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

In the Matter of:

HIREN PATEL,
Former Chairman of the Board,
Chief Executive Officer, and
Controlling Stockholder

The National Republic Bank of Chicago
Chicago, Illinois

Docket No.:
AA-EC-2018-89

ORDER GRANTING IN PART AND DENYING IN PART
ENFORCEMENT COUNSEL'S MOTION FOR SUMMARY DISPOSITION[1]

[1] Both parties have filed documents under seal. While the undersigned has endeavored to refrain from citing to anything that has been filed under seal, out of an abundance of caution, this order is being filed "under seal." As noted below, the parties shall notify the undersigned's office whether any portion of this order should remain under seal. After that time, the undersigned will issued a public version of this order.

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I. **Background**

The Office of the Comptroller of the Currency ("OCC") commenced this action against Respondent Hiren Patel ("Respondent") on February 7, 2018, filing a Notice of Charges ("Notice" or "NOC") that seeks an order of prohibition and the imposition of a $1 million civil money penalty against Respondent pursuant to Section 8 of the Federal Deposit Insurance ("FDI") Act, 12 U.S.C. §§ 1818(e) and (i). The Notice alleges that Respondent, in his capacity as Chairman of the Board of Directors ("Chairman"), Chief Executive Officer ("CEO"), and controlling stockholder of the National Republic Bank of Chicago ("the Bank"), was involved in Bank lending decisions that violated several laws and regulations as well as a final cease and desist order, constituted unsafe or unsound practices, and breached his fiduciary duties to the Bank.[2] The Notice alleges that Respondent's misconduct ultimately resulted in the Bank suffering or being likely to suffer financial loss and that such conduct demonstrated a continuing or willful disregard for the safety and soundness of the Bank, was part of a pattern of misconduct, and/or involved personal dishonesty.[3] On February 27, 2018, Respondent filed an Answer to the Notice ("Answer").

Following the remand and reassignment of this matter in the wake of the Supreme Court's decision in *Lucia v. SEC*[4] and completion of discovery, Enforcement Counsel for the OCC ("Enforcement Counsel") filed a Motion for Summary Disposition against Respondent Hiren Patel, along with a Brief in Support of its Motion ("Motion") and a Statement of Undisputed Material Facts in Support of Its Motion for Summary Disposition against Respondent Hiren Patel ("SMF") on July 13, 2021. Enforcement Counsel filed an exhibit list, along with a sealed exhibit

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[2] Notice ¶¶ 70-71 (Article III), 97-99 (Article IV), 141-142 (Article V), 176 (Article VI), 205-207 (Article VII).
[3] *Id.*
[4] 138 S. Ct. 2044 (2018).

list.[5] On August 13, 2021, Respondent filed a "Memorandum in Opposition to the OCC's Motion for Summary Disposition" ("Response") and a Statement of Undisputed and Disputed Material Facts in Opposition to the OCC's Motion ("SMF-OPP"). Respondent also filed an exhibit list, along with a sealed exhibit list and a "Motion for Leave to File under Seal," which was unopposed by Enforcement Counsel and is hereby granted.[6] Respondent opposes Enforcement Counsel's Motion as to all five articles in the Notice, asserting that genuine issues of material fact remain at issue. In addition, Respondent requests oral argument,[7] which the undersigned finds unnecessary and hereby denies.

Respondent's Response set forth a statute of limitations ("SOL") argument, and on September 1, 2021, both Respondent and Enforcement Counsel (collectively, "Parties") requested leave to file supplemental briefs on the statute of limitations issue, which was granted.[8] On September 10, 2021, Enforcement Counsel filed a "Supplemental Brief to its Motion for Summary Disposition in Opposition to Respondent's Statute of Limitations Arguments" ("EC SOL Response"). And on September 24, 2021, Respondent filed a "Reply Memorandum in Support of His Statute of Limitations Defense" ("R. SOL Reply").

For the reasons set forth below, the undersigned recommends the grant of Enforcement Counsel's motion with respect to certain aspects of the statutory elements of misconduct, culpability, and effect, and denial in all other respects. Specifically, the undersigned concludes, based on the undisputed material facts, that

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[5] Enforcement Counsel's exhibits are referred to as "EC-MSD-" with an "*" after the exhibit number indicating the document has been filed under seal.

[6] Respondent's exhibits are referred to as "R-MSD-" with an "*" after the exhibit number indicating the document has been requested to be filed under seal.

[7] Response at 1, n. 1.

[8] *See* "Order Granting Joint Motion to Modify Hearing and Prehearing Filing Dates and Seeking Leave to File a Supplemental Brief" issued on September 2, 2021.

1) Respondent violated 12 C.F.R. §§ 32.3 and 32.5, as well as Articles VII and XIX of the August 31, 2013 Consent Order,[9] when he directed the Bank to repurchase Nicholas Lombardi's $2 million participation in the Pruthvi loan ("Lombardi Participation Repurchase");

2) Respondent violated 12 U.S.C. § 161 when he directed the Bank to allow BRT Holdings to make loan payments by authorizing overdrafts up to $500,000 ("BRT Overdrafts"), which understated the amount of past due loans on the Bank's December 31, 2013 Call Report;

3) Respondent engaged in unsafe or unsound practices in conducting the affairs of the Bank based on the Lombardi Participation Repurchase, the Norcross and Sterling Key Loans, and the BRT Overdrafts;

4) Respondent breached his fiduciary duties to the Bank based on the Lombardi Participation Repurchase, the Norcross and Sterling Key Loans, and the BRT Overdrafts;

5) The Bank suffered loss based on Respondent's conduct regarding the Lombardi Participation Repurchase and the Norcross and Sterling Key Loans, and the Bank was likely to suffer loss based on Respondent's conduct regarding the BRT Overdrafts;

6) Respondent exhibited willful or continuing disregard for the Bank's safety and soundness with regard to the Lombardi Participation Repurchase, the Norcross and Sterling Key Loans, and the BRT Overdrafts; and

7) That elements required for a first- and second-tier civil money penalty have been met; however, any showing regarding the appropriateness of the amount in light of the mitigating factors should be made by both parties at a later stage in this matter.

Motion for Sanctions

On October 26, 2021, Enforcement Counsel filed a "Motion for Sanctions Based on Respondent's Repeated Attempts to Insert an Untimely Expert into these Proceedings in Contravention of this Tribunal's Order" ("Sanction Motion"). On November 9, 2021, Respondent filed a "Response to Motion for Sanctions" ("Sanction Response"), asserting that it was appropriate for Respondent to attach Joseph Moravy's report[10] in response to the Motion because

[9] *See* EC-MSD-61 (2013 Consent Order); R-MSD-13* (2013 Consent Order). This appears to be the same exhibit; however, Enforcement Counsel considers the exhibit to be public, whereas Respondent has designated it under seal.

[10] *See* R-MSD-79 (Moravy Report).

if the undersigned were to grant Enforcement Counsel's Motion, no hearing would take place, and no proffer could be made.[11]

Having reviewed the Sanction Motion and Sanction Response, the undersigned agrees with Enforcement Counsel that the undersigned has already ruled that Respondent's designation of Mr. Moravy as an expert in this matter was untimely, that he is not permitted to submit an expert report in this matter, and that Mr. Moravy is not permitted to testify as an expert in this matter.[12] Accordingly, Respondent's use of Mr. Moravy's "expert report" as an exhibit in Respondent's Response will be given no weight; however, it will not be stricken from the record. The exhibit, R-MSD-79, is thereby preserved for consideration by the Comptroller if so warranted.

Furthermore, it is already the undersigned's view that Mr. Moravy cannot be called as a witness at the upcoming hearing, that no part of his "expert report" may be introduced into evidence at the hearing, and that neither party may question any witnesses about the contents of his "expert report." Therefore, to the extent Enforcement Counsel requests such relief, it is hereby granted. The undersigned does not find it necessary to formally strike Exhibit 6 from Respondent's previously filed reconsideration motion[13] or, as noted above, to formally strike R-MSD-79 from Respondent's Response.

As the undersigned has already ruled that Mr. Moravy's report may be proffered at the hearing[14]—if the Parties determine that a hearing remains necessary—Respondent will be permitted to do so at the appropriate time; therefore, Enforcement Counsel's request regarding the

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[11] *See* Sanction Response at 2.

[12] *See* "Order Denying Respondent's Motion for Leave to Designate Rebuttal Expert Witness and to Adjust Discovery Schedule," filed on June 16, 2021.

[13] *See* Respondent's "Motion to Exclude the OCC's Accounting Expert or, in the Alternative, to Reconsider Respondent's Motion to Designate Rebuttal Accounting Expert," filed on July 2, 2021.

[14] *See* "Order Denying Respondent's Motion to Exclude the OCC's Accounting Expert and Order Denying Respondent's Motion to Reconsider Motion to Designate Rebuttal Accounting Expert" at 3, filed on July 21, 2021.

proffer is denied. The undersigned puts Respondent on notice, however, that any further attempt to attach Mr. Moravy's "expert report" to any other filing in this matter, to call Mr. Moravy as a witness, or to question any witness regarding Mr. Moravy's "expert report" will be denied and that the undersigned will, *sua sponte*, consider Enforcement Counsel's request to prohibit Respondent from formally proffering Mr. Moravy's expert report as a sanction for repeated attempts to contravene the undersigned's previous rulings on this matter.

II. Factual Summary

The following is drawn from the Parties' pleadings, the statement of material facts and Respondent's response thereto, and the exhibits submitted in support. Where the Parties appear to be in some genuine factual dispute, both accounts are noted as well as the evidence that each side has cited in support. The undersigned will then address where appropriate in this Order the extent to which these disputes implicate facts that are material to the resolution of some aspect of the instant action.

A. In General

Respondent acquired the Bank in 1984, and at all times relevant to this proceeding, was the Bank's CEO, Chairman of the Board, and principal shareholder in the stock of the Bank's parent company, until he resigned on July 2, 2014.[15] Although Respondent lacked experience and education in the banking industry prior to acquiring the Bank,[16] he grew the Bank's assets from $30 million in 1984 when he acquired it, to over $1 billion in assets. The Bank served minority-owned businesses and developed special expertise in financing hotels, motels, gas stations, and convenience stores.[17]

[15] Notice and Answer ¶¶ 6-7; *see also* SMF ¶¶ 4-5, 34; SMF-OPP ¶ 1.
[16] SMF ¶ 7.
[17] SMF-OPP ¶¶ 5, 7; *see* R-MSD-1 (Hiren Dep.) at 18-19; R-MSD-2* (Plante Moran Audit Report).

The Board consisted of: Respondent, President Edward Fitzgerald, and three to four independent directors. Bank management that reported to the Board included Fitzgerald, along with Chief Financial Officer ("CFO") Patrick Stack, Chief Credit Officer ("CCO") Bob Hinman, and Loan Reviewer Charles Hilbrich.[18] Respondent was heavily involved in lending decisions and approving loans, as he would meet with potential loan customers and structure deals before handing it over to Bank personnel, including the Bank president, Edward Fitzgerald.[19] Indeed, Enforcement Counsel adduces evidence, not materially disputed by Respondent, that Respondent exercised a significant amount of control over all aspects of Bank operations, including "even the most mundane decisions."[20] CCO Hinman, for example, testified that the Board simply served as "rubber stamps" for Respondent's desired actions,[21] and Enforcement Counsel offers evidence that President Fitzgerald largely operated at Respondent's behest[22] and that "[o]ther Bank officers had limited authority to act without Respondent's involvement or approval."[23]

B. <u>OCC Examinations</u>

The OCC conducted an examination of the Bank ("August 31, 2009 [Report of Examination] ROE")[24] and based on the findings of that examination, the OCC and the Bank entered into a Formal Agreement on April 2, 2010 ("2010 Formal Agreement"),[25] which was

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[18] SMF-OPP ¶ 8; *see also* R-MSD-3* (Board Agenda August 14, 2012); R-MSD-4* (Board Agenda July 17, 2013); R-MSD-5* (Board Agenda January 29, 2014).

[19] SMF ¶ 10; *see* EC-MSD-4 (Hiren Dep.) at 58, 84, 90, 96.

[20] SMF ¶ 12; *see also id.* ¶¶ 11, 13-14.

[21] SMF ¶ 8 (quoting EC-MSD-17 (Hinman Dep.) at 53).

[22] *See id.* ¶¶ 13 ("You had Hiren who wanted to run it the way he wanted to run it. You had Ed [Fitzgerald] doing what Hiren wanted.") (quoting EC-MSD-14 (Martinez Dep.) at 39), 17 ("Hiren Patel and Ed Fitzgerald make all the decisions, mostly Hiren Patel. . . . And Ed would pretty much do as he was told by Hiren Patel.") (quoting EC-MSD-44 (Rylander Dep.) at 78-79).

[23] *Id.* ¶ 14; *see also id.* ¶¶ 15-17.

[24] *See* EC-MSD-56* (August 31, 2009 ROE).

[25] *See* EC-MSD-57 (2010 Formal Agreement).

signed by Respondent.[26] The 2010 Formal Agreement included provisions that "[u]nderwriting and monitoring of construction loans is not consistently in accordance with bank policy. Significant and unwarranted exceptions have been granted on several Bharat Patel Loans that are considered unsafe and unsound"[27]; and "[f]ailure to maintain adequate capital is an unsafe and unsound banking practice."[28]

While Enforcement Counsel asserts that the Bank had a long history of being subject to enforcement actions and consent orders under Respondent's leadership,[29] Respondent claims in return that the Bank had a collaborative relationship with the OCC until 2013, when the relationship became more adversarial due to the appointment of a new examiner-in-charge, Becky Wilbert Donhardt.[30]

In an interim report of examination issued on January 22, 2013 ("January 2013 Interim ROE"),[31] the OCC determined that loans to depositor Bharat Patel were combinable and violated the legal lending limit ("LLL").[32]

The OCC began a full scope examination of the Bank on February 4, 2013, which led to the issuance of a Full Scope ROE to the Bank on April 29, 2013 ("2013 Full Scope ROE").[33] The 2013 Full Scope ROE noted that the Bank exhibited "extremely unsafe or unsound practices" and that the overall condition of the Bank, oversight by the Board and management, asset quality,

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[26] SMF ¶ 26; *see* EC-MSD-57 (2010 Formal Agreement) at 11.
[27] EC-MSD-57 (2010 Formal Agreement) at 8.
[28] *Id.* at 15.
[29] SMF ¶ 9.
[30] SMF-OPP ¶ 12; *see also* R-MSD-8 (Waltz Dep.) at 8-9, 23-26; R-MSD-9 (Ritter Dep.) at 114-116; R-MSD-1 (Hiren Dep.) at 293-294. Ms. Donhardt is referred to variously as Ms. Wilbert or Ms. Donhardt in contemporaneous documents, but is referred to here by the name she presently goes by, which is Donhardt. *See* EC-MSD-261 (Donhardt Dep.) at 12.
[31] *See* EC-MSD-51* (January 2013 Interim ROE).
[32] SMF ¶¶ 24, 86; *see* EC-MSD-51* (January 2013 Interim ROE) at 21; EC-MSD-55* (LLL Memo).
[33] SMF ¶ 27; *see* EC-MSD-15 (2013 Full Scope ROE).

capital levels, and earnings were "critically deficient."[34] In particular, the 2013 Full Scope ROE concluded that under Respondent's direction, the Bank had "implemented a high-risk strategy allowing for excessive concentrations in hotel lending predominantly funded with rate sensitive, non-core funding sources including a concentration in brokered deposits."[35]

The Board responded to the 2013 Full Scope ROE by letter dated June 12, 2013, in which it agreed to engage a consultant to address the OCC's issues.[36] The Board also appealed the findings in the 2013 Full Scope ROE, contending that the examination team for that ROE "had made material errors and violated OCC examination policies."[37] As a result of that appeal, OCC supervisory personnel agreed that $12.4 million in excess loan impairments was in error.[38]

Based on the 2013 Full Scope ROE, the OCC issued an order against the Bank on August 31, 2013 ("2013 Consent Order"),[39] which replaced the 2010 Formal Agreement. Respondent signed the 2013 Consent Order.[40] The 2013 Consent Order directed the Bank to retain a forensic auditor to conduct an investigation of identified issues.[41] The Bank retained McGladrey LLC in this capacity, and on January 6, 2014, McGladrey issued its Forensic Accounting Investigation, which concluded that "significant improvements are needed" to the Bank's lending policies, procedures, and activities.[42]

[34] SMF ¶ 28; *see* EC-MSD-15 (2013 Full Scope ROE) at 1-5.
[35] SMF ¶ 8 (quoting EC-MSD-15 (2013 Full Scope ROE) at 4).
[36] *Id.* ¶ 28; *see* EC-MSD-60 (Board Response to 2013 ROE).
[37] SMF-OPP ¶ 20; *see id.* ¶ 21.
[38] *Id.*¶ 22; *see* R-MSD-12* (June 28, 2013 Fleming Letter); R-MSD-83 (Fitzgerald Dep.) at 178.
[39] SMF ¶ 29; *see* EC-MSD-61 (2013 Consent Order).
[40] SMF ¶ 29; *see* EC-MSD-61 (2013 Consent Order); EC-MSD-4 (Hiren Dep.) at 130-131.
[41] SMF ¶ 29; *see* EC-MSD-61 (2013 Consent Order) at 12-24 (Article XIII).
[42] SMF ¶ 31; (quoting EC-MSD-47* (McGladrey Forensic Audit)).

The OCC issued an interim report of examination on November 22, 2013 ("November 2013 Interim ROE").[43] The November 2013 Interim ROE stated that the condition of the Bank, Board and management oversight, asset quality, capital levels, and earnings remained "critically deficient."[44]

The OCC began another full scope examination of the Bank on February 24, 2014. Before a Full Scope ROE was issued, the OCC issued a Directive Letter on March 27, 2014 ("March 2014 Directive Letter")[45] directing the Board to address certain identified issues immediately. On July 2, 2014, the OCC issued the Bank a Prompt Correction Action Directive, requiring the Bank to take certain actions, including dismissing Respondent from any and all positions as a director or senior executive officer ("July 2014 Prompt Corrective Action Directive").[46] Respondent resigned as Chairman and CEO of the Bank on that same day.[47]

The OCC issued a Full Scope ROE to the Bank on September 16, 2014 ("2014 Full Scope ROE").[48] The 2014 Full Scope ROE stated that the condition of the Bank remained "critically deficient" in all of the areas previously identified.[49] On that same day, the OCC sent a letter to the Board confirming that the Bank was critically undercapitalized ("September 2014 Critically Undercapitalized Notice")[50] and that the OCC was statutorily required to place a critically undercapitalized bank into receivership within ninety days.[51] On October 24, 2013, the OCC

[43] *Id.* ¶ 30; *see* EC-MSD-64* (November 2013 Interim ROE).
[44] SMF ¶ 30 (quoting EC-MSD-64* (November 2013 Interim ROE) at 1-6).
[45] *Id.* ¶ 32; *see* EC-MSD-66* (March 2014 Directive Letter).
[46] SMF ¶ 33; *see* EC-MSD-6 (July 2014 Prompt Corrective Action Directive).
[47] *See* SMF ¶ 34; Answer ¶ 24; *see also* EC-MSD-67* (Respondent's Resignation Letter); EC-MSD-68 (July 2, 2014 Board Minutes).
[48] SMF ¶ 35; *see* EC-MSD-5* (2014 Full Scope ROE).
[49] SMF ¶ 35 (quoting EC-MSD-5* (2014 Full Scope ROE) at 1-6).
[50] *Id.* ¶ 36; *see* EC-MSD-69* (September 2014 Critically Undercapitalized Notice).
[51] SMF ¶ 36; *see* EC-MSD-69* (September 2014 Critically Undercapitalized Notice) at 5.

appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver for the now-failed Bank.[52] The FDIC estimated that as of March 31, 2015, the Bank's failure caused a $111.6 million loss to the Deposit Insurance Fund ("DIF").[53] A subsequent Material Loss Review of the Bank's failure by the Treasury Department's Office of the Inspector General ("OIG") concluded that the Bank "failed primarily because of undue influence by the chairman of the board over the Bank's operations and critical decisions."[54]

C. Pruthvi Loan

The Bank's largest borrowing relationship was with Bharat Patel ("Bharat")[55], an individual who owned and operated hotels with his family members through his hotel management business, Sun Development and Management Corporation ("Sun Development").[56] Bharat and Sun Development typically had between 15 and 20 outstanding Bank loans at any given time between 2011 and 2014.[57] As of September 30, 2012, for example, the Bank had 15 loans made to 17 Bharat-related entities, which amounted to $173 million, which was 97% of the Bank's capital and surplus.[58]

On December 15, 2011, Bharat requested a new loan from the Bank for his entity Pruthvi LLC ("Pruthvi"), to be secured by corporate guarantees from five Bharat-related entities that

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[52] SMF ¶ 37; *see* EC-MSD-2* (Receivership Determination).

[53] SMF ¶ 38; *see* EC-MSD-3 (Material Loss Review) at 1.

[54] SMF ¶ 39 (quoting EC-MSD-3 (Material Loss Review) at 2).

[55] There are numerous individuals in this matter with the last name "Patel" who are unrelated to Respondent. For ease of reference, they will each be referred to by their first name except where remaining faithful to quotes from the Parties' filings and exhibits.

[56] *Id.* ¶¶ 18-19.

[57] *Id.* ¶ 21; *see* EC-MSD-47* (McGladrey Forensic Audit) at 5-7; EC-MSD-51* (January 2013 Interim ROE) at 21.

[58] SMF ¶ 22; *see* EC-MSD-51* (January 2013 Interim ROE) at 21. It is undisputed that Respondent treated the loans to Bharat-related entities as a single borrower relationship and "was in frequent contact with Bharat Patel regarding his loans." SMF ¶¶ 23, 25.

owned hotel properties ("JPM5").[59] Bharat warned the Bank that he could not formally pledge JPM5 as collateral, however, because JPM5 was already pledged to JPMorgan Chase Bank ("JPMC") through JPMC's loan agreement with Bharat-related entity Sun Companies Holdings LLC ("SunCo"), which restricted further pledging of the JPM5 entities without JPMC's prior consent, at risk of automatic default under the agreement.[60] In his own words to President Fitzgerald, Bharat had "no problem" offering JPM5 as collateral to secure the loan "provided you know that this would create a fraudulent conveyance."[61]

For his part, Respondent indisputably knew that the JPM5 collateral had been previously pledged and could not be repledged without the consent of JPMC; among other things, President Fitzgerald forwarded Respondent multiple emails from Bharat to this effect and asked to discuss it with him.[62] Yet regardless of this restriction, Respondent required pledges of the JPM5 equity interests from Bharat in order to secure the Bank's loan to Pruthvi.[63]

In order to avoid a default on SunCo's loan agreement with JPMC, Bharat also requested that the Bank refrain from filing any Uniform Commercial Code financing statements ("UCC-1") on the JPM5 security interest, which would have alerted JPMC that the interests were repledged.[64] Respondent agreed not to perfect the Bank's security interest in JPM5.[65] Respondent testified that the decision to accept the guarantee and not file a UCC-1 was a conscious and knowing "business

[59] These entities were Gateway Lodging Associates; Church St. Lodging Associates; Osceola Lodging Associates; Ridgefield Park Lodging Associates; and Palmdale Lodging Associates. *See id.* ¶ 43.

[60] *Id.* ¶ 46; *see also id.* ¶¶ 42-45. SunCo owned 99% of JPM5, while Sun Companies Holdings GP, LLC ("SunCo GP") owned the remaining 1% of JPM5. *See id.* ¶ 43. JPMC loaned SunCo $17.7 million, which was secured by JPM5.

[61] *Id.* ¶ 48 (quoting EC-MSD-30* (December 22, 2011 email)).

[62] *Id.* ¶¶ 48-50 (citing exhibits).

[63] *Id.* ¶ 51; *see* EC-MSD-45 (Hiren Dep.) at 176, 197-198, 199-200.

[64] SMF ¶ 61; *see* EC-MSD-45 (Hiren Dep.) at 196-198; EC-MSD-79 (Boudreau Memo); EC-MSD-80 (Donhardt Memo).

[65] SMF ¶ 63; *see* EC-MSD-45 (Hiren Dep.) at 193.

decision to protect the Bank,"[66] despite the undisputed fact that "[f]iling financing statements on collateral would mitigate the Bank's risk and was consistent with the Bank's policy."[67]

On December 21, 2011, the Bank's Board ratified the Pruthvi loan.[68] Although the loan presentation to the Board identified JPMC as holding the first mortgage on the JPM5 entities, it did not state that JPMC had received pledges from SunCo for the entire JPM5 equity interest; that JPMC restricted JPM5 from making additional pledges; or that the Bank did not plan to perfect its security interest in JPM5.[69]

The Parties disagree as to the Board's knowledge of the already-pledged status of the JPM5 equity interest at the time that it approved the Pruthvi loan. Respondent and President Fitzgerald stated to an OCC examiner in March 2014 that the Board had neither been informed that the JPM5 entities were fully pledged to JPMC nor that Respondent had agreed not to perfect the Bank's security interest in the Pruthvi loan collateral.[70] Further, it is undisputed that in addition to the loan presentation, the Pruthvi loan file, impairment calculations, and reports to regulators all failed to include any of this information.[71] Respondent now proffers a statement from President Fitzgerald, however, stating that to the best of his recollection, the Board was apprised of all relevant details of the Pruthvi loan at the time of its approval.[72]

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[66] SMF-OPP ¶ 58; *see* R-MSD-1 (Hiren Dep.) at 200:10-11 ("This was a business decision for us").

[67] SMF ¶ 62; *see* EC-MSD-45 (Hiren Dep.) at 165-167; EC-MSD-109 (Schwartz Dep.) at 61-64; EC-MSD-85 (October 19, 2011 Loan Policy) at 9; EC-MSD-86 (July 1, 2013 Loan Policy) at 4, 185.

[68] SMF ¶¶ 55, 59; *see* EC-MSD-78* (February 2012 Board Package); EC-MSD-83* (Pruthvi Loan Documents).

[69] *See* SMF ¶¶ 54, 66, 67.

[70] *Id.* ¶ 67; *see* EC-MSD-79 (Boudreau Memo); EC-MSD-45 (Hiren Dep.) at 196-197 (stating that Boudreau Memo accurately reflects his recollection).

[71] *See* EC-MSD-79 (Boudreau Memo).

[72] SMF-OPP ¶ 83; *see* R-MSD-45* (Fitzgerald Decl.) ¶ 9 (stating that the Board understood "the nature of the collateral and valuation supporting the loan," including that "there was a risk that the pledges would not be enforceable against the senior lender, [JPMC], because they violated a covenant that Bharat Patel had made").

The Bank originated its $24.6 million loan to Pruthvi on December 22, 2011.[73] As part of the loan's closing, the JPM5 entities signed a Guaranty of Payment and pledge agreements that "purportedly granted the Bank all of SunCo's interests in . . . the JPM5 entities, the same interests previously pledged to JPMC on the JPMC loan."[74] In all, the JPM5 equity interest comprised $39 million of the $48.4 million of total collateral on the Pruthvi loan, as valued by the Bank.[75] The remaining collateral for the loan consisted of three individual guarantors with a combined net worth of over $150 million, as well as second mortgages on three properties by the co-borrowers and 100% assignment of corporate stock.[76]

With respect to the Pruthvi loan structure, Respondent represents that "[t]he Bank also took assignments of the certificates of ownership in the [JPM5], based on advice of counsel, to ensure that Bharat was obligated to the Bank and did not use the equity in the [JPM5] to pledge those assets elsewhere."[77] Respondent states that the Bank's outside counsel "advised the Bank that the corporate guaranty agreements were permissible and enforceable," and asserts that he "relied on the Bank's counsel to draft the agreements to protect the Bank and to address the issues presented regarding the JPM-5 interests."[78] Enforcement Counsel does not dispute that the Bank's outside counsel played a role in drafting the terms of the Pruthvi loan.

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[73] SMF ¶ 59; *see* EC-MSD-83* (Pruthvi Loan Documents).

[74] SMF ¶ 60; *see* EC-MSD-84* (JPM5 Pledge Agreements). According to Respondent, "Bharat informed the Bank that he could not directly pledge the interests in the JPM-5 because of senior liens and restricted subordinated debt. The Bank therefore took the Guaranty of Payment by the JPM-5 entities, whose cash flow was sufficient to pay the monthly principal and interest obligations." SMF-OPP ¶ 55.

[75] SMF ¶ 60; *see* EC-MSD-52* (Pruthvi Loan Presentation).

[76] SMF-OPP ¶¶ 53-54. Specifically, the second mortgages were on hotel properties owned by Aakash, Inc., Beena, Inc., and Rupa, Inc. *Compare* SMF ¶ 60; EC-MSD-52* (Pruthvi Loan Presentation) (noting that the total equity in the second mortgages was approximately $9.4 million) *with* SMF-OPP ¶ 54; R-MSD-3* (Board Agenda August 14, 2012) (noting that the net equity after deducting the first mortgages was $8.4 million). There appears to be a $1 million discrepancy between these findings of fact.

[77] SMF-OPP ¶ 56.

[78] *Id.* ¶ 60.

On July 30, 2012, the Bank modified the Pruthvi loan by releasing some collateral and replacing it with different collateral, including an interest in nine real estate entities known as "Natixis-9." The modification was presented to the Board in August 2012 and the Bank perfected its security interest in Natixis-9 with a UCC-1 statement filed on October 1, 2012.[79] Once again, "[n]either the loan presentation for the Pruthvi modification nor the August 2012 minutes of the Board meeting where it was ratified indicated that JPMC restricted repledging of the ownership interests in the JPM5 entities or that the Bank had not perfected its security interest in the pledges."[80]

By the time the OCC began its 2013 Full Scope ROE on February 4, 2013, the Pruthvi loan was showing signs of distress, and the OCC downgraded the Pruthvi loan from pass to substandard and directed the Bank to place the loan on nonaccrual status "due to inadequate cash flow, low amount of tangible collateral, and excessive leveraging."[81] The Bank failed to downgrade the Pruthvi loan or to place the loan on nonaccrual status.[82] In August 2013, the OCC again downgraded the loan and directed its placement on nonaccrual status.[83] On September 18, 2013, the Board approved placing the Pruthvi loan on nonaccrual status as of January 1, 2013.[84]

The 2013 Consent Order directed the Bank to engage the services of a forensic auditor to verify the accuracy and completeness of the Bank's documents, books, and records.[85] On September 18, 2013, the OCC further directed the Bank that the forensic audit should include a

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[79] *Id.* ¶ 63; *see* R-MSD-42* (Pruthvi Loan Modification), R-MSD-45* (Fitzgerald Decl.).

[80] SMF ¶ 66; *see* EC-MSD-87* (July 30, 2012 Credit Memorandum); EC-MSD-89* (August 15, 2012 Board Minutes).

[81] SMF ¶ 68; *see* EC-MSD-15 (2013 Full Scope ROE) at 62, 66, 69, 72.

[82] SMF ¶ 69; *see* EC-MSD-64* (November 2013 Interim ROE) at 16.

[83] SMF ¶¶ 70-71.

[84] *Id.* ¶¶ 71, 90; *see* EC-MSD-91* (2013 Board Minutes) at 319.

[85] SMF ¶ 29; *see* EC-MSD-61 (2013 Consent order) at Article XIII.

review of "all loan transactions to Bharat Patel and all his related interests for the period of January 1, 2009 through August 22, 2013," which was completed in January 2014.[86] Based on the investigation, significant improvements were required with respect to the Bank's lending policies, procedures, and activities.[87]

After Bharat filed for Chapter 11 bankruptcy, the Bank filed a UCC-1 on JPM5 on September 23, 2013, and perfected its security interest on October 1, 2013.[88] Bharat's management company, Sun Companies Holdings ("Sun HC"), along with the then-owner of the JPMC loan, RCMC LLC, demanded that the Bank terminate this financing statement.[89] The Bank refused, and Sun HC and RCMC LLC filed lawsuits "seeking declaratory and injunctive relief that the JPM5 pledge agreements the Bank obtained at Respondent's direction were void, invalid, and unenforceable."[90] These lawsuits were subsequently dismissed as part of a Term Sheet agreement and resolution among the Bank, Bharat, the JPM5 entities, JPMC, and RCMC LLC.[91]

The 2014 Full Scope ROE directed the Bank to charge off $16 million of the Pruthvi loan "due, in part, to the questionable rights of the Bank to the JPM5 collateral."[92] The Bank appealed to the OCC Ombudsman, who determined that a $17.1 million charge off was appropriate.[93] The Bank charged off $17.1 million on the Pruthvi loan on September 8, 2014.[94]

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[86] SMF ¶ 29 (quoting EC-MSD-63 (November 22, 2013 letter)); *see id.* ¶ 154; EC-MSD-47* (McGladrey Forensic Audit) at OCC-00005820, OCC-00006032 (Exhibit E).

[87] SMF ¶ 31; *see* EC-MSD-65 (January 17, 2014 email).

[88] SMF ¶ 72; *see* EC-MSD-96 (Sun UCC); EC-MSD-97 (Sun GP UCC).

[89] SMF ¶ 73; *see* EC-MSD-98 (RCMC Demand Letter); EC-MSD-99 (RCMC Complaint).

[90] SMF ¶ 74; *see also id.* ¶¶ 75-76.

[91] SMF-OPP ¶¶ 69-72.

[92] SMF ¶ 77; *see* EC-MSD-110* (May 21, 2014 Directive Letter), EC-MSD-5* (2014 Full Scope ROE).

[93] SMF ¶¶ 78, 80; *see* EC-MSD-117* (Ombudsman Decision).

[94] SMF ¶ 81; *see* EC-MSD-118 (September 9, 2014 email); EC-MSD-119* (Email Attachment).

At the time of the Bank's failure, "the principal balance owed to the Bank on the Pruthvi loan was at least $24.4 million," including the $17.1 million charge-off.[95] After the FDIC became receiver for the Bank, Champ Patel acquired the Pruthvi loan from the FDIC.[96] The Pruthvi loan was assigned to Interbank, and Bharat paid the Interbank loans in full in 2015.[97]

D. Lombardi Participation Repurchase

As previously stated, the Bank entered into a 2010 Formal Agreement with the OCC, which implemented an asset diversification program related to its concentrations of credit, including its hotel loans.[98] In October 2010, the Board committed to reducing Bharat-related loans to 50% of capital by the end of 2012.[99]

In December 2011, the Bank entered into an agreement ("Participation Agreement")[100] with a Bank customer, Nicholas Lombardi ("Lombardi") to purchase a $1 million participation in the Pruthvi loan, so that the Bank would stay within its lending limit.[101] Lombardi was an original shareholder and director in the Bank when Respondent bought the bank in 1984 and was consistently a top ten depositor at the Bank.[102] The Participation Agreement was without recourse and stated that the Bank and Lombardi would each have a pro rata share of proceeds, income, losses, liabilities, and expenses with respect to the Pruthvi loan. In addition, the Bank agreed to pay Lombardi a 4% interest rate.[103]

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[95] SMF ¶ 82; *see* EC-MSD-120* (FDIC Loan Purchase Agreement).

[96] SMF-OPP ¶ 47; *see* R-MSD-33* (FDIC Large Asset Status Report).

[97] SMF-OPP ¶¶ 48; *see* R-MSD-34* (Riverside Loan/Security Agreement); R-MSD-35* (Interbank Loan Histories).

[98] SMF ¶ 100; *see* EC-MSD-57 (2010 Formal Agreement).

[99] SMF ¶ 103; *see* EC-MSD-134* (2010 Board Minutes); EC-MSD-135* (2010 ROE).

[100] EC-MSD-122 (Lombardi Participation).

[101] SMF ¶¶ 84-85; *see also* EC-MSD-122 (Lombardi Participation); EC-MSD-4 (Hiren Dep.) at 148.

[102] SMF-OPP ¶ 85; *see also* R-MSD-1 (Hiren Dep.) at 136; R-MSD-54* (Top Ten Depositors).

[103] SMF ¶ 84; *see* EC-MSD-122 (Lombardi Participation) at 2-4, 12.

In January 2013, as noted above,[104] the OCC cited the Bank for a lending limit violation related to the Bharat borrower relationship, requiring the Bank to take corrective action and stating that any new extensions of credit in that relationship would "be considered a separate and additional violation of the lending limit."[105] The Bank then increased Lombardi's participation in the Pruthvi loan to $2 million on March 14, 2013.[106] However, after seeing an article in Crain's Chicago Business Journal regarding the 2013 Consent Order imposed on the Bank by the OCC,[107] Lombardi came to the Bank in the fall of 2013 and asked the Bank to repurchase his investment.[108]

On October 10, 2013, Respondent directed Bank personnel to repurchase Lombardi's $2 million participation in the Pruthvi loan "over the objections of the Bank's controller and executive vice president" ("Lombardi Participation Repurchase").[109] By Respondent's admission, this repurchase knowingly constituted a further lending limit violation under the terms of the January 2013 Interim ROE as to the Bank's relationship with Bharat.[110] In addition, because Respondent and the Board had placed the Pruthvi loan on nonaccrual status in September 2013,[111] repurchasing the Lombardi participation contravened the OCC's directive in the 2013 Consent Order to protect the Bank's interests in substandard assets.[112]

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[104] See Section II.B.

[105] SMF ¶ 86 (quoting EC-MSD-51 (January 2013 Interim ROE) at 22).

[106] *Id.* ¶ 88; SMF-OPP ¶ 86; *see also* R-MSD-56* (Lombardi Participation, Amended).

[107] See Section II.B.

[108] SMF-OPP ¶ 87; *see* R-MSD-1 (Hiren Dep.) at 146.

[109] SMF ¶ 92; *see* EC-MSD-17 (Hinman Dep.) at 171-176; EC-MSD-125* (Svetich email); EC-MSD-126 (Hinman Dep. Ex.).

[110] SMF ¶¶ 96-97 (quoting EC-MSD-4 (Hiren Dep.) at 149); *see* SMF-OPP ¶¶ 90, 93. While Respondent admits to knowingly violating the lending limit, he assertedly believed it "would be temporary because several Indian doctor investors had expressed an interest in a participation investment." SMF-OPP ¶ 90.

[111] SMF ¶ 90; *see* EC-MSD-15 (2013 Full Scope ROE) at 73; EC-MSD-91* (2013 Board Minutes) at 319.

[112] SMF ¶ 95; *see* EC-MSD-61 (2013 Consent Order); EC-MSD-265 (Donhardt Decl.) ¶¶ 13, 18.

The Bank also paid accrued interest to Lombardi when repurchasing the participation, even though the Pruthvi loan had been moved to nonaccrual and was no longer accruing interest.[113] Beyond this payment of accrued interest, the repurchase generally "resulted in the Bank taking an additional $1.39 million loss when the Bank charged of $17.1 million of the Pruthvi loan in September 2014," since "[t]his loss would otherwise have been borne by Mr. Lombardi."[114]

Enforcement Counsel asserts without dispute that Respondent did not seek approval from the Board before repurchasing the Lombardi participation, and failed to inform the Board even after the fact until March 2014.[115] For his part, Respondent asserts that he made the repurchase at Lombardi's request because he and President Fitzgerald were concerned that otherwise Lombardi would "cause a run on the bank" by further spreading the negative publicity that the Bank had received in Crain's, which he characterizes as "the leading Chicago area business publication."[116] Respondent states that the Board had "discussed management's concerns about the negative Crain's publicity and the specific concerns that negative publicity could cause a run on the Bank or impair the Bank's liquidity,"[117] but he does not claim that the Board ever discussed or was aware of Lombardi's repurchase request or Respondent's decision to approve it.

E. Mogar Farms Loan

In 2011, Bharat and his related entities were "experiencing cash flow issues and having difficulty making payments on their Bank loans."[118] The Bank had also approved two

[113] SMF ¶ 94; *see* EC-MSD-4 (Hiren Dep.) at 154-156; EC-MSD-17 (Hinman Dep.) at 183; EC-MSD-127* (Participation Payoff Check); EC-MSD-128* (Lombardi Account Snapshot).

[114] SMF ¶ 98; *see also* EC-MSD-17 (Hinman Dep.) at 174-175; EC-MSD-109 (Schwartz Dep.) at 93-95; EC-MSD-265 (Donhardt Decl.) ¶¶ 22, 31.

[115] SMF ¶ 99; *see* EC-MSD-4 (Hiren Dep.) at 146; EC-MSD-79 (Boudreau Memo); EC-MSD-80 (Donhardt Memo).

[116] SMF-OPP ¶¶ 87-88.

[117] *Id.* ¶ 89.

[118] SMF ¶ 105 (citing exhibits).

concentration limits in the fall of 2010 that had implications for the Bharat loan relationship, one which applied a cap of outstanding credit to Bharat-related entities of "no more than 125 percent of Tier one capital plus reserves,"[119] and the other a general "Bank-wide limit on outstanding credit [of] no more than 50 percent of capital for any person and his related entities."[120] It is in this context that the following undisputed facts should be viewed.

On October 4, 2011, Respondent and Fitzgerald met with Bharat and Dipan Patel ("Dipan") to discuss a loan to a Dipan-related entity called Mogar Farms V, LLC ("Mogar Farms").[121] While Dipan testified that Respondent suggested the loan be made to Dipan for the benefit of Bharat, which is consistent with contemporaneous emails from President Fitzgerald,[122] Respondent disputes that either Dipan or Bharat stated that the loan proceeds would be going to Bharat when he met with them on October 4, 2011.[123] Instead, Respondent asserts that it was his understanding that Dipan subsequently used Bharat's name to try and "negotiate a better rate on his loan, one comparable to the lower rate the Bank charged to Bharat."[124]

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[119] *Id.* ¶ 102; *see* EC-MSD-134* (2010 Board Minutes) at 34-35.

[120] SMF ¶ 103; *see* EC-MSD-134* (2010 Board Minutes) at 11; EC-MSD-135* (2010 ROE) at 14.

[121] SMF ¶¶ 106, 109; SMF-OPP ¶ 96. There is no allegation that Dipan and Bharat are related.

[122] SMF ¶¶ 107-108; *see* EC-MSD-145 (Dipan Dep.) at 38, 42-44, 45-47. In particular, Enforcement Counsel offers an October 16, 2011 email in which President Fitzgerald tells Respondent, "I am working on the loan for Dipan Patel *where the loan proceeds will be going to Bharat*. Please let me know the rate and points you would like to charge for this loan." EC-MSD-147 (10/16/11 email) (emphasis added). President Fitzgerald has also testified in a separate proceeding that he and Respondent both understood that while the loan would be in the name of Dipan's company, Bharat would in fact be receiving the proceeds. SMF ¶ 108 (quoting EC-MSD-18 (Fitzgerald Dep.) at 179-180). Respondent disputes this and recounts a conversation with President Fitzgerald following the October 16th email in which Fitzgerald told him that the loan is "not going to Bharat." R-MSD-1 (Hiren Dep.) at 220-221. As discussed further *infra* at Section V.C.2, the undersigned concludes that genuine issues of material fact exist regarding Respondent's knowledge surrounding the Mogar Farms loan.

[123] Response at 29; *see* SMF-OPP ¶ 98.

[124] SMF-OPP ¶ 99; *see* R-MSD-1 (Hiren Dep.) at 220-221.

On November 18, 2011, the Bank issued a $2.6 million loan to Mogar Farms, which was deposited in Dipan's lawyer law firm account.[125] The next day, Dipan's lawyer wired $1.54 million to pay off a personal loan owed by Bharat.[126] A week following, Dipan's lawyer wired $900,000 to Bharat's management company.[127]

On December 5, 2012, the Mogar Farms loan was modified to extend its maturity date by one year.[128] On February 25, 2013, the loan was modified again to decrease the monthly principal and interest payment.[129] Dipan's company, and not Bharat, is listed as the borrower on both the original loan and the two modifications.[130] Enforcement Counsel further offers the uncontroverted testimony of an OCC examiner involved in the Bank's examination that "there was nothing in the loan file to indicate the proceeds went to Bharat Patel. The loan was papered as though Mogar Farms actually was the borrower and got the proceeds."[131]

It is nevertheless undisputed that Bharat's management company, Sun Development, was the only entity that made payments on the Mogar Farms loan,[132] although Respondent claims not to have been aware of this "because he was not involved in that process."[133] When Bharat stopped making payments in 2013, Fitzgerald emailed Dipan, requesting the past due payments.[134] In

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[125] SMF ¶¶ 109, 111; *see* EC-MSD-148 (Mogar Farms Note); EC-MSD-149 (Mogar Farms Security Agreement); EC-MSD-45 (Hiren Dep.) at 213-22.

[126] SMF ¶¶ 111-113; *see* EC-MSD-150* (Outgoing Wire); EC-MSD-151* (BofA Amended Memo); EC-MSD-152* (BofA Spreadsheet).

[127] SMF ¶ 114; *see* EC-MSD-151* (BofA Amended Memo); EC-MSD-152* (BofA Spreadsheet).

[128] SMF ¶ 118; *see* EC-MSD-157* (Mogar Farms Modification).

[129] SMF ¶ 123; *see* EC-MSD-163* (Mogar Farms Modification 2nd).

[130] SMF ¶ 124.

[131] *Id.* ¶ 136 (quoting EC-MSD-259 (Welch Dep.) at 35).

[132] *Id.* ¶¶ 115-117, 120-121.

[133] SMF-OPP ¶ 107. Enforcement Counsel offers evidence indicating at the very least that Respondent was copied on the email notification of a wire transfer made by Bharat to Dipan's law firm to effectuate a $1 million payment on the Mogar Farms loan in February 2013. *See* SMF ¶¶ 119-122.

[134] SMF ¶ 125; *see* EC-MSD-153* (October 31, 2013 emails).

response, Dipan stated that "these loans were an accommodation to [the Bank]. [The Bank] needed to make a loan to Bharat Patel and Sun Development . . . Bharat Patel and Sun Development paid down this loan and have been making all payments to date which you are fully aware of."[135] Fitzgerald then forwarded Dipan's response to Respondent.[136]

The Mogar Farms loan matured on November 18, 2013 and remained unpaid as of the Bank's failure on October 24, 2014.[137] Enforcement Counsel asserts, and Respondent does not dispute, that Respondent never disclosed to the Board or the OCC any involvement by Bharat in orchestrating, paying down, or benefiting from the Mogar Farms loan.[138]

F. <u>Norcross & Sterling Key Loans</u>

The Bank extended loans to Norcross Lodging Associates, LLP ("Norcross") and Sterling Key Lodging, Inc. ("Sterling Key"), which were both business interests of Mohan Hari ("Hari") in which Bharat and his related entities had no ownership interest or guarantor status during the relevant period of the OCC's claims.[139] By 2011, Hari had stopped making any payments on the Norcross loan, and was only making partial payments on the Sterling Key loan.[140]

From January 2011 through November 2012, at Respondent's undisputed direction,[141] the Bank took a total of $176,278.43 in loan proceeds from a Bharat-related hotel construction account

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[135] SMF ¶¶ 125-126; *see* EC-MSD-153* (October 31, 2013 emails).

[136] SMF ¶ 126.

[137] *Id.* ¶¶ 129, 138. Respondent asserts that the FDIC as receiver for the Bank sold the Mogar Farms loan to the State Bank of Texas, which itself ultimately received payment in full for the loan sometime after the Bank's failure and liquidation. SMF-OPP ¶ 112.

[138] SMF ¶¶ 135-137.

[139] *Id.* ¶¶ 141, 144. The OCC states that Bharat and other members held an initial 50 percent ownership interest and provided a personal written guarantee for the Norcross loan when it was originally made in March 2004, but avers that Hari and his wife had replaced Bharat as full owners and guarantors of the loan as of August 2008. *See id.* ¶¶ 143-145.

[140] *Id.* ¶ 145; *see* EC-MSD-172 (Hari Dep.) at 83, 103, 108; EC-MSD-15 (2013 Full Scope ROE) at 74-75.

[141] See SMF-OPP ¶ 148 (quoting EC-MSD-45 (Hiren Dep.) at 239-240 ("[W]e took money from [Bharat's] accounts and he didn't complain.")); *see also id.* ¶¶ 115-120.

("Jersey Gardens") and applied the money to loan payments on Norcross and Sterling Key.[142] These payments kept the Norcross and Sterling Key loans current and avoided delinquency, but also had the effect of "decreasing the funds available for Jersey Gardens to complete the hotel construction," thereby increasing the Bank's exposure on its relationship with Bharat.[143] As of December 31, 2012, the Bank had disbursed all of the loan proceeds meant for the construction of the Jersey Garden hotel, "but the hotel was incomplete with an estimated $19.2 million in construction costs remaining."[144]

On April 26, 2013, the Bank charged off $6.35 million on the Jersey Gardens loan as a collateral shortfall "because all proceeds had been disbursed but the project remained unfinished, would require significant additional funds to complete, and the Bank's outstanding loan balance exceeded the appraised value."[145] The 2013 Full Scope ROE stated that "[t]he Board and management's negligence to properly monitor this project has resulted in a $6.35 million loss to the bank [with] additional losses likely, due to the diversion of funds to other projects and inaccuracies in the bank's books and records."[146] Respondent asserts, however, that the Bank did not ultimately suffer any loss on the Jersey Gardens loan, because the $19 million outstanding balance "was paid off in full, including interest and late fees," on August 22, 2013.[147]

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[142] SMF ¶ 147 (citing exhibits).

[143] *Id.* ¶ 151; *see* EC-MSD-15 (2013 Full Scope ROE); EC-MSD-17 (Hinman Dep.) at 226-227. In its 2013 Full Scope ROE, the OCC concluded that Bank "[m]anagement's practice to apply loan proceeds as payments on other underperforming properties has masked delinquency, understated losses and the [LLL], and resulted in inaccurate books and records." SMF ¶ 154 (quoting EC-MSD-15 (2013 Full Scope ROE) at 11).

[144] SMF ¶ 153; *see* EC-MSD-187 (Bank's 2013 Appeal) at 22; EC-MSD-188* (Jersey Gardens Participation) at 4-14.

[145] SMF ¶ 155; *see* EC-MSD-15 (2013 Full Scope ROE); EC-MSD-187 (Bank's 2013 Appeal); EC-MSD-189* (May 2013 Board Package); EC-MSD-190* (Jersey Gardens Charge Off).

[146] EC-MSD-15 (2013 Full Scope ROE) at 43.

[147] SMF-OPP ¶ 122.

The Bank also used the deposit account of a different Bharat-related entity to make payments on the Norcross and Sterling Key loans. Ridgefield Park Lodging ("Ridgefield Park"), a company owned and controlled by Bharat, had a $250,000 standby letter of credit ("LOC") with the Bank that was collateralized by a Certificate of Deposit ("CD") for the same amount.[148] Between July 2011 and May 2012, the Bank applied a total of $248,041.82 from the Ridgefield Park CD to loan payments for Norcross and Sterling Key.[149] On January 7, 2013, the Bank closed the Ridgefield Park CD and issued a check for the balance of $631.28.[150] Enforcement Counsel asserts without dispute that "[t]his left [Ridgefield Park's] LOC uncollateralized and meant that if the beneficiary presented the LOC for payment, the Bank would be obligated to pay the $250,000 and seek reimbursement from [Ridgefield Park] on what would be an unsecured loan."[151]

On November 6, 2013, the beneficiary of the Ridgefield Park LOC did indeed draw on it, requiring the Bank to wire $250,000 of its own funds to the beneficiary.[152] In January 2014, the Bank charged off the full amount of the Ridgefield Park LOC after receiving no repayment from Ridgefield Park on the money it had expended paying the beneficiary.[153] As with Jersey Gardens, Respondent asserts that this charge-off did not result in loss to the Bank because the Ridgefield Park loan was ultimately repaid in full,[154] although the document he submits to support this proposition, a set of end-of-year loan statements for Ridgefield Park, show activity only up through May 2011 and does not appear on its face to support Respondent's claim.[155]

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[148] SMF ¶ 157; *see* EC-MSD-194* (Ridgefield Park LOC); EC-MSD-195* (Ridgefield Park Note).
[149] SMF ¶ 158 (citing exhibits).
[150] *Id.* ¶ 160; *see* EC-MSD-196 (January 24, 2013 email); EC-MSD-198* (Email re: Ridgefield Park CD).
[151] SMF ¶ 160; *see* EC-MSD-17 (Hinman Dep.) at 204-207; EC-MSD-109 (Schwartz Dep.) at 143.
[152] SMF ¶ 163; *see* EC-MSD-199* (Ridgefield Park Drafts and Wires).
[153] SMF ¶ 164; *see* EC-MSD-200 (January 15, 2014 Executive Loan Committee Minutes); EC-MSD-201* (January 28, 2014 Board Package).
[154] SMF-OPP ¶ 123; *see* R-MSD-69* (Ridgefield Park Loan History).
[155] *See* R-MSD-69* (Ridgefield Park Loan History).

G. BRT Holdings Overdrafts

Rohit Patel ("Rohit") and his related entities, including BRT Holdings ("BRT"), were customers of the Bank with multiple deposit accounts and loans.[156] Beginning in 2011, Rohit's accounts were frequently overdrawn, sometimes for several months and for amounts up to $500,000.[157] Respondent was aware of and approved Rohit's overdrafts because he was a big customer and Respondent preferred the Bank to make money on the overdraft fees.[158] In its January 2013 Interim ROE, the OCC criticized the Bank's overdraft practices, stating that "failure to charge-off unresolved overdrafts over 60 days past due will result in a violation of 12 U.S.C. § 161(a)."[159] The OCC also found in its 2013 Full Scope ROE that the Bank's "[c]apital levels are critically deficient and threaten the viability of [the Bank]."[160]

On July 17, 2013, the Board adopted a revised overdraft policy in response to the OCC's criticisms.[161] The revised policy stated that "[o]verdrafts should be infrequent, limited in dollar amount, and short term in nature."[162] The policy further provided that "[w]hen customers have more than one account, overdrafts may be approved if, on a consolidated basis, the customer is in a net positive position. . . . Overdrafts created by loan payments will be charged back, and the loan payment will not be considered made."[163]

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[156] SMF ¶¶ 170-171.
[157] *Id.* ¶¶ 173, 181, 183.
[158] *Id.* ¶¶ 174-175; *see* SMF-OPP ¶ 124 (stating that "[t]he Bank allowed customers to overdraw their accounts, which effectively worked as a de facto working capital line of credit"); R-MSD-1 (Hiren Dep.) at 244-245.
[159] SMF ¶ 176 (quoting EC-MSD-51 (January 2013 Interim ROE) at 2).
[160] *Id.* ¶ 177 (quoting EC-MSD-15 (2013 Full Scope ROE) at 4, 6).
[161] *Id.* ¶¶ 176-179.
[162] *Id.* ¶ 179 (quoting EC-MSD-86 (July 1, 2013 Loan Policy) at 112).
[163] *Id.* ¶ 179 (quoting EC-MSD-86 (July 1, 2013 Loan Policy) at 111).

Throughout 2013, Respondent nevertheless continued to allow Rohit to incur and maintain overdrafts "in significant amounts and for extended periods of time."[164] From mid-November 2013 through late March 2014, Rohit's total deposit relationship was net negative in various amounts spanning from $115,348.28 (as of December 15, 2013) to $532,257.19 (as of January 31, 2014).[165] Despite this, and despite the Bank's critically deficient capital position, Respondent approved up to a $500,000 overdraft for Rohit's accounts in February and March 2014.[166]

From October 2013 through December 2013, Respondent also allowed the Bank to accept and post loan payments from Rohit "via checks drawn on accounts with insufficient funds in violation of the Bank's loan policy."[167] These loan payments "made Rohit Patel's loans appear current and avoided delinquency."[168] Enforcement Counsel asserts that the Bank failed to list Rohit's loans as past due in reports to the Board and in regulatory Call Reports over this time "even though the most recent monthly loan payments had drawn on accounts with negative balances."[169]

III. 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

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[164] *Id.* ¶ 181; *see* EC-MSD-226* (March 2013 Board Package); EC-MSD-227* (June 2013 Board Package); EC-MSD-228* (October 2013 Board Package).

[165] SMF ¶ 183. Respondent asserts that this state of affairs was because "the Bank made the decision temporarily to pay [Rohit's] overdrafts in December 2013 and January 2014 because Rohit was rehabbing one of his properties and did not have a working capital line of credit to rely upon." SMF-OPP ¶ 128.

[166] SMF ¶ 184 (citing exhibits). In response, Respondent asserts that as of March 26, 2014, the Rohit borrower relationship was positive overall by an amount of $44,547.67. SMF-OPP ¶ 129.

[167] SMF ¶ 185 (citing exhibits).

[168] *Id.* ¶ 186; *see also id.* ¶ 187 (providing examples of a Rohit-controlled entity writing checks from an overdrawn business checking account to make payments on its Bank loans).

[169] *Id.* ¶ 189; *see also id.* ¶¶ 190-193.

law."[170] 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."[171] The summary disposition standard "is similar to that of the summary judgment standard under Rule 56 of the Federal Rules of Civil Procedure."[172] 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."[173] That means that this tribunal must "draw '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.[174]

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."[175] 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."[176] 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."[177] The underlying facts and inferences in the party's motion is to be considered in the light most favorable to the opposing party,[178] and summary disposition will be granted "only if one of the moving parties is entitled to judgment as a matter of law upon material facts that are not genuinely

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[170] 12 C.F.R. § 19.29(a).

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

[172] *In the Matter of William R. Blanton*, No. OCC AA-EC-2015-24, 2017 WL 4510840, at *6 (July 10, 2017) (OCC final decision), *aff'd on other grounds*, *Blanton v. OCC*, 909 F.3d 1162 (D.C. Cir. 2018).

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

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

[175] 12 C.F.R. § 19.29(b)(2).

[176] *Id.*

[177] *Id.*

[178] *Schaerr v. Dep't of Justice*, 435 F. Supp. 3d 99, 107 (D.D.C. 2020).

disputed."[179] Furthermore, "in granting a motion for summary disposition a trier of fact is not obliged to credit the non-moving party's factual assertions when they are not supported on the record," and the Tribunal "is not required to move a case past the summary [disposition] stage when inferences drawn from the evidence and upon which the non-moving party relies are 'implausible.'"[180]

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

Any evaluation of a party's motion for summary disposition must begin with the statutory elements that undergird the OCC's claims. The OCC brings this action against Respondent as an institution-affiliated party ("IAP") of the Bank for a prohibition order under 12 U.S.C. § 1818(e) and first- and second-tier civil money penalties under 12 U.S.C. § 1818(i).[181] To merit a prohibition order against an IAP under Section 1818(e), an agency must prove the separate elements of misconduct, effect, and culpability. The misconduct element may be satisfied, among other ways, by a showing that the IAP has (1) "directly or indirectly violated any law or regulation," (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."[182] 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

[179] *Heffernan*, 417 F. Supp. 3d at 7 (internal quotation marks and citation omitted).
[180] *Blanton*, 2017 WL 4510840, at *6.
[181] The undersigned finds that Respondent is an IAP of the Bank as that term is defined in 12 U.S.C. § 1818(u).
[182] 12 U.S.C. § 1818(e)(1)(A).

or other benefit."[183] And the culpability element may be satisfied that 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."[184]

The assessment of civil money penalties under Section 1818(i) also contains an "effect" element of a sort, at least with respect to the criteria necessary for the imposition of the second-tier penalty sought by the OCC.[185] The statute authorizes different levels of money penalties contingent on an increasingly stringent showing by the agency regarding the nature and consequences of the alleged misconduct. The lowest level, a first-tier penalty, may be assessed solely upon a showing of misconduct: specifically, that an IAP has violated some law, regulation, order, or written condition or agreement with a federal banking agency.[186] For a second-tier penalty to be assessed, by contrast, the agency must show not only misconduct,[187] but also some external consequence or characteristic of the misconduct: (1) that it "is part of a pattern of misconduct"; (2) that it "causes or is likely to cause more than a minimal loss to such depository institution"; or (3) that it "results in pecuniary gain or other benefit to such party."[188] As with Section 1818(e), fulfillment of this prong for the assessment of a second-tier money penalty does not require satisfaction of all three conditions; a second-tier penalty may be assessed (assuming misconduct

[183] *Id.* § 1818(e)(1)(B).

[184] *Id.* § 1818(e)(1)(C).

[185] *See id.* § 1818(i)(2)(B). The assessment of a third-tier civil money penalty similarly requires a showing of "effect," but the OCC does not seek such a penalty here, and it is accordingly unnecessary for the undersigned to discuss. *See id.* § 1818(i)(2)(C).

[186] *Id.* § 1818(i)(2)(A).

[187] In addition to the violations described in Section 1818(i)(2)(A), a second-tier showing of misconduct can be made as to a breach of a fiduciary duty or the reckless engagement in unsafe or unsound practices while conducting the institution's affairs. *Id.* § 1818(i)(2)(B)(i).

[188] *Id.* § 1818(i)(2)(B)(ii).

has been shown) if the misconduct is part of a pattern even if it has not caused more than a minimal loss to the institution, and so forth.

Although the misconduct prongs of both Sections 1818(e) and (i) may be satisfied by an IAP's engagement or participation in an "unsafe or unsound practice" related to the depository institution with whom he is affiliated, that phrase is nowhere defined in the FDI Act or its subsequent amendments. John Horne, Chairman of the Federal Home Loan Bank Board ("FHLBB") during the passage of the Financial Institutions Supervisory Act of 1966, submitted a memorandum to Congress that described such practices as encompassing "any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds."[189] This so-called Horne Standard has long guided federal banking agencies, including the OCC, in bringing and resolving enforcement actions.[190] It has also been recognized as "the authoritative definition of an unsafe or unsound practice" by federal appellate courts.[191] The undersigned accordingly adopts the Horne Standard, both for purposes of Respondent's instant motion and going forward in this proceeding, when evaluating allegations of unsafe or unsound practices under the relevant statutes.

Here, as noted, with respect to the misconduct element of Section 1818(e) and as applicable for Section 1818(i), the OCC alleges in the Notice that Respondent violated 12 C.F.R. §§ 32.3(a) and 32.5, 12 U.S.C. § 161, 18 U.S.C. § 1005, and violated the August 31, 2013 Consent Order,

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[189] *Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before the House Comm. on Banking and Currency*, 89th Cong., 2d Sess. 49 (1966) (statement of John H. Horne, Chairman of the FHLBB), 122 Cong. Rec. 26,474 (1966).

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

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

and breached his fiduciary duty, while also engaging in unsafe or unsound practices in conducting the affairs of the Bank.[192] With respect to the effect element of Section 1818(e), the OCC alleges that as a result of Respondent's conduct, the Bank suffered "financial loss or other damage."[193] With respect to the culpability element of Section 1818(e), the OCC alleges that Respondent's conduct involved personal dishonesty and/or demonstrated a willful or continuing disregard for the safety and soundness of the Bank.[194] And with respect to the remaining element required for the assessment of a second-tier civil money penalty under Section 1818(i), the OCC alleges that Respondent's violations and/or practices were part of a pattern of misconduct and/or caused more than minimal loss to the Bank."[195]

V. Argument and Analysis

A. Jurisdiction

There is no dispute that the OCC has jurisdiction to initiate these prohibition and civil money penalty actions against Respondent.[196] The Bank was a national banking association and an insured depository institution regulated by the OCC.[197] Respondent was a director, officer, and controlling stockholder of the Bank from 1984 to 2014 and served in those roles within six years from the date of the Notice.[198] Accordingly, the OCC is the appropriate Federal banking agency and is authorized to initiate and maintain these actions against Respondent pursuant to 12 U.S.C. § 1818(e) and (i).

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[192] Notice ¶¶ 70(a), 97(a), 176(a), 205(a).
[193] *Id.* ¶¶ 70(b), 97(b), 176(b), 205(b).
[194] *Id.* ¶¶ 70(c), 97(c), 176(c), 205(c).
[195] *Id.* ¶¶ 71, 99, 142, 177, 207.
[196] Motion at 11.
[197] *Id.* at 11; *see* 12 U.S.C. §§ 1813(a)(1)(A) and (c)(2).
[198] Motion at 11; *see* 12 U.S.C. § 1818(i)(3).

B. Statute of Limitations

Respondent argues that certain of Enforcement Counsel's claims—specifically, Article III (Pruthvi Loan), Article V (Mogar Farms Loan), and Article VI (Norcross & Sterling Key Loans)—should be dismissed on the grounds that the Notice was not timely filed as to those claims within the applicable five-year statute of limitations.[199] The undersigned concludes that this argument rests upon a misapprehension of the applicable law.

This action was filed on February 7, 2018. Under 28 U.S.C. § 2462, the statute that both parties agrees governs OCC enforcement actions, the agency has "five years from the date when the claim first accrued" in which to commence proceedings.[200] Therefore, any claim in the Notice that "first accrued" prior to February 7, 2013—five years before filing—is untimely, and this Tribunal cannot entertain it.[201]

According to Respondent, the claims in the Notice are time-barred to the extent that the misconduct at issue in Articles III, V, and VI occurred more than five years from the institution of the instant action. With respect to the agency's allegations regarding the Pruthvi Loan, for example, Respondent contends that the claim is untimely because the allegedly problematic loan "was entered into on December 22, 2011."[202] Likewise, Respondent asserts that claims relating to the Mogar Farms loan and the alleged advancement of loan proceeds and withdrawal of funds in

[199] Response at 15, 27, 31-32.

[200] The full relevant text of Section 2462 is as follows: "Except as otherwise provided by Act of Congress, an action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462.

[201] *See Blanton*, 909 F.3d at 1171 (discussing 28 U.S.C. § 2462 in enforcement context).

[202] Response at 15; *see also* R. SOL Reply at 2.

connection with the Norcross and Sterling Key loans are time-barred because they occurred in November 2011 and through 2011 and 2012, respectively.[203]

This, however, is not the law. Section 2462's five-year limitations period only begins to run once an agency is capable of bringing an enforcement action against a given respondent—which, in the case of statutes with "effect" elements or other multi-pronged prerequisites, such as Sections 1818(e) and 1818(i), may well be later than the date of the alleged misconduct. The Supreme Court has made it clear that the "standard rule" for limitations purposes "is that a claim accrues when the plaintiff has a complete and present cause of action"—in other words, when all of the elements of an actionable claim have been met and can be pled.[204] Any application of Section 2462 to the timeliness of a particular cause of action must thus take into account whatever "substantive prerequisites that Congress has placed on the right to file the underlying lawsuit," and "until a prospective plaintiff satisfies any such prerequisites and has a legal right to initiate an action to enforce a claim, that claim has not 'accrued.'"[205]

For many statutes, the essential elements of a cause of action are "complete and present" at the point of misconduct. In *Gabelli v. Securities and Exchange Commission*, for instance, the Supreme Court addressed the accrual of claims under Section 2462 in the context of the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-6 and 80b-9, which authorizes the enforcing agency to bring an action "against investment advisers who violate the Act, or individuals who aid and abet

[203] *See* Response at 27, 31-32; R. SOL Reply at 11, 13.

[204] *Gabelli v. SEC*, 568 U.S. 442, 448 (2017) (internal quotation marks and citation omitted); *see also*, *e.g.*, *FERC v. Powhatan Energy Fund*, 949 F.3d 891, 898 (4th Cir. 2020) (claim accrues "when the plaintiff can file suit and obtain relief") (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)); *Savory v. Cannon*, 947 F.3d 409, 427 (7th Cir. 2020) (all "essential element[s] of [a] claim" are necessary for accrual).

[205] *Powhatan Energy Fund*, 949 F.3d at 897-98; *see Blanton*, 909 F.3d at 1171 (observing in the context of 12 U.S.C. § 1818 that "[a] claim normally accrues when the factual and legal prerequisites for filing suit are in place.").

such violations."[206] Violation of the Act, in turn, requires only an act of misconduct.[207] If the agency determines that an individual has engaged in misconduct under the Act on a given date—for example, by engaging in a "transaction . . . which operates as a fraud or deceit upon any client or prospective client"[208]—then all elements are met, the agency's claim has accrued, and it may initiate an enforcement action on that date and for five years hence. Nothing more is needed.

By contrast, and as discussed, Section 1818 enforcement actions have multiple independent elements that must be satisfied to constitute a "complete and present" cause of action.[209] One such distinct element is "effect," and the OCC is not empowered to institute enforcement proceedings pleading a given statutory effect until after that effect can be alleged.[210] In a case where an alleged effect does not manifest itself immediately, the OCC's cause of action might not become "complete and present," and its claim thus not yet accrued, until some time after the misconduct has occurred.[211] That is, the "effect" prongs of Sections 1818(e) and 1818(i) serve as a threshold condition *that must be met* before any enforcement action can commence. If this condition is not met until some later point, and the agency has no complete cause of action prior to that point, then Section 2462's limitations period should not begin to run until that point is reached.[212] To hold

[206] *Gabelli*, 568 U.S. at 445.

[207] *See Powhatan Energy Fund*, 949 F.3d at 899 (noting that in *Gabelli*, "the SEC had a complete and present cause of action at the time of the disputed conduct").

[208] 15 U.S.C. § 80b-6(2).

[209] *See supra* at Section IV.

[210] *Cf. Powhatan Energy Fund*, 949 F.3d at 898 (finding that when Congress has "plainly conditioned" an agency's right to action on the satisfaction of certain statutory prerequisites, Section 2462's five-year limitations period does not commence until those prerequisites have been satisfied).

[211] *See Proffitt v. FDIC*, 200 F.3d 855, 863 (D.C. Cir. 2000) (noting that "the question of accrual becomes complex when considerable time intervenes between the underlying conduct and the harmful effect").

[212] *See Powhatan Energy Fund*, 949 F.3d at 898 ("That the[] circumstances [according a party the right to bring action] often occur at the moment of the violation does not imply that they invariably will or that every claim must accrue at that time.").

otherwise is to risk the absurd situation where an agency's time to bring its action has expired before its ability to do so has even reached the starting gate.[213]

Here, Enforcement Counsel has alleged that the Bank suffered loss (one of the actionable statutory effects) in connection with the Pruthvi loan when it charged off $17.1 million of the loan amount on September 8, 2014.[214] The limitations period for that cause of action therefore began to run on that date and extended to September 8, 2019, well after the commencement of these proceedings.[215] Similarly, Enforcement Counsel alleges that the Bank suffered losses relating to the Norcross and Sterling Key loans when it took a $6.35 million charge-off to the Jersey Gardens loan in April 2013 and was forced to pay $250,000 of its own funds to cover the unsecured Ridgefield Park letter of credit in November 2013.[216] Both instances are within the five-year limitations period occasioned by the filing of the Notice.

With respect to the Mogar Farms loan, Enforcement Counsel does not allege loss as an effect, but rather contends that Respondent's conduct in connection with the alleged straw loan

[213] *See id.* at 897 (claim accrual under Section 2462 should be determined "with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought") (quoting *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967)).

[214] *See* Notice ¶¶ 68-69; EC SOL Response at 6.

[215] Respondent asserts that the OCC's claims related to the Pruthvi loan are based on "the risk of loss created at the time of misconduct" rather than any actual loss suffered by the Bank, R. SOL Reply at 2 (emphasis omitted), but this contention is contradicted by the record. Moreover, it is irrelevant for limitations purposes that the agency could conceivably have brought its claim earlier based on a different effect (and thus a different cause of action) that it did not plead. *See Blanton*, 909 F.3d at 1172 ("[E]ven though the OCC might well have brought an action earlier, its failure to do so does not make the claims it elected to bring untimely.") (internal quotation marks and citation omitted); *Proffitt*, 200 F.3d at 864-65 (noting that Section 1818 was intended to provide enforcement agencies with some flexibility when determining when to bring actions). In the same vein, the undersigned takes issue with Enforcement Counsel's assertion that, if necessary, it will argue at the hearing that Respondent's misconduct resulted in a different statutory effect, namely prejudice to depositors. *See* Motion at 35 n.6. This effect was not alleged or pled, there has been no opportunity for the parties to conduct any discovery on it, and it cannot be asserted or reserved at this late date.

[216] *See* Notice ¶¶ 165, 173-74; EC SOL Response at 3, 4. Respondent argues that "[n]o pecuniary loss ever occurred because the loans ended up being paid as agreed," R. SOL Reply at 14, but this assertion is immaterial to the question of when the OCC's claims first accrued for limitations purposes based on the actionable effects it has alleged.

was part of "a pattern of misconduct that occurred over the course of several years,"[217] up to and including the modification of that loan on February 25, 2013.[218] As pled, the undersigned concurs with Enforcement Counsel that the origination and modification of this loan with allegedly false information regarding the true identity of the borrower, if proven, constitutes a continuing violation that extended into the limitations period, thus rendering the claim timely in all particulars.[219] Respondent's argument that Enforcement Counsel's claims in the aforementioned Articles should be dismissed as time-barred is therefore rejected.

C. Misconduct

Enforcement Counsel asserts that the misconduct prong for a prohibition order is satisfied because Respondent 1) violated various laws and regulations, including 12 C.F.R. §§ 32.3 and 32.5; 18 U.S.C. § 1005; 12 U.S.C. § 161, as well as the August 31, 2013 Consent Order; 2) engaged or participated in various unsafe or unsound practices in connection with the Bank, and 3) breached his fiduciary duty in various ways.[220] Respondent asserts that genuine issues of material fact remain, which preclude summary disposition.[221]

A summary of the undersigned's findings on misconduct is noted in the table below. With respect to the misconduct element of Section 1818(e) and as applicable for Section 1818(i), the

[217] The effect element of Section 1818(i) for the assessment of a second-tier civil money penalty may be satisfied by a showing that the complained-of conduct was "part of a pattern of misconduct." 12 U.S.C. § 1818(i)(b)(2); *see Blanton*, 909 F.3d at 1171 ("two elements" to second-tier civil money penalty cause of action). Enforcement Counsel does not seek the imposition of a Section 1818(e) prohibition order as to the conduct alleged in Article V of the Notice concerning the alleged nominee loan to a straw borrower. *See* Notice ¶¶ 141-42.

[218] Motion at 44; *see also* Notice ¶¶ 124-25, 142(b); EC SOL Response at 4 (arguing that "[t]he second loan modification perpetuated the 18 U.S.C. § 1005 violation that began at the loan's origination").

[219] *See* EC SOL Response at 7-8 ("Once an act of misconduct is determined to be part of a continuing violation, the applicable statute of limitations runs from the date of the last overt act in support of the violation.") (citing cases).

[220] Motion at 12.

[221] Response at 1.

items marked with "X" indicates that the OCC alleges misconduct in the Notice, but the undersigned has found that summary disposition is premature, while items marked with "√" indicates that the OCC has established that summary disposition is warranted:

	Article III (Pruthvi Loan)	Article IV (Lombardi Participation Repurchase)	Article V (Mogar Farms Loan)	Article VI (Norcross & Sterling Key Loans)	Article VII (BRT Overdrafts)
12 C.F.R. §§ 32.3, 32.5		√			
18 U.S.C. § 1005			X		
12 U.S.C. § 161					√
2013 Consent Order		√			
Unsafe/Unsound	X	√	X	√	√
Duty of Care	X	√	X	√	√
Duty of Candor	X				
Duty of Loyalty		√	X		

1. **Violation of 12 C.F.R. §§ 32.3 and 32.5 based on Repurchase of <u>Lombardi Participation in the Pruthvi Loan</u>**

National banks are subject to lending limits to protect their safety and soundness, to prevent excessive loans to one person, and to promote the diversification of loans.[222] Under 12 C.F.R. § 32.3, a bank's total outstanding loans and extensions of credit to one borrower may not exceed 15% of the bank's capital and surplus. The calculation of the lending limit is also subject to combination rules under 12 C.F.R. § 32.5, which provides that loans to one borrower will be attributed to another person when the proceeds of the loan are used for the direct benefit of the other person or a common enterprise is deemed to exist between the persons.

Enforcement Counsel asserts that Respondent violated the lending limit when the Bank repurchased the $2 million Lombardi participation in the Pruthvi loan.[223] According to

[222] See 12 C.F.R. § 32.1(b).
[223] Motion at 14.

Enforcement Counsel, Respondent testified that the repurchase of the Lombardi participation in the Pruthvi loan caused a lending limit violation.[224] Enforcement Counsel asserts that Respondent did not seek Board approval for the Lombardi participation repurchase and did not inform the Board about it until months afterwards.[225] Respondent disputes this, stating that he explicitly discussed the participation repurchase with Fitzgerald and two outside directors of the Bank, who concurred with the decision.[226]

Respondent does not deny that the $2 million repurchase of the Lombardi participation would trigger a violation of the Bank's legal lending limit.[227] But Respondent asserts that he had no choice but to buy back Lombardi's participation upon Lombardi's request because Lombardi was very influential in the Bank's community. Specifically, Respondent testified that he was concerned Lombardi would badmouth the Bank, which could cause a "run on the bank."[228]

According to Respondent, he believed that the technical legal lending limit violation would be temporary because several investors had expressed an interest in participation, which never materialized.[229] The repurchase resulted in an overage of $813,038.20, or 0.07% of total assets as of September 30, 2013.[230] Respondent asserts that the repurchase was a business judgment decision that was intended to minimize risk to the Bank and that Respondent's conduct regarding the repurchase does not justify a prohibition order.[231]

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[224] Motion at 14 (citing SMF ¶ 97); *see* EC-MSD-4 (Hiren Dep.) at 149.
[225] Motion at 5 (citing SMF ¶ 99).
[226] Response at 25 (citing SMF-OPP ¶ 89).
[227] *Id.* at 25-26.
[228] *Id.* at 25 (citing SMF-OPP ¶ 88; R-MSD-1 (Hiren Dep.) at 146).
[229] *Id.*
[230] *Id.* at 26 (citing SMF-OPP ¶ 93).
[231] *Id.* at 27.

The undersigned finds that there is little actual dispute between the parties regarding whether there was a violation of 12 C.F.R. §§ 32.3 and 32.5. Respondent does not deny that there was such a violation, but asserts that the violation was slight, temporary, and a necessary business decision to prevent a potential run on the Bank. While Respondent has the discretion to make such business decisions, he must also recognize that a violation, however temporary or slight, remains a violation. The undersigned does not have discretion in determining whether a violation is slight or a justified business decision. As such, the undersigned finds that Respondent violated 12 C.F.R. §§ 32.3 and 32.5 when he directed the Bank to repurchase Lombardi's $2 million participation in the Pruthvi loan, thereby satisfying the misconduct prong of 12 U.S.C. § 1818(e)(1)(A).

2. <u>Violation of 18 U.S.C. § 1005 based on Mogar Farms Loan</u>

Bank directors, officers and employees are prohibited from making a false entry in any book, report, or statement of the bank under 18 U.S.C. § 1005. Enforcement Counsel asserts that the Bank's loan to Mogar Farms was a nominee loan to Bharat Patel, with Dipan Patel acting as a so-called straw borrower. According to Enforcement Counsel, "Respondent proposed that the Bank make a multi-million dollar loan to Dipan Patel to benefit Bharat Patel."[232] Enforcement Counsel asserts that nominee loans omit key information, such as the true purpose and beneficiaries of the loan, and are fraudulent transactions, thereby violating 18 U.S.C. § 1005.[233]

Respondent counters that Enforcement Counsel has not presented evidence that Respondent was personally involved in the Mogar Farms loan. While Respondent agrees that he met with Bharat and Dipan on October 4, 2011, Respondent disputes that either Dipan or Bharat

[232] Motion at 15 (citing SMF ¶ 106).

[233] *Id.*at 17 (citing *In the Matter of Steven J. Ellsworth*, Nos. AA-EC-11-41 & -42, 2016 WL 11597958, at *12 (Mar. 23, 2016) (OCC final decision)).

stated that the loan proceeds would be going to Bharat.[234] According to Respondent, the Mogar Farms loan was not a nominee loan, and it was repaid in full; therefore, Enforcement Counsel is not entitled to summary disposition.[235] Respondent also asserts that he was not aware of the source of repayments on the Mogar Farms loan because he was not involved in that process.[236]

Based on the evidence, the undersigned finds that Respondent was highly involved in setting up and structuring loans to customers. There is no dispute that Respondent and President Fitzgerald met with Bharat and Dipan at the Bank on October 4, 2011 regarding the loan to Mogar Farms.[237] Dipan testified that Respondent suggested the loan be made to Dipan for the benefit of Bharat, which is consistent with emails from President Fitzgerald.[238] While Respondent asserts that he did not have any knowledge that the loan to Mogar Farms was for the benefit of Bharat, the undersigned finds this to be highly questionable.

When determining the existence of a genuine factual dispute, all evidence must be evaluated "in the light most favorable to the non-moving party,"[239] which means that this tribunal must "draw 'all justifiable inferences' in the non-moving party's favor and accept the non-moving party's evidence as true." Based on the record before the undersigned at this time, there appears to be, at minimum, genuine issues of material fact regarding Respondent's knowledge surrounding the Mogar Farms loan. Accordingly, based on the present record, the undersigned finds it premature to determine whether a violation of 18 U.S.C. § 1005 has been established.

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[234] Response at 29 (citing SMF-OPP ¶ 98).
[235] *Id.* at 28.
[236] *Id.* at 30 (citing SMF-OPP ¶ 107; R-MSD-1 (Hiren Dep.) at 223-224).
[237] SMF ¶ 106, 108; *see also* SMF-OPP ¶ 96-97.
[238] SMF ¶¶ 107-108; *see* EC-MSD-145 (Dipan Dep.) at 38, 42-44, 45-47.
[239] *Scott*, 550 U.S. at 380.

3. Violation of 12 U.S.C. § 161 based on BRT Overdrafts

National banks are required to file accurate reports of conditions ("Call Reports").[240] The Call Report instructions for the December 31, 2013 reporting period required banks to report all loans, leases, debt securities, and other assets that are past due on Schedule RC-N. Loans are considered past due when the borrower is in arrears for two or more monthly payments.[241] Enforcement Counsel asserts that Respondent's conduct regarding the BRT Overdrafts resulted in a material misstatement on the Bank's Call Reports.[242]

Enforcement Counsel asserts that Respondent authorized the Bank to approve large overdrafts to BRT for the purpose of making payments on BRT's loans to the Bank, which caused the Bank's loans to BRT to be falsely report as "current" on the Bank's Call Report, when they should have been reported as past due. Specifically, Enforcement Counsel points to an instance at the end of 2013 when Respondent approved an overdraft up to $500,000 for Rohit's accounts.[243] From October 2013 through December 2013, BRT made loan payments from checks drawn on its checking account at the Bank, which lacked sufficient funds to cover the loan payments. The Bank allowed the checks to clear, overdrawing BRT's account by $266,107 as of December 31, 2013.[244] According to Enforcement Counsel, this led to a material misstatement on the Bank's Call Report, which is a violation of 12 U.S.C. § 161.[245] The Bank's Call Report as of December 31, 2013 showed $2.49 million in past due loans, which did not include the BRT loans.[246] The failure to

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[240] *See* 12 U.S.C. § 161.
[241] Motion at 18 (SMF ¶¶ 190-191).
[242] *Id.* (citing SMF ¶¶ 193).
[243] *Id.* (citing SMF ¶ 184).
[244] *Id.* at 19 (citing SMF ¶¶ 179, 187, 189).
[245] *Id.* at 18-19 (citing SMF ¶¶ 172-193).
[246] *Id.* at 19 (citing SMF ¶ 189).

include the BRT loans as past due understated the Bank's past due loans by $6.93 million, which was the amount of the outstanding balance of the BRT loans as of December 31, 2013.[247]

Respondent asserts that Rohit was a longstanding, large customer with many loans and that the overdrafts were a convenience to him in lieu of providing a line of credit. Furthermore, the overdrafts generated significant interest for the Bank.[248] Respondent acknowledges that the Bank agreed to change its overdraft policy in 2012 in response to criticism from the OCC.[249] Respondent asserts that a "Bank loan officer wrote a memorandum to the Board regarding the overdraft status, indicating that the Bank made the decision temporarily to pay overdrafts in December 2013 and January 2014 because Rohit was rehabbing one of his properties and did not have a line of credit. Hiren had authorized overdrafts up to $500,000 . . ."[250] According to Respondent, the overdrafts fluctuated between approximately $115,000 and $362,000 from November 2012 to March 2014; however as of March 25, 2014, Rohit's balance was approximately a positive $44,500.[251]

Enforcement Counsel asserts that extending credit in the form of overdrafts without adequate risk controls is an unsafe or unsound practice.[252] Respondent counters that in the case cited by Enforcement Counsel in support of this proposition, the court reversed summary disposition against an officer based on amended call reports (although it upheld summary disposition on overdraft-related misconduct overall).[253] According to Respondent, at the time the December 31, 2013 Call Report was filed, Respondent "reasonably believed the [Call Report], which he did not personally prepare, was accurate based on information supplied by the Bank's

[247] *Id.* at 19 (citing SMF ¶ 192).
[248] Response at 34 (citing SMF-OPP ¶ 125).
[249] *Id.* at 35 (citing SMF-OPP ¶ 133).
[250] *Id.* (citing SMF-OPP ¶ 133).
[251] *Id.* (citing SMF-OPP ¶¶ 128-129).
[252] Motion at 29 (citing *Blanton*, 909 F.3d at 1172).
[253] *See* Response at 36-37, 38.

CFO, Patrick Stack, the Bank's controller, Jim Svetich, and the external auditors, Plante Moran."[254] Respondent also makes additional arguments based upon the expert report of Joe Moravy, which the undersigned specifically excluded, and is given no weight.[255]

The undersigned finds Enforcement Counsel's arguments persuasive and concludes that a violation of 12 U.S.C. § 161, however brief, has been established. Respondent acknowledges that the Bank made a business decision to temporarily allow BRT to make overdrafts up to $500,000 in the December 2013 to January 2014 timeframe, despite a previous change in the Bank's overdraft policy which prohibited such overdrafts. While Respondent has the discretion to make such business decisions, he must recognize the consequences of those decisions, especially in light of the attention such overdrafts generated, which led to a revision in the Bank's overdraft policies.

As such, the undersigned finds that Respondent violated 12 U.S.C. § 161 when he directed the Bank to allow BRT to make loan payments by authorizing overdrafts up to $500,000, which, in turn, understated the amount of past due loans on the Bank's December 31, 2013 Call Report.

4. Violation of August 31, 2013 Consent Order based on Repurchase of Lombardi Participation in the Pruthvi Loan

As noted above, the OCC and the Bank entered into a 2013 Consent Order on August 31, 2013, which was signed by Respondent.[256] The 2013 Consent Order required the Bank to "take immediate and continuing action to protect its interests in those assets criticized as 'doubtful,' 'substandard,' or 'special mention' in the most recent ROE, in any subsequent ROE . . . or in any list provided to management by the OCC Examiners during any examination."[257] The 2013

[254] *Id.* at 38.
[255] *Id.* (citing SMF-OPP ¶ 141).
[256] Motion at 20 (citing SMF ¶ 89).
[257] EC-MSD-61 (2013 Consent Order) at Art. VII, ¶ 1.

Consent Order also required the Bank to "promptly take all necessary steps to correct each violation of law, rule, or regulation" cited in the most recent ROE or any subsequent ROE.[258]

Enforcement Counsel asserts that Respondent failed to comply with the 2013 Consent Order, which lack of compliance alone satisfies the misconduct prong for a prohibition order.[259] Specifically, Enforcement Counsel asserts that Respondent's action in directing the repurchase of the Lombardi $2 million participation in the Pruthvi loan violated Articles VII and XIX of the 2013 Consent Order because the Pruthvi loan was a substandard asset and the Lombardi repurchase increased the Bank's exposure in that substandard asset.[260] Respondent argues, generally, that questions of fact remain as to whether Respondent violated the 2013 Consent Order.[261]

For similar reasons as those set forth above regarding a violation of 12 C.F.R. §§ 32.3 and 32.5 based on the $2 million Lombardi repurchase, the undersigned also finds Enforcement Counsel's arguments persuasive that Respondent's actions violated Articles VII and XIX of the 2013 Consent Order.

5. Unsafe and Unsound Practices

a. Pruthvi Loan

Enforcement Counsel asserts that Respondent's approval of the Pruthvi loan of $24.86 million was unsafe or unsound because the loan was not adequately secured. Without the JPM5 pledges of $39 million, Enforcement Counsel asserts that the Bank's only collateral was the second

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[258] *Id.* at Art. XIX, ¶ 1.

[259] Motion at 20 (citing *In re Leuthe*, FDIC-95-15e, FDIC-95-16k, 1998 WL 438324 at *40 (February 13, 1998) (recommended decision), *aff'd* 1998 WL 438323 (June 25, 1998), *review denied Leuthe v. FDIC*, 194 F.3d 174 (D.C. Cir. 1999) (without opinion); *Cavallari v. OCC*, 57 F.3d 137, 142-43 (2nd Cir. 1995)).

[260] *Id.* at 20-21 (citing SMF ¶ 95).

[261] Response at 27.

mortgages on three hotels, valued at $9.4 million.[262] Enforcement Counsel asserts that Respondent should not have approved the Pruthvi loan because Respondent knew or should have known that repledging of the JPM5 collateral not only posed an abnormal risk of repayment, but also constituted fraud.[263] Accordingly, Enforcement Counsel asserts that Respondent's failure to appropriately mitigate the Bank's risk on the Pruthvi loan was unsafe and unsound.[264] Enforcement Counsel further asserts that Respondent's decision to fail to perfect the Bank's security interest in JPM5 was also unsafe or unsound.[265]

Finally, Enforcement Counsel asserts that Respondent engaged in and unsafe or unsound practice by failing to disclose to the Board that the JPM5 collateral was restricted from repledging or that the Bank had agreed not to perfect its security interest in the JPM5 collateral.[266] While Enforcement Counsel asserts that Respondent admitted that he did not inform the Board of this information,[267] Respondent offers a statement from President Fitzgerald recollecting that the Board nevertheless understood "the nature of the security interest in [JPM5]" as well as "the nature of the collateral and valuation supporting the loan."[268]

Respondent further counters that the borrowers of the Pruthvi Loan also included additional borrowers, namely Aakash, Inc., Beena, Inc., and Rupa, Inc., which included second mortgages

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[262] Motion at 23 (citing SMF ¶ 60); *see also* EC-MSD-52* (Pruthvi Loan Presentation).

[263] The undersigned notes that Respondent's own expert testified that granting the Pruthvi loan with only the pledged equity interests as collateral "would have been improper [and] potentially illegal." EC-MSD-109 (Schwartz Dep.) at 67-68; *see also* SMP ¶ 52.

[264] Motion at 23-24 (citing *De La Fuente v. FDIC*, 332 F.3d 1208, 1223 (9th Cir. 2003); *Kaplan v. OTS*, 104 F.3d 417, 421 (D.C. Cir. 1997); *Lindquist & Vennum v. FDIC*, 103 F.3d 1409, 1414-15 (8th Cir. 1996)).

[265] *Id.* at 24-25 (citing *In re Grubb*, FDIC-88-282k and FDIC-89-111e, 1992 WL 813163 at *29 (Aug. 25, 1992) (final decision), *aff'd sub nom. Grubb v. FDIC*, 34 F.3d 956 (10th Cir. 1994)).

[266] *Id.* at 25 (citing *Michael v. FDIC*, 687 F.3d 337, 352-53 (7th Cir. 2012)).

[267] *Id.* at 25 (citing SMF ¶ 67); *see also* EC-MSD-259 (Welch Dep.) at 63-64; EC-MSD-20 (March 28, 2014 Board Minutes).

[268] Response at 23 (citing SMF-OPP ¶ 83); *see* R-MSD-45* (Fitzgerald Decl.) ¶ 9.

on hotel properties owned by these three aforementioned entities, along with eight guarantors, including Bharat's sister, Bharat's brother, and the JPM-5 real estate entities.[269] Taking this additional collateral into account, Respondent asserts that the loan to value ratio was approximately 76%.[270]

Respondent acknowledges that he knew that the JPM5 entities could not be repledged, but asserts that the guaranty of payment by the JPM5 entities had sufficient cash flow to pay the Pruthvi loan principal and interest obligations.[271] Furthermore, Respondent asserts that a security agreement is enforceable against a debtor even if the security interest is not perfected. According to Respondent's expert, the JPM5 pledge agreement was a "sound banking practice" and there were significant "cultural issues" supporting the decision not to file the UCC statement.[272]

Respondent argues that Enforcement Counsel fails to recognize that the Pruthvi loan was modified on July 30, 2012 to add additional collateral, including pledges of interest in nine additional real estate entities, known as the Natixis-9.[273] According to Respondent, the second mortgage on Rupa, Inc. was released in exchange for security interest in Natixis-9 (perfected on October 1, 2012), which more than doubled the collateral.[274]

The undersigned finds that genuine issues of material fact remain regarding whether the Pruthvi loan of $24.86 million was adequately secured, and therefore, whether approval of such loan was unsafe and unsound. Based on the record before the undersigned, it is unclear whether

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[269] Response at 15-16 (citing SMF-OPP ¶¶ 52-53); *see also* R-MSD-38* (Aakash/Beena/Rupa Loan Agreement); R-MSD-39* (Pruthvi Guaranty of Payment).

[270] Response at 16.

[271] *Id.* (citing SMF-OPP ¶ 55); *see also* R-MSD-1 (Hiren Dep.) at 168-169.

[272] Response at 17 (citing SMF-OPP ¶¶ 61-62); *see also* R-MSD-14 (Schwartz Expert Report) at 6; R-MSD-41 (Schwartz Dep.) at 62, 64.

[273] Response at 17-18 (citing SMF-OPP ¶ 63); *see also* R-MSD-42* (Pruthvi Loan Modification).

[274] Response at 18 (citing SMF-OPP ¶ 63); *see also* R-MSD-42* (Pruthvi Loan Modification); R-MSD-81* (Aakash/Beena/Rupa Credit Memorandum); R-MSD-45 (Fitzgerald Decl.).

the second mortgages on the Aakash, Inc., Beena, Inc., and Rupa, Inc. hotel properties, along with the additional guarantors on the loan, including Bharat's brother and sister, along with the "guaranty of payment" from JPM5, which purportedly had sufficient cash flow to make the loan payments, met the Bank's underwriting requirements for a loan of that size if the JPM5 pledges were excluded as collateral. Furthermore, it is unclear to the undersigned, based on the current record before her, what effect the loan modifications in July 2012 had on the Pruthvi loan.

While Respondent does not contest certain facts surrounding the Pruthvi loan—including the fact that he knew JPM5 could not be repledged and that he agreed not to perfect the Bank's security interest in the JPM5 pledges at the time the loan was made—there remain genuine issues of material fact regarding whether Respondent disclosed this information to the Board, whether the Board knew this information before it approved the loan, or whether knowing this information would have affected the Board's approval of the loan.

b. <u>Lombardi Participation Repurchase</u>

Enforcement Counsel asserts that the Bank's repurchase of Lombardi's $2 million participation in the Pruthvi loan not only violated the legal lending limit and 2013 Consent Order, but also constituted an unsafe or unsound practice, because participating in the violation of such a law in this circumstance is *per se* an unsafe or unsound practice.[275]

As noted above, the Bank had no legal obligation to repurchase Lombardi's $2 million participation in the Pruthvi loan. At the time the Bank repurchased Lombardi's participation in October 2013, the Pruthvi loan had already deteriorated to the point where the OCC had directed the Bank to put Pruthvi on nonaccrual status.[276] Respondent testified that the decision to

[275] Motion at 25; *see In re Massey*, FDIC 91-211e, 1993 WL 853749 at *20 (May 24, 1993) (recommended decision).
[276] SMF ¶¶ 90, 92.

repurchase Lombardi's participation was a business decision.[277] The undersigned has already found that the $2 million Lombardi Participation Repurchase violated the legal lending limit, 12 C.F.R. §§ 32.3(a) and 32.5, and violated the 2013 Consent Order. The undersigned similarly finds that Respondent's decision to have the Bank to repurchase Lombardi's $2 million participation in the Pruthvi loan at a time when the Pruthvi loan was on nonaccrual status also constituted an unsafe or unsound practice.

c. **Mogar Farms Loan**

Enforcement Counsel asserts that the November 2011 $2.6 million loan to Mogar Farms was a nominee loan that was made for the benefit of Bharat Patel.[278] Although the funds were disbursed to an account associated with Dipan, $1.54 million was wired to pay a personal loan of Bharat's the following day, and one week later, another $900,000 was wired to Bharat's management company.[279] In addition, Enforcement Counsel asserts that Bharat and his management company made payments on the Mogar Farms loan.[280] Enforcement Counsel asserts that OCC examiners reviewed the Mogar Farms documentation after the Bank failed and concluded that it was a nominee loan, which is an unsafe or unsound practice.[281]

Respondent asserts that there is "no evidence supporting the commission of a crime to defraud the Bank" and that facts drawn in Respondent's favor establishes that Mogar Farms was not a nominee loan.[282] According to Respondent, Enforcement Counsel has not presented evidence

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[277] EC-MSD-4 (Hiren Dep.) at 144-147.

[278] Motion at 6, 15-16 (citing SMF ¶ 108); *see also* EC-MSD-147 (October 16, 2011 email from Fitzgerald to Respondent stating "Good morning, I am working on the loan for Dipan Patel where the loan proceeds will be going to Bharat. Please let me know the rate and points you would like to charge for this loan.").

[279] Motion at 16 (citing SMF ¶ 111-114).

[280] *Id.* at 16-17 (citing SMF ¶ 115-117, 119-122).

[281] *Id.* at 26 (citing SMF ¶ 139); *see also* EC-MSD-259 (Welch Dep.) at 26-29.

[282] Response at 28.

that Respondent was personally involved in the Mogar Farms loan or that Respondent was self-dealing; therefore, Enforcement Counsel is not entitled to summary disposition that the Mogar Farms loan was unsafe or unsound. Furthermore, Respondent asserts that the Mogar Farms loan was repaid in full.[283]

As noted above, based on the record before the undersigned at this time, there appears to be, at minimum, genuine issues of material fact regarding Respondent's knowledge surrounding the Mogar Farms loan, therefore, the undersigned finds it premature to determine whether it was an unsafe and unsound practice.

d. <u>Norcross & Sterling Key Loans</u>

Enforcement Counsel asserts that Respondent directed, authorized, or approved the Bank diverting funds from accounts related to Bharat—namely, Jersey Gardens and Ridgefield Park—to make loan payments to the unrelated entities Norcross and Sterling Key. Enforcement Counsel asserts that Respondent's conduct created risks to the Bank, led to masking a loan delinquency, and resulted in loss to the Bank. According to Enforcement Counsel, using loan proceeds for an unauthorized purpose and to mask a loan delinquency on an unrelated loan is an unsafe or unsound practice.[284]

Specifically, Enforcement Counsel asserts that when the Bank drew funds from Jersey Gardens to make payments on the Norcross and Sterling Key loans, it left Bharat's loans underfunded and uncollateralized. Bharat's Jersey Garden's loan was approved for the purpose of hotel construction; however, from January 2011 through November 2012, the Bank diverted at

[283] *Id.* at 27-28.
[284] Motion at 27 (citing SMF ¶¶ 167-168).

least $176,278.43 from Jersey Gardens to make loan payments on Norcross and Sterling Key loans.[285] The Bank ended up charging off $6.35 million of the Jersey Gardens loan.[286]

Similarly, a $250,000 CD from Ridgefield Park was used as collateral for a stand-by letter of credit. When the Bank depleted $248,941.82 from the Ridgefield Park CD from July 2011 to May 2012 to make payments on the Norcross and Sterling Key loans, the letter of credit was no longer fully secured. When the beneficiary of the stand-by letter of credit requested payment, the Bank had to pay the beneficiary with its own funds, which caused the Bank to spend and then charge off $250,000.[287]

Respondent asserts that "Bharat knew about and authorized the use of funds" and that "the payments were transparent and nothing was concealed, the payments were made in the best interest of the Bank, and the Bank did not suffer any loss" because the loans were repaid and the $250,000 CD supporting a letter of credit was ultimately replenished.[288] According to Respondent's expert, the payments made by Bharat represented an assurance to make things "right," as Bharat guaranteed the payments verbally, which is common in "cultural" banks.[289]

The undersigned finds that Bharat and his related entities, Jersey Gardens and Ridgefield Park, had no legal obligation to make payments for the Norcross and Sterling Key loans. Respondent does not dispute that funds from Jersey Gardens and Ridgefield Park were used to make loan payments for Norcross and Sterling Key. Respondent testified that Bharat knew this was happening and did not complain,[290] implying that nothing improper took place. While there is

[285] *Id.* at 28 (citing SMF ¶¶ 142, 144, 147, 158).
[286] *Id.* (citing SMF ¶ 155).
[287] *Id.* (citing SMF ¶¶ 157, 158, 160, 164).
[288] Response at 31 (citing SMF-OPP ¶¶ 72, 123).
[289] *Id.* at 32 (citing SMF-OPP ¶¶ 114-117).
[290] EC-MSD-45 (Hiren Dep.) at 239-40.

testimony that Bharat made a verbal "guarantee," the undersigned finds that Bharat's entities had no legal obligation to make these loan payments, and that if such a guarantee were in the best interests of the Bank, the Bank should have had a written guarantee as part of the loan documentation.

Furthermore, even if the Bank was relying on Bharat's verbal guarantee, the manner in which payments were taken from one of Bharat's related entities to pay for an unrelated entity's loans was improper, as there were inadequate controls in place to prevent unauthorized payments. Rather, the Bank should have contacted Bharat to notify him that the Norcross and Sterling Key loans were past due and request that Bharat make payment on those loans based on his verbal guarantee. Based on a review of the evidence, the undersigned finds that Respondent directed, authorized, or approved the Bank inappropriately diverting funds from Jersey Gardens and Ridgefield Park to make loan payments for the Norcross and Sterling Key loans, which constituted an unsafe or unsound practice.

e. **BRT Holdings Overdrafts**

Enforcement Counsel asserts that Respondent authorized and directed the Bank to approve large overdrafts—up to $500,000—to BRT for the purpose of making payments on BRT's loans at the Bank, which was an unsafe or unsound practice because there were no adequate risk controls.[291] According to Enforcement Counsel, Bank officers and OCC examiners issued warnings regarding the risks in allowing such overdrafts, which were essentially large unsecured loans.[292]

[291] Motion at 29.
[292] *Id.*

Respondent responds that the Bank did not provide working capital lines of credit to its commercial customers. Rather, loan documents addressed the borrower's obligation to pay overdrafts.[293] Respondent asserts that Rohit was a longstanding large customer with many loans, and that the overdrafts were a convenience to him, in lieu of providing a line of credit.[294] Respondent's expert asserts that the way the Bank handled overdrafts "as if they were lines of credits was not unusual, and was consistent with the exercise of ordinary care."[295]

OCC examiners warned the Bank regarding risks related to overdrafts, something that was specifically noted in the January 22, 2013 Interim ROE which stated that allowing such overdrafts could result in a violation of 12 U.S.C. § 161(a), and led to the Bank revising its overdraft policy in July 2013.[296] Despite this policy change, Respondent continued to allow Rohit to incur large overdrafts as a "convenience."[297] As noted above, while the overdrafts were temporary and Rohit's accounts were eventually no longer overdrawn, the undersigned agrees with Enforcement Counsel that continually allowing a customer to overdraw his account to make payments for an outstanding loan—masking loan delinquencies and understating losses at a time when the Bank's capital levels were critically deficient and especially after the Bank instituted a policy change prohibiting the practice—constituted an unsafe or unsound practice.

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[293] Response at 34 (citing SMF-OPP ¶ 124); *see also* R-MSD-41 (Schwartz Dep.) at 148; R-MSD-14 (Schwartz Expert Report) at 13.

[294] Response at 34 (citing SMF-OPP ¶ 125); *see also* R-MSD-1 (Hiren Dep.) at 246.

[295] Response at 34 (citing SMF-OPP ¶ 124); *see also* R-MSD-41 (Schwartz Dep.) at 148.

[296] *See* EC-MSD-91* (2013 Board Minutes) at 349-350; EC-MSD-86 (July 1, 2013 Loan Policy) at 111-112.

[297] R-MSD-1 (Hiren Dep.) at 246.

6. **Breach of Fiduciary Duty**

Respondent owed the Bank a fiduciary duty of care, which at all times required him "to act in good faith and in a manner reasonably believed to be in the [institution's] best interest."[298] In furtherance of this duty, 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."[299] Respondent also owed the Bank a fiduciary duty of loyalty, requiring him "to put the interests of the bank before [his] own, and not use their positions at the bank for [his] own personal gain."[300] One aspect of this duty of loyalty is the duty of candor, which in turn requires fiduciaries to "disclose all material information relevant to corporate decisions from which they may derive a personal benefit."[301]

a. **Pruthvi Loan**

Enforcement Counsel asserts that Respondent breached his fiduciary duty of care by approving the Pruthvi loan, which was primarily secured by the JPM5 pledges. Enforcement Counsel argues that a prudent and diligent bank officer would not accept pledge agreements for collateral on a loan the size of the Pruthvi loan—pledges which violated the JPMC loan agreement, were likely invalid, and would likely trigger litigation if the security interest was filed and perfected.[302]

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[298] *Ellsworth*, 2016 WL 11597958, at *15 (emphasis added).

[299] *In the Matter of Tonya Williams*, No. 11-553e, 2015 WL 3644010, at *9 (Apr. 21, 2015) (FDIC final decision) (internal quotation marks and citation omitted).

[300] *In the Matter of Frank E. Smith and Mark A. Kiolbasa*, No. 18-036-E-I, 2021 WL 1590337, at *15 (Mar. 24, 2021) (FRB final decision).

[301] *Id.* (internal quotation marks and citation omitted) (also noting that "[o]missions are sufficient to trigger a violation of this duty").

[302] Motion at 32.

Enforcement Counsel asserts that Respondent's failure to disclose the nature of the JPM5 pledge restrictions to the Board breached his duties of care and candor. According to Enforcement Counsel, Respondent's reliance on outside counsel regarding documentation on the pledges does not obviate Respondent's own duties as Chairman and CEO of the Bank.[303]

Finally, Enforcement Counsel asserts that Respondent breached his duty of loyalty by failing to perfect the security interest in JPM5. According to Enforcement Counsel, in failing to perfect the Bank's security interest in JPM5, Respondent acted for the benefit of the borrower, Bharat, rather than for the Bank. Enforcement Counsel also asserts that Respondent breached his duty of care and candor by failing to disclose to the Board that he did not plan to perfect the security interest in JPM5, which was critical information that the Board should have known before deciding whether the approve the loan.[304] Respondent asserts that, for many of the same reasons his actions were not unsafe or unsound, he did not breach any of his fiduciary duties.[305]

As discussed above, the undersigned found that genuine issues of material fact remain regarding whether the Pruthvi loan of $24.86 million was adequately secured and whether Respondent disclosed to the Board that the JPM5 security could not be repledged, or that the Bank was not going to perfect its security interest in the JPM5 pledges at the time the loan was made. Accordingly, the undersigned finds that making a determination of Respondent's breach of fiduciary duties regarding the Pruthvi loan cannot be made at this time.

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[303] *Id.* (citing *De La Fuente*, 332 F.3d at 1222; *In re Landry*, 1999 WL 440608 at *15 (May 25, 1999) (final decision), *review denied, Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000)).

[304] *Id.* at 33.

[305] Response at 21.

b. Lombardi Participation Repurchase

Enforcement Counsel asserts that Respondent breached his fiduciary duty of care and loyalty when directing the Bank to repurchase Lombardi's $2 million participation in the Pruthvi loan. According to Enforcement Counsel, a prudent bank officer would not repurchase a $2 million participation on a "delinquent, substandard, nonaccrual loan" based on "unfounded speculation that Lombardi might mobilize customers against the Bank."[306] Enforcement Counsel notes that Lombardi deposited the check into his account at the Bank and left the amount there until at least March 2014, which indicates that Lombardi did not intend to move his money from the Bank because he had lost faith in the Bank.[307] Respondent asserts that, for many of the same reasons his actions were not unsafe or unsound, he did not breach any of his fiduciary duties.[308]

The undersigned agrees with Enforcement Counsel that Respondent breached his fiduciary duty of care with regard to the $2 million Lombardi Participation Repurchase. Directing the Bank to make the repurchase, when it had no legal obligation to do, when the Pruthvi loan was already on nonaccrual status, and would lead to a violation of the Bank's legal lending limit, based on mere speculation that Lombardi would bad mouth the Bank and create a run on the Bank, is clearly not what a diligent and prudent bank officer would do.

c. Mogar Farms Loans

Enforcement Counsel asserts that Respondent breached his fiduciary duty of care and loyalty with respect to the Mogar Farms loan. According to Enforcement Counsel, Respondent

[306] Motion at 34.
[307] *Id.* at 26 (citing SMF ¶ 94).
[308] Response at 27.

was responsible for orchestrating the nominee loan and concealing the nature of the Mogar Farms loan to the Board and the OCC.[309]

Respondent asserts that there is "no evidence supporting the commission of a crime to defraud the Bank" and that facts drawn in Respondent's favor establishes that Mogar Farms was not a nominee loan.[310] According to Respondent, Enforcement Counsel has not presented evidence that Respondent was personally involved in the Mogar Farms loan or that Respondent was self-dealing; therefore, Enforcement Counsel is not entitled to summary disposition that Respondent breached his fiduciary duty.[311]

As discussed above, the undersigned has found that genuine issues of material fact remain regarding Respondent's knowledge surrounding the Mogar Farms loan. Accordingly, the undersigned finds that making a determination of Respondent's breach of fiduciary duties regarding the Mogar Farms loan cannot be made at this time.

d. <u>Norcross & Sterling Key Loans</u>

Enforcement Counsel asserts that Respondent breached his fiduciary duty of care when he directed, authorized, or approved the Bank's practice of using funds from Bharat-related entities Jersey Gardens and Ridgefield Park to make payments for loans on unrelated entities Norcross and Sterling Key.[312] As noted above, Respondent asserts that Enforcement Counsel is not entitled to summary disposition because "Bharat knew about and authorized the use of funds."[313]

The undersigned agrees with Enforcement Counsel that Respondent breached his fiduciary duty of care with regard to the Norcross and Sterling Key loans. Directing, authorizing, or

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[309] Motion at 34.
[310] Response at 28.
[311] *Id.* at 27-28.
[312] Motion at 34-35.
[313] See Section V.C.5.d.

approving of the Bank's practice of diverting funds from Jersey Gardens and Ridgefield Park to make loan payments for Norcross and Sterling Key, without written authorization from Bharat, when Bharat was not legally obligated to make such loan payments, is clearly not what a diligent and prudent bank officer would do.

e. BRT Holdings Overdrafts

Enforcement Counsel asserts that Respondent breached his fiduciary duty of care when he directed, authorized, or approved of Rohit's overdrafts to make "payments" on loans to the Bank, when the Bank was already undercapitalized. According to Enforcement Counsel, such actions were not in the best interests of the Bank, because they led to inadequate risk controls and the filing of inaccurate Call Reports.[314] Respondent asserts that, for many of the same reasons his actions were not unsafe or unsound, he did not breach any of his fiduciary duties.[315]

The undersigned agrees with Enforcement Counsel that Respondent breached his fiduciary duty of care with regard to the BRT Overdrafts for Rohit. Directing, authorizing, or approving of the Bank's practice of allowing Rohit to overdraft his accounts for hundreds of thousands of dollars months at a time to make "payments" on his outstanding loans at the Bank, which led to the filing of inaccurate Call Reports, when the Bank was already severely undercapitalized was not in the best interests of the Bank and is clearly not what a diligent and prudent bank officer would do. Indeed, Respondent's own expert testified that it would be imprudent for a bank to recognize loan payments made from accounts with insufficient funds, stating that such loans should be considered past due rather than current.[316]

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[314] Motion at 35.
[315] Response at 36.
[316] EC-MSD-109 (Schwartz Dep.) at 151-153, 158; *see also* SMF ¶ 189.

C. <u>Effect</u>

Enforcement Counsel asserts that the effects prong for a prohibition order is satisfied because the Bank suffered or was likely to suffer loss or other damage related to Respondent's misconduct.[317] Respondent generally asserts that genuine issues of material fact remain, which preclude summary disposition.

A summary of the undersigned's findings on the effects prong is noted in the table below. With respect to the effects element of Section 1818(e) and as applicable for Section 1818(i), the items marked with "X" indicates that the OCC alleges loss in the Notice, but the undersigned has found that summary disposition is premature, while items marked with "√" indicates that the OCC has established that summary disposition is warranted:

	Article III (Pruthvi Loan)	**Article IV (Lombardi Participation Repurchase)**	**Article V (Mogar Farms Loan)**	**Article VI (Norcross & Sterling Key Loans)**	**Article VII (BRT Overdrafts)**
Bank Suffered Loss	X	√		√	
Bank Likely to Suffer Loss	X	√		√	√

1. <u>Pruthvi Loan</u>

Enforcement Counsel asserts that the effects prong of Sections 1818(e) and 1818(i) is satisfied because the Bank suffered likely and actual financial loss by virtue of Respondent's misconduct.[318] Specifically, the Bank was directed by the OCC to take a $17.1 million loss on the Pruthvi loan, which was charged off by the Bank on September 8, 2014.[319] In addition, Enforcement Counsel asserts that the Bank incurred extensive litigation expenses over lawsuits

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[317] Motion at 35-37.
[318] *Id.* at 36 (citing SMF ¶ 51).
[319] *Id.* at 25 (citing SMF ¶¶ 80-81).

regarding the JPM5 collateral.[320] Enforcement Counsel asserts that even if the Bank later recovered funds, a temporary loss is nevertheless a loss for the purposes of § 1818.[321]

Respondent asserts that Enforcement Counsel cannot establish that the effect requirement has been met because the Pruthvi loan was repaid. Specifically, Respondent asserts that when Bharat filed for Chapter 11 bankruptcy, Bharat and the Bank began negotiating the restructure of his loans, which would have included a $14 million loan payment and also began negotiating with an investor, Navika, who was willing to invest $20 million in Bharat's hotels. Respondent asserts, however, that, when he was forced to resign unexpectedly, Navika reneged on his $20 million investment, and that Bharat failed to make a $14 million payment on his loan.[322] Subsequently, in December 2014, Champ Patel purchased the Pruthvi loan from the FDIC as receiver. According to Respondent, Navika proceeded with its $20 million investment and in October 2015, the Pruthvi loan was paid in full.[323] Furthermore, Respondent asserts that there is no dispute that Respondent did not derive any personal benefit from the Pruthvi loan.[324] As to whether the Bank suffered any actual loss or an abnormal risk of loss, Respondent asserts that, at minimum, this remains in dispute and summary disposition cannot be granted in Enforcement Counsel's favor.[325]

The undersigned found above that genuine issues of material fact remain regarding Respondent's conduct regarding the Pruthvi loan. In addition, Respondent asserts that the Pruthvi loan charge-off was not a charge-off per se, but "a non-cash, partial loan loss reserve of $7.6

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[320] *Id.* at 25.

[321] *Id.* at 37 (citing *Towe v. Dep't of Treasury*, 168 F.3d 502 (Table) at *2 (9th Cir. 1999); *United States v. Mau*, 45 F.3d 212, 216 (7th Cir. 1995)).

[322] Response at 20 (citing SMF-OPP ¶¶ 73-75).

[323] *Id.* at 21 (citing SMF-OPP ¶¶ 76-77).

[324] *Id.* at 21-22.

[325] *Id.* at 22.

million," and is therefore, not an actual loss.[326] The undersigned finds that the issue of whether a non-cash charge-off and recording of a loan loss reserve is a Bank loss for accounting purposes remains a disputed issue of fact. Accordingly, the undersigned finds that making a determination of whether the Bank suffered an actual loss, or was likely to suffer a loss, is similarly premature at this time.

2. Lombardi Participation Repurchase

Enforcement Counsel asserts that the Section 1818 effects elements are satisfied because the Bank suffered likely and actual financial loss by virtue of Respondent's misconduct in directing the Bank to repurchase Lombardi's $2 million participation in the Pruthvi loan. As detailed above, had the Bank not repurchased the $2 million participation, Lombardi's pro-rata share of the $17.1 million charge-off of the Pruthvi loan would have been $1.39 million.[327] Further, and regardless, it is undisputed that the Bank paid accrued interest to Lombardi when repurchasing the participation, even though the Pruthvi loan had been moved to nonaccrual and "was no longer accruing interest."[328]

Respondent does not specifically address the effects element with respect to the Lombardi Participation Repurchase, but maintains that at minimum, questions of fact remain regarding Respondent violated any law, breached a fiduciary duty, committed an unsafe or unsound practice, and had requisite culpability, which precludes summary disposition.[329]

The undersigned agrees with Enforcement Counsel that the Bank suffered actual loss, or was likely to suffer loss, due to Respondent's misconduct related to the $2 Lombardi participation

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[326] R. SOL Reply at 8.
[327] Motion at 36 (citing SMF ¶ 98).
[328] SMF ¶ 98.
[329] Response at 27.

repurchase and that the effects prong has been satisfied. Specifically, had the Bank not repurchased the $2 million participation, Lombardi's pro-rata share of the $17.1 million charge-off of the Pruthvi loan would have been $1.39 million.[330] In addition, the Bank's payment of accrued interest to Lombardi independently and undeniably caused loss to the Bank as a result of Respondent's participation-related misconduct.

3. Mogar Farms Loan

While Enforcement does not specifically address Bank loss with respect to Mogar Farms, Respondent asserts that the Bank suffered no actual loss—as the loan was repaid in full—nor was there any abnormal risk of loss to the Bank.[331]

Enforcement Counsel did not allege that a prohibition order should be imposed based on Respondent's misconduct with regard to the Mogar Farms loan.[332] Rather, Enforcement Counsel alleges that Respondent's pattern of misconduct with regard to the Mogar Farms loan should be the basis of a second-tier civil money penalty.[333] As such, the undersigned declines to make a finding with respect to loss regarding the Mogar Farms loan at this time.

4. Norcross & Sterling Key Loans

Enforcement Counsel contends that the effects prong is satisfied as to this claim because the Bank suffered likely and actual financial loss by virtue of Respondent's misconduct based on his knowledge and approval of the Bank's use of Jersey Garden and Ridgefield Park CD funds to make payments on the Norcross and Sterling Key loans.[334] Specifically, the $176,278.43 taken from Jersey Gardens directly contributed to the hotel project's shortfall and the $6.35 million

[330] SMF ¶ 98.
[331] Response at 31 (citing SMF-OPP ¶ 112); *see also* R-MSD-65* (Mogar Farms Loan History).
[332] *See* Notice, Article V.
[333] *See id.* at ¶¶ 141-142.
[334] Motion at 36-37.

charge-off taken by the Bank in April 2013. And the $248,941.82 taken from the Ridgefield Park CD left the letter of credit unsecured, which required the Bank to pay—and charge-off in January 2014—$250,000 when the beneficiary presented the letter of credit for payment.[335] In addition, Enforcement Counsel asserts that Respondent's conduct regarding the Norcross and Sterling Key loans exposed the Bank to abnormal risk of loss from legal liability.[336]

Respondent asserts that the Bank did not suffer any actual loss on the Norcross and Sterling Key loans. Specifically, Respondent asserts that the Bank loaned $29 million to Bharat for the Jersey Gardens hotel; that in 2010 the Bank sold $9 million of the loan; and that in August 2013, the Jersey Gardens loan balance of $19 million plus was paid in full.[337] In addition, Respondent asserts that the other loans were repaid.[338] As to the $250,000 CD supporting a letter of credit, Respondent asserts that it was ultimately replenished.[339]

The undersigned agrees with Enforcement Counsel that the Bank suffered an actual loss, or was likely to suffer loss, thereby satisfying the effects prong. While Respondent asserts that the Jersey Gardens loan was eventually repaid and the Ridgefield Park CD was eventually replenished, in the interim, the Bank took two charge-offs related to these loans, specifically a $6.35 million charge-off taken by the Bank in April 2013 on Jersey Gardens,[340] and a $248,941.82 charge-off taken in January 2014 on the Ridgefield Park CD. Further, it is undisputed that the Bank paid

[335] *Id.* at 37.
[336] *Id.* at 29.
[337] Response at 33-34 (citing SMF-OPP ¶ 122).
[338] *Id.* at 34 (citing SMF-OPP ¶ 123).
[339] *Id.* at 31 (citing SMF-OPP ¶ 123).
[340] Respondent asserts that this charge-off, similar to the charge-off for the Pruthvi loan, "merely shifted money around on the Bank's books, with the result that there was only a bookkeeping or theoretical loss." R. SOL Reply at 14 (quoting case). While the issue of whether such a charge-off constitutes a "loss" may be a disputed fact, the undersigned finds that resolution of this issue is not essential here because of the undisputed fact that—due to Respondent's misconduct—the Bank was obligated to pay $250,000 with its own funds to the beneficiary of the letter of credit, which independently constitutes an actionable loss.

$250,000 of its own funds to honor the Ridgefield Park letter of credit when it was left unsecured as a result of Respondent's misconduct. At minimum, this payment of funds constituted at least a temporary financial loss to the then-severely undercapitalized Bank for the purposes of 12 U.S.C. § 1818—a loss that persisted, to all appearances, through the date of the Bank's failure.[341]

5. BRT Holdings Overdrafts

Finally, Enforcement Counsel asserts that the effects prong is satisfied as to this claim because the Bank was made likely to suffer financial loss by virtue of Respondent's misconduct regarding Rohit's BRT Overdrafts. Specifically, Enforcement Counsel asserts that Rohit's entire deposit relationship at the Bank was frequently negative for hundreds of thousands of dollars, which effectively constituted unsecured loans. Enforcement Counsel also asserts that by allowing the overdrafts to occur to make loan payments on Rohit's loans, the Call Reports were inaccurate, thus further masking loan delinquencies and increasing the Bank's risk and exposure.[342]

Respondent asserts that the Bank did not suffer any actual loss on the BRT loan.[343] Specifically, Respondent asserts that the overdrafts were paid in full by early 2014 and that there were no other subsequent overdrafts.[344] In addition, after the Bank closed, the FDIC, as receiver, sold Rohit's loans to the State Bank of Texas, which was timely paid.[345]

The undersigned agrees with Enforcement Counsel that the Bank suffered likely financial loss by reason of Respondent's overdraft-related misconduct, thus satisfying the effects prong.

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[341] *See Towe*, 168 F.3d 502 at *2 (finding that Section 1818 effects prong was met and observing that "[t]he fact that the Bank ultimately recovered its financial health does not negate the fact that some of the unlawful transactions caused short-term losses to the Bank"); *Mau*, 45 F.3d at 216. Indeed, the undersigned notes that unlike the financial institution at issue in *Towe*, the Bank here *never* "ultimately recovered its financial health" after suffering the loss in question, regardless of any allegedly belated recovery of the money by the FDIC as receiver.

[342] Motion at 37.

[343] Response at 39.

[344] *Id.* at 36 (citing SMF-OPP ¶ 138).

[345] *Id.* (citing SMF-OPP ¶ 138).

While Respondent asserts that the Rohit's deposit relationship was eventually in the positive, the overdrafts were against the Bank's new overdraft policy and resulted in a misstatement in the Bank's Call Reports. The Bank's approval of such large overdrafts were akin to unsecured loans, which likely could have resulted in financial loss if Rohit's deposit relationship remained in the negative. Moreover, the inaccuracy of the Call Reports alone increased the likelihood of the Bank suffering future losses as a result of its loan delinquencies and lending limit violations.

D. Culpability

Enforcement Counsel asserts that the culpability prong for a prohibition order is satisfied because Respondent's actions demonstrated either a willful or continuing disregard for the safety and soundness of the Bank, or that Respondent engaged in personal dishonesty.[346] Respondent generally asserts that genuine issues of material fact remain, which preclude summary disposition.

It is typically, although not exclusively, appropriate to resolve questions of culpability at the hearing stage rather than on summary disposition.[347] However, where the undisputed material facts make it sufficiently clear, without "making credibility determinations, weighing evidence, and drawing [impermissible] inferences from facts,"[348] that a respondent acted with the requisite level of culpability, then such a finding may be made.

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[346] Motion at 37-42.

[347] *See*, *e.g.*, *Miller v. FDIC*, 906 F.2d 972, 974 (4th Cir. 1990) (noting "the general rule that summary judgment is seldom appropriate in cases wherein particular states of mind are decisive elements of a claim or defense"); *Gomez v. Trustees of Harvard Univ.*, 677 F. Supp. 23, 24 (D.D.C. 1988) (noting that "intent and state of mind [are] areas that are particularly ill-suited for summary disposition"); *but see In the Matter of Carl V. Thomas et al.*, Nos. 99-027-B-I, -CMP-I, & E-I, 2005 WL 1520020, at *7 (June 7, 2005) (FRB final decision) (finding Section 1818(e) culpability elements satisfied on summary disposition); *In the Matter of Charles F. Watts*, Nos. 98-046e & -044k, 2002 WL 31259465, at *6 (Aug. 6, 2002) (FDIC final decision) (same).

[348] *Blanton*, 2017 WL 4510840, at *6 (internal quotation marks and citation omitted) (noting that "there is no genuine issue [of fact] if the evidence presented [by the non-moving party] is of insufficient caliber or quantity to allow a rational finder of fact to find for the non-movant"); *cf. Brodie v. Dep't of HHS*, 715 F. Supp. 2d 74, 81-82 (D.D.C. 2010) (affirming ALJ's summary disposition against respondent where "the record . . . supported only one reasonable inference regarding [respondent's] state of mind:

A summary of the undersigned's findings on the culpability prong is noted in the table below. With respect to the culpability prong of Section 1818(e) and as applicable for Section 1818(i), the items marked with "X" indicates that the OCC alleges culpability in the Notice, but the undersigned has found that summary disposition is premature, while items marked with "√" indicates that the OCC has established that summary disposition is warranted:

	Article III (Pruthvi Loan)	**Article IV (Lombardi Participation Repurchase)**	**Article V (Mogar Farms Loan)**	**Article VI (Norcross & Sterling Key Loans)**	**Article VII (BRT Overdrafts)**
Personal dishonesty	X		X	X	
Willful or continuing disregard	X	√		√	√

1. Willful or Continuing Disregard for the Safety and Soundness of the Bank

"Willful disregard is deliberate conduct that exposes the bank to abnormal risk of loss or harm contrary to prudent banking practices, while continuing disregard is conduct that has been voluntarily engaged in over a period of time with heedless indifference to the prospective consequences."[349] For conduct to constitute willful disregard, it is not necessary to find that an IAP "deliberately exposed the Bank to abnormal risk of loss or harm,"[350] only that the unsafe or unsound banking practice engaged in by the individual was done intentionally and was not

[that he] had been either knowing or reckless with regard to the falsification of information," and where respondent "had failed to offer any specific facts or evidence at the summary disposition stage that would support his claims of blamelessness or counter [the agency's] evidence").

349 *Ellsworth*, 2016 11597958, at *17 (internal quotation marks and citation omitted).

350 *In the Matter of Charles R. Vickery, Jr.*, No. AA-EC-96-95, 1997 WL 269106, at *8 (Apr. 14, 1997) (OCC final decision); *see also Smith and Kiolbasa*, 2021 WL 1590337, at *29 (noting that "[a]n officer acts willfully when he is aware of his conduct; willfulness does not require a showing that Respondent was aware of the law") (internal quotation marks and citation omitted).

"technical or inadvertent."[351] Continuing disregard, in turn, requires evidence of "a mental state akin to recklessness"[352] that has manifested through, for example, the "voluntary and repeated inattention to" unsafe and unsound practices, or the "knowledge of and failure to correct clearly imprudent and abnormal practices that have been ongoing."[353]

a. Pruthvi Loan

Enforcement Counsel asserts that the culpability prong is satisfied because Respondent's misconduct was deliberate, contrary to prudent banking practices, exposed the Bank to abnormal risk of loss, and caused significant actual loss to the Bank. Specifically, Enforcement Counsel states that the Bank funded the Pruthvi loan in December 2011 secured by the defective JPM5 collateral, but (at Respondent's direction) did not perfect its interest in that collateral until October 2013, thus assertedly demonstrating deliberate conduct with willful and continuing disregard on the part of Respondent.[354] In response, Respondent argues that his failure to "repeat the facts about the Bank's security interest in the JPM-5 ownership interests does not establish the culpability required under § 1818(e)(1)(C)."[355]

The undersigned found above that genuine issues of material fact precluded a finding whether Respondent's conduct regarding the Pruthvi loan constituted an unsafe or unsound practice. As such, the undersigned similarly finds that it is premature to determine whether

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[351] *In the Matter of Douglas V. Conover*, Nos. 13-214e & -217k, 2016 WL 10822038, at *28 (Dec. 14, 2016) (FDIC final decision) (internal quotation marks and citation omitted).

[352] *Smith and Kiolbasa*, 2021 WL 1590337, at *29 (internal quotation marks and citation omitted).

[353] *In the Matter of Lawrence A. Swanson, Jr.*, No. AP-ATL-93-7, 1995 WL 329616, at *5 (Apr. 4, 1995) (OTS final decision on reconsideration); *see also Watts*, 2002 WL 31259465, at *8 (continuing disregard is "conduct which is voluntarily engaged in over time").

[354] Motion at 38.

[355] Response at 23.

Respondent's conduct regarding the Pruthvi loan constituted willful or continuing disregard for the safety and soundness of the Bank.

b. **Lombardi Participation Repurchase**

As to the $2 million Lombardi Participation Repurchase, Enforcement Counsel asserts that directing the Bank to make the repurchase showed a deliberate violation of the legal lending limit, as well as willful disregard for the Bank's safety and soundness, which resulted in an abnormal risk of loss, as well as an actual loss of $1.39 million.[356] Respondent asserts that questions of fact remain regarding Respondent's culpability regarding the Lombardi Participation Repurchase.[357]

The undersigned agrees with Enforcement Counsel that Respondent's misconduct with regard to the Lombardi Participation Repurchase constituted willful or continuing disregard for the safety and soundness of the Bank. As noted above, the Bank was under no obligation to repurchase Lombardi's $2 million participation in the Pruthvi loan—and, in fact, doing so violated the Consent Order directing the Bank to protect its interest in substandard assets. At the time Lombardi requested the Bank to make the repurchase, the Pruthvi loan was on nonaccrual, which exposed the bank to abnormal risk of loss contrary to prudent banking practices.[358] There is also no question that Respondent repurchased Lombardi's participation intentionally rather than inadvertently, thus constituting deliberate conduct exposing the Bank to that risk of loss. The elements of continuing disregard are met.

c. **Norcross & Sterling Key Loans**

Enforcement Counsel asserts that using funds securing the Jersey Gardens loan and the Ridgefield Park CD to make payments on the Norcross and Sterling Key loans constitutes both

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[356] Motion at 39.
[357] Response at 27.
[358] *See* Section V.C.5.b.

willful and continuing disregard for the safety or soundness of the Bank. The Bank diverted funds from Jersey Gardens and Ridgefield Park for nearly two years, which exposed the Bank to abnormal risk of loss and actual loss of $6.6 million.[359]

Respondent asserts that summary disposition is not warranted because Bharat knew about and authorized the use of the funds from Jersey Gardens and Ridgefield Park to make payments on the Norcross and Sterling Key loans, that the payments were in the best interest of the Bank, and the Bank did not suffer any loss.[360]

The undersigned agrees with Enforcement Counsel that Respondent's misconduct with regard to the Norcross and Sterling Key loans constituted willful and continuing disregard for the safety and soundness of the Bank. As noted above, Bharat and his related entities, Jersey Gardens and Ridgefield Park, had no legal obligation to make payments for the Norcross and Sterling Key loans. Respondent does not dispute that funds from Jersey Gardens and Ridgefield Park were used to make loan payments for Norcross and Sterling Key. Respondent asserts that because Bharat knew this was happening and did not have any complaints,[361] nothing improper took place. The undersigned disagrees, based on the reasoning above. Knowingly taking funds from one entity to pay another unrelated entity's loans, without explicit authorization, over a prolonged period of time, is at the very least a "voluntary and repeated inattention to" unsafe and unsound practices[362] that exposed the Bank to abnormal risk of loss by masking loan delinquencies, understating losses,

[359] Motion at 39.
[360] Response at 31.
[361] EC-MSD-45 (Hiren Dep.) at 239-40. Enforcement Counsel appears to dispute Respondent's contention that Bharat agreed, implicitly or explicitly, to have money removed from his accounts to pay unrelated loans. *See* SMF ¶¶ 145, 163.
[362] *Swanson*, 1995 WL 329616, at *5.

and resulting in inaccurate books and records.[363] This constitutes willful and continuing disregard for the safety and soundness of the Bank.

d. BRT Holdings Overdrafts

Enforcement Counsel asserts that allowing Rohit to incur large overdrafts when the Bank's capital was critically deficient also demonstrated Respondent's willful and continuing disregard for the Bank's safety or soundness. Specifically, Respondent was aware that the overdrafts could result in a violation of 12 U.S.C. § 161, but he allowed the overdrafts to continue, even after the OCC's January 22, 2013 Interim ROE.[364]

Respondent counters that there is no evidence that Respondent acted to harm the Bank with respect to the overdrafts. Specifically, Respondent asserts that the Bank's loan officers monitored BRT's loans and that the finance department monitored Rohit's overdrafts, which was reviewed by the Board monthly. Respondent asserts that he directed Bank employees to follow Bank policy and that the overdrafts were fully paid by the spring of 2014.[365]

The undersigned agrees that Respondent's misconduct with regard to the BRT Overdrafts constituted willful or continuing disregard for the safety and soundness of the Bank. As noted above, OCC examiners warned the Bank regarding risks related to overdrafts, which was specifically noted in the January 22, 2013 Interim ROE which stated that allowing such overdrafts could result in a violation of 12 U.S.C. § 161(a). Due to these warnings, the Bank revised its overdraft policy in July 2013.[366] Despite this policy change, Respondent continued to allow Rohit to incur large overdrafts as a "convenience."[367] The undersigned finds that continually and

[363] *See* SMF ¶ 154; EC-MSD-15 (2013 Full Scope ROE) at 11.
[364] Motion at 40.
[365] Response at 39 (citing SMF-OPP ¶¶ 140, 143).
[366] EC-MSD-91* (2013 Board Minutes) at 349-350; EC-MSD-86 (July 1, 2013 Loan Policy) at 111-112.
[367] R-MSD-1 (Hiren Dep.) at 246.

knowingly allowing a customer to overdraw his account to make payments for an outstanding loan in a way that masked delinquencies and understated losses, after the Bank instituted a policy change prohibiting the practice, constituted willful or continuing disregard for the safety and soundness of the Bank.

2. Personal Dishonesty

Personal dishonesty under Section 1818(e) "encompasses a broad range of conduct, 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 and straight forwardness."[368] This element "is satisfied when a person disguises wrongdoing from the institution's board and regulators or fails to disclose material information."[369] As with willful or continuing disregard, a finding of personal dishonesty requires evidence that an individual acted with scienter, or some knowledge of the wrongfulness of their actions.[370]

a. Pruthvi Loan

Enforcement Counsel asserts that the culpability prong is also satisfied on this claim due to Respondent's failure to disclose material information to the Board regarding the collateral on the Pruthvi loan, which demonstrates "personal dishonesty."[371]

Respondent asserts that he has not engaged in any personal dishonesty regarding the Pruthvi loan.[372] First, Respondent asserts he did not hide any documents or information. Second, he asserts that he reasonably relied upon management and Bank employees to follow the Bank's

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[368] *Smith and Kiolbasa*, 2021 WL 1590337, at *28 (internal quotation marks, citation, and alterations omitted).
[369] *Dodge v. Comptroller of the Currency*, 744 F.3d 148, 160 (D.C. Cir. 2014).
[370] *See id.* at 160; *see also*, *e.g.*, *Michael*, 687 F.3d at 351.
[371] Motion at 41-42.
[372] Response at 22-24, 39.

loan policy, prepare credit memoranda, and analyze credit issues. Third, he asserts that he reasonably relied upon external counsel to prepare loan documents and security instruments. Fourth, he asserts that he was not a member of the executive loan committee and generally did not attend Board meetings when credit approvals were discussed.[373] According to Respondent, his failure to alert the Board about the Bank's security interest in JPM5 does not meet the requisite culpability standard. Regardless, Respondent asserts that, any inferences must be drawn in favor of Respondent, precluding summary disposition.[374]

As noted above, the undersigned found that genuine issues of material fact remain regarding whether Respondent disclosed information to the Board regarding the JPM5 pledging restrictions and that financing statements would not be perfected at the time of the loan, whether the Board knew this information before it approved the loan, or whether knowing this information would affect the Board's approval of the loan. Accordingly, the undersigned finds that summary disposition whether Respondent's actions constituted personal dishonesty on this issue cannot be made at this time.

b. Mogar Farms Loan

Enforcement Counsel asserts that the culpability prong is satisfied here due to Respondent's failure to disclose material information to the Board and the OCC regarding the nature of the Mogar Farms loan, which demonstrates "personal dishonesty."[375]

Respondent asserts that he has not engaged in any personal dishonesty regarding the Mogar Farms loan.[376] Respondent asserts that Dipan was a friend and business associate of Bharat's and

[373] *Id.* at 21-22.
[374] *Id.* at 24.
[375] Motion at 41-42.
[376] Response at 28-31.

that Bharat introduced Dipan to Respondent for a loan on October 4, 2011. Respondent disputes that Dipan or Bharat asserted that "the loan proceeds would be going to Bharat" at that initial meeting.[377] Respondent asserts that the loan had a 10% interest rate, which is much higher than the rate given to Bharat for his loans, which was 4%. According to Respondent, the Bank conducted a full underwriting on the Mogar Farms loan, which included a valuation of the collateral and creditworthiness of the guarantors. Respondent asserts that he subsequently learned that Dipan had "invested" in Bharat's company and that such an investment does not render the loan illegal or improper. Furthermore, Respondent asserts that he was not aware of the source of the repayments on the Mogar Farms loan, as he was not involved in that process.[378]

As noted above, the undersigned found that genuine issues of material fact remain regarding Respondent's knowledge surrounding the Mogar Farms loan. Accordingly, the undersigned finds that summary disposition whether Respondent's actions constituted personal dishonesty on this issue cannot be made at this time.

c. Norcross & Sterling Key Loans

Enforcement Counsel asserts that the culpability prong is also satisfied due to Respondent's knowledge, authorization and/or approval of directing payments from Jersey Gardens and Ridgefield Park to make payments on the Norcross & Sterling Key Loans, which demonstrates "personal dishonesty."[379]

Respondent asserts that summary disposition is not warranted because Bharat knew about and authorized the use of the funds from Jersey Gardens and Ridgefield Park to make payments

[377] *Id.* at 28-29 (citing SMF-OPP ¶ 98); *see also* R-MSD-58* (October 16, 2013 Board Report).
[378] *Id.* at 29-30.
[379] Motion at 41-42.

on the Norcross and Sterling Key loans, that the payments were in the best interest of the Bank, and the Bank did not suffer any loss.[380]

While the undersigned found above that sufficient evidence showed that Respondent's misconduct regarding the Norcross and Sterling Key loans constituted a willful or continuing disregard for the safety and soundness of the Bank, the undersigned disagrees with Enforcement Counsel that sufficient evidence on the present record shows that Respondent's misconduct demonstrates "personal dishonesty." As such, the undersigned declines to find that the current record supports summary disposition regarding this issue.

F. <u>Civil Money Penalty</u>

The Comptroller seeks to assess a civil money penalty against Respondent in the amount of $1 million.[381] For such a penalty to be appropriate, the agency must find that the statutory elements of 12 U.S.C. § 1818(i) have been met and must further consider certain potentially mitigating factors that are enumerated in the statute.[382]

Enforcement Counsel argues that the undisputed material facts establish the basis for both a first and second-tier civil money penalty,[383] and offers a brief analysis of the statutory mitigating factors in support of its requested penalty amount.[384] Respondent asserts that summary disposition is not warranted because there remain genuine issues of material facts regarding whether he recklessly engaged in an unsafe or unsound practice, breached his fiduciary duty, and whether his

[380] Response at 31.
[381] *See* Notice at 1-2.
[382] *See* 12 U.S.C. § 1818(i)(2)(G).
[383] Motion at 42-44.
[384] *Id.* at 44-46.

conduct caused more than a minimal loss.[385] Furthermore, Respondent asserts that he has not engaged in a pattern of misconduct and did not obtain any pecuniary gain.[386]

Both first-tier and second-tier civil money penalties under Section 1818(i) require proof of some form of actionable misconduct, including the violation of "any law or regulation" or a breach of fiduciary duty. Here, the misconduct element has been satisfied to the extent detailed above.

Enforcement Counsel argues that Respondent's misconduct has caused more than a minimal loss to the Bank, and is part of a pattern of misconduct, either one of which, if found, would be sufficient to satisfy the remaining statutory prong for the assessment of a second-tier civil money penalty.[387] Because the undisputed material facts demonstrate that Respondent's misconduct as to the Lombardi Participation Repurchase and the Norcross and Sterling Key loans caused more than a minimal loss to the Bank, and that Respondent's misconduct with regard to the BRT Overdrafts was likely to cause more than a minimal loss to the Bank, the undersigned finds that the elements of a first- and second-tier civil money penalty have been met.

Although the undersigned has found that the elements of a first- and second-tier civil money penalty have been met, the undersigned finds that any showing regarding the appropriateness of the amount in light of the statutory mitigating factors should be made by both parties at a later stage in this matter.

A summary of the undersigned's findings on the civil money penalties are noted in the table below. Items marked with "X" indicates claims on which the OCC seeks an assessment of a civil money penalty in the Notice, but the undersigned has found a determination to be premature,

[385] Response at 39-40.
[386] *Id.* at 39-40.
[387] Motion at 44.

while items marked with "√" indicate that the undersigned has determined that a civil money penalty is warranted based on the undisputed material facts:

	Article III (Pruthvi Loan)	**Article IV (Lombardi Participation Repurchase)**	**Article V (Mogar Farms Loan)**	**Article VI (Norcross & Sterling Key Loans)**	**Article VII (BRT Overdrafts)**
1st Tier		√	X		√
2nd Tier	X	√	X	√	√

1. <u>Section 1818(i)'s Misconduct Element</u>

As with a prohibition order under Section 1818(e), both first- and second-tier civil money penalties under Section 1818(i) require proof of some form of actionable misconduct, including the violation of "any law or regulation" or a breach of fiduciary duty.[388] Here, the misconduct element has so far been satisfied in these respects as to Respondent's actions in connection with the Lombardi Participation Repurchase, the Norcross and Sterling Key loans, and the BRT Overdrafts, as discussed above.

2. <u>Section 1818(i)'s Effect Element</u>

Enforcement Counsel argues that Respondent's misconduct has caused more than a minimal loss to the Bank and is "part of a pattern of misconduct," either one of which, if true, would be sufficient to satisfy the remaining statutory prong for the assessment of a second-tier civil money penalty.[389] The undisputed material facts demonstrate that Respondent caused the Bank more than minimal actual or likely loss in connection with the Lombardi Participation Repurchase, the Norcross and Sterling Key loans, and the BRT Overdrafts for the reasons stated above.[390] It is therefore unnecessary to determine at this time whether Respondent's misconduct

[388] 12 U.S.C. § 1818(i)(2)(B)(i).
[389] See Motion at 42; 12 U.S.C. § 1818(i)(2)(B)(ii).
[390] *See* Section V.D.

was "part of a pattern of misconduct" within the meaning of the statute except with respect to the Mogar Farms loan, where Enforcement Counsel does not plead Bank loss. Because disputed questions of material fact remain as to the Mogar Farms loan, however, it is also presently premature to determine whether Respondent's alleged misconduct concerning the Mogar Farms loan constituted an actionable pattern.

3. Statutory Mitigating Factors

Before assessing a civil money penalty, the agency is bound to consider the appropriateness of the amount being assessed in light of four mitigating factors: (1) "the size of financial resources and good faith of the insured depository institution or other person charged"; (2) "the gravity of the violation"; (3) "the history of previous violations"; and (4) "such other matters as justice may require."[391] Enforcement Counsel now seeks to justify the $1 million civil money penalty it seeks in this matter by adverting to these factors and to the thirteen interagency factors that the OCC also should take into account in its assessment.[392] The undersigned agrees with Respondent that consideration of any mitigating factors is premature at this stage,[393] not least because the precise contours of Respondent's violation are still at issue and because Respondent should be afforded an opportunity to be heard regarding his good faith, financial resources, and "such other matters as justice may require."

VI. 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, based on the undisputed material facts of the case, the undersigned finds that:

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[391] 12 U.S.C. § 1818(i)(2)(G).
[392] Motion at 44-46.
[393] Response at 39-40.

1) Respondent violated 12 C.F.R. §§ 32.3 and 32.5, as well as Articles VII and XIX of the August 31, 2013 Consent Order,[394] when he directed the Bank to repurchase Nicholas Lombardi's $2 million participation in the Pruthvi loan;

2) Respondent violated 12 U.S.C. § 161 when he directed the Bank to allow BRT Holdings to make loan payments by authorizing overdrafts up to $500,000, which understated the amount of past due loans on the Bank's December 31, 2013 Call Report;

3) Respondent engaged in unsafe or unsound practices in conducting the affairs of the Bank based on the Lombardi Participation Repurchase, the Norcross and Sterling Key Loans, and the BRT Overdrafts;

4) Respondent breached his fiduciary duties to the Bank based on the Lombardi Participation Repurchase, the Norcross and Sterling Key Loans, and the BRT Overdrafts;

5) The Bank suffered loss based on Respondent's conduct regarding the Lombardi Participation Repurchase, and the Norcross and Sterling Key Loans, and the Bank was likely to suffer loss based on Respondent's conduct regarding the BRT Overdrafts;

6) Respondent exhibited willful or continuing disregard for the Bank's safety and soundness with regard to the Lombardi Participation Repurchase, the Norcross and Sterling Key Loans, and the BRT Overdrafts; and

7) That elements required for a first- and second-tier civil money penalty have been met; however, any showing regarding the appropriateness of the amount in light of the mitigating factors should be made by both parties at a later stage in this matter.

In addition to the facts identified in this Order as being the subject of material dispute, the undersigned also concludes that resolution of the remaining issues is either not possible or unnecessary at this time as the facts are presented developed:

1) whether Respondent engaged in unsafe or unsound practices or breached his fiduciary duty regarding the Pruthvi loan;

2) whether Respondent's conduct regarding the Pruthvi loan showed willful or continuing disregard for the safety and soundness of the Bank;

3) whether the Bank suffered loss or was likely to suffer loss on the Pruthvi loan;

4) whether Respondent violated 18 U.S.C. § 1005, engaged in unsafe or unsound practices, or breached his fiduciary duty regarding the Mogar Farms loan;

[394] EC-MSD-61 (2013 Consent Order), R-MSD-13* (2013 Consent Order).

5) whether Respondent's conduct with respect to the Mogar Farms loan constituted an actionable pattern of misconduct;

6) whether Respondent's actions constituted personal dishonesty; and

7) the appropriateness of the amount of the civil money penalty sought by the OCC.

The Parties are directed to confer and determine whether and to what extent a hearing remains necessary to resolve these outstanding issues, in light of the undersigned's conclusion that at least one aspect of each of the statutory elements for a Section 1818(e) prohibition order and Section 1818(i) first- and second-tier civil money penalty has been met. Should the Parties conclude that the only remaining issue that requires resolution is the appropriateness of the civil money penalty amount, the Parties should consider whether submissions on this topic should be made on paper, rather than an in person or virtual hearing. The Parties shall file a joint status report by January 18, 2022 reflecting the results of the Parties' deliberations. Should one or both of the Parties prefer to continue with the currently scheduled in-person hearing to resolve some or all of the remaining issues, the joint status report shall also include the Parties' joint conclusions regarding the expected length of the hearing to facilitate securing a hearing venue in Chicago, Illinois, should the undersigned determine that a hearing remains necessary. In light of this Order, the undersigned is extending the date that the parties were to exchange initial witness lists and exhibit lists to January 25, 2022.

In addition, the parties shall also include in the joint status report an indication whether any portion of this order should remain under seal.[395] (The Parties are reminded that OFIA proceedings are presumptively public and that redactions to the public version of this order should be made

[395] In future submissions, the Parties are directed to clearly and specifically identify what information contained within documents that are being submitted under seal would necessitate redaction if referenced in this Tribunal's orders, including by putting such information in [red text and bracketed] or [highlighting such text and bracketed] when cited by the Parties in their briefs. This will allow the undersigned to issue a public order, to the extent practicable.

only if disclosure of that information would be contrary to the public interest.)[396] In the interim, the order will remain under temporary seal. Upon review of the submissions, the undersigned will issue a public version of this order.

SO ORDERED.

Issued: January 4, 2022

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication

[396] *See* 12 C.F.R. § 263.33(b).