasses Off-Book Referral Arrangements Between Individuals at the Same Firm

To begin with, the undersigned agrees with Enforcement Counsel that there is nothing in the plain language of 12 U.S.C. § 2607(a) that prevents that statute from being applied to a referral arrangement between two individuals employed by the same firm, if the arrangement in question took place outside of the normal business framework.[31] *See* Motion at 13-14. While Respondent does cite several cases that advert to a referral fee being given to, or received by, "a third party," *see* Opposition at 8-9, none of those cases address the scenario at issue here, in which payments pursuant to the referral arrangement were made in cash, off Bank premises, without being recorded in the Bank's payroll system, in violation of Bank policy, and without telling the Bank. *See supra* at 5-7. In such a circumstance, it is immaterial whether the participants in that arrangement incidentally share an employer, as the person receiving money for loans originated under the arrangement—in this instance, Respondent—is doing so entirely illicitly.

This can be illustrated by a counterfactual: Imagine that, instead of being promoted to a non-producing Area Manager position, Respondent had left the Bank in the summer of 2017. If he had then still contrived, as a former Bank employee, to provide his handwritten list of referral contacts to Jablonski in exchange for an ongoing portion of the resulting origination fees, there is nothing about this identical arrangement that would or should render it any more or less violative of each element of RESPA's anti-kickback provision—the gravamen of the violation would remain the same. The undersigned declines to read into the statutory text an unwritten requirement that individuals engaging in behavior that is otherwise prohibited by Section 2607(a) must work for separate entities in order for that behavior to be actionable.

[31] RESPA provides that fees paid, *inter alia*, to employees by lenders in the ordinary course of business "for services actually performed in the making of a loan" are not subject to Section 2607(a)'s anti-kickback provision. 12 U.S.C. § 2607(c)(1)(C).

2. <u>A Determination of Respondent's Liability Under Section 2607(a) Is Presently Premature</u>

Respondent argues that only referral-for-money arrangements in which the referring party "did absolutely no work in exchange for the fee" are prohibited by Section 2607(a), pointing to the "hands-on" work he claims, without dispute, to have "performed in connection with originating and closing loans" that he referred to Jablonski.[32] Opposition at 10, 11; *see supra* at 7-8. In response, Enforcement Counsel asserts that the payments Respondent received from Jablonski under the arrangement were solely "for the referral of mortgage loans," and any work Respondent may have done in helping to originate or close those loans after the referral is therefore irrelevant. Motion at 10. Upon consideration of the factual record and the statute as a whole, the undersigned concludes that (1) 12 U.S.C. § 2607(a) does permit payments in connection with mortgage loan referrals if actual services are provided in at least some circumstances; (2) it is unclear from the undisputed facts whether the payments made to Respondent fall within this exception; and thus (3) a determination of Respondent's liability under the statute is premature at this stage.

A companion provision to Section 2607(a) provides that RESPA's prohibition of for-pay mortgage loan referral arrangements does not apply to "the payment to any person of a bona fide salary or *compensation or other payment* for goods or facilities actually furnished or for *services actually performed*."[33] In this case, it is presently undisputed that Respondent "performed work to help close the loans" that had been referred to Jablonski by the agents on Respondent's list. CSOF

[32] The undersigned notes at the outset that the portions of the cases quoted by Respondent in support of his proposition pertain exclusively to 12 U.S.C. § 2607(b), a provision not at issue in this matter, *see* Motion at 9 n.1, and are therefore misleading and inapposite. *See Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 631 (2012) (addressing liability under 12 U.S.C. § 2607(b)); *Sosa v. Chase Manhattan Mortg. Corp.*, 348 F.3d 979, 983 (11th Cir. 2003) (same); *Bolinger v. First Multiple Listing Serv., Inc.*, No. 2:10-CV-211, 2014 WL 4803155, at ** (N.D. Ga. Sept. 26, 2014) (same). The undersigned thus rejects Respondent's broad characterization of the scope of Section 2607(a) and expects Respondent's counsel to be more diligent about accurately reflecting the state of the law in future submissions.

[33] 12 U.S.C. § 2607(c)(2) (emphasis added).

¶ 20. Moreover, although Enforcement Counsel is correct that payments were made to Respondent broadly "for the referral of mortgage loans," Motion at 10, it is also undisputed that Respondent was not paid for each referral he provided, but as a percentage of Jablonski's origination fee on each referred loan that was ultimately originated and closed.[34] *See* CSOF ¶ 11.

This may be a distinction without a difference. It is notable, however, that the examples of paradigmatic "kickbacks" in the Supreme Court's *Freeman* decision both concern arrangements in which the amount of the kickback is not tied to any contingent occurrence but is settled either by the referral itself or even simply an agreement to provide referrals.[35] By contrast, it is at least colorable, based on the present record, that by doing work on the loans after their referral, Respondent was increasing the size of his compensation under the arrangement, because he would receive more in total payments if more referred loans could be originated and closed.

It appears to be a question of first impression whether a loan referral arrangement in which (a) the agreed-upon compensation is entirely tied to the closure of the loans and (b) the referring party then assists in originating and closing the loans in question—thereby potentially increasing the amount he or she is compensated—might fall within the "services actually performed" safe harbor of 12 U.S.C. § 2607(c)(2).[36] The undersigned concludes that this question cannot be answered as a matter of law on the strength of the factual record as presented in the parties' briefing. Specifically, more details are necessary regarding the precise nature of the arrangement

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[34] *See also*, *e.g.*, EC Ex. PSD-004 (Maffettone Sworn Statement ("S. S.") 79:20-23) (agreeing that "loans referred to by someone on [Respondent's] lists [were] subject to . . . the 50/50 split arrangement"); EC Ex. PSD-016 (Jablonski S.S. 90:4-8) (describing the arrangement as one in which he paid Respondent "50 percent of the commission earned on any loan that's referred by somebody whose name is on this list").

[35] *See Freeman*, 566 U.S. at 636 (stating that "a settlement-service provider who agrees to exchange valuable tickets to a sporting event in return for a referral of business" and a provider "who agrees to pay . . . a monthly lump sum in exchange for the recipient's agreement to refer any business that comes his way" would violate Section 2607(a)).

[36] *See* EC Ex. PSD-003 (Maffettone Dep. 92:9-16) (suggesting that Respondent did origination work on all loans that had been referred under the referral arrangement).

between Respondent and Jablonski; the extent to which it depended on, or was benefited by, work performed by Respondent on the origination and closure of the referred loans; and whether there were any loans with respect to which Respondent ultimately received compensation under the arrangement but on which he did not perform any post-referral work. Until then, the undersigned finds that summary disposition of the agency's Section 2607(a) claim is not merited.

B. Respondent's Conduct Amounted to a Breach of Fiduciary Duty

Even if an IAP has not violated any law or regulation, his or her conduct may warrant an order of prohibition and the assessment of a second-tier civil money penalty if it can be shown that the conduct constituted a breach of the IAP's fiduciary duty to the affiliated institution (and if the other statutory elements are met). Here, Enforcement Counsel contends that Respondent breached his fiduciary duties of loyalty and care to the Bank by entering into a private financial arrangement with a subordinate for his own personal enrichment and in violation of the Bank's policies. *See* Motion at 14-23. Respondent, in turn, argues that the referral arrangement "had no impact whatsoever to customers and posed no financial harm or reputational risk to the Bank," Opposition at 11, and that Respondent acted at all times in good faith and with due care, *see id.* at 14-15. Based on the undisputed material facts before her, the undersigned largely, but not wholly, agrees with Enforcement Counsel that summary disposition is warranted here.

As an initial matter, the undersigned declines to hold that any Section 1818 enforcement action alleging breach of fiduciary duty must also show that such breach created a "reasonably foreseeable" or "undue" risk to the affiliated institution. *See* Opposition at 12. While Respondent is correct that two cases in the D.C. Circuit couch the agency's burden in proving a breach of fiduciary duty in those terms,[37] the undersigned can find no decision by the Comptroller adopting

[37] *See* Opposition at 12 (citing *Dodge v. OCC*, 744 F.3d 148, 152 (D.C. Cir. 2014); *Kaplan v. OTS*, 104 F.3d 417, 421 (D.C. Cir. 1997)).

or applying that standard; indeed, the only mention of such a requirement is in the discussion of D.C. Circuit case law on unsafe or unsound practices in the Comptroller's *Patrick Adams* decision, which did not itself deal with fiduciary duty at all.[38] By contrast, Comptroller decisions that substantively address the fiduciary duty standard in the Section 1818 context, such as the 2016 *Ellsworth* decision and the 1997 *Vickery* decision, do not require any showing of institutional risk in order to find that the conduct at issue constitutes a breach of fiduciary duty.[39] Decisions by the other federal banking agencies in Section 1818 enforcement actions are likewise silent in this regard.[40] In the absence of clear guidance from the Comptroller, then, the undersigned will not condition a finding of breach of fiduciary duty for purposes of the misconduct prongs of Sections 1818(e) and 1818(i) on proof of foreseeable or undue risk to the institution in question.

1. The Undisputed Material Facts Establish That Respondent Breached His Duty of Loyalty to the Bank

As fiduciaries, all directors, officers, and employees of a bank owe a duty of loyalty to that institution, requiring them "to put the interests of the bank before their own, and not use their positions at the bank for their own personal gain."[41] Furthermore, "[a] crucial component of the

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[38] *See In the Matter of Patrick Adams*, Final Decision, No. AA-EC-11-50, 2014 WL 8735096, at *23 (OCC Sep. 30, 2014) (quoting *Kaplan*, 104 F.3d at 421).

[39] *See In the Matter of Steven Ellsworth*, Final Decision, Nos. AA-EC-11-41 and -42, 2016 WL 11597958, at *15 (OCC March 23, 2016) (finding breach of fiduciary duty where "[r]espondents failed to disclose [that] they had a personal interest in [certain bank] loans or that the loan proceeds would actually be used to satisfy their personal financial obligations"); *In the Matter of Charles Vickery, Jr.*, Decision and Order, Nos. AA-EC-96-05 and -06, 1997 WL 269093, at **3-6 (OCC March 31, 1997) (finding breach of fiduciary duty where respondent, among other things, approved real estate loans in which he had a personal financial interest and failed to disclose that interest to his bank's Board of Directors). The undersigned notes that the *Kaplan* decision cited by Respondent in this case predated the *Vickery* decision by several months, and the Comptroller would reasonably have been expected to be aware of *Kaplan* and to incorporate its holdings as appropriate.

[40] *See, e.g.*, *In the Matter of Smith and Kiolbasa*, Final Decision, No. 18-036-E-I, at **26-28 (FRB March 24, 2021), available at https://www.federalreserve.gov/newsevents/pressreleases/files/enf20210330a1.pdf (finding breach of fiduciary duty without requiring showing of institutional risk); *In the Matter of Harry Calcutt III*, Final Decision, Nos. 12-568e & 13-115k, 2020 WL 847250, at **14-16 (FDIC Dec. 15, 2020) (same); *In the Matter of Katharina Gully*, Final Decision, No. 00-0701-I, 2002 WL 34156884, at *8 (NCUA July 23, 2002) (same).

[41] *Smith and Kiolbasa* at *27 (internal quotation marks and citation omitted); *accord Ellsworth*, 2016 WL 11597958, at *15 (duty of loyalty requires fiduciaries "to avoid conflicts of interests and to act solely for the [bank's] benefit").

duty of loyalty is the duty of candor,"[42] which requires these individuals "to disclose all material relevant to [bank] decisions from which they may derive a personal benefit."[43] Indeed, "[o]missions are sufficient to trigger a violation of this duty"[44]—the duty of candor obliges fiduciaries to disclose to the bank everything they know about transactions in which they hold a personal financial interest, "even if not asked."[45]

Respondent does not contest that he owed the Bank a fiduciary duty of loyalty. Rather, he argues that the referral arrangement did not create any conflict of interest that would violate such a duty, because the loans generated pursuant to the arrangement "were all underwritten in accordance with [the Bank's] usual processes," the Bank "did not expend any amounts in addition to what it had already agreed to pay as compensation for making these loans," and the Bank's borrowers did not "incur any additional costs as a result of the arrangement." Opposition at 12. This approach is unavailing. It is undisputed that Respondent had a personal financial interest in the generation of these loans above and beyond his compensation as Area Manager. *See* CSOF ¶¶ 11, 21; Answer ¶ 54. It is also undisputed that Respondent did not disclose this personal interest, or any other details regarding his private arrangement with Jablonski, to the Bank in whose interests he was obliged to be wholly acting. *See* EC Ex. PSD-003 (Maffettone Dep. 32:9-22). Put simply, Respondent used his position at the Bank "for [his] own personal gain,"[46] thereby violating his duty of loyalty, and did not inform the Bank of this fact, thereby additionally violating his duty

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[42] *Smith and Kiolbasa* at *27 (internal quotation marks and citation omitted).

[43] *In the Matter of Tonya Williams*, Final Decision, No. 11-553e, 2015 WL 3644010, at **8-9 (FDIC Apr. 21, 2015) (internal quotation marks and citation omitted); *accord Ellsworth*, 2016 WL 11597958, at *15.

[44] *Smith and Kiolbasa* at *27.

[45] *In the Matter of Michael Sapp*, Final Decision, Nos. 13-477e & 13-478k, 2019 WL 5823871, at *14 (FDIC Sep. 17, 2019) (internal quotation marks and citation omitted).

[46] *Smith and Kiolbasa*, at *27 (internal quotation marks and citation omitted).

of candor.[47] The undisputed material facts thus establish a breach of fiduciary duty sufficient to constitute actionable misconduct under Sections 1818(e) and 1818(i).

2. It Cannot Be Determined At This Juncture Whether Respondent Also Violated His Duty of Care

In addition to a duty of loyalty, bank officers, directors, and employees owe the bank a fiduciary duty of care that at all times requires them "to act in good faith and in a manner reasonably believed to be in the bank's best interest."[48] In furtherance of this duty, bank fiduciaries must "act diligently, prudently, honestly, and carefully in carrying out their responsibilities and must ensure their bank's compliance with state and federal banking laws and regulations."[49] Enforcement Counsel asserts that Respondent violated this duty by entering into an off-book referral arrangement that he had reason to know was prohibited by the Bank, *see* Motion at 19, and that hampered the Bank's ability to ensure that it was complying "with governing laws and regulations, including RESPA," *id.* at 22. In response, Respondent contends that he "believed in good faith that Citizens would not prohibit him continuing to work to generate loans," albeit not in his own name, "so long as he also fulfilled all of his Area Manager responsibilities," which he claims that he indisputably did. Opposition at 14.

Viewing the evidence in the light most favorable to Respondent as the non-moving party,[50] the undersigned finds that the undisputed material facts do not quite establish a breach of Respondent's fiduciary duty of care to the Bank. Certainly, the record establishes that Respondent was not candid with the Bank regarding the referral arrangement and that he exercised poor judgment, at minimum, in entering into a clandestine private agreement with a subordinate outside

[47] *See Ellsworth*, 2016 WL 11597958, at *15.

[48] *Id.*

[49] *Williams*, 2015 WL 3644010, at *9 (internal quotation marks and citation omitted).

[50] *See Scott*, 550 U.S. at 380; *Anderson*, 477 U.S. at 255.

of the Bank's payroll system that implicated the work-related duties of both individuals.[51] It is likewise undisputed that Respondent's conduct constituted a violation of Bank policy and was grounds for discipline or termination had Respondent not resigned.[52] And there is force to Enforcement Counsel's argument that "[a]n ordinary prudent person in the same circumstances would have ensured that any financial arrangement with another employee regarding Bank business was well documented, disclosed to and approved by the [B]ank." Motion at 23. All of these things are indicia of a potential lack of diligence, prudence, honesty, or carefulness on the part of Respondent rising to the level of a breach of his fiduciary duty of care.

Yet it is also at least colorable, based on the present record, that Respondent in fact held a good faith belief that the mechanics of the referral arrangement and his compensation thereunder were not in conflict with the "non-producing" nature of his new position, given that all loans were being referred to Jablonski and originated under Jablonski's name with, at most, some degree of assistance by Respondent. Respondent says as much in his pleadings and in the incomplete excerpts[53] of his deposition testimony offered by the parties as exhibits.[54] While Respondent should have exercised much better judgment, the facts thus far adduced do not compel a finding that he failed to carry out his responsibilities as Area Manager or that he could not reasonably have believed that he could act at all times in the Bank's best interests, as his fiduciary duty of care required, despite his arrangement with Jablonski. It is even within the realm of plausibility, at this stage, that Respondent might reasonably have been unaware at the time that he was being

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[51] *See, e.g.*, Resp. Ex. B (Maffettone Dep. 122:18-123:4).

[52] Respondent's expert agrees on both of these points. *See* Resp. Ex. J (Faulkner Dep. 25:20-26:25, 28:23-29:25, 31:8-16, 48:23-24, 50:7-8); Resp. Ex. M (Faulkner Expert Report at 6).

[53] *See* note 8, *supra*, regarding the undersigned's direction that the parties provide full and complete copies of all deposition transcripts being relied upon in the future.

[54] *See* Answer at 12-13; EC Ex. PSD-003 (Maffettone Dep. 40:1-7, 40:24-41:7, 72:4-19); *see also* EC Ex. PSD-007 (May 23, 2017 email in which Respondent asks a superior, "[A]t what point do you suggest I stop originating loans in my name?").

compensated twice for the closure of loans subject to the arrangement, as he asserts.[55] The duty of care, more so than the duty of loyalty, may turn on degrees of reasonableness or good faith or credibility that are more readily determinable at hearing than on summary disposition.[56]

None of this means, of course, that Respondent did not engage in actionable misconduct—there is no "bad faith" requirement for a potential RESPA violation or the engagement in unsafe or unsound practices, and as the undersigned has held, Respondent breached his duty of loyalty by using Bank resources for personal benefit, regardless of anything else. But with respect to the duty of care, there still exist genuine issues of material fact as to whether Respondent acted "in good faith and in a manner reasonably believed to be in the bank's best interest" that are better addressed at a later stage.[57] As for failing to ensure the Bank's compliance with governing laws and regulations, Enforcement Counsel argues only that Respondent's arrangement hampered the Bank's ability to monitor its own compliance risk, not that Respondent himself was lax in Bank-related compliance duties, as appears necessary under the applicable standard.[58] *See* Motion at 22. And while it is undisputed that Respondent's conduct violated Bank policy, the undersigned declines to hold that any violation of bank policy by a bank fiduciary *per se* constitutes a breach of that fiduciary's duty of care, without some further manner in which the violative behavior is indisputably shown to be materially imprudent, dishonest, careless, or lacking in diligence or good faith. *See id.* The undersigned therefore denies Enforcement Counsel's motion for summary disposition on its claim that Respondent breached his fiduciary duty of care.

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[55] *See* EC Ex. PSD-003 (Maffettone Dep. 114:1-115:9).

[56] *Cf. Blanton*, 909 F.3d at 1174-75 (material factual dispute existed as to whether bank official who filed inaccurate call reports reasonably believed in the reports' accuracy, precluding summary disposition in Section 1818 action).

[57] *Ellsworth*, 2016 WL 11597958, at *15.

[58] *See Williams*, 2015 WL 3644010, at *9.

C. The Effects Prongs of Section 1818 Are Satisfied By Respondent's Undisputed Personal Gain

An agency may satisfy the effect element of an action for a prohibition order under Section 1818(e) or a second-tier civil money penalty under Section 1818(i) by demonstrating that the respondent "received financial gain or other benefit" from the charged conduct[59] or that such conduct resulted "in pecuniary gain or other benefit" for the respondent,[60] respectively. In this case, it is undisputed that Respondent received approximately $50,000 in cash payments from Jablonski under the terms of the referral arrangement. *See* SOF ¶¶ 14-15; CSOF ¶ 21; Answer ¶ 65. While Respondent characterizes this amount as "nominal" and "de minimis," Opposition at 19, he offers no authority establishing some lower limit on how much financial gain an IAP must receive from his or her misconduct before the relevant statutes are triggered, and the undersigned finds that Respondent's gain is large enough in any event.[61] Accordingly, Enforcement Counsel's motion for summary disposition is granted as to the issue of Respondent's personal gain.

D. Respondent's Culpability Cannot Be Determined At This Stage

As noted, an agency seeking a Section 1818 order of prohibition against an IAP must demonstrate culpability as well as misconduct and effect: proof that the IAP's conduct involves either "personal dishonesty" or a "willful or continuing disregard" of the safety or soundness of the institution in question.[62] Both of these criteria "require some showing of scienter"—that is, evidence of an intentionality or recklessness to the charged conduct that goes beyond mere

[59] 12 U.S.C. § 1818(e)(1)(B)(iii)

[60] *Id.* § 1818(i)(2)(B)(ii)(III).

[61] Respondent's argument that the amount sought by the OCC as a civil money penalty is excessive, disproportionate, or otherwise subject to mitigating factors should be raised at the appropriate stage of the proceedings and is not considered here. *See* Opposition at 19-21.

[62] 12 U.S.C. § 1818(e)(1)(C).

negligence.[63] Enforcement Counsel argues that the standard for personal dishonesty is satisfied by the undisputed facts of this case. *See* Motion at 24-26. Respondent contends that his actions were driven by poor judgment rather than dishonesty. *See* Opposition at 16-18. Viewing the evidence, again, in the light most favorable to Respondent as the non-moving party, the undersigned finds that material questions of fact remain as to the level and degree of Respondent's culpability and that summary disposition is therefore inappropriate at this time.

Personal dishonesty within the meaning of Section 1818(e) encompasses "a range of behavior, including a disposition to lie, cheat, or defraud; untrustworthiness; lack of integrity; misrepresentation of facts and deliberate deception by pretense and stealth; or want of fairness or straightforwardness."[64] Enforcement Counsel argues that Respondent's undisputed conduct falls within this standard in multiple respects. First, it maintains that his failure to disclose the referral arrangement to the Bank was dishonest, because "he knew or had reason to know" that the arrangement was prohibited and that knowledge of its existence could lead to his termination. Motion at 24. Enforcement Counsel adverts to "[t]he fact that the payments at issue were made outside of the Bank's official payroll system entirely in cash, and typically off Bank premises," as evidence that Respondent sought to consciously conceal the nature of the arrangement. *Id.* at 25. And it points to Respondent's decision to submit "an immediately effective resignation over email the day before he was scheduled to be interviewed by Bank investigators" as a sign that he understood that what he was doing was wrong and would be subject to discipline.[65] *Id.*

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[63] *Dodge*, 744 F.3d at 160 (internal quotation marks and citation omitted).

[64] *Williams*, 2015 WL 3644010, at *10 (internal quotation marks and citation omitted); *accord, e.g., Michael v. FDIC*, 687 F.3d 337, 351 (7th Cir. 2012).

[65] Enforcement Counsel asserts that, at the very least, "Respondent was 'heedlessly indifferent to the legality of his conduct,'" which it claims "is enough to 'satisfy the state of mind requirement of 12 U.S.C. § 1818(e)(1)(C).'" Opposition at 25 (quoting *Shollenburg v. FDIC*, 130 Fed. App'x 889, 891-892 (9th Cir. 2005)). The case Enforcement Counsel cites for this proposition, however, involved a factual finding that the respondents had "*knowingly* provid[ed] false information," a circumstance that is itself strongly indicative of personal dishonesty,

In response, Respondent asserts that the personal dishonesty standard in this context is satisfied only by "affirmative acts of concealment" or some more "active nondisclosure" than what has been shown here. Opposition at 17. He argues that he did not try to keep the referral arrangement secret from the Bank, citing "openly held" weekly pipeline meetings with subordinates in which loans subject to the arrangement were among those reviewed. *Id.* He notes that he "often" asked one of his assistants questions regarding these loans, *id.*, and maintained a spreadsheet that included the loans, which he shared weekly with that assistant over the Bank email system. *See id.* He states that many of the payments from Jablonski under the arrangement were made on Bank property. *See id.* And he generally reiterates his ostensibly good faith belief "that he was simply continuing a compensation arrangement that was sanctioned by the Bank," *id.* at 16, and that there was nothing prohibited about his splitting fees on loans originated in Jablonski's name. *See id.* at 16-17.

The undersigned finds that the present record does not conclusively demonstrate that Respondent acted in a personally dishonest manner, as opposed to exhibiting extremely poor judgment. While it is not necessary for the OCC to prove some "affirmative" or "active" concealment of the referral arrangement by Respondent,[66] the undersigned cannot conclude at this stage that Respondent's conduct necessarily amounts to culpable dishonesty rather than a

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and one that is not alleged to be present here. *Shollenburg*, 130 Fed App'x at 891 (emphasis added).

[66] *See Dodge*, 744 F.3d at 160 ("The personal dishonesty standard of § 1818(e) is satisfied when a person disguises wrongdoing . . . or fails to disclose material information."); *accord, e.g.*, *In the Matter of Donald Watkins, Sr.*, Final Decision, Nos. 17-0154e & -0155k, 2019 WL 6700075, at *8 (FDIC Oct. 15, 2019) ("[W]ithholding material information from either the Bank or the Bank's directors is evidence of personal dishonesty."). Here, as discussed in Part IV.B.1 *supra*, the undisputed facts demonstrate that Respondent failed to disclose information to the Bank regarding the extent of his personal financial interest in the loans being originated by Jablonski, such that he breached his fiduciary duty of loyalty; no additional showing of affirmative or active concealment is therefore required. Of course, failure to disclose material information *standing alone* is not enough to demonstrate personal dishonesty—as *Dodge* further notes, the culpability prong of 1818(e) also requires proof of scienter. *See Dodge*, 744 F.3d at 160. Thus, for the personal dishonesty standard to be satisfied in this instance, there must be some showing regarding Respondent's mindset when failing to disclose the information in question that has not yet been demonstrated by Enforcement Counsel.

negligence of mind. That is, it is plausible that Respondent was trying to disguise what he knew to be wrongdoing. It is also not overly credible that he believed that his arrangement was in any way normal or had been approved by the Bank as a continuation of the transition plan. The mere fact that Respondent sent loan-related spreadsheets through company email or discussed the pipeline progress of loans subject to the arrangement in weekly meetings with Jablonski and two assistants, moreover, does not itself signify a lack of culpability.[67] Nor does the assertion that the cash payments sometimes occurred at the Bank rather than in the parking lot or elsewhere.

But as with the question of good faith, Respondent's credibility—and by extension, his honesty—is best weighed here by the undersigned as factfinder through a fuller accounting of Respondent's conduct in hearing testimony rather than on summary disposition,[68] particularly given the excerpted nature of the deposition transcripts. Drawing "all justifiable inferences" in Respondent's favor, as the undersigned is bound to do at this stage, the factual record as developed does not compel a finding of personal dishonesty.[69] That aspect of Enforcement Counsel's motion is therefore denied.

V. Conclusion

The undersigned hereby recommends the partial entry of summary disposition in favor of Enforcement Counsel in the manner and to the extent detailed above—specifically, on the issues of the breach of Respondent's fiduciary duty of loyalty and on his personal financial gain as a

[67] There is no evidence, for example, that those weekly meetings involved discussion of the referral arrangement itself, as might have happened if it was nothing to hide, and it is undisputed that Respondent did not disclose the existence of the arrangement to his assistants or to anyone else other than Jablonski. *See* EC Ex. PSD-003 (Maffettone Dep. 32:4-22) (testifying that Respondent did not discuss the arrangement with his assistants, with the Bank, or with anyone else).

[68] *See Thompson v. Dist. of Columbia*, 967 F.3d 804, 812-13 (D.C. Cir. 2020) ("We view the evidence in the light most favorable to the party opposing summary judgment . . . and avoid weighing the evidence or making credibility determinations.").

[69] *Anderson*, 477 U.S. at 255.

result of that actionable misconduct. Under the Uniform Rules, a recommended decision regarding this determination will be deferred until after a hearing on the remaining issues is conducted.[70]

SO ORDERED.

Issued: April 5, 2021

Jennifer Whang
Administrative Law Judge
Office of Financial Institution Adjudication

[70] 12 C.F.R. § 19.30. Pursuant to the July 8, 2020 Order Setting Procedural Schedule, such hearing is presently scheduled to begin on May 24, 2021, in the District of Rhode Island or at some other location mutually agreed to by the parties. At the telephonic scheduling conference held on March 23, 2021, there was agreement that the parties would confer and select a later date for the hearing sometime during the summer, which the undersigned is awaiting.