FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

In the Matter of	
PINCHUS D. RAICE, Esq., individually and as an institution-affiliated party of	**DECISION AND ORDER TO DISMISS NOTICE OF ASSESSMENT OF CIVIL MONEY PENALTY**
THE PARK AVENUE BANK NEW YORK, NEW YORK	
(In Receivership)	**FDIC-14-119k**
(Insured State Non-Member Bank)	

I. INTRODUCTION

This matter is before the Board of Directors ("Board") of the Federal Deposit Insurance Corporation ("FDIC") following the issuance on October 19, 2016, of a Recommended Decision ("Recommended Decision" or "R.D.") by Administrative Law Judge C. Richard Miserendino ("ALJ"). The ALJ recommended that a Notice of Assessment of Civil Money Penalty issued to Pinchus D. Raice ("Raice") be dismissed for lack of jurisdiction. The Notice was predicated on Raice's status as an institution-affiliated party ("IAP") under the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1813(u)(4), of The Park Avenue Bank, New York, New York (the "Bank"), for which he performed legal services. The ALJ, however, found that FDIC Enforcement counsel ("Enforcement") failed to prove by a preponderance of the evidence that Raice was an IAP of the Bank because the evidence did not support a finding that the misconduct alleged by Enforcement had occurred, precluding a finding that Raice participated in such misconduct.

The Board has reviewed the record, including the parties' submissions, the Recommended Decision, and the parties' exceptions to the Recommended Decision. The Board

agrees with the ALJ's findings and adopts and affirms the Recommended Decision, as clarified below.

II. STATEMENT OF THE CASE

The FDIC initiated this action in December 2014, when it issued a Notice of Assessment of Civil Money Penalty ("Notice") alleging that Raice, an attorney with Pryor Cashman LLP, had knowingly and recklessly participated in improper loans by the Bank to its subsidiary, Deep Woods LLC, to secure payment for legal fees owed by Deep Woods to Pryor Cashman. Raice timely filed an Answer and Motion for Summary Disposition, which the ALJ denied on June 19, 2015, finding genuine issues of material fact on a number of issues.

A hearing was held from January 11 to 14, 2016, in Brooklyn, New York. On October 19, 2016, the ALJ issued a Recommended Decision to dismiss the Notice of Assessment of Civil Money Penalty based on his determination that the FDIC lacked jurisdiction against Raice because he did not satisfy the statutory definition of an IAP.

On November 18, 2016, both Enforcement and Raice filed written exceptions to the Recommended Decision. On January 5, 2017, pursuant to 12 C.F.R. § 308.40(c)(2), the FDIC Assistant Executive Secretary transmitted the record in the case to the Board for final decision.

III. FACTUAL OVERVIEW

Because the ALJ provided a lengthy, detailed, and well-reasoned opinion with extensive citations to the record in support of his conclusions, the Board finds it unnecessary to reiterate in full the contents of the Recommended Decision. The discussion below, however, provides a brief overview of the basis for dismissing the Notice.[1]

[1] The Recommended Decision includes detailed citations to the voluminous record. In the interest of efficiency and, except where otherwise noted, the Board cites only to the numbered pages in the Recommended Decision rather than to the underlying supporting evidentiary documents or transcripts.

The Bank is an insured State nonmember bank subject to federal and state banking laws as well as the various rules and regulations of the FDIC. From at least 2005 onward, Raice and Pryor Cashman served as outside counsel for the Bank, providing legal services as an independent contractor. R.D. 7-8.

In 2004, the Bank had undergone a change in control when the controlling shareholder, a Turkish national, was subject to legal proceedings in his home country. David Lichtenstein obtained the majority of the voting shares of the Bank, and the former controlling shareholder retained certain non-voting shares. The non-voting shares were later seized by the Savings Deposit Insurance Fund of Turkey ("SDIF") to satisfy a judgment against the former controlling shareholder. Lichtenstein and the SDIF entered into a call option for the non-voting shares, but when Lichtenstein attempted to exercise that option, the SDIF refused to tender the shares. R.D. 8.

SDIF's refusal to deliver the non-voting shares to Lichtenstein adversely affected the Bank's ability to raise capital. The disputed ownership of the shares made it difficult for potential investors to determine what portion of the Bank they would acquire by making an investment, and the owner of the disputed shares was entitled to a premium on any dividends paid until the issue was resolved. R.D. 11.

In 2007, Lichtenstein, Bank President Charles Antonucci, and Bank Chairman David Glascoff, formed Deep Woods, which had the sole purpose of commencing legal proceedings against SDIF to enforce the call option to obtain the non-voting shares of the Bank. Pryor Cashman represented Deep Woods in the litigation against SDIF. R.D. 8.

The Deep Woods operating agreement provided for the funding of Deep Woods through "a combination of capital contributions and through loans." The agreement stated that the members' initial capital contributions would be "listed on Exhibit A," which "shall be amended

from time to time to reflect any changes to the Members' capital contributions and Percentage Interests." The agreement also permitted the Managing Member to "call for Member loans" in his discretion, which "shall be evidenced by a promissory note in the form of Exhibit B." R.D. 9.

In late 2008, Lichtenstein experienced severe financial problems and ceased his contributions to Deep Woods. The Bank's board became concerned that without Lichtenstein's contributions, Deep Woods would be unable to continue the litigation against SDIF, and the Bank's capital raising problems would continue. R.D. 10. After concluding that it could not loan money to Deep Woods, the Bank decided to invest in Deep Woods, replacing Lichtenstein as a member. R.D. 15.

In June 2009, the Bank made a capital contribution of $552,000 and assumed a 75 percent ownership interest in Deep Woods. R.D. 17. Deep Woods immediately paid $368,000 in outstanding invoices from Pryor Cashman for legal services. R.D. 19. In September 2009, the Bank transferred $62,950.40 to Deep Woods' account, and Deep Woods paid $69,944.89 in additional Pryor Cashman invoices the same day. *Id.*

Also in September 2009, the FDIC commenced an examination of the Bank. The Examiner-in-Charge ("EIC") expressed concerns regarding the Bank's June 2009 investment in Deep Woods, and identified four apparent violations. R.D. 20. The apparent violations were discussed at the exit meeting at the conclusion of the exam, and were added to a draft of the 2009 Report of Examination ("ROE"). R.D. 21.

On December 15, 2009, Raice inquired about the status of several unpaid Deep Woods invoices totaling $150,416.17. R.D. 21. Two weeks later, the Bank disbursed $113,000 to Deep Woods, and Deep Woods paid Pryor Cashman $113,000 for legal services. R.D. 22.

On December 16, 2009, the FDIC and New York State Banking Department representatives presented their preliminary examination findings to the Bank's Board, noting that they were still subject to review. R.D. 22. Raice disagreed with the EIC's assessment, and because it was not yet final, he advised the Bank to wait until it had received the final ROE to respond. R.D. 23.[2]

Pryor Cashman continued to perform legal work for Deep Woods, and submitted invoices in January, February, and March 2010. R.D. 24. On March 10, 2010, Raice sent an email to inquire about the status of payment. *Id.* The following day, the Bank authorized a transfer to Deep Woods of $100,826.73, and Deep Woods paid Pryor Cashman $98,070.48. R.D. 25.

On March 12, 2010, the Bank was closed and the FDIC was appointed as receiver. The FDIC's Division of Resolutions and Receiverships ("DRR") reclassified the Bank's September 2009, December 2009, and March 2010 transfers to Deep Woods, which the Bank had treated as expenses, as capital contributions/investments in a subsidiary. As a result, the book value of the Bank's investment in Deep Woods increased from $552,000 to $828,777.13. The receiver used this value when it transferred the Bank's assets, including its interest in Deep Woods, to an acquiring institution. R.D. 25.

IV. ANALYSIS

The FDIC has the authority to assess a civil money penalty against any insured depository institution or IAP who engages in certain misconduct specified by statute. 12 U.S.C. § 1818(i)(2). An independent contractor, including an attorney, meets the definition of an IAP if he

> knowingly or recklessly participates in—
> (A) any violation of any law or regulation;
> (B) any breach of fiduciary duty; or

[2] The Bank failed on March 12, 2010 (R.D. 25) and a final ROE was not issued for 2009. R.D. 44.

(C) any unsafe or unsound practice,

which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution.

12 U.S.C. § 1813(u)(4).

The Board agrees with the ALJ's conclusion that Raice does not meet this definition. The Notice alleges that Raice participated in violations of sections 23A and 23B of the Federal Reserve Act, Regulation O, breaches of fiduciary duty, and unsafe or unsound practices by participating in what the Notice characterizes as the Bank's improper and imprudent "loans" and "extensions of credit" to Deep Woods. Notice at ¶¶203-204, 214, 219, 237, 246-247. As the ALJ concluded, however, the evidence does not support the characterization of the Bank's transfers to Deep Woods as "loans" or "extensions of credit," precluding a finding that the Bank engaged in the misconduct alleged in the Notice. Without evidence to support the alleged misconduct, the Board finds no basis for concluding that Raice "knowingly or recklessly participate[d]" in such misconduct, as required to designate him as an IAP.

The primary evidence offered to support the theory that the Bank's transfers to Deep Woods were "loans" was Section 4.2 of Deep Woods' Operating Agreement, which Enforcement argued specified that any contributions beyond a member's initial capital contribution would be in the form of a loan. Neither the plain language of the operating agreement nor the testimony offered by Enforcement support this interpretation.

Section 4.2 states:

4.2 Capital Contributions and Membership Interests of the Members. The Members intend to provide the funds required for the Company's operations through a combination of capital contributions and through loans as described below.

(a) Initial Capital Contributions. Set forth opposite the name of each Member listed on Exhibit A attached hereto is such Member's initial capital contribution to the Company and his initial Percentage Interest in the Company ("Percentage Interest"). Exhibit A shall be amended from time to

time to reflect any changes to the Members' capital contributions and Percentage Interests of the Members.

(b) Loans. The Managing Member shall call for Member loans, as the Managing Member may in its discretion determine necessary to fund the Company's operations, and the Members shall provide such loans in the proportions set forth in Exhibit A under the captions "Percentage of Additional Loans." Such loans shall be evidenced by a promissory note in the form of Exhibit B, due five years from the date of the applicable loan or upon earlier acquisition of shares in The Park Avenue Bank upon exercise of the Lichtenstein Option, calling for payments of interest only prior to maturity and bearing interest at the rate of 10% per annum compounded annually.

(c) Procedure for Loans. The Managing Member shall provide at least twelve (12) business days' prior written notice of any additional loans, specifying in each case the amount thereof.

R.D. 9-10. Although this provision indicates that members could be required to make loans to Deep Woods, it does not clearly prohibit non-loan contributions. Indeed, Enforcement's witnesses, the EIC and a FDIC accountant (FDIC witnesses), ultimately conceded that additional capital contributions could be made under the terms of the Operating Agreement. R.D. 33, 38.

Absent any prohibition on capital contributions in the Operating Agreement, the Board finds no evidence to support Enforcement's theory that the Bank's transfers to Deep Woods were loans. As the ALJ explained, the evidence shows that (1) Raice told the Bank that it could not make loans to Deep Woods; (2) the Bank's Board understood these restrictions and believed that the transfers were capital contributions; (3) no promissory note or other documentation typical of a loan was associated with the transfers; (4) the transfers were recorded as "expenses" on the Bank's books; and (5) FDIC's DRR characterized these expenses as capital contributions after the Bank's failure. R.D. 33, 34, 37.

In the absence of any evidence that the parties intended to treat the transfers as loans, the Board agrees with the ALJ that there is no basis to conclude that Raice participated in the violations alleged by the FDIC, all of which are predicated on the transfers' characterization as loans.

V. ENFORCEMENT'S EXCEPTIONS TO THE RECOMMENDED DECISION

Enforcement has raised three exceptions to the Recommended Decision, including that (1) the ALJ incorrectly required proof that Raice played a "directive role" with respect to the Bank's alleged violations to establish his "participation" for purposes of 12 U.S.C. § 1813(u)(4); (2) the ALJ incorrectly concluded that the Bank did not violate sections 23A and 23B; and (3) the ALJ failed to give proper deference to the opinions of FDIC examiners as to the nature of the transactions. For the reasons discussed above, we find no merit in the exception that the ALJ incorrectly concluded that the Bank did not violate Sections 23A and 23B. As explained below, the Board similarly concludes that neither of Enforcement's other exceptions warrant a departure from the Recommended Decision.

A. Participation.

Enforcement's first exception argues that the ALJ incorrectly applied *Grant Thornton, LLP v. OCC*, 514 F.3d 1328 (D.C. Cir. 2008) to require proof that Raice played a "directive role" in the misconduct to satisfy the "participation" element of the IAP definition. Because we find that no misconduct occurred, we need not reach the issue of whether Raice "participated" in the activity alleged. Nevertheless, to avoid confusion in future FDIC enforcement proceedings, the Board would like to clarify certain points raised in the ALJ's decision.

The Board agrees with Enforcement that the plain meaning of "participate[ ]" as used in 12 U.S.C. § 1813(u)(4) is not restricted to people who "direct" an institution to engage in misconduct. Although *Grant Thornton* described participation as requiring a "directive role," it

did so in the context of 12 U.S.C. § 1813(u)(4)(C), which describes persons engaged in unsafe or unsound practices. Because other provisions of the FDI Act restrict the agencies' enforcement authority to unsafe or unsound practices "in conducting the business" or "affairs" of an institution,[3] the court concluded that a person "participates" in an unsafe or unsound practice for purposes of 12 U.S.C. § 1813(u)(4)(C) if he plays a "directive role" in the institution's affairs. *Grant Thornton*, 514 F.3d at 1332-33. The FDI Act contains no similar language with respect to violations of law or breaches of fiduciary duty—both alleged in the Notice—so *Grant Thornton* does not appear to apply to the subparts of the IAP definition governing those forms of misconduct.[4]

Despite the ALJ's reliance on *Grant Thornton*'s "directive role" language, however, a close look at the Recommended Decision shows that he engaged in the correct analysis. To demonstrate participation, prior Board precedent requires that there at least be evidence that a person was in a position to influence the Bank's affairs. *Matter of LeBlanc*, FDIC-94-17k, 1995 WL 702094, at *5 (FDIC Oct. 11, 1995). For attorneys, providing good faith legal advice does not amount to participation in a transaction unless the advice goes beyond legal analysis to recommending a course of action based on the institution's business interests. *See Cavallari v. OCC*, 57 F.3d 137, 142 (2d Cir. 1995); *see also Loumiet*, 650 F.3d at 801 (citing *Cavallari*).

Enforcement takes no issue with the standard employed in *Cavallari*, and we find that the ALJ applied it correctly. The fatal problem with Enforcement's proof of the participation element is not the failure to show that Raice directed the transactions, but the failure to show that he did anything more than provide good faith legal advice. Although Enforcement asserts that

---

[3] 12 U.S.C. §§ 1818(b)(1), (i)(2)(B)(i)(II).

[4] Although the D.C. Circuit's decision in *Loumiet v. OCC*, 650 F.3d 796 (D.C. Cir. 2011) cited *Grant Thornton* with approval in the context of an independent contractor attorney accused of breaches of fiduciary duty, the court did not rely on *Grant Thornton*'s "directive role" language. *Id.* at 799, 801.

Raice provided advice to the Bank regarding "whether ... to transfer funds to Deep Woods, and ... repeatedly advised that the Bank's future payments of Deep Woods' legal fees were in the Bank's best interests" (Enf. Exceptions at 10), the record does not support these assertions. With respect to the Bank's initial investment in Deep Woods, Raice expressly told the Bank's board that it "needs to determine whether it is in the best interests of the Bank and its stockholders ... to invest in Deep Woods," and he advised the Bank only on the mechanism for making such an investment in accordance with law. R.D. 50. Raice's involvement in the additional transfers is even more attenuated. With respect to the September 2009 transfer, there is no evidence that Raice had any contact with the Bank or Deep Woods. R.D. 52. For the December 2009 and March 2010 transfers, the record shows only that Raice made inquiries regarding his firm's past due invoices. Nothing about Raice's communications suggests that he advised that the transfers would be in the Bank's best interest or that he was in a position to influence the Bank to ensure that the transfers occurred. R.D. 52-54.

B. Deference to Examiners

Enforcement argues that the ALJ failed to afford proper deference to the FDIC witnesses under *Sunshine State Bank v. FDIC*, 783 F.2d 1580 (11th Cir. 1986). Although we agree that under *Sunshine State Bank* the ALJ generally must afford deference to examiners' predictions and discretionary judgments on matters pertaining to their special expertise, Enforcement seeks deference for the EIC's and the FDIC accountant's interpretation of the Deep Woods operating agreement and their related legal conclusions that the transfers were "loans" or "extensions of credit" within the meaning of Sections 23A and 23B, and Regulation O. In this case, the witnesses' opinions that the transfers were loans lack the rational basis required for deference because their own testimony establishes that they misinterpreted the Operating Agreement. *See id.* at 1583. The witnesses relied on their interpretation of the Operating Agreement to support

their opinion that the transfers were loans, believing that the Operating Agreement contemplated an initial capital contribution followed only by loans. On the witness stand, however, they conceded that the Operating Agreement allowed additional capital contributions. R.D. 33, 38. This concession vitiates the basis for their conclusion that the transfers could only have been loans.

VI. RAICE'S EXCEPTIONS TO THE RECOMMENDED DECISION

Raice raised a number of exceptions to the Recommended Decision, focusing on additional grounds that he believes require dismissal and various objections to the ALJ's evidentiary rulings. Because we agree with the ALJ's recommendation to dismiss the Notice, giving Raice the relief he seeks, we find it unnecessary to address Raice's additional grounds for dismissal or the alleged errors in the ALJ's evidentiary rulings.

VII. CONCLUSION

After a thorough review of the record in this proceeding, the Board finds that the FDIC lacks jurisdiction to assess a CMP against Raice in this case. Based on the foregoing, the Board affirms the Recommended Decision, adopts in full the findings of fact and conclusions of law therein, except as clarified above, and issues the following Order implementing its Decision.

ORDER DISMISSING NOTICE OF ASSESSMENT OF CIVIL MONEY PENALTY

On December 5, 2014, the Federal Deposit Insurance Corporation issued a NOTICE OF ASSESSMENT OF CIVIL MONEY PENALTY, FINDINGS OF FACT AND CONCLUSIONS OF LAW, ORDER TO PAY, AND NOTICE OF HEARING ("Notice") against Respondent PINCHUS D. RAICE. Respondent filed a timely answer to the Notice.

A hearing in this case commenced on January 11, 2016. All parties appeared and were given the opportunity to be heard and evidence was taken.

Having considered the evidence presented at the hearing, the arguments of all parties, the record as a whole, and the Recommended Decision issued by the ALJ:

IT IS ORDERED that the Notice be **DISMISSED**.

IT IS FURTHER ORDERED that copies of this Decision and Order to Dismiss Notice of Assessment of Civil Money Penalty shall be served on counsel for all parties, the ALJ, and the Superintendent of the New York State Department of Financial Services.

By direction of the Board of Directors

Dated at Washington, D.C., this 21st day of March, 2017.

/s/
Valerie J. Best
Asssistant Executive Secretary

(SEAL)

084065