

FEDERAL DEPOSIT INSURANCE CORPORATION

WASHINGTON, D.C.

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In the Matter of:	)	
	)	
PINCHUS D. RAICE, individually, and as an	)	NOTICE OF ASSESSMENT OF
institution-affiliated party of	)	CIVIL MONEY PENALTY,
	)	FINDINGS OF FACT AND
THE PARK AVENUE BANK	)	CONCLUSIONS OF LAW,
NEW YORK, NEW YORK	)	ORDER TO PAY, and NOTICE
	)	OF HEARING
(IN RECEIVERSHIP)	)	
(INSURED STATE NONMEMBER BANK)	)	FDIC-14-119k
_____	)	

The Federal Deposit Insurance Corporation ("FDIC") has determined that Pinchus D. Raice ("Respondent"), individually, and as an institution-affiliated party of The Park Avenue Bank (In Receivership), New York, New York ("Bank"), violated laws or regulations, breached his fiduciary duty to the Bank, and/or participated in unsafe or unsound practices. The FDIC therefore institutes this proceeding for the assessment of a civil money penalty against Respondent pursuant to the provisions of 12 U.S.C. § 1818(i)(2).

The FDIC hereby issues this NOTICE OF ASSESSMENT OF CIVIL MONEY PENALTY, FINDINGS OF FACT AND CONCLUSIONS OF LAW, ORDER TO PAY, ("NOTICE OF ASSESSMENT") and NOTICE OF HEARING pursuant to 12 U.S.C. § 1818(i), and the FDIC's Rules of Practice and Procedure, 12 C.F.R. Part 308, and alleges as follows:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**I. Jurisdiction**

1. The Bank was, at all times pertinent to this proceeding, a corporation existing and doing business under the laws of the State of New York, having its principal place of business at

New York, New York, and an insured State nonmember bank, subject to the Federal Deposit Insurance Act, 12 U.S.C. §§ 1811-1831aa, and the Rules and Regulations of the FDIC, 12 C.F.R. Chapter III.

2. The FDIC has jurisdiction over the Bank, Respondent, and the subject matter of this proceeding pursuant to 12 U.S.C. §§ 1813(q)(2), 1813(u)(4), and 1818(i).

3. Under 12 U.S.C. § 1813(u)(4) an “institution-affiliated party” (“IAP”) includes “any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in: (i) any violation of any law or regulation; (ii) any breach of fiduciary duty; or (iii) 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.”

4. Respondent is a partner at the law firm Pryor Cashman LLP (“Pryor Cashman”).

5. Respondent was outside counsel to the Bank at all relevant times.

6. Respondent began representing the Bank at least as early as 2005 and continued to represent the Bank as outside counsel on a variety of matters at all relevant times thereafter.

7. Respondent’s services for the Bank included acting as regulatory counsel for the Bank and assisting the Bank in corporate and leasing matters.

8. As outside counsel to the Bank, Respondent was an independent contractor who, as detailed below, knowingly or recklessly participated in violations of law or regulation, breach of fiduciary duty, and/or unsafe or unsound practices.

9. Respondent’s knowing or reckless participation in the violations of law or regulation, breach of fiduciary duty, and/or unsafe or unsound practices caused or was likely to cause more than a minimal financial loss to, or a significant adverse effect on, the Bank.

10. Respondent was an IAP as that term is defined in 12 U.S.C. § 1813(u) and for purposes of 12 U.S.C. §§ 1818(i).

## **II. Regulatory History**

11. On October 6, 2008, Respondent, several Bank officers, members of the Bank's Board of Directors ("Board"), and approximately 18 representatives of the FDIC and the New York State Banking Department ("NYSBD") attended a meeting at the NYSBD offices.

12. During the October 6, 2008 meeting, the representatives of the FDIC and the NYSBD discussed their serious concerns about the Bank's capital, liquidity, and viability.

13. By letter dated October 12, 2008, the FDIC and the NYSBD formally notified the Board that the Bank was designated as being in "troubled condition" as defined in 12 C.F.R. § 303.101(c).

14. As of October 30, 2008, the date the Bank's Consolidated Reports of Condition and Income ("Call Report") was required to be filed for the third quarter of 2008, the Bank was deemed to have notice it was "Undercapitalized" for purposes of the prompt corrective action ("PCA") rules, 12 U.S.C. § 1831o ("Section 38").

15. By letter dated November 19, 2008, the FDIC formally notified the Board that the Bank was "Undercapitalized" for purposes of PCA rules and restrictions and was subject to the limitations imposed by Section 38 and 12 C.F.R. Part 325 ("Part 325").

16. The November 19, 2008 notice stated that the Bank was required to submit a capital restoration plan to the FDIC within thirty days and, in accordance with Section 38 and Part 325, the Bank was prohibited from, among other things, acquiring, directly or indirectly, any interest in any company unless the FDIC's Regional Director accepted the Bank's capital restoration plan and approved such acquisition.

17. On December 19, 2008, the Bank submitted a 3-page proposed capital restoration plan to the FDIC that stated, *inter alia*, “[t]he Bank will continue to comply with PCA restrictions until the PCA plan is accepted. These include restrictions on new activities, dividend payments, growth restrictions and the inability to accept, renew or roll over brokered deposits.”

18. On February 11, 2009, with Respondent’s counsel, each member of the Bank’s Board signed a Stipulation and Consent to the issuance of parallel Cease and Desist Orders with the FDIC and the NYSBD (“C&D Orders”).

19. The C&D Orders required the Bank to, *inter alia*, take all steps necessary to correct and prevent the identified unsafe or unsound practices and violations of law or regulation set forth in the C&D Orders, cease operating with inadequate loan underwriting and credit administration practices, and take all steps necessary to ensure that the Bank would be operated with adequate management supervision and Board oversight to prevent any future unsafe or unsound practices or violations of law or regulation.

20. By letter dated February 12, 2009, the FDIC formally notified the Board that the Bank continued to be “Undercapitalized” for purposes of the PCA rules and, *inter alia*, was still subject to the limitations on acquisitions in accordance with Section 38 and Part 325 until the FDIC accepted a capital restoration plan.

21. The February 12, 2009 notice stated that the FDIC had received the proposed capital restoration plan from the Bank by letter dated December 19, 2008 and that, due to the C&D Orders, the FDIC had extended its review period of the Bank’s proposed capital restoration plan.

22. On March 13, 2009, the Bank submitted a revised proposed capital restoration plan to the FDIC. The proposed plan acknowledged the PCA restrictions on asset growth and

stated that the Bank would continue to comply with the restrictions imposed by Section 38 and Part 325 until the FDIC accepted a capital restoration plan.

23. By letter dated May 18, 2009, the FDIC formally notified the Board that the Bank was now "Significantly Undercapitalized" for purposes of the PCA rules and restrictions.

24. In addition to citing additional restrictions imposed by Section 38 and Part 325 as a result of being "Significantly Undercapitalized," the May 18, 2009 notice reiterated that the Bank was still subject to the restrictions on acquisitions in accordance with Section 38 and Part 325 until the FDIC accepted a capital restoration plan.

25. By letter dated May 21, 2009, the Board informed the FDIC that the Board had reviewed the FDIC's May 18, 2009 letter in detail at a Board meeting and would comply with Section 38.

26. By letter dated June 4, 2009, the FDIC notified the Board that the Bank's capital restoration plan submitted on March 13, 2009 was unacceptable, that the Bank must immediately submit a new or revised capital restoration plan, and that the restrictions and prohibitions detailed in the May 18, 2009 notice applicable to "Significantly Undercapitalized" institutions continued to apply.

27. By letter dated July 13, 2009, the FDIC and the NYSBD notified the Board that compliance with the majority of provisions of the C&D Orders was deficient.

28. On July 21, 2009, the Board submitted another proposed capital restoration plan to the FDIC. The proposed plan stated that the Bank would continue to comply with the restrictions imposed by Section 38 and Part 325 until the FDIC accepted a capital restoration plan.

29. By letter dated July 27, 2009, the FDIC and NYSBD notified the Bank of their findings from a joint visitation of the Bank. The letter reiterated that the Bank's compliance with the majority of the provisions contained in the C&D Orders was deficient.

30. By letter dated August 5, 2009, the FDIC informed the Board that the July 21, 2009 revised proposed capital restoration plan was not acceptable. The letter notified the Board that it must immediately submit a new or revised capital restoration plan and that the prohibitions detailed in the May 18, 2009 notice applicable to "Significantly Undercapitalized" institutions continued to apply.

31. By letter dated August 25, 2009, the FDIC formally notified the Board that the Bank remained "Significantly Undercapitalized" for purposes of the PCA rules.

32. The August 25, 2009 notice stated that the Bank was required to submit a new or revised proposed capital restoration plan within forty-five days and the notice reiterated that the Bank was still subject to the limitations on asset growth and acquisitions in accordance with Section 38 and Part 325 until the FDIC accepted a capital restoration plan.

33. The FDIC and NYSBD conducted a joint examination of the Bank as of June 30, 2009, with a start date of September 28, 2009.

34. On December 16, 2009, Respondent, the Bank's Board, representatives of the FDIC and the NYSBD attended a meeting at the offices of Pryor Cashman ("December 16, 2009 Meeting").

35. During the December 16, 2009 Meeting, the FDIC presented initial results of the 2009 joint examination of the Bank.

36. During the December 16, 2009 Meeting, the FDIC specifically informed Respondent and the Board that, among other things, the Bank's investment in Deep Woods

Holdings, LLC (“Deep Woods”) violated Section 23A and Section 23B of the Federal Reserve Act (12 U.S.C. §§ 371c and 371c-1 made applicable to state non-member banks by 12 U.S.C. § 1828(j)(1)), 12 C.F.R. § 325.105, and 12 C.F.R. § 362.3.

37. The FDIC prepared a draft 2009 report of exam but did not finalize the report before the Bank failed.

38. On March 12, 2010, the NYSBD closed the Bank and the FDIC was appointed as receiver.

39. At the time the Bank was placed into receivership, the Bank had approximately \$509 million in assets.

40. At all relevant times, Respondent knew the Bank became “Undercapitalized” and then “Significantly Undercapitalized,” knew that the Bank never had an approved capital restoration plan, knew that the Bank was subject to PCA restrictions on acquisitions, and knew that the C&D Orders required the Bank to take all steps necessary to prevent future unsafe or unsound practices or violations of law or regulation.

### **III. Background**

#### **A. Change in Control**

41. The Bank was originally established in November 1987 as a federally-chartered depository institution.

42. In 2004, the Bank converted to a state nonmember charter with the NYSBD.

43. Also in 2004, the Bank underwent a change of control when a new shareholder (“DL”) made a \$10 million capital injection into the Bank and acquired 90% of the Bank’s voting shares.

44. Following the change in charter and change in control, the Bank had an entirely new Board and management team.

45. Park Avenue Bancorp, Inc. was a one-bank holding company that controlled the Bank.

46. DL became the controlling shareholder of Park Avenue Bancorp, Inc.

**B. Sublease to Lightstone**

47. DL owned a real estate investment company, The Lightstone Group LLC (“Lightstone”).

48. On October 23, 2007, the Bank entered into an agreement with DL’s company Lightstone for the sublease to Lightstone of space on the 13<sup>th</sup> floor of the Bank’s offices at 460 Park Avenue in New York, NY for the period retroactive to August 1, 2007 and continuing through March 30, 2021 (“Lightstone sublease”).

49. Pryor Cashman prepared the sublease and Respondent provided legal advice to the Bank regarding the sublease.

50. The aggregate of the fixed rent payments due over the life of the Lightstone sublease was approximately \$5.1 million.

51. Included in the Lightstone sublease as “additional rent” was the repayment of two extensions of credit, totaling approximately \$980,000 in principal, the Bank had advanced to Lightstone for renovations and furnishings (“Lightstone sublease loans”).

**C. Call Option**

52. After the 2004 change in control of the Bank, a Turkish citizen and prior Bank controlling shareholder (“EA”), continued to own a minority interest in the Bank through ownership of preferred, non-voting shares (“legacy shares”).

53. In 2004, the Savings Deposit Insurance Fund of the Republic of Turkey (“SDIF”) filed an action in a New York court to seize EA’s legacy shares in the Bank as part of the SDIF’s attempt to collect on a judgment the SDIF had obtained against EA in Turkey.

54. In 2004, the SDIF and DL entered into an option agreement, conceived and prepared by Respondent, which allowed DL the right to call EA’s legacy shares for \$7 million within 45 days after the SDIF was able to deliver the legacy shares (the “Call Option”).

55. DL, by and through his counsel Respondent, made an untimely exercise of the Call Option on November 2, 2005 and the SDIF refused to deliver the legacy shares.

**D. Deep Woods Operating Agreement**

56. Deep Woods is a limited liability company formed, with Respondent’s assistance, on February 6, 2006.

57. At all relevant times, Respondent represented the Bank and Deep Woods.

58. The original owners of Deep Woods included DL, the Chairman of the Bank’s Board (“DG”), and the Bank’s President/Chief Executive Officer/Board member (“CA”).

59. Respondent prepared the Deep Woods Operating Agreement (“Operating Agreement”).

60. Under the Operating Agreement, DL was a non-managing member, held a 75% ownership interest and was responsible for making loans to Deep Woods in the amount of 90% of Deep Woods’ operating expenses.

61. Under the Operating Agreement, CA held a 12.5% ownership interest in Deep Woods and was responsible for making loans to Deep Woods in the amount of 5% of Deep Woods’ operating expenses.

62. Under the Operating Agreement, DG directly held an 11.5% ownership interest in Deep Woods and was responsible for making loans to Deep Woods in the amount of 5% of Deep Woods' operating expenses.

63. Under the Operating Agreement, Torcross Holdings LLC, later replaced by Tivna Holdings LLC, held a 1% ownership interest in Deep Woods.

64. DG owned and controlled 100% of each of Torcross Holdings LLC and Tivna Holdings LLC.

65. Through his ownership of Torcross Holdings LLC and Tivna Holdings LLC, DG indirectly owned an additional 1% of Deep Woods.

66. Torcross Holdings LLC, later replaced by Tivna Holdings LLC, was the managing member of Deep Woods.

67. Through DG's ownership and control of Torcross Holdings LLC and Tivna Holdings LLC, he acted as Deep Woods' managing member ("Managing Member").

68. Upon its formation, Deep Woods' only assets were the Call Option, which Deep Woods valued at \$150,000, and \$50,000 in initial cash contributions.

69. The initial \$50,000 cash contributions to Deep Woods consisted of \$25,000 contributed by CA and \$25,000 contributed by DG.

70. Under the Operating Agreement, Deep Woods members could be required, at DG's discretion (as Managing Member), to make additional loans to Deep Woods to fund its operations.

71. Under the Operating Agreement, DG, as Managing Member, had the authority to determine the amount of loans required from the members based on their proportion of loan obligations and to remove members who failed to make required loans.

**E. Deep Woods Litigation**

72. Deep Woods' sole purpose was to take an assignment of the Call Option from DL and pursue litigation against the SDIF based on the SDIF's refusal to deliver the legacy shares.

73. On February 8, 2007, Respondent's law firm, Pryor Cashman, filed suit on behalf of Deep Woods against the SDIF in the United States District Court for the Southern District of New York seeking specific performance of the Call Option and seeking money damages ("Deep Woods litigation").

74. By September 2008, Deep Woods had expressly abandoned its specific performance claim and sought only monetary damages in the litigation.

75. On June 3, 2009, at a sheriff's auction, the SDIF purchased the legacy shares.

76. On October 22, 2009, the district court granted summary judgment in Deep Woods' favor on the issue of liability in the Deep Woods litigation and made an initial award of damages in the amount of \$7 million plus attorney's fees and costs.

77. On December 29, 2009, the district court vacated the initial damages award.

78. On March 2, 2011, after a trial on the issue of damages, the district court awarded approximately \$16.2 million in damages plus \$9.1 million in attorney's fees and costs to Deep Woods.

79. On March 14, 2014, the United States Court of Appeals for the Second Circuit reversed the trial court's decision in the Deep Woods litigation.

80. The circuit court held that SDIF was entitled to summary judgment since Deep Woods failed to exercise the Call Option within the required 45-day deadline.

81. Specifically, the circuit court relied upon the district court's factual determinations that: (a) SDIF was able to deliver the legacy shares covered by the Call Option on July 12, 2005; and (b) DL exercised his Call Option 113 days later, on November 2, 2005.

82. The circuit court remanded the case to the district court for determination of the amount of attorney's fees and costs Deep Woods owes to SDIF.

83. On August 11, 2014, the circuit court denied Deep Woods' petition for panel rehearing, or, in the alternative, for rehearing *en banc*.

**F. Unpaid and Overdue Deep Woods Litigation Invoices**

84. By July 2008, there were mounting unpaid invoices from Pryor Cashman to Deep Woods for the Deep Woods litigation.

85. On July 15, 2008, Respondent emailed DG seven invoices for Pryor Cashman's representation of Deep Woods, one for each month from December 2007 through June 2008.

86. In the July 15, 2008 email, Respondent stated that he was "under severe pressure to get the outstanding invoices paid before the end of the month."

87. On July 15, 2008, DG forwarded this email to the general counsel of Lightstone, and stated that DL was behind in his payments to Deep Woods.

88. In an October 26, 2008 email to Respondent, DG acknowledged that he received a legal bill from Pryor Cashman on October 17, 2008. DG stated that DL was falling behind and had not paid Pryor Cashman's last few statements.

89. Also on October 26, 2008, DG forwarded this email to CA, with the comment: "FYI. Laying the groundwork. [DL] is in default."

90. On November 25, 2008, DG emailed attorneys at Pryor Cashman, including Respondent, asking if the Operating Agreement allowed DG to call for loans from Deep Woods' members to pay for future expenses.

91. On November 26, 2008, a Pryor Cashman attorney wrote to DG and Respondent stating that Deep Woods owed Pryor Cashman \$140,769 in legal fees and expenses, and that DL would have to pay Deep Woods \$178,146 to pay both those expenses and to repay DG and CA's excess loans to Deep Woods.

92. On December 4, 2008, DG, as Managing Member, sent an email to CA and DL calling upon them to loan further funds to Deep Woods to pay existing legal fees and expected future expenses.

93. DG's December 4, 2008 letter called for a total of \$540,769 in additional loans to Deep Woods, including \$140,769 to pay off outstanding legal fees and expenses, and another \$400,000 to cover estimated legal fees and expenses through settlement of the lawsuit with the SDIF.

94. Adjusting for previous loans made, the December 4, 2008 letter requested DL to lend Deep Woods \$539,046 and DG and CA to each lend Deep Woods \$862.

95. DG copied the December 4, 2008 letter to Respondent.

96. In a series of emails on December 17, 2008, DG and CA discussed DL's failure to make the requested loans to Deep Woods.

97. In these December 17, 2008 emails, DG and CA discussed treating DL as a defaulting member under the Operating Agreement but then agreed to try to negotiate a settlement to purchase DL's interest in Deep Woods at a discount.

**G. Discussions Preceding Bank's Acquisition of an Interest in Deep Woods**

98. In a December 22, 2008 email from Respondent to DG and CA, Respondent suggested that Deep Woods admit the Bank as a member of Deep Woods and then the Managing Member would require the Bank to lend Deep Woods the funds it needed to pay the outstanding invoices to Pryor Cashman.

99. On December 24, 2008 DG, as Managing Member, sent DL a notice of default letter. DG copied the notice to Respondent.

100. In the December 24, 2008 notice of default, DG stated that DL had not made the loans requested in the December 4, 2008 letter and that Respondent had requested that Deep Woods pay its outstanding legal fees of approximately \$174,000 by the end of the year.

101. DG continued to make demands to DL for an additional \$539,046 in loans to Deep Woods, but DL never provided the funding.

102. DG sent DL additional notices of his default to Deep Woods and opportunities to cure the default.

103. On April 1, 2009, Respondent wrote an email to the general counsel of Lightstone concerning the funds DL owed for the Deep Woods litigation. Respondent expressed that it was unfair that he was not being paid for the Deep Woods litigation invoices and indicated he was under pressure from Pryor Cashman to get paid.

104. In the April 1, 2009 email, Respondent again made a recommendation whereby the Bank would replace DL as a member of Deep Woods, and Respondent suggested that the Bank buy DL's interest in Deep Woods for \$350,000.

105. In his April 1, 2009 email, Respondent stated that due to the Bank's capital position the Bank's Board might object to paying DL the entire \$350,000 upfront.

106. During the April 22, 2009 monthly Board meeting, DG informed the Board that DL was in default to Deep Woods, and DG proposed that the Bank loan between \$500,000 and \$750,000 to Deep Woods so Deep Woods could purchase DL's interest and acquire the Call Option. DG said that the collateral for the loan would be Deep Woods' interest in the litigation with the SDIF.

107. Respondent wrote a letter dated May 11, 2009 to the Bank, addressed to CA, and sent to CA and DG by email on that date.

108. In the May 11, 2009 letter, Respondent analyzed some of the legal implications of the Bank lending funds to Deep Woods and concluded that the Bank's proposed loan to Deep Woods would be permissible under both state and federal laws and regulations, including Section 23A and Section 23B and Regulation O of the Board of Governors of the Federal Reserve System, 12 C.F.R. § 215 *et. seq.* ("Regulation O"), subject to certain conditions.

109. On May 12, 2009, Respondent sent an email to DG and CA supplementing the May 11, 2009 letter by saying that a loan from the Bank to Deep Woods would be constrained by the collateral requirements of Section 23A.

110. As of May 2009, Deep Woods had spent all of the initial cash contributions and any loans received, was in debt to Pryor Cashman, and had no tangible assets available as collateral.

111. To avoid the collateral constraints of a Bank loan to Deep Woods while still facilitating the Bank's ability to pay the legal fees DL owed to Pryor Cashman, Respondent returned instead to the concept of Deep Woods admitting the Bank as a member and the Bank making a capital contribution to Deep Woods, as detailed in both a May 15, 2009 email to DG,

CA, and the Bank's in-house counsel, and a May 19, 2009 memorandum to DG, CA, and the Bank's in-house counsel.

112. In his May 15, 2009 email to DG, CA, and the Bank's in-house counsel, Respondent gave combined advice to Deep Woods and the Bank.

113. In his May 15, 2009 email, Respondent advised Deep Woods:

- a. DG and CA could vote to approve admitting the Bank as a new member of Deep Woods to replace DL;
- b. Deep Woods may need to amend its Operating Agreement to reflect that the Bank's funding of Deep Woods is in the form of a capital contribution;
- c. For Deep Woods to remove DL as a member, DL would have to be repaid his initial capital contribution (valued at \$150,000), and his loans to Deep Woods in the amount of \$150,000, plus interest; and
- d. There was a proposal that DL would waive receipt of these payments from Deep Woods in exchange for the Bank terminating its sublease to Lightstone.

114. In his May 15, 2009 email, Respondent advised the Bank:

- a. The Bank could not loan money to Deep Woods without collateral;
- b. The Bank would be able to "cure" DL's default to Deep Woods by making a capital contribution; and
- c. The Board would need to determine if the benefit to the Bank in acquiring the Call Option was at least equivalent to the value of the loss of future rental income arising from termination of the Lightstone sublease.

115. On May 19, 2009, Respondent formalized his advice from the May 15, 2009 email into a new legal memorandum to DG, CA, and the Bank's in-house counsel, adding that

the Board, with DG and CA abstaining, would have to determine if investing in Deep Woods was in the best interest of the Bank.

116. Respondent's May 15, 2009 letter and May 19, 2009 memorandum were placed into the Board packets for the Board's May 20, 2009 meeting.

117. During the Board's May 20, 2009 meeting:

- a. DG informed the Board that the Bank could not lend funds to Deep Woods without collateral, so the Bank would need to be admitted as a new member of Deep Woods and make capital contributions;
- b. DG said that DL wished to terminate the Lightstone sublease;
- c. DG proposed that CA would advance to DL the funds needed to cure his default to Deep Woods, and then the Bank would purchase DL's interest in Deep Woods with the consideration being the termination and release of the Lightstone sublease; and
- d. With DG and CA abstaining, the Board unanimously approved a motion to authorize continued discussion of the possibility of the Bank "stepping into the option litigation."

**H. The Bank's Admission as Member of Deep Woods**

118. On May 22, 2009, DG asked Respondent to deliver a draft agreement substituting the Bank for DL as a member of Deep Woods.

119. In his May 22, 2009 email to Respondent, DG promised that Pryor Cashman would be paid as soon as they had "the deal signed with [DL]."

120. In a May 27, 2009 email, Respondent informed DG and CA that Respondent planned to call the general counsel of Lightstone during his family vacation in an effort to get the Deep Woods substitution resolved in order to get Pryor Cashman's legal bills paid.

121. On June 2, 2009, DG sent an email to Respondent outlining the sequential steps he wished to take on June 4, 2009:

- a. As Managing Member, DG would execute an amendment to the Operating Agreement substituting DG and CA, equally, as members replacing DL;
- b. DG and CA would each contribute capital to Deep Woods equal to the fees Deep Woods owed to Pryor Cashman and third-party expenses accrued in the litigation;
- c. Deep Woods would then pay all fees owed to Pryor Cashman and third-party expenses accrued in the litigation;
- d. DG and CA would assign DL's former membership interest in Deep Woods to the Bank;
- e. Upon assignment of DL's former membership interest in Deep Woods to the Bank, the Bank would simultaneously make a capital investment in Deep Woods in the amount DG and CA had just invested and Deep Woods had just paid to Pryor Cashman to cover its legal fees and the third-party expenses accrued in the litigation; and
- f. Once Deep Woods received the Bank's investment, Deep Woods would then return capital to DG and CA in the amount they had just invested and that Deep Woods had used to pay the legal fees and expenses.

122. Respondent knew from DG's June 2, 2009 email that DG's and CA's new capital contributions would be used to pay Deep Woods' legal fees and expenses to Respondent's firm.

123. Respondent knew from DG's June 2, 2009 email that the sequence of the transactions would include Deep Woods returning DG's and CA's new capital contributions upon receipt of the Bank's equivalent capital investment.

124. Respondent knew that the return of DG's and CA's new capital contributions would leave Deep Woods with little or no remaining tangible assets.

125. Respondent knew from DG's June 2, 2009 email that after the Bank invested \$552,000 in Deep Woods and the subsequent transactions were completed as DG described, Deep Woods would almost immediately again have little or no tangible value.

126. Respondent, with assistance from another attorney at Pryor Cashman, prepared the documents needed to accomplish the Bank's investment in Deep Woods as DG had requested on June 2, 2009.

127. On June 4, 2009, DG, as Managing Member, sent DL a Notice of Withdrawal by Default.

128. Before the Bank acquired an interest in Deep Woods, DG discussed the potential acquisition with the CPA and partner at the accounting firm that provided auditing services to the Bank ("the Bank's Accountant"), but DG did not inform the Bank's Accountant that DG and CA planned for the Bank to return their new capital contributions once Deep Woods received the Bank's equivalent capital investment.

129. By email dated June 9, 2009, Respondent expressed to DG that Pryor Cashman's managing partner was awaiting payment of the Deep Woods invoices, and Respondent hoped the Bank's Accountant would approve the Bank's acquisition of Deep Woods by the next day.

130. On June 9, 2009, DG and CA signed the documents that Respondent and other Pryor Cashman attorneys prepared, thereby causing the Bank to become a member of, make a

capital contribution to, and become obligated for future loans to Deep Woods, and exposing the Bank to potential liability to DL in regard to his interest in Deep Woods.

131. The documents that Respondent and other Pryor Cashman attorneys prepared and that DG and CA signed on June 9, 2009 required the Bank to contribute \$552,000 as an initial capital contribution to Deep Woods.

132. The documents that Respondent and other Pryor Cashman attorneys prepared and that DG and CA signed on June 9, 2009 caused the Bank to become a 75% owner of Deep Woods and required the Bank to thereafter lend Deep Woods 90% of its operating expenses when the Managing Member required such loans.

I. **The Bank Made a \$552,000 Capital Contribution to Deep Woods and Deep Woods Used the Funds to Pay Pryor Cashman**

133. On June 10, 2009, a business checking account, account #5200025913, was opened at the Bank for Deep Woods with an initial deposit from CA in the amount of \$1,000.

134. No funds other than the \$1,000 were deposited in the Deep Woods checking account before the Bank invested in Deep Woods.

135. At all relevant times before the Bank was closed on March 12, 2010, Deep Woods had no funds in bank accounts other than account #5200025913.

136. On June 11, 2009, DG and CA prepared and signed a memo to the Bank's controller, instructing him to transfer \$552,000 from the Bank to Deep Woods' account #5200025913.

137. The June 11, 2009 memo stated that "pursuant to the authorization provided by the Directors at the last Board meeting," the Bank has completed its capital investment in Deep Woods.

138. The Bank's controller recorded the \$552,000 transfer to Deep Woods on June 11, 2009 on the Bank's general ledger as an "Investment in Subsidiaries."

139. In the Bank's June 30, 2009 Call Report, and in every subsequent report filed by the Bank until its failure, the Bank's investment in Deep Woods was recorded on Schedule RC-Balance Sheet on line 8 as "Investments in unconsolidated subsidiaries and associated companies."

140. When the Bank made its capital contribution to and became a member of Deep Woods on June 11, 2009, Deep Woods was in debt for legal fees to Pryor Cashman and expenses in at least the amount of \$368,000.

141. When the Bank made its capital contribution to and became a member of Deep Woods on June 11, 2009, Deep Woods also was in debt in the amount of other incurred, but not yet invoiced, legal fees and expenses.

142. When the Bank made its capital contribution to and became a member of Deep Woods on June 11, 2009, Deep Woods had spent all of the initial cash contributions and any other funds it may have received previously (other than the \$1,000 from CA deposited in Deep Woods' checking account one day earlier).

143. When the Bank made its capital contribution to and became a member of Deep Woods on June 11, 2009, Deep Woods had no tangible assets other than the \$1,000 in its checking account.

144. When the Bank made its capital contribution to and became a member of Deep Woods on June 11, 2009, Deep Woods' only remaining asset other than the \$1,000 in its checking account was the intangible possibility of obtaining a successful judgment in the ongoing litigation.

145. When the Bank made its capital contribution to and became a member of Deep Woods on June 11, 2009, Deep Woods' liabilities exceeded its tangible assets by at least \$367,000 – consisting of at least \$368,000 owed to Pryor Cashman less the \$1,000 in Deep Woods' checking account.

146. On June 11, 2009, DG wrote check #000001 on the Deep Woods account at the Bank in the amount of \$368,000 to pay Pryor Cashman for Pryor Cashman's outstanding invoices to Deep Woods, for services rendered and expenses incurred before the Bank acquired an interest in Deep Woods, using most of the funds the Bank had just contributed to Deep Woods.

147. Two weeks later, on June 24, 2009, DG wrote check #1003 on the Deep Woods account in the amount of \$155,000 to pay Pryor Cashman for Pryor Cashman's additional litigation invoices through June 2009, using nearly all of the remaining funds from the Bank's capital contribution to Deep Woods.

148. Also in June 2009, Deep Woods made direct payments totaling \$22,500 for various other litigation expenses Deep Woods had incurred before the Bank acquired an interest in Deep Woods.

149. As of June 30, 2009, Deep Woods had \$7,500 remaining in its checking account from the Bank's \$552,000 capital contribution, and had no other tangible assets.

150. Deep Woods' actual tangible equity value was nominal or negative at all relevant times thereafter because Deep Woods spent nearly all of the Bank's \$552,000 capital contribution, Deep Woods was in debt to Pryor Cashman for legal fees and expenses in varying amounts and, upon receipt of additional funds, Deep Woods immediately paid the funds to Pryor Cashman.

151. Respondent knew that all or nearly all of the Bank's \$552,000 capital contribution to Deep Woods had been used to pay Pryor Cashman's legal fees and expenses and that Deep Woods planned to return any equivalent amounts invested by DG and CA upon receipt of the Bank's \$552,000; therefore, Respondent knew that on or about June 30, 2009, Deep Woods had little or no remaining tangible assets.

152. On June 11, 2009, Respondent received a copy of the FDIC's June 4, 2009 rejection of the Bank's proposed capital restoration plan.

153. Accordingly, when Respondent received the payments for the Deep Woods legal fees from the Bank's \$552,000 capital contribution to Deep Woods on June 12, 2009 and June 26, 2009, Respondent knew that the Bank did not have an approved capital restoration plan in place.

**J. Board Ratified the Deep Woods Acquisition After Respondent Was Paid**

154. When DG and CA signed the documents on June 9, 2009 that Respondent prepared, obligating the Bank to make a capital contribution and make future loans to Deep Woods when required by the Managing Member, the Board had not approved the acquisition.

155. When the Bank made its \$552,000 capital contribution to Deep Woods on June 11, 2009, the Board had not approved the acquisition.

156. When Deep Woods made the initial \$368,000 payment to Pryor Cashman on June 11, 2009, the Board had not approved the Bank's acquisition of an interest in Deep Woods.

157. At the Board's June 17, 2009 monthly meeting, the Board ratified the actions taken with respect to the Bank's \$552,000 capital investment in Deep Woods, with DG and CA abstaining.

**K. Bank Released Lightstone Sublease and DL**

158. On June 12, 2009, DG wrote to the Bank's in-house counsel, stating "We kicked David out of Deep Woods and substituted the bank for him."

159. On June 23, 2009, DG forwarded to Respondent an email DG had received from the president of Lightstone which stated "Assuming that you are still interested, we are willing to do the original deal that we discussed and give up our space in exchange for David giving back his option."

160. On or before August 3, 2009, Respondent and other attorneys at Pryor Cashman prepared documents that provided for:

- a. The Bank's release of Lightstone from its obligations under the performing Lightstone sublease and Lightstone sublease loans;
- b. The Bank's and Deep Woods' release of DL from his outstanding and any future obligations to make loans to Deep Woods; and
- c. The Bank's and Deep Woods' termination of any remaining interest DL had in Deep Woods.

161. On August 3, 2009, representatives of the DG, CA, and DL executed the documents releasing Lightstone from its sublease and sublease loans, releasing DL from his obligations to DW, and terminating DL's interest in Deep Woods.

**L. Regulator Inquiries and Criticism of Deep Woods Investment**

162. On September 17, 2009, the FDIC examiner-in-charge held an entrance meeting with DG and CA for the 2009 joint examination of the Bank ("2009 Entrance Meeting").

163. At the 2009 Entrance Meeting, DG and CA informed the FDIC examiner-in-charge that SDIF now held the legacy shares formerly held by EA and that the Deep Woods litigation was nearing a conclusion.

164. On October 20, 2009, the FDIC examiner-in-charge and a representative of the NYSBD met with DG and other Bank staff ("October 20 Meeting") to address, *inter alia*, questions about the Bank replacing DL as a member of Deep Woods and the Bank making a capital contribution to Deep Woods.

165. During the October 20, 2009 meeting with DG, the FDIC and NYSBD representatives requested additional information about the Bank's acquisition of an interest in Deep Woods, including whether any cash had been distributed or was involved in the transaction.

166. In an October 20, 2009 email to the Bank's Accountant, the Bank's controller asked the Bank's Accountant if she had work papers or notes that computed the Bank's \$552,000 investment in Deep Woods.

167. The Bank's Accountant stated in an October 20, 2009 email to the Bank's controller that DG and CA told her they had a valuation of Deep Woods performed by a third-party.

168. On October 21, 2009, DG emailed Respondent stating that the examiners had asked for copies of the memoranda and emails Respondent prepared relating to the Bank replacing DL's membership in Deep Woods.

169. On October 21, 2009, DG sent an email to the president of Lightstone, alerting him to the fact that FDIC and NYSBD examiners were taking a very close look at various transactions involving DL and the Bank, including the Deep Woods transactions.

170. By memorandum to the FDIC examiner-in-charge and to the NYSBD dated November 9, 2009, DG summarized the Bank's acquisition of DL's interest in Deep Woods, stating:

- a. Resolving the option litigation with the SDIF was in the Bank's interest, as "it was the only way to clarify the bank's capital structure;"
- b. The Bank's auditors were consulted concerning the accounting treatment of the investment. They advised that the Bank could capitalize its investment in Deep Woods in an amount based on Deep Woods' capital position;
- c. To increase Deep Woods' level of capital, DG and CA "delivered checks to Deep Woods...and this amount was booked as capital in Deep Woods;" and
- d. The capital contributed by the Bank after its investment in Deep Woods was used solely to pay litigation expenses. The return of capital to DG and CA was "a paper entry only...no cash returned to them."

171. On or about November 12, 2009, the FDIC examiner-in-charge informed DG that the Bank's investment in Deep Woods was an apparent violation of Part 325.

172. After the FDIC examiner-in-charge informed DG that the Bank's investment in Deep Woods was an apparent violation of Part 325, DG shared that concern with Respondent.

173. Respondent told DG that the FDIC Examiner-in-Charge was wrong and there was no violation.

174. During the November 25, 2009 exit meeting for the 2009 joint examination, the FDIC examiner-in-charge informed Bank management that the Bank's investment in Deep Woods violated Section 23A and Section 23B, 12 C.F.R. § 325.105, and 12 C.F.R. § 362.3.

175. During the December 16, 2009 Meeting, the FDIC examiner-in-charge informed the Board and Respondent that the Bank's investment in Deep Woods violated Section 23A and Section 23B, 12 C.F.R. § 325.105, and 12 C.F.R. § 362.3.

176. Specifically, the FDIC examiner-in-charge informed Respondent during the December 16, 2009 Meeting that the Bank's investment in Deep Woods was in violation of:

- a. 12 C.F.R. § 325.105, as the Bank was a "significantly undercapitalized" and not under an approved capital plan when it purchased part of Deep Woods without prior approval;
- b. 12 C.F.R. § 362.3, as the Deep Woods investment appeared to be an investment not permissible for a national bank;
- c. Section 23A, because any covered transactions between a bank and an affiliate had to be on terms and conditions that are consistent with safe and sound banking practices, and since the Deep Woods investment was an apparent violation of two regulations, the transaction was not consistent with safe and sound banking practices; and
- d. Section 23B, which requires that any covered transaction be on terms and under circumstances that in good faith would be offered to nonaffiliated companies, and there was no indication that the Bank considered the terms and circumstances that would have been offered to a nonaffiliated company and there had not been any third-party appraisals or valuations of the interest the Bank was acquiring.

177. During the December 16, 2009 Meeting, Respondent did not express disagreement with any of the examiner-in-charge's statements regarding the violations related to the Bank's investment in Deep Woods.

**M. The Bank's Loans to Deep Woods**

178. Contrary to Respondent's prior advice, upon preparing the amendments to the Operating Agreement, Respondent did not include an amendment providing that after the Bank's \$552,000 capital contribution all future funding obligations would also be in the form of capital contributions rather than loans.

179. Accordingly, the Operating Agreement permitted the Managing Member to require the Bank to make loans to Deep Woods for 90% of Deep Woods operating expenses once the Bank became a member of Deep Woods.

180. After the Bank made its \$552,000 capital contribution to Deep Woods, in accordance with the Operating Agreement all of the Bank's payments to Deep Woods thereafter were loans to Deep Woods.

181. After the Bank made its \$552,000 capital contribution to Deep Woods, the Bank made loans to Deep Woods totaling \$276,777.13, in three disbursements, to pay Pryor Cashman's subsequent invoices.

182. The Board did not specifically approve the Bank's loans to Deep Woods.

183. The Bank made the first loan to Deep Woods on September 23, 2009 in the amount of \$62,950.40.

184. On September 23, 2009, DG wrote check #1004 on the Deep Woods account in the amount of \$69,944.89 to pay Pryor Cashman's additional invoice for services and costs for Deep Woods.

185. Over the course of his representation of the Bank, Respondent had attended meetings of significance with regulators many times and he routinely communicated with approximately 24 different representatives of the FDIC and the NYSBD, yet Respondent did not inform the FDIC or the NYSBD of any disagreement with the examiner-in-charge's statements regarding the violations related to the Bank's investment in Deep Woods.

186. Instead, after being told by the FDIC's examiner-in-charge that the Bank's investment in Deep Woods violated laws and regulations, Respondent pressed the Bank to make two additional disbursements to pay his and Pryor Cashman's invoices to Deep Woods.

187. On December 30, 2009, Respondent contacted the Bank's controller and requested that the controller notify Respondent regarding availability of a check for Deep Woods' payment of Pryor Cashman's invoices. Respondent stated "When you have the check, please let me know and I'll send someone over to pick it up. (Don't put it in the mail!)"

188. On December 31, 2009 the Bank loaned Deep Woods \$113,000.

189. On December 31, 2009, DG wrote check #1006 on the Deep Woods account in the amount of \$113,000 to pay Pryor Cashman's invoice for additional services and costs for Deep Woods. Respondent came to the Bank in person to retrieve the check.

190. On March 2, 2010, Respondent submitted an invoice to the Bank for Pryor Cashman's additional services and costs for Deep Woods, including services and costs incurred after the FDIC's examiner-in-charge told Respondent that the Bank's investment in Deep Woods violated laws and regulations.

191. On March 10, 2010, Respondent wrote to the Bank's controller, copying DG and the Special Advisor to the Board/Member of the Bank's Office of the Chairman ("Special

Advisor”), asking if there had been any progress on the payment of Pryor Cashman’s invoice to Deep Woods.

192. DG replied to Respondent that DG was “stuck” after making a call for funds and receiving nothing, and DG told Respondent that Respondent’s audience was the Special Advisor.

193. Thereafter, also on March 10, 2009, Respondent informed DG that the Special Advisor had returned Respondent’s call and “authorized the bank to cut a check for \$98,000 for our fees.”

194. On March 11, 2010, one day before the Bank’s failure, the Bank loaned Deep Woods \$100,826.73.

195. By email to the Bank’s controller on March 11, 2010, DG confirmed that the funds were in Deep Woods’ account at the Bank so that he could get a check to Respondent.

196. The Bank’s controller replied that the Bank had credited Deep Woods’ account on March 11, 2010 a total of \$100,826.73, of which \$98,070.48 pertained to Pryor Cashman’s invoices dated January, February, and March 2010.

197. On March 11, 2010, DG wrote check #1008 on the Deep Woods account in the amount of \$88,070.48 to pay Pryor Cashman’s additional invoice for services and costs for Deep Woods.

198. When Respondent contacted the Bank on March 10, 2010 to obtain payment for the invoices, Respondent had reason to know that closure of the Bank was imminent.

199. Respondent did not inform the Special Advisor that the Bank’s payments of additional invoices for Pryor Cashman’s services and costs for Deep Woods were extensions of credit from the Bank to Deep Woods.

**IV. Violations of Law and Regulations**

**A. Section 23A and Section 23B Violations**

200. When the Bank made its investment in Deep Woods and assumed liability for future loans to Deep Woods, Deep Woods was an affiliate of the Bank under Section 23A and Section 23B by virtue of DL's, DG's, and CA's ownership interests in the Bank and in Deep Woods.

201. After the Bank became a 75% owner of Deep Woods, Deep Woods continued to be an affiliate of the Bank and the restrictions of Section 23A and Section 23B continued to apply.

202. Any covered transaction with an affiliate must be on market terms that would apply to non-affiliates and must be on terms and conditions that are consistent with safe and sound banking.

203. The Bank's loans to Deep Woods were covered transactions under Section 23A and Section 23B.

204. The Bank's three loans to Deep Woods, totaling \$276,777.13, violated the requirements of Section 23A and Section 23B.

205. The Bank was prohibited from making the loans to Deep Woods based on Section 23A since Deep Woods lacked eligible collateral, the loans were not on market terms, and the loans were not consistent with safe or sound banking.

206. Respondent had specifically advised the Bank on May 15, 2009 and May 19, 2009 that the Bank was prohibited under Section 23A and Section 23B from making loans to Deep Woods without collateral.

207. Respondent had specifically advised the Bank on May 15, 2009 and May 19, 2009 that the Deep Woods Operating Agreement needed to be amended to reflect that the Bank's current and future funding obligations with respect to Deep Woods would be in the form of additional capital contributions rather than loans.

208. When Respondent prepared the amendments to the Operating Agreement, however, he retained the language characterizing all future funding obligations as loans

209. Respondent knew that all additional funds the Bank paid to Deep Woods after the initial investment were in the form of loans.

210. Respondent knew when the Bank made the three loans to Deep Woods that its only significant asset continued be the intangible asset of the possibility of a successful final judgment in the ongoing litigation against the SDIF.

211. The Bank's three loans to Deep Woods totaling \$276,777.13 were prohibited based on Section 23B since the Bank failed to do a fair market evaluation before extending the loans and otherwise failed to extend credit on terms and conditions that would be provided to an unaffiliated third-party.

212. Respondent urged the Bank to pay Pryor Cashman's invoice for services and costs for Deep Woods after the FDIC told Respondent that the Bank's investment in Deep Woods violated Section 23A because any covered transactions between a bank and an affiliate had to be on terms and conditions that are consistent with safe and sound banking practices.

213. Respondent urged the Bank to pay his and Pryor Cashman's invoice for services and costs for Deep Woods after the FDIC told Respondent that the Bank's investment in Deep Woods violated Section 23B because any covered transaction must be on terms and under

circumstances that in good faith would be offered to nonaffiliated companies and there had not been any third-party appraisals or valuations of the interest the Bank was acquiring.

214. Respondent violated Section 23A and Section 23B by causing, participating in, counseling, or aiding and abetting the Bank's loans to Deep Woods.

**B. Regulation O Violations**

215. Under 12 C.F.R. § 215.2(h) "insiders," include directors and their "related interests."

216. DG and CA were both insiders of the Bank.

217. Deep Woods was a related interest of DG and CA under Regulation O since they jointly controlled Deep Woods as 25% owners, including through DG's wholly-owned company Tivna Holdings LLC.

218. Under 12 C.F.R. § 215.3(a), an extension of credit is a making or renewal of any loan, a granting of a line of credit, or an extending of credit in any manner whatsoever.

219. The Bank's loans to Deep Woods totaling \$276,777.13 were extensions of credit subject to Regulation O.

220. Under 12 C.F.R. § 215.4, extensions of credit to insiders must, *inter alia*, be approved by a majority of the Bank's disinterested directors, be made on market terms, and not involve more than the normal risk of repayment or present other unfavorable features.

221. In violation of Regulation O, a disinterested majority of the Board did not approve the Bank's extensions of credit to Deep Woods totaling \$276,777.13.

222. The extensions of credit to Deep Woods were unsecured.

223. The unsecured extensions of credit to Deep Woods were not on market terms.

224. Repayment of the extensions of credit to Deep Woods was contingent on obtaining a favorable final judgment in the Deep Woods litigation and then collecting from a foreign sovereign.

225. Given the unsecured status of the extensions of credit to Deep Woods, the likelihood of the Bank being repaid for the funds loaned to Deep Woods involved significant risk.

226. Given the speculative nature of obtaining a favorable final judgment in the Deep Woods litigation and the uncertainty of enforcing a judgment, the likelihood of the Bank being repaid for the funds loaned to Deep Woods involved significant risk.

227. The extensions of credit to Deep Woods involved more than the normal risk of repayment.

228. The Bank violated 12 C.F.R. § 215.4 upon making extensions of credit to Deep Woods that were not approved by a majority of the Bank's disinterested directors, that were on terms that were not substantially similar to extensions of credit made to other persons, and that presented more than the normal risk of repayment.

229. The extensions of credit to Deep Woods also were subject to the prohibition under 12 C.F.R. § 215.6 against a director knowingly receiving or permitting his related interests to receive loans not authorized under Regulation O.

230. Under 12 C.F.R. § 215.3(f), extensions of credit are considered made to an insider to the extent the proceeds are transferred to or for the tangible economic benefit of the insider.

231. The \$276,777.13 in loans to Deep Woods was used for DG's and CA's tangible economic benefit.

232. Deep Woods used most or all of the \$276,777.13 loan funds to pay Respondent's and his firm's attorney's fees and expenses that insiders (DG and CA) otherwise had been obliged to pay.

233. Upon receiving the tangible economic benefit of the extensions of credit to Deep Woods, DG and CA violated 12 C.F.R. § 215.6.

234. Upon permitting their related interest, Deep Woods, to receive proceeds of the extensions of credit, DG and CA violated 12 C.F.R. § 215.6.

235. Respondent knew that under the Deep Woods Operating Agreement, the Bank's payments of additional invoices for services and costs for Deep Woods were in the form of extensions of credit from the Bank to Deep Woods.

236. Notwithstanding the restrictions of Regulation O, Respondent contacted the Bank to urge the Bank to pay his and Pryor Cashman's invoices for services and costs for Deep Woods.

237. Respondent violated Regulation O by causing, participating in, counseling, or aiding and abetting the Bank's extensions of credit to Deep Woods.

238. Respondent violated Regulation O by causing, participating in, counseling, or aiding and abetting DG's and CA's violations of 12 C.F.R. § 215.6.

**V. Respondent's Breach of Fiduciary Duty and Unsafe or Unsound Practices**

239. As an IAP, Respondent owed a fiduciary duty to the Bank.

**A. Respondent Placed His Self-Interest Over the Bank's Interest**

240. At all relevant times, Respondent's interests included his self-interest and Pryor Cashman's interest in receiving payment for the Deep Woods litigation invoices.

241. Respondent placed his self-interest in payment of his and Pryor Cashman's legal fees before and to the detriment of the Bank's interests.

242. By placing his self-interest before and to the detriment of the Bank's interest, Respondent knowingly or recklessly breached his fiduciary duty to the Bank.

243. By urging the Bank to pay additional invoices for Pryor Cashman's services and costs for Deep Woods, Respondent knowingly or recklessly participated in unsafe or unsound practices.

**B. Respondent Placed Deep Woods' Interest Over the Bank's Interest**

244. Respondent recommended and urged the Bank to pay additional invoices for Pryor Cashman's services and costs for Deep Woods.

245. Respondent placed Deep Woods' interest in paying its debt before the Bank's interest in making legal and safe and sound loans.

246. By placing Deep Woods' interest in paying its debt before the Bank's interest in making legal and safe and sound loans, Respondent knowingly or recklessly breached his fiduciary duty to the Bank.

247. By placing Deep Woods' interest in paying its debt before the Bank's interest in making legal and safe and sound loans, Respondent knowingly or recklessly participated in unsafe or unsound practices.

**C. Respondent Knowingly or Recklessly Participated in Breach of His Fiduciary Duty to the Bank and Unsafe or Unsound Practices in Regard to the Bank's Extensions of Credit to Deep Woods**

248. When Respondent urged the Bank to pay additional invoices for Pryor Cashman's services and costs for Deep Woods in December 2009 and March 2010, Respondent knew:

- a. All additional payments by the Bank for Deep Woods were in the form of loans under the Operating Agreement;
- b. The Bank could not extend credit to Deep Woods without collateral;
- c. Deep Woods had no tangible value;
- d. The Call Option had been exercised more than 45 days after the SDIF was able to deliver the legacy shares;
- e. Potential recovery in the Deep Woods litigation was speculative;
- f. The FDIC examiner-in-charge had advised in November 2009 that the Bank's investment in Deep Woods was a violation of Section 23A and Section 23B, 12 C.F.R. § 325.105, and 12 C.F.R. § 362.3; and
- g. The FDIC examiner-in-charge stated during the December 16, 2009 Meeting that the FDIC considered the Bank's investment in Deep Woods to have violated Section 23A, Section 23B, 12 C.F.R. § 325.105, and 12 C.F.R. § 362.3.

249. Respondent utterly disregarded the FDIC examiner-in-charge's statements that the Bank's funding of Deep Woods violated laws and regulations.

250. After learning in November 2009 of the FDIC's criticism that the Bank's investment in Deep Woods violated laws and regulations and after attending the December 16, 2009 Meeting during which the FDIC similarly criticized the Deep Woods investment, and before urging the Bank to pay additional invoices for Pryor Cashman's services and costs for Deep Woods, Respondent did not investigate whether such payments were in violation of laws or regulations.

251. Instead, Respondent urged the Bank to continue to pay Respondent's and Pryor Cashman's invoices to Deep Woods.

252. When Respondent urged the Bank to make its final payment for Pryor Cashman's invoice to Deep Woods, Respondent had reason to know that closure of the Bank by the NYSBD was imminent.

253. By contacting the Bank, even on the eve of the Bank's failure, to urge the Bank to pay his and Pryor Cashman's additional invoices to Deep Woods after regulator criticism of the Bank's investment in Deep Woods and notwithstanding his knowledge concerning Deep Woods' lack of tangible value, Respondent knowingly or recklessly breached his fiduciary duty to the Bank.

254. By contacting the Bank, even on the eve of the Bank's failure, to urge the Bank to pay his and Pryor Cashman's additional invoices to Deep Woods after regulator criticism of the Bank's investment in Deep Woods and notwithstanding his knowledge concerning Deep Woods' lack of tangible value, Respondent knowingly or recklessly participated in unsafe or unsound practices.

**VI. Grounds for Assessment of Civil Money Penalty**

255. As a result of the foregoing facts and conclusions, the FDIC concludes that Respondent violated laws or regulations.

256. As a result of the foregoing facts and conclusions, the FDIC concludes that Respondent knowingly or recklessly violated laws or regulations.

257. As a result of the foregoing facts and conclusions, the FDIC concludes that Respondent knowingly or recklessly breached his fiduciary duty to the Bank.

258. As a result of the foregoing facts and conclusions, the FDIC concludes that Respondent's knowing or reckless violations of laws or regulations or breaches of fiduciary duty to the Bank caused or was likely to cause more than a minimal financial loss to the Bank.

259. As a result of the foregoing facts and conclusions, the FDIC concludes that Respondent's knowing or reckless violation of laws or regulations or breaches of fiduciary duty resulted in a pecuniary gain or other benefit to Respondent.

#### **ORDER TO PAY**

The FDIC has concluded that a civil money penalty should be assessed against Respondent pursuant to 12 U.S.C. § 1818(i)(2)(A) by reason of Respondent's violations of laws or regulations, as set forth in this NOTICE OF ASSESSMENT.

The FDIC has concluded that a civil money penalty should be assessed against Respondent pursuant to 12 U.S.C. § 1818(i)(2)(B) by reason of Respondent's violations of laws, regulations, or final orders, or breach of fiduciary duty that caused or were likely to cause more than minimal financial loss to the Bank, or resulted in personal gain or other benefit to Respondent, as set forth in this NOTICE OF ASSESSMENT.

After taking into account the appropriateness of the penalty with respect to the size of Respondent's financial resources, his good faith, the gravity of the misconduct and such other matters as justice may require, it is:

ORDERED, that by reason of his misconduct set forth in this NOTICE OF ASSESSMENT, a penalty of \$105,000 be, and hereby is, assessed against Respondent pursuant to 12 U.S.C. § 1818(i)(2).

FURTHER ORDERED, that the effective date of this ORDER TO PAY be, and hereby is, stayed until 20 days after the date of receipt by Respondent of this NOTICE OF

ASSESSMENT, during which time Respondent may file an answer and request a hearing pursuant to 12 U.S.C. § 1818(i)(2)(H) and 12 C.F.R. § 308.19.

**If Respondent fails to file a request for a hearing within 20 days of receipt of this NOTICE OF ASSESSMENT, the penalty assessed against Respondent, pursuant to this ORDER TO PAY, will be final and shall be paid within 60 days after the date of receipt of this NOTICE OF ASSESSMENT.**

#### **NOTICE OF HEARING**

IT IS FURTHER ORDERED, that, if Respondent requests a hearing with respect to the charges alleged in this NOTICE OF ASSESSMENT, the hearing shall commence sixty (60) days from the date of receipt of this NOTICE OF ASSESSMENT at New York, New York, or at such other date or place upon which the parties to this proceeding and the Administrative Law Judge may agree. The purpose of the hearing will be for the taking of evidence on the charges, findings and conclusions stated herein in order to determine whether the FDIC's ORDER TO PAY assessed against Respondent should be sustained.

The hearing will be public and in all respects conducted in accordance with the provisions of the Federal Deposit Insurance Act, 12 U.S.C. §§ 1811-1831aa, the Administrative Procedure Act, 5 U.S.C. §§ 551-559, and the FDIC Rules of Practice and Procedure, 12 C.F.R. Part 308. The hearing will be held before an Administrative Law Judge to be appointed by the Office of Financial Institution Adjudication pursuant to 5 U.S.C. § 3105. The exact time and precise location of the hearing will be determined by the Administrative Law Judge.

**In the event Respondent requests a hearing, Respondent is hereby directed to file an answer to this NOTICE OF ASSESSMENT within 20 days from the date of service as provided by 12 C.F.R. § 308.19.**

An original and one copy of the answer, any such request for a hearing, and all other documents in this proceeding must be filed in writing with the Office of Financial Institution Adjudication, 3501 N. Fairfax Drive, Suite VS-D8116, Arlington, Virginia, 22226-3500, pursuant to 12 C.F.R. § 308.10. Respondent is encouraged also to file copies of any answer and request for a hearing electronically with the Office of Financial Institution Adjudication at [ofia@fdic.gov](mailto:ofia@fdic.gov). Copies of all papers filed in this proceeding shall be served upon the Office of the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429; A. T. Dill, III, Assistant General Counsel, Legal Division, Enforcement Section, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429; and upon Ashby G. Hilsman, Regional Counsel, New York Regional Office, Federal Deposit Insurance Corporation, 350 Fifth Avenue, Suite 1200, New York, New York, 10118.

**PRAYER FOR RELIEF**

The FDIC prays for relief in the form of the issuance of an Order to Pay Civil Money Penalty to 12 U.S.C. § 1818(i) in the amount of \$105,000 against Respondent.

Pursuant to delegated authority.

Dated at Washington, D.C., this 5<sup>th</sup> day of December, 2014.

/s/

\_\_\_\_\_  
Christopher J. Newbury  
Associate Director  
Division of Risk Management Supervision