

**FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.**

In the Matter of

HARRY C. CALCUTT III,
Individually and as an Institution-Affiliated
Party of

NORTHWESTERN BANK
Traverse City, Michigan
(Insured State Nonmember Bank)

DECISION AND ORDERS

FDIC-12-568e
FDIC-13-115k

I. INTRODUCTION

This matter is before the Board of Directors (Board) of the Federal Deposit Insurance Corporation (FDIC) on remand from the United States Court of Appeals for the Sixth Circuit (Sixth Circuit). The FDIC seeks an order of prohibition and a second-tier civil money penalty (CMP) against Respondent Harry C. Calcutt III (Respondent or Calcutt), who was during the relevant times President and CEO of Northwestern Bank, Traverse City, Michigan (Bank). The FDIC alleges that Respondent negotiated and approved a series of unsafe and unsound transactions with the Bank's largest group of borrowers and then concealed the nature of the transactions from the Bank's Board of Directors (Bank's Board) and its regulators. For the reasons discussed herein, the Board finds that entry of a prohibition order and assessment of a second-tier CMP of \$125,000 against Respondent are warranted.

II. FACTUAL BACKGROUND

A. General Background

At all times relevant to the FDIC's allegations, the Bank was a state-chartered financial institution with its principal place of business in Traverse City, Michigan. The FDIC was the

Bank's primary federal regulator. From 2000 until 2013, Respondent was the President, CEO, and Chairman of the Bank's Board. R. Proposed FOF and Conclusions of Law at ¶¶ 3, 5; Answer ¶ 1. Respondent also was a member of the Bank's Senior Loan Committee (SLC) and the CEO of the Bank's holding company, Northwestern Bancorp. R. Proposed FOF and Conclusions of Law at ¶ 3. Respondent retired from the Bank in 2013. *Id.*

Respondent described the Bank as having a "flat" management structure with 20 employees reporting directly to Respondent. R. Proposed FOF and Conclusions of Law at ¶ 5 (citing Tr. 249, 251, 296). Among those employees were Richard Jackson and William "Bill" Green. Jackson was an Executive Vice President and served on the Bank's Board, SLC, Classified Assets Committee (CAC), and Asset Liability Committee. Recommended Decision of the Administrative Law Judge (ALJ) Christopher B. McNeil dated April 3, 2020 (R.D.) at 13; Joint Stipulation ¶ 6. Green served as a commercial loan officer for the Bank and was a member of the CAC. R.D. at 13; Answer ¶ 5.

B. The Bank's Relationship with the Nielson Family

The claims against Respondent arise out of the Bank's lending relationship with 19 limited liability companies controlled by the Nielson family (collectively, Nielson Entities). Answer ¶ 8. The Nielson Entities were centrally managed by one of those entities, Generations Management, LLC. Tr. at 930 (Nielson). Generations Management, in turn, was managed by Cori Nielson and Keith Nielson. R. Proposed FOF and Conclusions of Law at ¶ 6. Autumn Berden served as the Chief Financial Officer (CFO) of Generations Management from 2008 to at least 2012. Tr. at 25, 27 (Berden). The Nielson Entities engaged in a variety of business activities, including holding vacant and developed real estate, engaging in commercial and residential property rentals and development, and holding oil and gas interests. Tr. at 29 (Berden).

As of August 2009, the Nielson Entities had \$38 million in loans at the Bank (Nielson Loans) and collectively represented the Bank's largest loan relationship. Answer ¶ 8. Any lending relationship that exceeds 25 percent of the Bank's Tier 1 capital is considered a concentration of credit. JT. Exh. 2, at 20. The Bank's Reports of Examination (ROEs) for 2008 and 2009 treated the Nielson Entities as a single borrower and identified the Nielson Loans as a concentration of credit because they exceeded the 25 percent threshold. JT. Exh. 2, at 20, 37-39. The 2010 ROE again identified the Nielson Loans as a concentration of credit because together they represented approximately 47 percent of the Bank's Tier 1 capital. FDIC Exh. 19, at 11.

A concentration of credit, like a large loan to a single borrower, has the potential to threaten the safety and soundness of a bank in the event the loan or loans stop performing. Tr. at 888 (Miessner); 2015 Tr. at 797-98 (Bird). The Nielson Loans, in addition to making up nearly half the Bank's Tier 1 capital, posed additional risks to the Bank. First, although the Bank's loan policy required the Bank to obtain personal guarantees from the borrowing entity's principals, the Bank did not require any members of the Nielson family to sign a personal guarantee. Tr. at 946-47 (Nielson); FDIC Exh. 86, at 5; JT. Exh. 2, at 37-38. Second, the Nielson Loans were not cross-collateralized, which precluded the Bank from using the collateral of one Nielson Entity to satisfy the obligation of another Nielson Entity in the event of a default. 2015 Tr. 1861-1863 (Calcutt).

C. Respondent Directed the Nielsons to Mask Inter-company Transfers.

Some of the Nielson Entities had insufficient cash flow to cover their operating expenses. Tr. at 36 (Berden); FDIC Exh. 135_002. As a result, they sold assets or borrowed from other Nielson Entities. Tr. at 37 (Berden). Historically, these types of transfers were reflected on the two companies' balance sheets as intercompany loans. Tr. at 39 (Berden).

On April 29, 2008, Respondent and Green met with representatives of the Nielson Entities Cori Nielson and Autumn Berden (Berden) and requested that they stop reporting transfers between Nielson Entities as intercompany loans on their balance sheets. *Id.* at 39 (Berden). Respondent and Green recommended that instead, when an entity needed funds another entity should distribute funds to its members, which could then loan or give funds to the entity in need of funds. *See, e.g.*, Tr. at 39, 151 (Berden) (“instead of loaning money to Artesian, [Bedrock] would make a distribution to its members” and “the members then would either loan it to Artesian or make a capital contribution as the owners to the other entity”); *see also id.* at 1277 (Calcutt). Booking payments this way would not be reported to the regulators as an intercompany loan and thus would conceal the Nielson Entities’ “common use of funds.” Tr. at 157 (Berden). This masked the interrelationship of the Nielson Entities and hid loans with no positive cash flow.

D. Nielson Entities Default in 2009.

By the second quarter of 2009, several of the Nielson Loans were past due, and some were due to mature on September 1, 2009. FDIC Exh. 3, at 70-77; Joint Stipulation ¶ 10. In late summer 2009, several Nielson Entities wrote to Respondent saying that many businesses were slowing down and that they lacked sufficient cash flow to continue paying the loans. Tr. at 932-33 (Nielson). On August 10, 2009, Berden informed the Bank that the Nielson Entities needed to restructure their loans. FDIC Exh. 3, at 78. When the Bank did not respond favorably, Cori Nielson sent an email to Respondent on August 21, 2009, advising that the Nielson Entities “will not make our September payment or any further payments until we have the necessary meetings and discussions to reach an overall restructuring of the relationship.” FDIC Exh. 3, at 82; Tr. at 936-37 (Nielson). All of the Nielson Entities stopped paying their loans on September 1, 2009. Tr. at 937 (Nielson).

During the fall of 2009, Cori Nielson continued to communicate with the Bank about options for restructuring the Nielson Loans. Tr. at 938-42 (Nielson). Most of her communications were with Respondent, who she understood to be the decision-maker for the Bank. Tr. at 934 (Nielson). In a September 21, 2009 email to Respondent, Cori Nielson proposed that the Bank “suspend [the Nielson Entities’] monthly payments . . . until our cash flow improve[s].” Tr. at 941 (Nielson); FDIC Exh. 3, at 39. She explained that “[t]he real estate market had dropped so dramatically that a lot of our loans were underwater.” Tr. at 943 (Nielson). Respondent testified that he thought the Nielsons merely were “posturing,” and that they “did have the funds” to pay their loans. Tr. at 1296 (Calcutt). Yet, Respondent did not do anything to evaluate the financial condition of the Nielson Entities, Tr. at 1382 (Calcutt), and he declined Cori Nielson’s offer to provide updated financial information for the Nielson Entities, Tr. at 938-39 (Nielson).

According to Cori Nielson, a recurring theme during her discussions with Respondent about a restructuring of the Nielson Loans was that Respondent did not want the Bank to enter into any new agreements that might be “red flags” to the Bank’s regulators and lead them to scrutinize the Bank’s loan relationship with the Nielson Entities. Tr. at 934-35, 986-87 (Nielson). For example, Respondent expressed concern that any loan modifications that reduced the Nielson Entities’ debt service would act as “red flags,” as would a transaction in which the Bank accepted an assignment of deeds as satisfaction of certain of the loans. Tr. at 934, 947, 986-87 (Nielson).

E. The Bank Enters Into the “Bedrock Transaction” with the Nielson Entities.

While negotiating with the Bank about restructuring their loans, none of the Nielson Entities made loan payments. Joint Stipulation ¶¶ 10, 11. By mid-November 2009, many of the Nielson Loans were about to become 90 days past due, a milestone that had important

ramifications for the Bank because it meant that the loans would be placed on non-accrual status. Joint Stipulation ¶ 11; Tr. at 1377 (Calcutt). Despite this, the Bank and the Nielsons were unable to agree on a workout transaction until November 30, 2009, by which time most of the Nielson Loans had become 90 days past due and were placed on nonaccrual status. Joint Stipulation ¶ 17.

The “Bedrock Transaction,” which became effective on December 1, 2009, was an agreement to bring all of the Nielson Loans current. It consisted of three main components. First, the Bank extended a new \$760,000 loan to one of the Nielson Entities, Bedrock Holdings LLC, which would be used for future required loan payments until April 2010 (Bedrock Loan). Answer ¶¶ 17-18, Joint Stipulation ¶ 15. Second, the Bank agreed to release \$600,000 worth of collateral in investment trading funds that had been granted to it by Pillay Trading LLC, another Nielson Entity (Pillay Collateral). Answer ¶ 17. The funds from the released Pillay Collateral were used to cure the arrearages on all past-due Nielson Loans. Third, the Bank renewed all past-due loans to Nielson Entities, including a loan of \$4.5 million to Bedrock Holding. Answer ¶ 30, Joint Stipulation ¶ 20. As a result, the loans were removed from the Bank’s nonaccrual list on December 1, 2009. Respondent consented to the Bedrock Transaction and was aware of its purpose. Joint Stipulation ¶¶ 14, 16.

F. The Bedrock Transaction Was Tainted by Numerous Irregularities, Including Multiple Violations of the Bank’s Commercial Loan Policy.

The actions surrounding the Bedrock Transaction violated multiple sections of the Bank’s Commercial Loan Policy (CLP). First, the Bank violated CLP Section 13, which mandates that “all commercial loans are to be supported by a written analysis of the net income available to service the debt and by written evidence from the third parties supporting the collateral value of the security.” FDIC Exh. 86, at 5. The Bank did not conduct these analyses or collateral

appraisals before funding the Bedrock Loan and releasing the Pillay Collateral. 2015 Tr. 1659-63 (Jackson); Tr. at 829 (Miessner).

Second, the Bank violated CLP Section 12, which provides that “it is the policy of the [Bank] to require the personal guarantee of the debt by all parties holding a major equity interest in the business enterprise when the borrower is other than a personal entity.” FDIC Exh. 86, at 5. The Bank did not obtain personal guarantees from any of the Nielson family members to support the Bedrock Loan or any of the other loans to the Nielson Entities. Tr. at 273-74 (Gomez).

Third, the Bank violated CLP Section 3, which requires approval by two-thirds vote of the Bank’s Board for “any loans where the total aggregate exposure is between 15 and 25 percent of the Bank’s Regulatory Capital.” FDIC Exh. 86, at 2. Loans to the Nielson Entities were approximately half of the Bank’s Tier 1 capital, and therefore were subject to that approval requirement. Tr. at 733 (Miessner); JT. Exh. 2; 2015 Tr. at 1669-70. No approval by the Bank’s Board was sought for the Bedrock Loan or any other part of the Bedrock Transaction until March 2010, four months after disbursements. R.D. at 79-81 & n.596; *see* Resp. Exhs. 22-24 (Bedrock Transaction was not mentioned in any Bank Board minutes from September 2009 through March 2010); *see also* Tr. at 486-87 (Swanson) & Tr. at 1023-25 (Byl) (two Bank Board members testified that the Bedrock Transaction had not been discussed with them before March 2010).

G. The Bedrock Transaction Write-up Given to the Bank’s Board Contained Materially Incorrect Information.

In addition to violating the Bank’s CLP, the loan write-up for the Bedrock Transaction that was presented to the Bank’s Board in March 2010 contained incorrect information, including misstating the purpose of the Bedrock Loan as “working capital requirements,” omitting that the Bedrock Transaction had already occurred, and failing to disclose the Nielson Entities’ financial issues. Answer ¶¶ 31-32; JT. Exh. 6, at 2.

First, the statement in the write-up that the \$760,000 loan would be used for “working capital requirements” was false because making payments on other loans does not meet the Bank’s definition of the term “working capital.” Answer ¶ 32. The true purpose of this loan was to make the Nielson Entities’ future required loan payments until April 2010. Tr. at 745 (Miessner) (through the Bedrock Transaction, loan proceeds were “used specifically to make interest payments on . . . all of the entities’ loans within that relationship”). Second, the write-up omitted that the \$4.5 million loan already had been renewed, the \$600,000 of Pillay Collateral already had been released, and the new \$760,000 loan to Bedrock already had been funded in December 2009. JT. Exh. 6. Third, the write-up presented to the Bank’s Board failed to disclose that: (i) all of the Nielson Entities had stopped making payments on their loans in September 2009; (ii) the Nielson Entities had informed the Bank that they were having severe cash flow problems; and (iii) the proceeds from the new \$760,000 loan would be used to make payments on the various Nielson Loans through April 2010. JT. Exh. 6; Answer ¶ 36. The write-up was prepared by a credit analyst, but Respondent initialed it before it was presented to the Bank’s Board. Respondent knew that the Bedrock Transaction had been completed months before and he knew that at least a portion of the proceeds from the \$760,000 loan would be used to make payments on the Nielson Loans through April 2010. Answer ¶¶ 33, 35.

H. Respondent Concealed the Problems with the Neilson Loans from Examiners by Providing False Information on an FDIC Questionnaire.

In preparation for its 2010 bank examination, the FDIC required Respondent to complete an Officer’s Questionnaire. The first question required him to list the loans that the Bank had renewed or extended since the previous year’s examination by accepting separate notes for the payment of interest or without fully collecting interest, as well as any loans made for the direct benefit of anyone other than the named recipients of the loans. FDIC Exh. 18, at 2. Respondent

answered that he was not aware of any such loans and signed the Questionnaire in May 2010. *Id.*; Answer ¶ 79. He later conceded in his testimony that these answers were incorrect, but claimed that the misstatements were “inadvertent[] and unintentional[].” Tr. at 1311 (Calcutt).

I. Respondent Concealed the Problems with the Nielson Loans from Examiners by Selling the Loans Before the Examination and Repurchasing Them Afterward.

In May 2010, shortly before FDIC examiners were due to arrive on-site for a pre-scheduled examination, Respondent and Jackson decided to sell several Nielson Entity loans to two of the Bank’s affiliates, State Savings Bank and Central State Bank. Tr. at 855, 858-59 (Miessner); Resp. Exhs. 42, 44; 2015 Tr. 1621-22, 1691-93 (Jackson); 2015 Tr. at 1766 (Calcutt); Joint Stipulation ¶ 36. Respondent was the Chairman of the Board at both affiliate banks and at their respective holding companies. Tr. at 884 (Miessner); 2015 Tr. at 167 (O’Niell). Notwithstanding the loan sales, Green informed Berden that he and Respondent would continue to be “[the Nielson Entities’] points of contact and that [the Nielsons] would work directly with them when it came time for the renewals in September.” Tr. at 113-14 (Berden). Jackson testified that the Bank was attempting to reduce its exposure to the Nielson relationship, and he denied that the timing of the sale had any connection with the FDIC examination that was about to commence. 2015 Tr. at 1622 (Jackson). This explanation is undermined by the Bank’s decision to repurchase the loans in September 2010 after the examination and by which time each loan was delinquent and past maturity. Joint Stipulation ¶ 38.

J. The Nielson Entities Default Again on All of Their Loans in 2010.

Beginning on September 1, 2010, the Nielson Entities again stopped making payments on their loans. Answer ¶ 42; Tr. at 959 (Nielson). In December 2010, after negotiations, the Bank and the Nielson Entities reached an agreement pursuant to which the Nielson Loans were

renewed, the Nielson Entities were given interest rate reductions and other concessions, and the Bank released \$690,000 in additional Pillay Collateral to fund five months of payments from September 2010 to January 2011. Tr. at 962-64 (Nielson); FDIC Exh. 3 at 165-67; Answer ¶¶ 44, 45. However, at the end of this period, all of the Nielson Entities stopped paying their loans for a third time and all of the Nielson Loans went into default. 2015 Tr. 1775-76 (Calcutt); Joint Stipulation ¶ 29.

K. Respondent Made False Statements About the Bedrock Transaction to Examiners During the 2011 Examination.

Respondent made several false statements during a September 14, 2011, meeting with examiners from the FDIC and the Michigan Office of Financial and Insurance Regulation. First, in response to a question about his understanding of the purpose of the Bedrock Transaction, Respondent said that the funds were meant to provide “working capital” in connection with an acquisition of another business. JT. Exh. 11, at 3. But this was false. Respondent knew that the Bedrock Loan was made to help pay off loans to Nielson Entities. Joint Stipulation ¶¶ 14, 16. Second, when examiners asked him about the release of the Pillay Collateral, Respondent answered, “I thought we still had them.” JT. Exh. 11, at 4; 2015 Tr. at 591-92 (O’Niell). This was also false. Respondent authorized the release of \$600,000 in Pillay Collateral in December 2009, and he authorized release of an additional \$690,000 in December 2010. Tr. at 623-24 (Smith); Joint Stipulation ¶¶ 13, 16; Answer ¶¶ 44, 45. Third, when questioned about how the Nielson Entities managed to bring their loans current in December 2010, he answered that they used their “vast resources between oil, gas, and rentals.” JT. Exh. 11, at 4. However, it was the release of \$690,000 of the Pillay Collateral in December 2010 that allowed the Nielson Entities to bring their loans current. Answer ¶¶ 44, 45. While testifying during the 2015 hearing, Respondent admitted that his statement was untrue. 2015 Tr. at 1794-95 (Calcutt).

L. Respondent Signed Inaccurate Call Reports That Did Not Disclose that the Nielson Loans Were in Nonaccrual Status.

During the 2011 examination, the FDIC noted that the Bank's Call Reports from December 2009 forward were inaccurate because they failed to appropriately report the Nielson Loans as nonaccrual since December 2009 with no interest income recognized subsequent to the payments made in August 2009. FDIC Exh. 48, at 42. These Call Reports, therefore, failed to reflect these loans as impaired, "resulting in a material overstatement in earnings both in the form of falsely inflated interest income and of grossly understated provision expense." *Id.* Respondent signed each Call Report in question attesting to its accuracy. 2015 Tr. at 1724, 1757 (Calcutt). Although Respondent claims that he had no involvement in preparing them, Tr. at 1300 (Calcutt); 2015 Tr. at 1724, 1757 (Calcutt), Respondent could not delegate his responsibility for ensuring the accuracy of the Call Reports, Tr. at 861-62 (Miessner). As a result of the 2011 examination, the Bank was required to restate its earlier Call Reports going back to December 2009. 2015 Tr. at 1082 (Smith).

Ultimately, the FDIC's 2011 examination report identified the Bank's failures in securing and analyzing the Bedrock Transaction, its reporting inaccuracies, and its misstatements during the examination. The report ordered the Bank to charge off \$6.443 million on the loans to Nielson Entities. On July 31, 2012, the Bank charged off an additional \$30,000 specifically on the Bedrock Loan.

III. RELEVANT PROCEDURAL HISTORY

The FDIC commenced this action against Respondent on August 20, 2013, by filing a Notice of Intention to Remove from Office and Prohibit from Further Participation, Notice of Assessment of Civil Money Penalties, Findings of Fact, Conclusions of Law, Order to Pay, and

Notice of Hearing (Notice) seeking an order of prohibition and the imposition of a second-tier CMP of \$125,000 under 12 U.S.C. §§ 1818(e) and 1818(i).

FDIC Enforcement Counsel (Enforcement Counsel) and Respondent (together, the Parties) engaged in extensive discovery and pre-trial motions culminating in an eight-day hearing before ALJ Richard Miserendino in September 2015. Twelve witnesses, including Respondent, testified at the hearing and thousands of pages of exhibits were admitted into evidence. On June 6, 2017, ALJ Miserendino issued a Recommended Decision that Respondent be subject to an order of prohibition and assessing a CMP in the amount of \$125,000. On July 19, 2018, following the Supreme Court's decision in *Lucia v. Securities & Exchange Commission*, 138 S. Ct. 2044 (2018), this matter was remanded to the Office of Financial Institutions Adjudication with instructions that the matter be reassigned to ALJ Christopher McNeil.

ALJ McNeil conducted a seven-day hearing between October 29, 2019, and November 6, 2019. Twelve witnesses, including Respondent, testified at the new hearing, and more than 1,000 pages of exhibits were admitted into evidence. On April 3, 2020, ALJ McNeil issued a Recommended Decision that Respondent be subject to an order of removal and prohibition and assessing a CMP in the amount of \$125,000.

On December 15, 2020, the FDIC Board issued a decision (2020 Decision) along with an order prohibiting Calcutt from working in the banking industry (2020 Prohibition Order) and an order imposing a second-tier CMP of \$125,000. Calcutt petitioned the United States Sixth Circuit Court of Appeals for review of the 2020 Decision and the orders.

On June 10, 2022, the Sixth Circuit issued a decision affirming the 2020 Decision despite finding that the Board had applied the wrong causation standard and had erred in considering certain harms. *Calcutt v. FDIC*, 37 F.4th 293 (6th Cir. 2022). However, the Sixth Circuit

concluded that there were nevertheless sufficient harms on which the Board based its decision to support the Board’s decision to enter a prohibition order against Respondent. *Id.* at 300-01, 329-35. The Sixth Circuit also rejected Calcutt’s constitutional challenges, holding that, even if Calcutt could establish that the Board and the ALJ were unconstitutionally protected from removal by the President without cause, Calcutt had failed to show any entitlement to relief because he had not shown that he had been harmed by those removal protections. *E.g., id.* at 310.

Respondent filed a petition for rehearing *en banc*, which the Sixth Circuit denied. Respondent then filed a petition for *certiorari* in the Supreme Court.

On May 22, 2023, the Supreme Court reversed the Sixth Circuit’s ruling and directed the Sixth Circuit to remand the case to the FDIC Board for reconsideration “anew in a manner consistent with [the Court’s] opinion.” *Calcutt v. FDIC*, 598 U.S. 623, 624-25 (2023). The Supreme Court found that the Sixth Circuit had identified two legal errors in the Board’s decision: (1) that the “by reason of” language in Federal Deposit Insurance Act (FDI Act) section 8(e), 12 U.S.C. § 1818(e)(1)(B)(i), (iii), providing that the effect requirement for entry of a prohibition order is satisfied if “by reason of” the respondent’s conduct the bank “has suffered or will probably suffer financial loss or other damage” or that “by reason of” that conduct the respondent “received financial gain or other benefit” requires a showing of proximate cause, and (2) that certain of the harms that the Board found do not qualify as effects. *Id.* at 627-28. However, despite identifying these legal errors, the Sixth Circuit affirmed the Board’s decision on the ground that substantial evidence in the record as a whole supported that decision. *Id.* at 628. The Supreme Court held that this was reversible error and that the proper course was for

the Sixth Circuit to remand the case back to the Board for further consideration of Respondent's case. *Id.* at 629.

On June 28, 2023, the Sixth Circuit vacated the 2020 Decision and orders and remanded the case to the Board to "reconsider Calcutt's case in a manner consistent with the Supreme Court's opinion." *See Calcutt v. FDIC*, No. 20-4303, 2023 WL 4236221, at *1 (6th Cir. June 28, 2023).

On January 11, 2024, Respondent submitted a Third Amended Answer that added additional affirmative defenses including an alleged violation of the Seventh Amendment right to a jury trial by holding proceedings before the ALJ.

On January 18, 2024, Respondent filed a Motion to Dismiss the Case, or, alternatively, Hold the Proceedings in Abeyance Pending the Supreme Court's Disposition of *SEC v. Jarkesy*, or, alternatively, Assign the Case for Remand Proceedings (Motion to Dismiss). On February 1, 2024, FDIC Enforcement Counsel filed an Opposition to the Motion to Dismiss.

On February 27, 2024, the FDIC ordered a stay of the matter pending the disposition of *SEC v. Jarkesy* by the Supreme Court.

The Supreme Court decided *SEC v. Jarkesy* on June 27, 2024. On July 18, 2024, the FDIC set a briefing schedule to address "(a) the impact, if any, of the Supreme Court's decision in *Jarkesy* on the case, and (b) the Parties' respective legal positions regarding (1) whether the proximate cause standard is satisfied under the 'by reason of' requirement of 12 U.S.C. § 1818(e)(1)(B); (2) whether sanctions are warranted in this case under the narrowed set of harms identified by the Sixth Circuit; and (3) if sanctions are warranted, what sanctions are warranted in this case." July 18, 2024 Order on Briefing Schedule at 2.

ANALYSIS

IV. SECTION 1818 VIOLATIONS.

A. Standard

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

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

Prohibition Order

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

The misconduct element is established by showing that Respondent, an institution-affiliated party (IAP), (1) “directly or indirectly violated any law or regulation [or] any cease-and-desist order which has become final,” (2) “engaged or participated in any unsafe or unsound practice in connection with [the Bank],” or (3) “committed [] any act, omission, or practice which constitutes a breach of [Respondent’s] fiduciary duty.” 12 U.S.C. § 1818(e)(1)(A).

The effect element is established by showing that “by reason of” the misconduct the Bank “has suffered or will probably suffer financial loss or other damage,” that the Bank’s depositors’ interests “have been or could be prejudiced,” or that Respondent “has received financial gain or other benefit.” 12 U.S.C. § 1818(e)(1)(B).

The culpability element, is satisfied when the alleged misconduct either “involves personal dishonesty” or “demonstrates willful or continuing disregard by [Respondent] for the safety or soundness of [the Bank].” 12 U.S.C. § 1818(e)(1)(C)

Civil Money Penalty

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

First, the FDIC must show misconduct through, *inter alia*, the breach of “any fiduciary duty,” or the reckless engagement “in an unsafe or unsound practice in conducting the affairs” of the Bank. 12 U.S.C. § 1818(i)(2)(B)(i). Second, the FDIC must show that the misconduct (1) “is part of a pattern of misconduct”; (2) “causes or is likely to cause more than a minimal loss to” the Bank; or (3) “result[ed] in pecuniary gain or other benefit” to the Respondent. 12 U.S.C. § 1818(i)(2)(B)(ii). Third, before any civil money penalty can be assessed, the FDIC must take into account the appropriateness of the amount of the penalty sought when considered in light of certain potentially mitigating factors, which include “the size of financial resources and good faith of the insured depository institution or other person charged,” “the gravity of the violation,” the history of previous violations,” and “such other matters as justice may require.” *See* 12 U.S.C. § 1818(i)(2)(G).

V. RESPONDENT ENGAGED IN MISCONDUCT.

As noted in the Recommended Decision, and as the Board explained in the 2020 Decision, misconduct under section 8(e) encompasses participation in activity that is an unsafe and unsound banking practice or in breach of a party’s fiduciary duty. *See* 12 U.S.C. § 1818(e)(1)(A); R.D. at 122. The Sixth Circuit found that in its 2020 Decision the FDIC Board did not err in its conclusion on the misconduct prong of Sections 1818(e) and (i). The Board adopts and affirms the 2020 Decision’s analysis and its conclusions. *See* 2020 Decision at 18-26. For convenience, the relevant portion of the 2020 Decision is, in substance, set forth herein.

A. Unsafe and Unsound Practices

As the Board found in the 2020 Decision, and as the Sixth Circuit affirmed, the record in this matter established that Respondent engaged in numerous unsafe or unsound practices including breaches of fiduciary duties while serving as the Bank's President and CEO, a key position with significant influence and control over the Bank.

i. Violations of the Commercial Loan Policy

Extending credit in violation of the institution's loan policy can constitute an unsafe or unsound practice. *See In the Matter of Haynes*, FDIC-11-370e, 11-371k, 2014 WL 4640797 (July 15, 2014) (finding that misconduct would have a reasonably direct effect on the institution's financial soundness); *In the Matter of Stephens Security Bank*, FDIC-89-234b, 1991 WL 789326 (Aug. 9, 1991). The Sixth Circuit affirmed the finding that, in violation of Section 13 of the CLP, Respondent approved the Bedrock Transaction without performing (or even reviewing) a written analysis of the net income available to service the debt and without obtaining an appraisal or other evidence from third parties supporting the collateral value of the security. *See* Section II(F), *supra*; *see also Calcutt*, 37 F.4th at 305-06, 326. In violation of Section 3 of the CLP, Respondent authorized and funded the Bedrock Loan without securing the approval of a two-thirds majority of the Board, notwithstanding the fact that the Nielson relationship already exceeded 25 percent of the Bank's Tier 1 capital. *See id.* And in violation of Section 12 of the CLP, Respondent did not solicit or obtain personal guarantees from any of the Nielson family members, nor did he document his rationale for failing to do so. *See id.* ALJ McNeil found Respondent's explanations and justifications for these acts and omissions to be insubstantial as a matter of law and belied by the greater weight of the evidence. *See id.*

ii. Imprudent Lending Practices

Even if the CLP did not establish minimum requirements for the approval of commercial loans, the Sixth Circuit affirmed the conclusion that Respondent's management of the Nielson borrowing relationship entailed acts and omissions that consistently have been found to be unsafe or unsound lending practices. *See Calcutt*, 37 F.4th at 326-27. Extending credit without adequate credit analysis, extending credit without evaluating the borrower's ability to repay the loan, extending credit without assessing the value of the collateral, extending credit to pay off past due loans, and capitalizing unpaid interest (*i.e.*, extending additional credit for the amount of interest owed when loans are renewed), all have been determined to be unsafe or unsound practices. *See, e.g., First State Bank of Wayne Cty. v. FDIC*, 770 F.2d 81, 82 (6th Cir. 1985) (recognizing that "extending unsecured credit without first obtaining adequate financial information" and "extending secured credit without obtaining complete supporting documentation" constitute unsafe and unsound practices); *Gulf Fed. Sav. & Loan Ass'n v. FHLBB*, 651 F.2d 259, 264 (5th Cir. 1981) (concluding that "disregarding a borrower's ability to repay" constituted an unsafe and unsound practice); *In the Matter of Grubb*, FDIC-88-282k & 89-111e, 1992 WL 813163, at *29 (Aug. 25, 1992) (approving loans without determining the borrower's ability to repay constituted an unsafe and unsound practice).

As discussed above, and as described in greater detail in this Decision, Respondent jeopardized the safety and soundness of the Bank's financial condition by failing to manage properly the risks posed by the Nielson borrowing relationship. Respondent allowed the Nielson relationship to grow from approximately \$31 million in 2008 to approximately \$36 million in 2009, even though it already was the Bank's largest borrower. JT. Exh. 2, at 38; Joint Stipulation ¶ 11. In the summer of 2009, the Nielsons informed Respondent that they were in

financial distress and that many of the Nielson Entities would be unable to continue making loan payments. R.D. at 19-21. A prudent lender would have investigated the matter, but when the Nielsons offered to provide their financial information to the Bank, Respondent, remarkably, declined their offer. R.D. at 21. In September 2009, all the Nielson Entities stopped paying their loans. R.D. at 20 (citing Tr. at 937 (Nielson)). Once the Nielson Loans were 90 days past due, as many of them were by November 30, 2009, they should have been placed on non-accrual status, Tr. at 1377 (Calcutt), and a prudent lender would have begun collection efforts, Tr. at 1296 (Calcutt).

Respondent did not begin collection efforts. He testified that he had every confidence that the Nielson Entities would pay off their loans in full, explaining that he felt certain that the Nielsons “did have the funds” and that they were merely “posturing.” R.D. at 23 (quoting Tr. 1296 (Calcutt)). Instead of calling their bluff by, among other things, reviewing the financial records they offered to provide, Respondent approved an additional loan to Bedrock Holdings of \$760,000 and he authorized the release of Pillay Collateral worth \$600,000. Answer ¶¶ 17, 18, 20. Again, prior to approving the Bedrock Transaction, Respondent did not perform or review any analysis of the Nielson Entities’ ability to repay their loans, he did not obtain appraisals of the collateral securing the loans, and he did not obtain personal guarantees from any of the Nielson Entities’ principals. Respondent’s acts and omissions were unsafe or unsound.

iii. Efforts to Mislead Regulators

As the Board found in the 2020 Decision, as the Sixth Circuit affirmed, and as described in greater detail in the Recommended Decision, the record in this matter confirms that Respondent repeatedly concealed material information about the Nielson Loans from the Bank’s regulators. *See* Section II(H), (K), (L) *supra*; R.D. at 38-39, 41-49, 73-81. Among other

deceptive acts and omissions, Respondent failed to inform the examiners that the Nielson Entities had stopped making loan payments in September 2009 and again in September 2010; he arranged for the Bank to sell some of the Nielson loans to affiliate banks shortly before the examiners arrived to conduct the 2010 examination, and he arranged for the Bank to repurchase the loans shortly after the examiners left; he directed the Nielsons to disburse the proceeds of the Bedrock Loan to individual Nielson principals instead of making distributions to other Nielson Entities and recording them as inter-company loans; he made misleading statements to examiners during meetings and in his response to the 2010 Officer's Questionnaire; and he caused the Bank to file inaccurate Call Reports that later had to be amended. *See* Section II(H)-(L), *supra*. An FDIC examiner testified that "through his actions of concealing facts about the Nielson Loans, [Respondent] did materially obstruct our ability to effectively supervise an Examination-exam in the institution." Tr. at 808 (Miessner). These acts were undertaken by an individual with significant influence and control over the bank and pertained to the bank's largest lending relationship.

Respondent attempted to avoid responsibility for the false and misleading statements he made and the deceptive actions he took by attributing them to a failure of memory, inadvertence, or to his reliance on other Bank employees. *See* Tr. at 1300, 1308 (Calcutt); R.D. at 36 (citing Respondent's testimony). ALJ McNeil did not find Respondent's explanations to be credible or legally sufficient, R.D. at 42, 73-77, 84-85, 99-101. The Board also is unpersuaded. To the extent Respondent sought to lay the blame on other Bank employees, such deflection is not a defense. *See In the Matter of Leuthe*, FDIC-95-15e, 95-16k, 1998 WL 438324, at *39 (Feb. 13, 1998) (explaining that "abdication of duty by directors to officers is not a defense," and that "Respondent's duty as a board member, and particularly as Chairman of the Board, was to

monitor the activities of bank management, to ensure compliance with laws, regulations, cease and desist orders and the Bank’s own loan policy”).

B. Breach of Fiduciary Duty

The Board found in 2020 and the Sixth Circuit affirmed, *Calcutt*, 37 F.4th at 327, that a President and CEO, Respondent owed fiduciary duties to the Bank. *See Seidman*, 37 F.3d at 933. At their most basic, these duties include an obligation to act in good faith and in the best interests of the Bank. *See In the Matter of ****, FDIC-85-356e, 1988 WL 583064, at *9 (Mar. 1, 1988). As President and CEO, Respondent was also required to adequately supervise his subordinates. *Id.* “The greater the authority of the director or officer, the broader the range of his duty; the more complex the transaction, the greater the duty to investigate, verify, clarify and explain.” *In the Matter of ****, 1988 WL 583064, at *9; *Matter of Baker*, FDIC-92-86e, 1993 WL 853599 (July 27, 1993). The duty of candor requires a corporate fiduciary to disclose “everything he knew relating to the transaction,” even “if not asked.” *De La Fuente II*, 332 F.3d at 1222 (fiduciary duty breached by failure to disclose relevant information to bank’s board of directors when it was considering a loan even though the bank’s board did not ask); *Michael*, 687 F.3d at 350; *Seidman*, 37 F.3d at 935 n.34.

i. Duty of Care

The record in this case establishes that, during the relevant period, Respondent engaged in multiple breaches of his duty of care by failing to properly manage the Bank’s relationship with the Nielson Entities and by failing to ensure the employees who worked directly for him were not engaging in unsafe or unsound practices in connection with the Nielson Loans. In the summer of 2009, Cori Nielson informed Respondent and others at the Bank that the Nielson Entities were having financial difficulties and that they would not be able to continue paying all

of their loans. *See* Section II(D), *supra*. In September 2009, the Nielson Entities stopped paying their loans, and by the end of November, many of the loans were at least 90 days past due. *See* Section *id.*, *supra*. Instead of initiating collection efforts, Respondent authorized the Bedrock Transaction, which increased the Bank's exposure to what already was its largest borrower relationship. *See id.* While negotiating the Bedrock Transaction with the Nielsons, Respondent failed to comply with the Bank's loan policy. Specifically, he did not perform any credit analysis, he did not secure the approval of the Bank's Board, and he did not obtain personal guarantees from the Nielson Entities' principals. *See* Section II(F), *supra*. Respondent did not demonstrate a higher level of care and attention when the Nielson Entities stopped paying their loans again in September 2010. Without making any effort to evaluate the Nielson Entities' ability to service their loans, Respondent authorized the renewal of all of their loans, and the release of additional Pillay Collateral, and he also granted them lower interest rates and other concessions. *See* Section II(J), *supra*.

Respondent attempted to shift blame for the mishandling of the Nielson Loans to his subordinates, including Green (the lender assigned to the Nielson relationship) and the Credit Administration department. *See, e.g.*, Tr. at 1281, 1304-05 (Calcutt) (contending that Green and the Credit Administration department were responsible for reviewing the Nielson Entities' financial statements); Tr. at 1353 (Calcutt) (denying that he had any responsibility for ensuring that the Bank's loan files were maintained in a safe and secure manner despite having previously admitted that this was his responsibility during the first evidentiary hearing in 2015); Tr. at 1270 (Calcutt) (arguing that overall responsibility for regulatory compliance rested with a number of people in the Commercial area, Credit Administration, and the individual lenders). Even if one were to accept the premise that certain of these activities were not Respondent's direct

responsibility, Respondent's duty of care obligated him, at a minimum, to ensure that his subordinates were handling these tasks in a competent and careful way. The record shows that Respondent failed to do even that much.

ii. Duty of Candor

Respondent breached his duty of candor by failing to provide the Bank's Board with timely, accurate, and complete information about the status of the Nielson Loans. Given their concentration of credit, the Nielson Entities represented the Bank's largest borrower relationship. When the Nielsons announced in the summer of 2009 that they were having financial difficulties that would prevent their companies from making loan payments, the problem was significant for the Bank, and Respondent should have disclosed it to the Bank's Board. Instead he kept silent. Tr. at 778-79 (Miessner) (Bank Board members stated that they were not aware of the problems with the Nielson Loans described in the 2010 ROE); Tr. at 1026-27 (Byl) (stating that, prior to March 2010, no one discussed the Nielson Loans at any of the Bank Board meetings he attended, nor did anyone speak with him individually about them); FDIC Exh. 48, at 40 (concluding that "management has actively concealed the accurate condition of [the Nielson] relationship from regulators and from the [Bank's] Board through the failure to maintain complete loan files and through false or misleading verbal and written statements"). When the Nielson Entities stopped paying their loans in September 2009, Respondent did not inform the Bank's Board. *See id.* When many of the Nielson Loans became more than 30 days past due, Respondent failed to inform the Bank's Board. *See id.* These are all violations of Respondent's duty of care and candor. *See De La Fuente II*, 332 F.3d at 1222 (recognizing that the duty of candor requires a corporate fiduciary to disclose "everything he knew relating to the transaction," even "if not

asked”); *In the Matter of Massey*, FDIC- 91-211e, 1993 WL 853749, at *11 (May 24, 1993) (concealment of information from bank’s loan committee constituted breach of fiduciary duty).

Respondent’s lack of candor in connection with the Bedrock Transaction was egregious. The transaction required Bank Board approval, but Respondent did not seek it. In March 2010, months after the new Bedrock Loan had been funded, the Pillay Collateral released, and the original \$4.5 million loan to Bedrock renewed, Respondent approved a Bank Board presentation concerning the Bedrock Transaction that was materially misleading. In particular, the document did not inform the Bank’s Board that, in violation of the CLP, the Bank already had consummated the transaction. In addition, the presentation falsely stated that the proceeds of the Bedrock Loan would be used for “working capital” when, as Respondent well knew (having negotiated the transaction with the Nielsons), the funds would be routed to the other Nielson Entities so that they could make payments on their loans. Third, the presentation failed to disclose that all of the Nielson Entities had stopped paying their loans in September 2009 and had refused to resume making payments unless the Bank entered into the Bedrock Transaction. These facts were material, and Respondent’s failure to disclose them to the Bank’s Board was a breach of his duty of candor. *See, e.g., In the Matter of ****, 1988 WL 583064, at *9 (FDIC Mar. 1, 1988).

VI. THE BOARD DECLINES TO ANALYZE “EFFECTS” NOT CITED IN RESPONDENT’S PREVIOUS PROHIBITION ORDER.

Before addressing the merits, Respondent raises a procedural issue, arguing that Enforcement Counsel impermissibly identifies new “effects” in submissions to the Board following the Sixth Circuit’s remand to the agency. Respondent’s Reply Br. at 20-25. Respondent maintains that Enforcement Counsel cites seven such effects, five of which “are either absent from [the 2020] Prohibition Order or have already been rejected by the Sixth

Circuit.” *Id.* at 20. Respondent contends that although the Board can “elaborate” on its original reasons for entering the 2020 Prohibition Order, it cannot “provide new ones” unless it chooses to “deal with the problem afresh by taking *new* agency action.” *Id.* at 21 (quoting *Biden v. Texas*, 597 U.S. 785, 808 (2022)).

Enforcement Counsel’s briefing does not address this issue directly. Rather, Enforcement Counsel points to language in the Supreme Court’s May 22, 2023, opinion ordering that the Sixth Circuit “remand this matter to the FDIC so it may reconsider petitioner’s case anew in a manner consistent with this opinion.” *Enf’t. Couns. Br.* at 27 (quoting *Calcutt*, 598 U.S. at 624-25). In Enforcement Counsel’s view, this means that “[t]he Sixth Circuit’s factual analysis . . . may not be relied upon” and that the Board “must now apply the proximate cause standard ‘anew’ to the evidence in the record and the litany of legally supportable ‘effects’” in its post-remand submissions. *Id.* at 28.

The Supreme Court anchored its opinion on the Sixth Circuit’s finding that “the FDIC Board had made two legal errors” in the Prohibition Order centered on (1) the Board’s conclusion that the FDI Act’s “by reason of” language does not require a showing of proximate causation and (2) application of the proximate-causation standard to “the harms that the Board had identified” in the Prohibition Order. *Calcutt*, 598 U.S. at 628-29. The Supreme Court’s instruction to the Sixth Circuit to remand the matter for the FDIC to “reconsider petitioner’s case anew” was in relation to those two identified errors. *See id.* at 625 (ordering that the Sixth Circuit remand to the FDIC “in a manner consistent with this opinion”); 630 (“[T]he case is remanded for further proceedings consistent with this opinion.”); *see also Calcutt*, 2023 WL 4236221, at *1 (“The Court held that after identifying the legal errors, the proper course was to remand to the FDIC for it to reconsider its order under the proper legal standards.”). The

Supreme Court’s remand instruction to the Sixth Circuit—and the Sixth Circuit’s parallel remand instruction to the FDIC—direct the Board to reconsider the harms the Board identified in the 2020 Decision under the proximate-causation standard. The Board will not supplement those “identified” effects with new ones at this stage of the proceeding.¹

However, Respondent tries to narrow the case even further by arguing that the Board cannot consider certain “effects” that the Sixth Circuit previously “rejected” as “not cognizable.” Respondent’s Reply Br. at 20, 22, 24. For example, Respondent argues that the Sixth Circuit held that “Enforcement [Counsel] cannot rely on the use of the Pillay Collateral to pay down other Nielson Loans as an effect.” Respondent’s Reply Br. at 25. But contrary to Respondent’s framing, the 2020 Prohibition Order was not based on a finding that merely *using* the Pillay Collateral for that purpose was an “effect.” Rather, in its 2020 Decision, the Board found that use of the Pillay Collateral *caused* a separate “effect”—namely, the \$6.443 million loss on the Nielson portfolio. The Sixth Circuit’s previous decision does not foreclose review of that issue on remand; rather, that conclusion is exactly what the Supreme Court’s and Sixth Circuit’s remand instructions direct the Board to revisit “anew.” *Calcutt*, 598 U.S. at 630.²

¹ The Board retains discretionary authority to remand matters like these to OFIA for additional fact-finding or a new on-the-record hearing but elects not to do so here because the effects already identified in the record support the issuance of a prohibition order and CMP. *See, e.g., In the Matter of James C. Amberg*, FDIC-89-144k, 1992 WL 812668, at *1 (Jan. 7, 1992).

² In briefing before the Board following the Sixth Circuit’s remand, Enforcement Counsel does not rely upon one harm identified in the 2020 Decision as follows: investigative, auditing, and legal expenses incurred in dealing with the Nielson Entities. In its June 10, 2022, opinion, the Sixth Circuit held “that such professional fees are not ‘effects’ under Section 8(e)” of the FDI Act. *Calcutt*, 37 F.4th at 331. It is unclear whether Respondent is referring to this effect in arguing that the Sixth Circuit “rejected” certain effects as “not cognizable.” Regardless, the Board limits its proximate-causation analysis on remand to the three remaining effects cited in the 2020 Decision.

VII. RESPONDENT'S MISCONDUCT PROXIMATELY CAUSED LOSSES TO THE BANK AND PERSONAL BENEFITS TO ACCRUE.

The Board turns to whether substantial record evidence supports a finding that Respondent's misconduct proximately caused three effects cited in the 2020 Decision as supporting the issuance of a Prohibition Order: (1) a \$30,000 charge-off to the \$760,000 Bedrock Loan that the Bank recorded; (2) dividends that Respondent received from the Bank's holding company in 2011; and (3) all or some portion of \$6.443 million in losses that the Bank recorded on other Nielson Loans. It is well settled that the Board has flexibility in assessing the "effect[s]" of misconduct under the statute, and "the exact amount of harm need not be proven." *Dodge*, 744 F.3d at 158. The Board need find only one "effect" to impose a prohibition order. *See* 12 U.S.C. § 1818(e)(1)(B); *see also Calcutt*, 37 F.4th at 334 ("[I]f substantial evidence supports the FDIC's finding as to *one* effect out of multiple possibilities, the fact that it fails to adequately support its other effects findings does not limit its power to issue a removal and prohibition order.") (emphasis in original). Here, applying the appropriate legal standards, the Board concludes that Respondent's misconduct proximately caused each of the three aforementioned effects.

A. Proximate-Causation Standard

Proximate causation limits "liability where there is not a sufficient link between the defendant's conduct and the plaintiff's injuries." *Crosby*, 921 F.3d at 623. It effectively serves as "shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692 (2011).

Proximate cause also "is a flexible concept that does not lend itself to a black-letter rule that will dictate the result in every case." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008) (internal quotation omitted); *see also Wallace v. Midwest Fin. & Mortg. Servs., Inc.*,

714 F.3d 414, 419-20 (6th Cir. 2013). Rather, the “[p]roximate-cause analysis is controlled by the nature of the statutory cause of action,” meaning the harm alleged must have “a sufficiently close connection to the conduct the statute prohibits.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014). Guided by the Sixth Circuit’s decision in this case and others, we know that “substantiality, directness, and foreseeability are all relevant in a proximate cause determination.” *Calcutt*, 37 F.4th at 330 (quoting *Crosby*, 921 F.3d at 624). But “other established principles of tort causation will often be useful as well.” *Kemper v. Deutsche Bank*, 911 F.3d 383, 392 (7th Cir. 2018). And “[t]here may, of course, be more than one proximate cause.” *Hausrath v. N.Y. Cent. R.R. Co.*, 401 F.2d 634, 637 (6th Cir. 1968). For example, a plaintiff does not necessarily “fail in their burden of proof” merely because they “were unable to show which of two projected causes was the actual cause” of their injury. *Pierce v. United States*, 679 F.2d 617, 622 (6th Cir. 1982). To that end, the Supreme Court endorses a “catch-all approach” to proximate causation, *Bridge*, 553 U.S. at 654, in line with treating it as a “reflect[ion] . . . of what justice demands, or of what is administratively possible and convenient,” W. Page Keeton, et al., *Prosser and Keeton on Law of Torts* § 41, at 264 (5th ed. 1984).

B. Effect No. 1: The \$30,000 Loan Charge Off

In November 2009, the Bank entered into the Bedrock Transaction with the Nielson Entities. JT Exh. 15, at ¶¶ 12, 13. As part of the Bedrock Transaction, the Bank agreed to extend an additional \$760,000 loan to the Nielson Entities. JT Exh. 15, at ¶ 13. The purpose of the Bedrock Transaction was to provide the funding necessary to bring current all of the past-due loans to the Nielson Entities and to provide a reserve sufficient to make payments for the loans into 2010. JT Exh. 15, at ¶ 14. Respondent consented to the Bedrock Transaction and was aware of its purpose. JT Exh. 15, at ¶ 16. In fact, as the ALJ concluded, the record shows that

the Bedrock Loan funds were disbursed on the basis of Respondent's "direct approval, before the [Bank's] Board gave its approval." R.D. at 93 & n.718 (citing Tr. at 1378-80 (Calcutt)). On July 31, 2012, the Bank recognized a \$30,000 charge-off against the \$760,000 Bedrock Loan. R.D. at 88 & n.673 (citing EC Exh. 81 at 70).

In its prior decision, the Board found that, as a result of Respondent's misconduct in approving the Bedrock Loan, the Bank suffered or likely would suffer a financial loss in connection with the \$30,000 charge-off. 2020 Board Dec. at 27. On appeal, the Sixth Circuit, applying the proximate causation standard, independently concluded that "the record indicates that, because Calcutt participated extensively in negotiating and approving the Bedrock Transaction, his actions proximately caused the [\$30,000] Bedrock Loan charge-off." *Calcutt*, 37 F.4th at 330. The Board agrees.

Respondent nevertheless contends, in his post-remand submission to the Board, that the \$30,000 Bedrock charge-off does not satisfy the effects requirement for two reasons. First, he contends that the misconduct attributed to him is "too far removed from the \$30,000 charge-off to have directly caused it." Resp. Br. at 22. Second, he argues that "the FDIC has failed to rule out intervening factors that more substantially and directly may have caused the \$30,000 charge-off." *Id.* at 24. The Board addresses these contentions in turn.

With respect to Respondent's remoteness argument, substantial evidence established that Respondent breached his fiduciary duties and committed unsafe and unsound practices in approving the Bedrock Transaction, including the Bedrock Loan. Among other things, Respondent (1) failed to evaluate whether the Nielsons had the ability to repay the new loan, (2) failed to secure any personal guarantees supporting the loan, and (3) caused the loan proceeds to be disbursed before the Bank's Board approved the transaction. The record therefore shows that

Respondent's misconduct "played a significant role" in the Bank's decision to enter—and ultimately charge off—the Bedrock Loan. *See Wallace*, 714 F.3d at 420. Accordingly, the Board can "trace a straight line" between Respondent's misconduct and the \$30,000 loss. *See id.*

Respondent points out that his misconduct took place between 2009 and September 2011, but the \$30,000 charge-off was not recorded until July 2012. Resp. Br. at 22. In the interim, the FDIC conducted an examination of the Bank and also investigated Respondent's misconduct involving the Nielson relationship. *See id.* at 22-23. Respondent emphasizes that, despite these examinations and investigations, the FDIC nevertheless concluded that the Bank had not suffered a loss on the Bedrock Loan as of October 2011. *See id.* at 23. Because the charge-off was recorded nine months later, Respondent therefore reasons that his misconduct could not have proximately caused it. *See id.* But Respondent's remoteness argument relies on an application of the proximate causation standard that is far too rigid. As the Supreme Court explained in *Bridge*, proximate cause is a "flexible concept" that must be adapted to the case at hand. 553 U.S. at 654. More recently, in its decision in *Calcutt*, the Sixth Circuit recognized that "substantiality, directness, and foreseeability are all relevant in a proximate cause determination." *Calcutt*, 37 F.4th at 330 (quoting *Crosby*, 921 F.3d at 624). Here, Respondent's misconduct was a substantial factor that directly caused the charge-off. The Bedrock Loan did not satisfy the Bank's underwriting standards and should not have been made. Had Respondent complied with the Bank's loan policy, the Bank would not have suffered actual or potential losses related to the loan. Furthermore, it was foreseeable that a risky loan, unsupported by personal guarantees, could result in a loss to the Bank. *See Wallace*, 714 F.3d at 421 (finding foreseeability where mortgage company's alleged scheme to artificially inflate home-appraisal figures "created more than a bare possibility that [the plaintiff] would enter into a

large loan”). Therefore, the \$30,000 charge-off was not too remote to have been proximately caused by Respondent’s misconduct.

Respondent also argues that “the FDIC has failed to rule out intervening factors that more substantially and directly may have caused the \$30,000 charge-off.” Resp. Br. at 24.

Intervening forces may relieve an actor of liability only if they break the chain of causation between the actor’s misconduct and the harm at issue. *See Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996) (explaining that, under the superseding cause doctrine, a defendant may avoid liability for injuries that were “actually brought about by a later cause of independent origin that was not foreseeable” to the defendant); RESTATEMENT (SECOND) OF TORTS § 442 (identifying six factors that should be considered in resolving whether an intervening force constitutes a superseding cause that severs the chain of causation).

Respondent has not identified any superseding causes that severed the chain of causation between his misconduct and the Bank’s \$30,000 loss. The mere possibility that the Bank’s Board might have approved the Bedrock Transaction had Respondent presented it for consideration before effectuating the transaction does not constitute a superseding cause. *See* Resp. Br. at 24. Likewise, the possibility that “macroeconomic circumstances, or other factors” might have contributed to the Nielsons’ default does not sever the chain of causation. *Id.* Respondent does not claim, nor did he present evidence, that *unforeseeable* macroeconomic circumstances broke the chain of causation for the \$30,000 loss.

At most, Respondent has identified a handful of factors that at best might have been additional proximate causes of the \$30,000 loss. But it is well settled that an injury may have more than one proximate cause. *See Roberts v. City of Troy*, 773 F.2d 720, 725 (6th Cir. 1985);

Hausrath, 401 F.2d at 637. In *Roberts*, for example, the Sixth Circuit held that the district court “did not err in giving the standard general proximate cause instruction” that:

There may be more than one proximate cause. To be a proximate cause the claimed wrongful conduct need not be the only cause nor the last cause. A cause may be proximate although it and another cause act at the same time or in combination to produce the occurrence.

773 F.2d at 725. Respondent’s speculation that other factors may have contributed to the charge-off does not undermine the conclusion that his own misconduct also was a proximate cause of the charge-off. See *In the Matter of Adams*, FDIC-93-91e, 1997 WL 805273, at *5 (Nov. 12, 1997) (recognizing that “multiple factors, and individuals, may contribute to a bank’s losses,” and that a respondent cannot escape liability simply because others have contributed to the bank’s loss as well).

In sum, Respondent’s misconduct was a proximate cause of the \$30,000 charge-off on the Bedrock Loan.

C. Effect No. 2: Respondent’s Financial Gain

The FDI Act expressly provides that the effect requirement is satisfied if an IAP “has received financial gain or other benefit by reason of [his] violation, practice, or breach” of fiduciary duty. 12 U.S.C. § 1818(e)(1)(B)(iii). The ALJ found that Respondent received a financial benefit from his misconduct in the form of a dividend that would not have been paid if the true condition of the Nielson Loans had been properly reported. R.D. at 5. In seeking regulatory approval for the Bank to pay a \$463,000 dividend to its holding company, the Bank failed to disclose “the fact that on April 20, 2011 the Bank had placed the Nielson loans on non-accrual and reversed all of the income that they had . . . accrued throughout 2011 to that point.” R.D. at 99 & n.777 (citing Tr. at 785 (Miessner), and Tr. (2015) at 1703 (Jackson)). As a result, both the Bank’s capital and its earnings were overstated. See R.D. at 99 & n.779. The \$463,000

dividend “exceeded year-to-date earnings and also violated the provisions in the Section 39 Compliance Plan that required Tier 1 capital to be 8.5 percent in conjunction with the asset growth plan, and [the provision that] the ALLL that was supposed to make the ALLL adequate and make sure that the Tier 1 capital doesn’t go below 8.5 percent.” *See* R.D. at 99 & n.780. The Bank’s holding company used the \$463,000 dividend from the Bank to pay out a dividend to the holding company’s own shareholders. Respondent, as a large shareholder in the holding company, personally benefited from the payment of this dividend. R.D. at 117 & n. 923; *see also* Tr. at 895 (Miessner).

The Board, in its prior decision, adopted the ALJ’s determination that Respondent received a financial benefit—specifically, an unwarranted dividend—as a direct result of his misconduct. *See* Board Dec. at 35-36. As the Sixth Circuit recognized, “Calcutt does not really challenge the findings that the Bank paid a dividend to the holding company, nor that the Bank’s dividend reflected its inflated representation of the Nielson Loans’ performance.” *Calcutt*, 37 F.4th at 333. Given these concessions, the Sixth Circuit held that it was “reasonabl[e]” for the Board to conclude that “the dividends paid by the holding company reflected the value of the dividends paid by the [B]ank.” *Id.* And “[o]n balance, the evidence and common sense support the agency’s position as to this effects finding.” *Id.*

Against this backdrop, Respondent argues in his post-remand submission to the Board that Enforcement Counsel failed to introduce sufficient evidence linking his misconduct to the dividend he received from the Bank’s holding company. *Resp. Br.* at 24-28. Respondent emphasizes that he did not receive any dividends directly from the Bank; instead, he received dividends from the Bank’s holding company, which is not regulated by the FDIC. *See id.* at 25. Undisputed evidence established that the Bank paid dividends to its holding company, which the

holding company then used to pay dividends to its shareholders, including Respondent.

Respondent concedes that “[d]ividends from the Bank to the holding company first depend on whether the Bank made a profit,” Resp. Br. at 25, and he acknowledges that the FDIC was empowered to prohibit the Bank from paying dividends based on the agency’s assessment of its financial condition, *see id.* at 26. Respondent nevertheless contends that, even if the Bank had been unable to pay a dividend, it is possible that the holding company might have paid one anyway using some other source of funds. *See id.* at 27.

The Sixth Circuit squarely rejected this argument, noting that Respondent “does not provide evidence (other than his own testimony, which is stated in general terms) that the holding company had ever paid dividends over and above a reflection of the Bank’s perceived performance.” *Calcutt*, 37 F.4th at 333. The record does not support a finding that the holding company might have decided to pay a dividend in 2011 even if the FDIC had prohibited the Bank from paying a dividend to the holding company upon learning the true condition of the Nielson Loans. Rather, substantial record evidence shows that Respondent’s misconduct was a “fundamental part of the calculus” in the Bank’s—and, in turn, the holding company’s—ultimate decision to pay the dividend. *See Wallace*, 714 F.3d at 422.

Respondent also relies upon the Supreme Court’s decision in *Bank of America Corp. v. City of Miami*, 581 U.S. 189 (2017), to contend that linking his misconduct in 2009 to financial benefits that he received in 2011 impermissibly extends the proximate causation analysis “beyond the first step.” Resp. Br. at 27 (quoting *Bank of Am.*, 581 U.S. at 203). However, in *Bank of America* the Supreme Court declined to “draw the precise boundaries of proximate cause” under the statute there at issue, and Respondent does not cite any other case establishing a rigid demarcation between the “first step” and the second. In *Bank of America*, the Court held

that the Eleventh Circuit’s approach to proximate causation improperly focused exclusively on the issue of foreseeability. *See Bank of Am.*, 581 U.S. at 202. On remand, in accordance with the Supreme Court’s instructions, the Eleventh Circuit expanded its proximate causation analysis to encompass, in addition to foreseeability, whether the plaintiff plausibly had alleged “some direct relation between the injury asserted and the injurious conduct alleged.” *City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260, 1272 (11th Cir. 2019) (quoting *Bank of Am.*, 581 U.S. at 202-203), *vacated as moot by Wells Fargo & Co. v. City of Miami, Fl.*, 140 S. Ct. 1259 (2020)). Although there were a number of links in the plaintiff’s causation theory—at least *six*, according to the defendant banks—the Eleventh Circuit concluded that the City of Miami had plausibly pled a sufficiently direct relation between the banks’ alleged violations of the Fair Housing Act and the City’s alleged loss of tax revenue. *See City of Miami*, 923 F.3d at 1277, 1294. As the Eleventh Circuit aptly observed in its remand decision, “[t]he Supreme Court has never held that the presence of an intervening causal step or the involvement of a third party necessarily bars a finding of proximate cause as a matter of law.” *City of Miami*, 923 F.3d at 1294 (emphasis in original); *see id.* at 1274 (recognizing that “intervening steps in a causal chain cannot automatically and invariably end the analysis”).

Respondent also points to *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258 (1992), as an example of a case in which the Supreme Court found an insufficiently direct linkage between the plaintiff’s injuries and the defendant’s misconduct. *See* Resp. Br. at 27 (citing *Holmes*, 503 U.S. at 269-70). But the issue in *Holmes* was whether a plaintiff could recover damages under the Clayton Act despite having suffered only indirect injuries as a result of the defendants’ unlawful conduct. *See Holmes*, 503 U.S. at 269-70. The Supreme Court answered that question in the negative, concluding that otherwise, in addition to determining

factual causation, courts would be burdened with the complicated task of “apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries.” *Id.* at 269. The Court reasoned that grappling with these burdensome tasks was unnecessary because the claimants with direct injuries could be counted on to vindicate the goals of the statute. *See id.* at 269-70.

The case against Respondent does not present any of the remoteness concerns at issue in *Bank of America* or *Holmes*. Respondent concealed the true status of the Bank’s largest lending relationship and then “received financial gain or other benefit by reason of [his] violation, practice, or breach” of fiduciary duty. 12 U.S.C. § 1818(e)(1)(B)(iii). The fact that the Bank paid a dividend to its holding company, which then paid a dividend to Respondent, does not break the chain of causation. In sum, Respondent’s reliance on *Bank of America* and *Holmes* is misplaced.

D. Effect No. 3: The \$6.443 Million in Losses to the Bank

The ALJ found that the Nielson Loans first went into default in 2009. R.D. at 6. The ALJ also found that Respondent was aware of the true condition of the Nielson Loans, having received various proposals from the Nielsons about renewing the loans, forbearance, and deeds-in-lieu of foreclosure. *See id.* at 19-20. Instead of foreclosing on the Nielson Loans, Respondent actively concealed the problem from the Bank’s Board and the Bank’s regulators and caused the Bank to extend additional credit to the Nielsons. *See id.* at 4-7. The ALJ found that Respondent’s misconduct caused the Bank to suffer \$6.443 million in losses on the Nielson Loans. *See id.* at 4.

Respondent argues that he cannot be held responsible for causing the *entirety* of the \$6.443 million loss, citing the Sixth Circuit’s conclusion that “[t]he Bank probably would have incurred some loss no matter what Calcutt did.” Resp. Br. at 14 (quoting *Calcutt*, 37 F.4th at

331). But Respondent elides the remainder of the Sixth Circuit’s analysis of this effect. In particular, Respondent does not address the Sixth Circuit panel’s conclusion that “there is *substantial evidence* that part of the \$6.443 million in losses was an effect of Calcutt’s actions.” *Calcutt*, 37 F.4th at 332 (emphasis added). As the court observed, “[t]he record indicates that Calcutt, knowing that the Nielson Entities were near default and that they were a large lending relationship, extended credit and renewed loans to them while concealing these transactions and the scale of the problem from the Bank’s Board and from regulators.” *Id.* The Sixth Circuit further determined that Respondent’s “negotiation with the Nielson Entities and approval of loans despite indications that they would not be able to repay their debts was a direct, substantial, and foreseeable cause of a situation in which the Bank could suffer a potential loss.” *Id.* Accordingly, the Sixth Circuit “conclude[d] from the record as a whole that Calcutt’s actions proximately caused an actual and potential loss to the Bank—even if the loss did not amount to the total of \$6.443 million.” *Id.* We agree and adopt the Sixth Circuit’s reasoning in this respect.

Against this backdrop, Respondent offers several arguments for why, in his view, his misconduct was not a proximate cause of any portion of the \$6.443 million in losses that the Bank suffered on the Nielson Loans. *See* Resp. Br. at 14-21. For instance, he contends that the Nielsons had loans that were not performing before the Bedrock Transaction, *see id.* at 17; that the Great Recession, which was unforeseeable, adversely affected the Nielsons’ various businesses, making it more difficult for them to service their loans, *see id.*; and that the Nielsons exacerbated the situation by taking “increasingly unreasonable, bad faith negotiating positions” with the Bank, *see id.* at 18. Even assuming, *arguendo*, that these factors caused some portion of the \$6.443 million in losses sustained by the Bank, Respondent’s misconduct was a direct, substantial, and foreseeable cause of actual and potential losses to the Bank.

* * * * *

In sum, the Board finds that each of the foregoing effects independently—and collectively—supports the issuance of a removal and prohibition order against Respondent.

VIII. THE CULPABILITY REQUIREMENT IS SATISFIED.

As the Board explained in the 2020 Decision, culpability, for purposes of section 1818(e), can be shown by “personal dishonesty” or a “willful or continuing disregard” for the safety and soundness of the financial institution. 12 U.S.C. § 1818(e)(1). “Personal dishonesty” can be established through evidence that an IAP disguised wrongdoing from the institution’s board and regulators, or failed to disclose material information. *See Dodge*, 744 F.3d at 160 (citing *Landry v. FDIC*, 204 F.3d 1125, 1139-40 (D.C. Cir. 2000)); *Greenberg v. Bd. of Governors of the Fed. Reserve Sys.*, 968 F.2d 164, 170 (2d Cir. 1992); *Van Dyke v. Bd. of Governors of the Fed. Reserve Sys.*, 876 F.2d 1377, 1379 (8th Cir. 1989)). “Willful disregard” is “deliberate conduct that exposes ‘the bank to abnormal risk of loss or harm contrary to prudent banking practices.’” *Michael*, 687 F.3d at 352 (quoting *De La Fuente II*, 332 F.3d at 1223). “Continuing disregard” is “conduct that has been ‘voluntarily engaged in over a period of time with heedless indifference to the prospective consequences.’” *Id.* at 353 (quoting *Grubb v. FDIC*, 34 F.3d 956, 962 (10th Cir. 1994)). “Although inadvertence alone is not sufficient to establish culpability, recklessness suffices.” *Id.* (citation omitted). An IAP “cannot claim ignorance by turning a blind eye to obvious violations of his statutory and fiduciary duties.” *Id.* at 352.

ALJ McNeil made the following findings with respect to Respondent’s personal dishonesty:

Respondent persistently concealed from both the Bank’s Board and its regulatory examiners the true common nature of the Nielson Entities Loan portfolio, problems with that portfolio, and Respondent’s efforts in dealing with the Nielson Family’s decision to stop making payments on the loans in that portfolio, first in 2009, then in 2010, and finally in 2011. Respondent

falsely answered questions presented to him during examinations in 2009, 2010, and 2011, concealed documents showing the true condition of the loans during that period, and falsely testified that Board members had been fully apprised of the nature of the Nielson Loan portfolio.

Respondent envisioned and then implemented the means by which proceeds apparently earmarked for the Bedrock Fund LLC would in fact be distributed to multiple Nielson Entities, using bookkeeping protocols that would withhold from the Bank's own auditors and its examiners the true common nature of the Entities and their loan portfolio.

R.D. at 6. As the Board found in the 2020 Decision, and as the Sixth Circuit affirmed, these findings are well supported by the testimony and exhibits in the record.

Respondent's exceptions to these findings are not well taken. For example, Respondent admits that he advised the Nielsons to "upstream" payments to the principals of other Nielson Entities instead of reporting inter-company transfers on the companies' respective books. R. Exceptions, at 146-147. Respondent argues that because he made this recommendation in April 2008, it could not have been his intention to mask how the Nielson Entities distributed the proceeds of future transactions with the Bank, such as the 2009 Bedrock Transaction. *See id.* The fact that this was a standing instruction to the Nielsons, rather than a directive specific to the Bedrock Transaction, is immaterial. Respondent also renews his arguments that the misstatements and acts of concealment attributed to him were either unintentional or the fault of other bank personnel on whom Respondent relied. *See id.* at 145-154. ALJ McNeil determined that Respondent's testimony in support of these points was not credible and was squarely contradicted by other record evidence. The Board reaches the same conclusion.

The Board also finds that Respondent's behavior exhibited willful and continuing disregard for the safety and soundness of the Bank. During the relevant period, Respondent took steps to conceal the interrelatedness and the precarious financial condition of the Nielson Entities from the Bank's Board, thereby frustrating its efforts to perform its oversight role. Similarly,

Respondent actively concealed the same information from the examiners, thereby obstructing them from performing their supervisory role. In violation of the Bank's CLP, Respondent authorized the release of Pillay Collateral and the disbursement of the Bedrock Loan without first obtaining the approval of a 2/3rd majority of the Bank's Board. This course of conduct, spanning a period of years, undertaken by the President and CEO of the Bank, constitutes a continuing and willful disregard for the safety and soundness of the Bank.

IX. THE AMOUNT OF THE CMP IS JUSTIFIED.

As the Board explained in the 2020 Decision, and as the Sixth Circuit affirmed, a second tier CMP may be imposed against a party who (1) commits any violation of law, regulation, or certain orders or written conditions imposed by regulators; (2) recklessly engages in an unsafe or unsound practice in conducting the affairs of the institution; or (3) breaches any fiduciary duty, and whose "violation, practice, or breach . . . is part of a pattern of misconduct; causes or is likely to cause more than a minimal loss" to the institution; or "results in pecuniary gain or other benefit" to the party. 12 U.S.C. § 1818(i)(2)(B). The FDI Act authorizes up to \$25,000 for each day the violation, practice, or breach continues, subject to adjustments for inflation. 12 U.S.C. § 1818(i)(2)(B); 12 C.F.R. § 509.103.

The Board already has discussed Respondent's breaches of fiduciary duty and unsafe or unsound banking practices, as well as the effects of those acts and omissions. Respondent is subject to a second tier CMP as a result of his breaches of fiduciary duty. Although the breaches of fiduciary duty standing alone support the recommended CMP, the Respondent also acted recklessly, providing an independent basis to support a second tier CMP.

Recklessness is established by acts committed "in disregard of, and evidencing conscious indifference to, a known or obvious risk of a substantial harm." *Cavallari v. OCC*, 57 F.3d 137, 142 (2d Cir. 1995); *see also Simpson v. Office of Thrift Supervision*, 29 F.3d 1418, 1425 (9th Cir.

1994) (similar definition of “reckless[ness]”). Conduct that demonstrates willful or continuing disregard under Section 8(e) has been held to satisfy the recklessness requirement. *See Dodge*, 744 F.3d at 162. For the reasons set forth above, the Board finds that Respondent’s conduct reflected a willful or continuing disregard for the safety and soundness of the Bank.

Before assessing a CMP, the Board is required to consider the appropriateness of the amount being assessed by considering five mitigating factors: (1) Respondent’s financial resources; (2) the good faith or lack thereof of Respondent; (3) the gravity of the violation; (4) Respondent’s history of previous violations; and (5) such other matters as justice may require. 12 U.S.C. § 1818(i)(2)(G). In addition, the Interagency Policy Regarding Assessment of CMPs by the Federal Financial Institutions Regulatory Agencies provides 13 factors for interpreting these statutory factors. Civil Money Penalties Interagency Statement, 63 Fed. Reg. 30226-02, 1998 WL 280287 (adopting Interagency Policy Regarding Assessment of CMPs by the Federal Financial Institutions Regulatory Agencies (June 3, 1998)). As to the first factor, Respondent stipulated that he has the resources to pay a \$125,000 penalty. As the Board found in the 2020 Decision, the gravity of the violations and Respondent’s efforts to conceal them support a significant CMP, and the record does not support a finding that Respondent acted in good faith. These factors are not outweighed by the fact that Respondent does not have a history of previous violations. The Board therefore adopts the ALJ’s recommendation of a \$125,000 CMP.

Having considered the statutory and regulatory factors anew, the record in this case, and the briefing on Remand, the Board adopts and affirms the reasoning and conclusion of the ALJ that the amount of the CMP in this case, \$125,000, is appropriate. R.D. at 124-25. The Board has also considered the reduced set of harms under the Sixth Circuit’s decision and has determined that this does not suffice under the relevant factors to reduce the \$125,000 CMP.

The ability to pay and the gravity of the misconduct that the Board has found support the CMP amount.

X. THE MANDATE RULE FORECLOSES RESPONDENT’S JURY TRIAL ARGUMENTS.

It is undisputed that Respondent did not argue that he was entitled to a jury trial until after the case was remanded and he filed his third amended answer on January 11, 2024.

Enforcement Counsel argues that Respondent waived his Seventh Amendment and Article III arguments by not raising them at any point in the prior two administrative proceedings. FDIC Brief at 17-19. In response, Respondent argues that Enforcement Counsel conflates waiver and forfeiture and that Respondent has not waived or forfeited these arguments. Respondent’s Reply Brief at 15-20.

The Board concludes that it is unnecessary to decide whether Respondent has waived or forfeited his “right to a jury trial” arguments because the Board is foreclosed from deciding them under the “mandate rule.” The Sixth Circuit issued a limited remand to address specific issues. These issues do not include the right to a jury trial under the Seventh Amendment, Article III, or due process.

The Sixth Circuit’s remand did not open the door for Respondent to argue that he has been denied the right to a jury trial, an argument Respondent has not previously made in this proceeding. As Enforcement Counsel points out, “[t]he Supreme Court reversed the FDIC’s prior decision because it failed to require a showing of proximate cause and directed the Sixth Circuit to remand for consideration of whether the evidence before the FDIC supported that finding and whether the originally imposed sanctions were warranted given any reappraisal of causation.” FDIC Brief at 17 (citing *Calcutt v. FDIC*, 598 U.S. 623, 629-30 (2023)). That is what the Sixth Circuit did. *Calcutt v. FDIC*, 2023 WL 4236221, at *1 (6th Cir. Jun. 28, 2023)

(“Accordingly, we VACATE the FDIC’s order and REMAND this matter to the FDIC so that it may reconsider Calcutt’s case in a manner consistent with the Supreme Court’s opinion.”). The Supreme Court did not address any Seventh Amendment, Article III, or due process issues. Because the Sixth Circuit did not remand on all issues and instead remanded on specified issues, any right to a jury trial has nothing to do with the issues on which it did remand.

The Sixth Circuit’s remand was a limited one—it remanded for the Board to consider the matter in a manner consistent with the Supreme Court’s opinion, which identified two legal errors in the Sixth Circuit’s decision. *Cf. U.S. v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999) (“Limited remands explicitly outline the issues to be addressed by the district court and create a narrow framework within which the district court must operate.”). Under the Sixth Circuit’s mandate, the Board is empowered only to evaluate the case using a proximate cause standard and decide whether the sanctions against Respondent are warranted on the narrower set of harms that the Sixth Circuit identified. *See Calcutt v. FDIC*, 598 U.S. 623, 628 (2023). Absent a relevant exception, the Board is without authority to expand its inquiry beyond those issues. *See Monroe v. FTS USA, LLC*, 17 F.4th 664, 669 (6th Cir. 2021). Accordingly, under the mandate rule, Respondent is foreclosed from raising his arguments for a right to a jury trial before this Board on remand. *See, e.g., id.* at 669 (“The mandate rule binds a district court to the scope of the remand issued by the court of appeals.”); *U.S. v. O’Dell*, 320 F.3d 674, 679 (6th Cir. 2003) (“The basic tenet of the mandate rule is that ‘a district court is bound to the scope of the remand issued by the court of appeals.’” (citation omitted)); *U.S. v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999) (“[T]he mandate rule instructs that the district court is without authority to expand its inquiry beyond the matters forming the basis of the appellate court’s remand.” (citation omitted)); *see also* 18B Charles Alan Wright & Arthur R. Miller, *FED. PRAC. & PROC. Juris* §

4478.3 (3d ed.) (“An administrative agency is bound by the mandate of a reviewing court much as a lower court is bound by the mandate of a higher court.”).

To the extent that the Board has discretion to go beyond the Sixth Circuit’s mandate under the exception for a subsequent contrary view of the law by controlling authority, it declines to exercise such discretion. *See, e.g., United States v. Porter*, 127 Fed. Appx. 825, 826-27 (6th Cir. 2005) (setting out limited discretionary exceptions to mandate rule). As discussed below, Section XI *infra*, there has been no change in the law that requires a jury trial here. *SEC v. Jarkesy*, 603 U.S. 109 (2024) involved a different agency and a different statute than is at issue here. And *Jarkesy* did not change the underlying principles involved in determining the right to a jury trial with respect to agency proceedings. *See, e.g., Campbell*, 168 F.3d at 269 (“The case law clearly explains that the ‘change in the law’ asserted by Campbell was merely a clarification of the Sentencing Guidelines, and not a change in any underlying principles.”).

XI. THE SEVENTH AMENDMENT IN ANY EVENT DOES NOT REQUIRE A JURY TRIAL FOR RESPONDENT.

In any event, to the extent the mandate rule does not apply and the Board is authorized to decide the issue, Respondent is not entitled to a jury trial. To resolve the question of whether the Seventh Amendment entitles Respondent to a jury trial for this section 1818 administrative enforcement proceeding, it is necessary to decide two issues: (1) “whether th[e] action implicates the Seventh Amendment[;]” and (2) if it does, “whether the ‘public rights’ exception to Article III jurisdiction applies.” *SEC v. Jarkesy*, 603 U.S. 109, 120 (2024); *see also Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 42 (1989).

A. Removal and Prohibition Proceedings Do Not Implicate the Seventh Amendment.

The Seventh Amendment provides that the jury trial right is “preserved” for “suits at common law.” U.S. Const. amend. VII. It “extends to a particular statutory claim if the claim is

‘legal in nature.’” *Jarkesy*, 603 U.S. at 122; *see also, e.g., Granfinanciera S.A.*, 492 U.S. at 53 (no jury trial is necessary for a claim that is not “legal in nature”); *Atlas Roofing Co., Inc. v. OSHA*, 430 U.S. 442, 449 (1977) (“The phrase ‘Suits at common law’ has been construed to refer to cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not.”). To determine whether a claim is “legal” in nature, the Supreme Court has stated that a “court [must] consider the cause of action and the remedy it provides.” *Id.* at 123. And the remedy is “the ‘more important’ consideration.” *Id.*

The removal and prohibition proceeding against Respondent under section 1818(e) does not implicate the Seventh Amendment. The removal and prohibition order in this case is essentially an injunction preventing Respondent from further participation in the banking industry. As such, it is an equitable remedy not a legal one. Further, a prohibition order is remedial, serving “the legitimate remedial purpose of protecting insured institutions from the dangers of misconduct by bank insiders.” *See United States v. Stoller*, 906 F. Supp. 39, 41-42 (D. Mass. 1995) (noting the support in the legislative history of Section 1818 for this interpretation), *aff’d* 78 F.3d 710, 713, 718 (1st Cir. 1996); *see also United States v. Rusk*, 96 F.3d 777, 779 (5th Cir. 1996) (“[D]ebarment orders do not serve a punitive purpose but rather the remedial goal of protecting the banking industry.”); *Bae v. Shalala*, 44 F.3d 489, 496 (7th Cir. 1995) (debarment under Generic Drug Enforcement Act remedial, not punitive); *United States v. Hudson*, 14 F.3d 536, 541-42 (10th Cir. 1994) (“[T]he OCC’s use of debarment as a means of protecting the integrity of the banking system and the interests of the depositors is a legitimate remedial purpose that need not necessarily be defined as also serving as deterrence or retribution.”); FDIC Reply Br. at 8-9 (discussing legislative history of Section 1818(e)); *In the*

Matter of John J. Schmalzer, FDIC-00-007e, 2004 WL 2930775, at *4 (Oct. 21, 2004) (“Orders of removal and prohibition under section 8(e) of the Act are remedial and are *issued not to punish, but rather to protect the public*”); *In the Matter of Richard M. Wright*, FDIC-95-79e, 2000 WL 1742018, at *3 (Oct. 2, 2000) (same); *In the Matter of Douglas A. Winter*, FDIC-89-29e, 1997 WL 602923, at *4 (Aug. 20, 1997) (same); *In the Matter of Allan Hutensky*, FDIC-92-300e, 1997 WL 557612, at *2 (FDIC July 8, 1997) (“Section 8(e) of the FDI Act is a remedial, not a punitive statute.”).

Respondent disagrees, contending that removal and prohibition are punitive and “effectively operate as a professional death penalty by ending a banker’s career.” Resp’s. Br. at 8. As Respondent points out, some courts have found that removal and prohibition orders constitute a penalty in other contexts. *See Proffitt v. FDIC*, 200 F.3d 855, 860-62 (D.C. Cir. 2000) (finding section 1818(e) removal and prohibition to be a penalty in context of statute of limitations under 28 U.S.C. § 2462); *De la Fuente*, 332 F.3d at 1219 (same).³ However, a remedy can be equitable even if punishment or deterrence are also consistent with its rationales or effects. *See, e.g., S.E.C. v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006) (SEC’s equitable disgorgement remedy has “the effect of deterring subsequent fraud”); *EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1253 (11th Cir. 1997) (EEOC’s injunctive remedies “deter[] the employer from future discrimination”); *F.T.C. v. Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011) (SEC disgorgement remedies are equitable even if their “primary purpose is to deter violations of the laws by depriving violators of their ill-gotten gains”); *U.S. v. Stoller*, 78 F.3d 710, 723, 724 (1st Cir. 1996) (finding, in a double jeopardy analysis, that

³ Notably, *Proffitt* distinguished cases finding debarment remedial rather than punitive “in various constitutional contexts.” *Proffitt*, 200 F.3d at 860 n.5.

a debarment order imposed by the FDIC was “essentially remedial in nature” and surveying the legislative history of Section 1818(e) and determining that it “indicates that Congress gave the FDIC removal power for remedial purposes”). That is the case here, where any legal relief is “incidental to or intertwined with injunctive relief.” See *Tull v. United States*, 481 U.S. 412, 424 (1987). The core purpose of removal and prohibition is equitable rather than legal. The fact that these remedies may also be consistent with deterrence or punishment in part does not alter their equitable nature.

The nature of the “cause of action” also supports this conclusion. The FDIC charged Respondent with breach of fiduciary duty and unsafe and unsound practices under sections 1818(e)(1)(A)(ii) and (iii) of the FDI Act. Respondent contends that these claims “are closely related to common law causes of action for breach of fiduciary duty, gross negligence, and fraud.” Resp’s Brief at 10. But that argument fails.

Courts have recognized that actions for breach of fiduciary duty do not implicate the Seventh Amendment because those actions, to the extent they existed in 1791, were brought against trustees, not corporate officers. See FDIC Br. at 6-9. Those actions were solely equitable and did not involve damages. See *Evans v. Pearson Enter.*, 434 F.3d 839, 849 (6th Cir. 2006). For that reason, the Supreme Court noted in *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558 (1990), that a modern action that is comparable to an equitable action by a trust beneficiary does not require a jury trial. *Id.* at 568-69.⁴ A breach of fiduciary duty claim

⁴ Respondent observes that *Chauffeurs* held that a jury trial was required because the remedy—monetary damages—was legal. Resp’s Reply Br. at 4-5. But Respondent cites no authority that a cause of action for breach of fiduciary duty, without a request for damages, sounded in law rather than equity. Respondent’s citation to *Pereira v. Farace*, 413 F.3d 330, 340-41 (2d Cir. 2005), confirms the point. See Resp’s Reply Br. at 4. The *Pereira* court found a right to a jury trial based on the legal remedy—compensatory damages—but also agreed that “as a ‘general rule’ breach of fiduciary duty claims were historically within the jurisdiction of the equity

for debarment of a banking participant is not a claim that “involves rights and remedies of the sort traditionally enforced in an action at law, rather than in equity or admiralty.” *See Pernell v. Southall Realty*, 416 U.S. 363, 375 (1974).⁵

Breach of fiduciary duty and unsafe and unsound practices actions under section 1818(e) also are not analogues to any common-law actions brought before juries in the eighteenth century. For example, actions under section 1818(e) are not analogous to fraud claims either in elements or remedy. A determination of “personal dishonesty” does not equate to a civil fraud claim; personal dishonesty is a broader concept. *See, e.g., Van Dyke v. Bd. of Gov. of the Fed. Rsv. Sys.*, 876 F.2d 1377, 1379 (8th Cir. 1989) (noting that Federal Reserve Board finding that personal dishonesty must be evaluated on a case-by-case basis and need not amount to civil fraud was a permissible construction of the statute at issue in that case). An action for a prohibition order is not modeled on common law fraud—it does not, for instance, involve reasonable reliance or damages—nor does it provide a type of remedy available only in courts of law. Further, “personal dishonesty” relates to only one of the three prongs under section 1818(e)—the “culpability” prong. The other two prongs of section 1818(e)—“misconduct” and “effect”—do not mirror the substance or framework of a fraud claim. For example, “misconduct” can be found if an IAP “engaged or participated in any unsafe or unsound practice in connection with [a

courts.” *Pereira*, 413 F.3d at 338. Likewise, Respondent’s arguments with respect to *Osborn v. Griffin*, 865 F.3d 417 (6th Cir. 2017), focus on CMPs and do not support a conclusion that a fiduciary duty claim for debarment has a valid common law ancestor. *See Resp’s Reply Br.* at 5, 5 n.1.

⁵ Respondent’s argument that section 1818(e) prohibition actions resemble common law actions for accounting, uses, and other implied-contract actions is unpersuasive. *See Respondent’s Reply Br.* at 12-13. Respondent provides no persuasive argument that these actions are comparable in either right or remedy to an action for prohibition of a banking participant based on a breach of fiduciary duty.

bank]” and is not limited to dishonesty or fraud. 12 U.S.C. § 1818(e)(1)(A). As another example, an “effect” can be found if a bank “will *probably* suffer financial loss or other damage.” 12 U.S.C. § 1818(e)(1)(B) (emphasis added).

A section 1818(e) action, which consists of three prongs each of which can be satisfied by a number of different showings, is not somehow transformed into a fraud claim because one of those potential showings is “personal dishonesty.” A finding of “personal dishonesty” is a sufficient but not a necessary finding even on the culpability prong. *See Haynes v. FDIC*, 664 Fed. Appx. 635, 637-38 (9th Cir. 2016) (FDIC Board “not required to find personal dishonesty . . . [t]he statute lists willful or continuing disregard as an alternative to personal dishonesty”). And the remedy for any misconduct involving “personal dishonesty”—the most important factor in determining whether a claim is legal or equitable—is an equitable remedy. Moreover, unlike section 1818(e) actions, fraud actions are intended to compensate victims (or negate contracts). As Enforcement Counsel points out, “[r]emoval and prohibition actions require no misrepresentations, knowing or otherwise, nor do they require reasonable reliance or an injury, and the effect of them neither compensates a victim nor restores the status quo ante by voiding a contract.” FDIC Reply Br. at 14.

Section 1818(e) proceedings for prohibition orders also do not closely resemble actions for gross negligence. Gross negligence claims do not serve “the same essential function” or “target the same basic conduct” as section 1818(e) claims. *See Pernell v. Southall Realty*, 416 U.S. 363, 375 (1974); *Jarkesy*, 603 U.S. at 125. Gross negligence claims are directed at compensating victims retrospectively, whereas section 1818(e) actions are not brought to compensate victims but rather to prospectively safeguard the bank and the banking industry. And unlike a claim for gross negligence, an 1818(e) proceeding requires satisfaction of the

culpability prong of section 1818(e)(1)(C). This prong is only satisfied if a party commits a relevant act that “involves personal dishonesty” or “demonstrates willful or continuing disregard . . . for the safety or soundness” of a bank. *See* 12 U.S.C. § 1818(e)(1)(C)(i), (ii). Personal dishonesty is not an element of a gross negligence claim. Gross negligence also does not align with “willful or continuing disregard.” Depending on the jurisdiction, gross negligence can mean heightened or aggravated negligence with no scienter requirement. *See* 65 Corpus Juris Secundum § 92 (“Depending on the authority, gross negligence may or may not include the element of intent.”). But as courts have held, negligence does not alone equate to “willful . . . disregard.” *See, e.g., Kim v. OTS*, 40 F.3d 1050, 1054 (9th Cir. 1994) (“[T]he OTS must show a degree of culpability well beyond mere negligence, *i.e.*, there must be a showing of scienter.”). In contrast, to constitute willful disregard, an IAP must “deliberately and consciously take part in an action that evidences utter lack of attention to an institution’s safety or soundness” or demonstrate “a willingness to turn a blind eye to the institution’s interests in the face of a known risk.” *See Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995); *see also De La Fuente*, 332 F.3d at 1223 (noting that “some scienter” is necessary to establish culpability and stating that “[w]illful disregard’ means ‘deliberate conduct which exposed the bank to abnormal risk of loss or harm contrary to prudent banking practices” (citation omitted)); *In the Matter of Larry B. Faigin*, FDIC 11-269e, 2015 WL 9855325, at *18 (Dec. 15, 2015) (“Courts have held that ‘willful or continuing disregard’ signifies, at least, ‘a mental state . . . akin to recklessness” (quoting *Kim*, 40 F.3d at 1054)); *Gully v. Nat’l Credit Union Admin. Bd.*, 341 F.3d 155, 164 (2d Cir. 2003) (“Courts have concluded that ‘willful . . . disregard’ requires a heightened showing of scienter”); *Doolittle v. NCUA*, 992 F.2d 1531, 1539 (11th Cir. 1993) (“Conduct sufficient to satisfy subsection 1818(e)(1)(C)(ii) must have the same magnitude as personal dishonesty.”); *see*

also RESTATEMENT (SECOND) TORTS, § 500 (“Reckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it.”).⁶ The standard for “gross negligence” varies by state, and is not uniform, unlike Section 1818(e) actions, which in all cases relying on “willful or continuing disregard” require scienter. *See* 57A Am. Jur. 2d § 222 (“‘Gross negligence’ is a nebulous term that is defined in a multitude of ways . . .”). Also, in 1976, Congress considered, but did not enact, legislation that would have added gross negligence to the 8(e) standard of culpability. *See* Financial Institution Supervisory Act Amendments of 1976, S. 2304, 94th Cong. (1976). For these reasons, the Board is unpersuaded that “willful or continuing disregard” fits the “nebulous” concept of gross negligence.

In sum, the removal and prohibition proceeding against Respondent under section 1818(e) does not implicate the Seventh Amendment. Prohibiting Respondent from participation in the banking industry is an equitable remedy rather than a legal remedy. The purpose of prohibition is remedial, not punitive; it protects the banking industry from the misconduct of insiders and thereby maintains public confidence in the banking system. There is no common law analog to an FDIC enforcement action for breach of fiduciary duty and unsafe and unsound banking practices.

⁶ The cases cited by Respondent (Respondent’s Brief at 10 n.13) do not show that section 1818(e) actions closely resemble claims based on gross negligence. For example, *FDIC as Receiver for The Buckhead Community Bank v. Loudermilk*, 930 F.3d 1280 (11th Cir. 2019) involved the FDIC as receiver bringing claims against former officers and directors of a failed bank for negligence and gross negligence in their management of the bank. It did not involve a section 1818 proceeding. Similarly, *FDIC as Receiver of Eurobank v. Arrillaga-Torrens*, 212 F. Supp. 3d 312 (D.P.R. 2016) involved civil professional liability claims by the FDIC as receiver. *See In the Matter of James L. Leuthe*, FDIC-95-15e, 1998 WL 438323, at *14 n.26 (June 26, 1998) (breach of fiduciary duty standard under 1818(e) is different from gross negligence standard of care when FDIC sues directors and officers).

B. This Action Concerns Public Rights

The FDIC's removal and prohibition action and its civil money penalty action can constitutionally be adjudicated within the Executive Branch because they concern public rights.

Under the public rights doctrine, Congress may “assign certain matters to agencies for adjudication even though such proceedings would not afford the right to a jury trial.” *Jarkesy*, 603 U.S. at 120. In *Jarkesy*, the Supreme Court addressed how matters involving public rights are distinguished from those involving private rights. The Court explained that “[i]f a suit is in the nature of an action at common law”—that is, if the suit “is made of ‘the stuff of the traditional actions at common law tried by the courts at Westminster in 1789’”—“then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory.” *Jarkesy*, 603 U.S. at 127-28. However, “matters . . . [that] fall within . . . distinctive areas involving governmental prerogatives” like those previously identified by the Court involve public rights. *Id.* at 120. “Such matters ‘historically could have been determined exclusively by [the executive and legislative] branches,’ even when they were ‘presented in such form that the judicial power is capable of acting on them.’” *Id.* at 128. And “[i]n contrast to common law claims, no involvement by an Article III court in the initial adjudication is necessary in such a case.” *Id.* As examples of well-recognized public rights, the Court pointed to taxation, immigration, relations with Indian tribes, administration of public lands, and granting of public benefits such as payments to veterans, pensions, and patent rights. *Id.* at 128-31.

Respondent argues that the Supreme Court's decision in *Jarkesy* leads to the conclusion that the public rights doctrine is inapplicable here. *E.g.*, Resp's Brief at 11 (“*Jarkesy* vitiates the public rights exception for legal remedies and actions”). Not so. Instead, the reasoning of *Jarkesy* supports the conclusion that section 1818 administrative enforcement actions fall within the public-rights doctrine. The enforcement action at issue in *Jarkesy* is distinguishable from

those brought by the FDIC. In *Jarkesy*, “[t]he object of th[e] SEC action [wa]s to regulate transactions between private individuals interacting in a pre-existing market.” *Jarkesy*, 603 U.S. at 135. In contrast, the FDIC’s section 1818 actions regulate an insurance program created and run by the federal government. Such actions address prohibited conduct at insured banks that, if left unchecked, risk reducing public funds in the Deposit Insurance Fund and could even require public funds to be withdrawn from the Treasury.

Jarkesy thus supports the conclusion that these enforcement proceedings concern public rights—in particular, Congress’ creation of a federal insurance scheme supported by federal funds to stabilize the national economy. This is the same conclusion that the Board reached in *In the Matter of Bonan*, Dec. 17, 2024 Decision and Orders, FDIC 16-0254e, FDIC 16-0256k, at 75-81.

The Supreme Court described the object of the SEC enforcement action in *Jarkesy* as “transactions between private individuals interacting in a pre-existing market.” *Jarkesy*, 603 U.S. at 135. In contrast, the Supreme Court has acknowledged that “[b]anking is one of the longest regulated and most closely supervised of public callings.” *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947). Moreover, the deposit insurance system at the heart of the FDIC’s core function is not a pre-existing market, but rather a federally created and managed benefit program with no private analog. *See Millennia Housing Mgmt. v. HUD*, 783 F.Supp.3d 1051, 1068 (N.D. Ohio 2025) (holding that the court lacked subject matter jurisdiction but, even if it had jurisdiction, the public rights exception applied to Department of Housing and Urban Development’s administrative enforcement scheme seeking civil money penalties, stating that the HUD scheme “regulates a transaction between a private individual and HUD in a market specifically created by Congress[.]”). The object of a section 1818 enforcement action is not to

regulate transactions between private individuals, but to regulate federally insured banks to deter misconduct that puts the safety and soundness of those banks—and therefore, public funds in the Deposit Insurance Fund and the Treasury—at risk. *See Ortega*, 155 F.4th at 404 (purpose of OCC’s enforcement actions is to “ensure proper stewardship of public funds in the federal deposit insurance program”). As the Fifth Circuit has stated, “[t]here is no private, commercial equivalent to the FDIC’s role of stabilizing and promoting confidence in the national banking system.” *Spawn v. Western Bank-Westheimer*, 989 F.2d 830, 837 (5th Cir. 1993); *cf. FCC v. Consumers’ Research*, 656, 678 (2025) (FDIC insurance benefits public by ensuring a stable banking system).

The FDIC’s deposit insurance program also closely resembles regulatory programs for which the Supreme Court has upheld Congress’s power to condition the grant of rights or privileges on voluntary participation in a program in which rights are adjudicated in a non-Article III tribunal without a jury. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 571 (1985) (Congress could select binding arbitration with only limited judicial review for resolving disputes among participants in pesticide licensing scheme). *Union Carbide* involved a statutory scheme under which manufacturers seeking licenses required to sell pesticides had to submit research data to the Environmental Protection Agency. *Id.* at 571. Manufacturers were permitted to rely on data previously submitted by other applicants, but they were required to compensate those other applicants for use of their data. *Id.* at 571-72. The governing statute required the parties to submit disputes to binding arbitration. *Id.* at 573-75, 579. The question presented in *Union Carbide* was “whether Article III of the Constitution prohibit[ed] Congress from selecting binding arbitration with only limited judicial review as the mechanism for resolving disputes among participants in [the] pesticide [licensing] scheme.” *Id.* at 571. The

Supreme Court held that it did not, ruling that the right to compensation under the statutory scheme before the Court in that case was a “public” right because “use of [applicant’s] data to support a follow-on [application] serve[d] a public purpose as an integral part of a program safeguarding the public health.” *Id.* at 589. For these reasons, in *Union Carbide* the Court held that “Congress ha[d] the power, under Article I,” to require that binding arbitration be used by the “voluntary participants in the program without providing an Article III adjudication.” *Union Carbide*, 473 U.S. at 589.

FDIC insurance is an integral part of a program safeguarding the public right to a safe and sound national banking system; it is a valuable government benefit for banks that receive it. Like the petitioners in *Union Carbide*, FDIC-insured banks are “voluntary participants” in a complex regulatory scheme. *Id.* at 589-91. Therefore, Congress has the power to condition receipt of FDIC deposit insurance on compliance with section 1818 procedures “without providing an Article III adjudication” beyond the right to appeal to a federal court of appeals from final orders issued under section 1818. *Id.* at 589.

A recent decision by the Fifth Circuit is directly on point and demonstrates that the purpose of Section 1818 proceedings—ensuring the proper stewardship of public funds in the deposit insurance fund—involves public rights. In *Ortega v. OCC*, the Fifth Circuit ruled that section 1818 enforcement actions for civil money penalties and prohibition orders involving federal banks concern public rights. *Ortega v. OCC*, 155 F.4th 394 (5th Cir. 2025). In reaching its decision, the *Ortega* court explained the multiple meaningful differences between the OCC’s enforcement of banking regulations in Section 1818 as compared to the enforcement action in *Jarkesy*. First, the OCC, like the FDIC here and unlike the SEC in *Jarkesy*, has a long “history of exclusively in-house proceedings.” *Id.* at 404. Second, Section 1818 enforcement actions are

within the “distinctive areas involving governmental prerogatives” involving public rights. *Id.*

The *Ortega* court explained:

The purposes of the OCC’s enforcement actions, and the statutory scheme in general, are to regulate federally insured and nationally chartered banks, *to ensure proper stewardship of public funds in the federal deposit insurance program*, and to safeguard the value of the national currency. These prerogatives have been, historically and exclusively, the domain of the non-Article III branches.

Id. (emphasis added). Similarly, the purpose of FDIC enforcement actions is to regulate banks and to ensure proper safeguarding of public funds in the federal deposit insurance program.

Third, unlike in *Jarkesy*, “the OCC’s enforcement action was not meant to regulate private transactions[,] . . . [r]ather, it was meant to vindicate safety to the banking ecosystem at large[.]”

Id. And, fourth, the *Ortega* court found that “[t]he FIRREA amendments [of 1989] are analogous to *Atlas Roofing*’s OSHA: Congress saw the inadequacy of court adjudication of a particular problem, created new remedies to target that particular problem, and assigned their adjudication to an administrative agency.” *Id.* at 408.⁷

Further, prior to *Jarkesy* federal courts of appeals that have decided the question before this Board have held that there is no right to a jury trial of section 1818 administrative claims because they fall within the public-rights exception. *See Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995); *Simpson v. OTS*, 29 F.3d 1418, 1423 (9th Cir. 1994). The Supreme Court did not overturn, either explicitly or implicitly, these cases. Rather the Court in *Jarkesy* applied pre-existing case law to a different statute, different claims, and different facts.

The nature of Section 1818 proceedings confirms that they address public rights. Like the collection of revenue, imposition of tariffs, and granting of public benefits, the functions of

⁷ Respondent in *Ortega* moved for rehearing *en banc* on October 21, 2025. Dkt. 140. The outcome of that motion would not impact the Board’s conclusion in this case. While the *Ortega* decision is supportive, it is not necessary for the Board’s decision.

protecting funds in the Deposit Insurance Fund and the United States Treasury and granting the government benefit of deposit insurance involve distinct governmental prerogatives. Protecting public funds has a long history as a core function of the Government. Indeed, one of the primary purposes of enforcement of banking regulatory laws is protection of the Deposit Insurance Fund (a public benefit) and public funds. *See Simpson v. OTS*, 29 F.3d 1418, 1423 (9th Cir. 1994) (stating in case involving OTS and the thrift regulation laws that “[t]he purpose of enforcement of the [banking] regulation laws is to safeguard the [banking] industry, the depositors, and the federal insurance fund.”). FDIC enforcement actions reduce the risk of the Deposit Insurance Fund being diminished, which could require use of public funds in the Treasury. *See id.* (“[A]lthough the FDIC relies on premiums from insured banks to pay the cost of deposit insurance, *see* 12 U.S.C. § 1817, the FDIC also relies on borrowing from the United States Treasury to meet its obligations, *see* 12 U.S.C. § 1824.”).⁸ Thus, section 1818 enforcement actions are matters that fall within a distinctive area involving governmental prerogatives like those listed in *Jarkesy*.

In *Jarkesy* the Supreme Court instructed that, when determining if the public-rights doctrine applies, courts must also “consider[] whether the [enforcement] actions [at issue] [are] ‘closely intertwined’ with the [relevant regulatory] regime.” *Jarkesy*, 603 U.S. at 133. With respect to this factor, the Court in *Jarkesy* stated that when “Congress ha[s] already authorized jury trials for certain [relevant] matters[,] [this] demonstrate[s] that jury trials were not generally

⁸ Respondent argues that his specific behavior did not implicate the public fisc. *See* Respondent’s Reply Br. at 6-7. However, the FDIC’s enforcement regime protects not only individual banks and their depositors but also the banking system as a whole, and this broader concept informs the nature of the public rights it protects. *See, e.g.*, S. Rep’t 89-1482, 89th Cong., 2d Sess., at 4 (Aug. 18, 1966) (purpose of § 1818(e) is to ensure that insured institutions are “financially sound and capably managed” in light of the “public concern that might extend to the entire industry”).

‘incompatible’ with the overall [statutory] regime.” *Id.* at 134. Applying this analysis to the SEC’s enforcement regime, the Court found it significant that “Congress had authorized the SEC to bring [fraud] actions in Article III courts and still authorizes the SEC to do so today.” *Id.* at 140. In contrast, Congress has never authorized the FDIC to bring enforcement actions in Article III courts. Rather the FDIC is authorized to bring such claims *exclusively* in administrative proceedings. *See* 12 U.S.C. § 1818(h)(1). The FDIC has never brought a section 1818(e) action in an Article III court and lacks authority to do so. This further demonstrates that section 1818 administrative enforcement actions are “closely intertwined” with the federal banking regulatory regime.

Respondent also argues that a jury trial is independently mandated by Article III and due process. Resp’s Brief at 11. Because the public rights exception applies to this enforcement action, as discussed above, Respondent is not entitled to a jury trial. *See Oil States Energy Servs. LLC v. Greene’s Energy Group, LLC*, 584 U.S. 325, 345 (2018).⁹

For the foregoing reasons, the Board concludes that the public rights exception applies to both the CMP and the removal and prohibition orders at issue in this matter. No jury trial is required.

⁹ Respondent also briefly raises a due process argument but does not develop that argument. *See* Respondent’s Br. at 12; Respondent’s Reply Br. at 15. The Board concludes that due process does not require that the allegations against Respondent be heard by an Article III court or that Respondent is entitled to a jury trial. Respondent raises in a footnote that: (1) the FDIC Board is unconstitutionally structured; (2) FDIC ALJs are unconstitutionally shielded from removal; and (3) the FDIC failed to cure the Appointments Clause violations in earlier proceedings against Respondent. Resp’s Brief at 11-12, n. 15. The Board declines to address these arguments as they are not within the scope of the Sixth Circuit’s remand in this case and, under the mandate rule previously discussed, are not properly before the Board.

CONCLUSION

For the foregoing reasons, the Board finds that entry of a prohibition order and assessment of a second-tier CMP of \$125,000 against Respondent are warranted.¹⁰

¹⁰ To the extent that Respondent's January 18, 2024, Motion to Dismiss is properly before the Board, and for the reasons set forth in this Decision and Orders, the Board also denies the Motion to Dismiss.

FEDERAL DEPOSIT INSURANCE CORPORATION

WASHINGTON, D.C.

In the Matter of

HARRY C. CALCUTT III,
Individually and as an Institution-Affiliated
Party of

NORTHWESTERN BANK
Traverse City, Michigan
(Insured State Nonmember Bank)

ORDERS

FDIC-12-568e
FDIC-13-115k

ORDER TO PROHIBIT

The Board of Directors (Board) of the Federal Deposit Insurance Corporation (FDIC), having considered the entire record of this proceeding and finding that Respondent Harry C. Calcutt III of Northwestern Bank, Traverse City, Michigan (Bank) violated 12 U.S.C. § 1818(e), hereby ORDERS and DECREES that:

1. Harry C. Calcutt III shall not participate in any manner in any conduct of the affairs of any insured depository institution, or any other institution, credit union, bank or agency enumerated in section 8(e)(7)(A) of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D).

2. As described in 12 U.S.C. § 1818(e)(6)(B), Harry C. Calcutt III shall not solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent or authorization with respect to any voting rights in any insured depository institution, or any other institution, credit union, bank or agency enumerated in section 8(e)(7)(A) of the FDI Act, 12 U.S.C. §

1818(e)(7)(A), without the prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D).

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

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

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

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

SO ORDERED.

IT IS FURTHER ORDERED that copies of this Decision and Order shall be served on Harry C. Calcutt III (through counsel), FDIC Enforcement Counsel, and the Administrative Law Judge.

Dated at Washington, D.C., this 16th day of April, 2026.

/s/
Debra A. Decker
Executive Secretary

ORDER TO PAY CIVIL MONEY PENALTY

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

1. A civil money penalty is assessed against Harry C. Calcutt III in the amount of \$125,000 pursuant to 12 U.S.C. § 1818(i).
2. This ORDER shall be effective and the penalty shall be final and payable sixty (60) days from the date of its issuance.

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

SO ORDERED

IT IS FURTHER ORDERED that copies of this Decision and Order shall be served on Respondent Harry C. Calcutt III (through counsel), FDIC Enforcement Counsel, and the Administrative Law Judge.

Dated at Washington, D.C. this 16th day of April 2026.

/s/

Debra A. Decker
Executive Secretary