

{{6-30-94 p.A-2444}}

[¶5214] **In the Matter of In Chul Song, Empire State Bank, New York City (Manhattan), New York, New York, Docket No. FDIC-92-140e, 92-350k, 5-17-94**

FDIC issues an order of prohibition and assesses a civil money penalty against a former director of a failed bank. It adopts the ALJ's findings that respondent's participation in sham stock transactions, violation of two cease and desist orders, and failure to attend any directors' meetings constituted unsafe and unsound banking practices, violations of law and regulations, and breach of fiduciary duty. FDIC also expressly finds that respondent defaulted by his failure to respond or to cooperate with his counsel.

**[.1] Practice and Procedure—Default**

Where respondent has failed to appear, but ALJ permits enforcement counsel to put on a prima facie case and makes findings and conclusions of law based on the evidence, it is appropriate for the ALJ also to make an alternative finding of default.

**[.2] Civil Money Penalty—Factors Determining Amount—Ability to Pay**

Where FDIC presented evidence that respondent was a plastic surgeon associated with several hospitals and resident of an affluent neighborhood, ALJ correctly concluded that respondent had the ability to pay a penalty of \$75,000.

**[.3] Civil Money Penalty—Factors Determining Amount—Good Faith**

Violations involving personal dishonesty and fraud, breach of fiduciary duty, and violations of cease and desist orders, in addition to a history of prior violations, are so egregious as to justify a civil money penalty far in excess of \$75,000.

**In the Matter of  
IN CHUL SONG  
individually, as a director,  
and as a person participating in the  
conduct of the affairs of  
EMPIRE STATE BANK  
NEW YORK CITY(MANHATTAN),  
NEW YORK  
(Insured State Nonmember Bank—In  
Receivership)  
FDIC-92-140e  
FDIC-92-350k  
DECISION AND ORDER**

**STATEMENT OF THE CASE**

This matter is before the Board of Directors ("Board") of the Federal Deposit Insurance Corporation ("FDIC") following a Recommended Decision by Administrative Law Judge Walter J. Alprin ("ALJ") dated January 4, 1994.<sup>1</sup> The ALJ recommended that In Chul Song ("Respondent" or "Song") be subject to an order of prohibition and an assessment of civil money penalties in the amount of \$75,000.

The case arises out of a Notice of Intention to Prohibit from Further Participation in the affairs of federally insured financial institutions certain directors and persons participating in the conduct of the affairs of Empire State Bank, New York City (Manhattan), New York ("Bank"), issued on August 26, 1992, pursuant to 12 U.S.C. § 1818 (e). On January 5, 1993, the FDIC issued a Notice of Assessment of Civil Money Penalties, Findings of Fact and Conclusions of Law, Order to Pay, and Notice of Hearing, pursuant to 12 U.S.C. §§ 1828(j)(4)(1987) and 1818(i)(2)(1987) against certain Respondents. Song was named as a Respondent in both Notices, although he was only named as a Respondent for purposes of the penalties pursuant to section 1818(i) arising from violation of cease and desist orders.

On November 2, 1993, the ALJ held a hearing in the above matter. Song was the only Respondent still present in the case. He failed to appear, and his counsel requested permission to withdraw because of his lack of cooperation and their inability to contact him. The ALJ granted the motion, subject to counsel remaining his agent for service of process.

At the hearing, FDIC Enforcement Coun-

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<sup>1</sup>Citations to the Recommended Decision shall be "R.D. at \_\_\_\_."

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sel sought to place in the record evidence of a *prima facie* case, even though the ALJ found that there were grounds for default including failure to appear at the hearing and failure to respond to a motion for summary disposition filed by FDIC Enforcement Counsel. Based on the evidence submitted, the ALJ found that a prohibition order was warranted because Song took actions constituting violations of regulations, unsafe or unsound banking operations, and breach of fiduciary responsibilities. R.D. at 8. In addition the ALJ found that Song's actions caused loss to the Bank, constituted a continuing disregard for the safety and soundness of the Bank, and were the result of personal dishonesty. *Ibid.* The ALJ also found that a civil money penalty was warranted against Song because of the nature of his actions, *ibid.*, and that Song had the ability to pay the penalty, *id.* at 6–7, 21.

No party filed Exceptions to the ALJ's Recommended Decision.

## DISCUSSION

The Board concurs in and adopts the ALJ's findings of facts, conclusions of law, and Recommended Decision. The Recommended Decision is supplemented by the discussion below of two matters.

[.1] First, the Board notes that although the ALJ, as he stated, had several grounds for entering a default judgment against Song, he permitted FDIC Enforcement Counsel to put on a *prima facie* case and made findings and conclusions based on the evidence. The Board agrees with the ALJ's handling of the case in this fashion so as to avoid a summary disposition or default that might later be challenged. In such cases, however, it is also appropriate for the ALJ to make an alternative finding of default, and based on Song's failure to appear at the hearing and to respond to FDIC Enforcement Counsel's motion for summary disposition, the Board expressly finds that Respondent has defaulted. The Board also notes that Song's failure to file Exceptions to the Recommended Decision pursuant to 12 C.F.R. § 308.39 must be deemed a waiver of any objection to the ALJ's Recommended Decision.

[.2] The second issue involves the assessment of the civil money penalty. Although the ALJ considered the factors set forth in the statute governing assessment of penalties, he did not explicitly address each one. Accordingly, the Board will now briefly do so.

[.3] Because the actions giving rise to the assessment of the civil money penalties occurred prior to August 9, 1989, they are governed by the pre-FIRREA statute, 12 U.S.C. § 1818(i)(2)(1987).<sup>2</sup> The factors to be considered are set forth in section 1818(i)(2)(ii): "the size of the financial resources and good faith of the...person charged, the gravity of the violation, the history of previous violations, and such other factors as justice may require." The ALJ discussed in some detail Mr. Song's financial resources. R.D. at 7. He correctly concluded that Song had the ability to pay a \$75,000 penalty since he was a plastic surgeon associated with several hospitals in New York City and resided in a cooperative apartment on Sutton Place, "a locale of upper-income residents." *Ibid.* The ALJ's findings concerning "good faith" are implicit in his discussion of the violations themselves as involving personal dishonesty and fraud, breach of fiduciary duty, and violations of cease and desist orders. R.D. at 5–6, 11, 20. The ALJ specifically found that the "gravity" of the violations was very serious because they caused "substantial financial loss" to the Bank and "seriously prejudiced the interests of the Bank's depositors." Finally, a finding of a serious history of prior violations is implicit in the existence of the cease and desist orders and the numerous violations thereof. R.D. at 5, 11. "Justice" requires consideration of no other factors. In short, the violations are so egregious that the Board concludes that a civil money penalty far in excess of the \$75, 000 assessed would have been justified in light of the factors specified by statute.

## CONCLUSION

The Board finds that an Order of Prohibition and the assessment of a civil money penalty in the amount of \$75,000 are warranted against Respondent. Accordingly, the Board affirms the Recommended Decision

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<sup>2</sup> The ALJ treated the allegations against Song as if they were governed by section 1828(j) rather than 1818(i). Since the factors to be considered under those two provisions were the same, *compare* 12 U.S.C. § 1828(j)(3)(B)(1987) *with* 12 U.S.C. § 1818(i)(2)(ii)(1987), this error is harmless, and the Board hereby modifies the ALJ's decision to reflect the correct statutory provision. [{{7-31-94 p.A-2446}}](#)of the ALJ to that effect and issues the following order implementing its Decision.

## ORDER

The Board of the FDIC, having considered the entire record of this proceeding, and finding that Respondent, In Chul Song, as a director of the Bank, violated laws, regulations and written agreements,

engaged in unsafe or unsound banking practices, and breached his fiduciary duty, causing financial loss to the Bank, and said actions having involved personal dishonesty and a willful and continuing disregard for the safety and soundness of the Bank, it is hereby ORDERED and DECREED that:

1. In Chul Song is permanently prohibited from participation in the affairs of any federally insured financial institution pursuant to 12 U.S.C. § 1818(e); and
2. a civil money penalty of \$75,000 is assessed against In Chul Song pursuant to 12 U.S.C. § 1818(i) (1987).

IT IS FURTHER ORDERED, that this Order shall be effective immediately and the penalty payable twenty (20) days from the date of this Order.

IT IS FURTHER ORDERED, that copies of the Decision and Order be served upon In Chul Song, FDIC Enforcement Counsel, the ALJ, and the Superintendent of Banks for the State of New York.

By direction of the Board of Directors.

Dated at Washington, D.C., this 17th day of May, 1994.

/s/ Robert E. Feldman

Acting Executive Secretary

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**RECOMMENDED DECISION AND  
ORDER AS TO  
RESPONDENT IN CHUL SONG**

**I. STATEMENT OF THE CASE**

Pursuant to Section 8(e) of the Federal Deposit Insurance Act ("Act"), 12 U.S.C. § 1818(e), on August 26, 1992, the Federal Deposit Insurance Corporation ("FDIC") issued a Notice of Intention to Prohibit From Further Participation in the affairs of federally insured financial institutions against certain named Respondents, including In Chul Song ("Song"), who filed an answer on or about September 26, 1992. Pursuant to Section 18(j)(4) of the Act, 12 U.S.C. § 1828(j)(4)(1987) [currently 12 U.S.C. § 1818(i)(2)], the FDIC simultaneously issued a Notice of Assessment of Civil Money Penalties against certain named Respondents, including Song, who filed an answer and a Request for Hearing.

Hearing of the above matter was held on November 2, 1993, at New York, New York. At that time a number of Respondents were identified by agency enforcement counsel as having submitted written and executed offers of settlement, which await agency consideration, and one Respondent failed to request a hearing, rendering the penalties final and unappealable. Common Rules of Practice and Procedure, Rule 19, 12 C.F.R. 308.19. Proceedings against other said Respondents are stayed awaiting agency action.

Song did not appear at the hearing personally. His counsel, who had orally advised the undersigned and agency enforcement counsel a number of weeks prior to the hearing that they had been unable to contact their client and that they intended to submit a motion to withdraw, were present and, having filed the motion in written form shortly prior to the hearing, moved for its entry. The motion cites numerous attempts to contact Song and have him assist in preparation for trial, including provision of financial information demanded by the FDIC. The motion was granted orally at the hearing, subject to counsel remaining an agent of Respondent for purpose of service of process.

In addition, the FDIC had filed a motion seeking summary disposition, but barely provided time for response. Song was not present, and there was no objection to the motion. However, despite being entitled to entry of decision by reason of default in appearance, and default in responding to the motion for summary disposition, FDIC enforcement counsel sought permission to place in the record evidence of a *prima facie* case,<sup>1</sup> which was granted by the undersigned. FDIC enforcement counsel provided testimony of witnesses, with documentary support, constituting a preponderance of the evidence proving the allegations of the Notices as to Song, as summarized in the following Findings of Fact.

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<sup>1</sup> As a result of a *prima facie* case having been presented, the motion for summary disposition is moot, and no ruling is issued thereon.

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**II. FINDINGS OF FACT**

Specific findings of fact, with appropriate references to transcript and exhibit, are presented as part "VI" hereof, of which the following is a short and limited summary.

1. The initial FDIC examination of Empire State Bank, an insured non-member state bank subject to FDIC jurisdiction which had opened for business on July 21, 1986, took place as of the close of business February 27, 1987. As a result of the unsafe and unsound conditions found at the bank during the course

of this initial examination a consent cease and desist order was issued on April 17, 1987.

2. On February 29, 1988, a second examination of the bank was conducted by the FDIC, resulting in a letter sent in September of 1988 advising that in view of the unsafe and unsound conditions still existing, the FDIC intended to issue a second cease and desist order. In August of 1988, Song was elected as a director of the bank, and became an institution-affiliated party. In September 1988, the second cease and desist order was issued against the bank, incorporating and continuing provisions of the first Order as well.

3. As a director, Song consented to the issuance of the second cease and desist order. The second order contained numerous provisions, including, and the most important of which was, a requirement for the bank to raise \$2 million in additional, new capital. The bank thereafter reported to the FDIC that it had raised the \$2 million in additional capital through the sale of common stock. However, \$1,460,000 of the \$2 million actually represented loans by the bank to third-party nominees who then returned the money back to the bank. After these loan proceeds were returned to the bank, the bank caused stock to be issued in the names of several directors, including Song. This stock was purchased with the loan proceeds previously described, and the proceeds were not a contribution to capital. However, neither Song nor the other parties to whom the stock was issued had made payments for the stock. Thereafter, Song authorized a proxy to vote all of his shares at a shareholders meeting on March 30, 1989, at, or shortly after which, he was re-elected to his directorship.

4. At the bank examination of February 28, 1989, it was found that the institution-affiliated parties, including Song, had violated or participated in the violations of various provisions of the 1987 and 1988 cease and desist orders. Due to its insolvency, the bank was closed by The State of New York July 1989, and the FDIC bank insurance fund sustained a substantial loss, estimated at \$2,600,000.

5. During Song's tenure as a director of the bank there were 13 meetings convened of the bank's board of directors, of which he attended none, completely failing to perform his fiduciary obligations as a director.

### III. DISCUSSION OF PROHIBITION

Misconduct, deleterious effect, and culpability, must be proven in order to support an order of prohibition. In the matter at hand, Song's misconduct is evidenced by his participation in the numerous violations of the first and second cease and desist orders by complete failure to attend any Directors' meetings, and in his participation in the scheme of improperly making sham contributions to capital. His actions constituted violations of regulations, participating in unsafe and unsound practices in connection with the bank, and breaching his fiduciary duty as a director. The bank, in receivership, suffered terminal losses and damage, by which the interests of depositors could have been prejudiced. Culpability is established by the personal dishonesty of Song in participating in the scheme to perpetrate a fraud, in continuing breach of his fiduciary responsibilities as a director, and in demonstrating willful or continuing disregard for the safety and soundness of the Bank.

### IV. DISCUSSION OF IMPOSITION OF CIVIL MONEY PENALTY

The above discussion of prohibition is incorporated into this discussion of the civil money penalty; the highly imprudent operations, resulting in an abnormal risk of losses to the bank, constitute "unsafe and unsound" banking practices. These practices actually did result in substantial financial loss, and seriously prejudiced the interests of the Bank's depositors. Continuing over a period of time, Song's actions evidenced a continuing disregard for the safety and soundness of the bank. The violations continued through more than 365 days of Song's fiduciary disservice on the Board.

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### V. DISCUSSION OF AMOUNT OF CIVIL MONEY PENALTY

The violations took place prior to the passage of the current statute, and the penalties are limited to a maximum of \$5,000 *per day* for *each* violation of any law or regulation or any written agreement, and \$1,000 *per day* for *each* violation of a final order. The violations were numerous, exceedingly serious, extended in instances over 300 days each, and resulted in the failure of the bank, and in great loss to the insurance fund. It has been proven that Song is a plastic surgeon associated with several hospitals in the City of New York, and that he resides in a cooperative apartment on Sutton Place in New York City, a locale of upper-income residents. He failed to appear at the hearing or to provide the details of his economic condition as known only to himself.

The burden of proof regarding the financial capacity of Respondent to pay a civil money penalty is governed by 5 U.S.C. 56(d), which provides that "the proponent of a rule or order has the burden of proof." This "burden of proof" which would fall on the petitioner agency, however, refers only to the

burden of going forward with evidence, and not the ultimate burden of persuasion.<sup>2</sup> Once Enforcement counsel has met its minimal burden of going forward with evidence, the burden shifts and Respondent then has the burden of persuasion, to demonstrate that he lacks the resources to pay the assessed penalty.<sup>3</sup> The forfeiture of \$75,000, a minuscule portion of the maximum, is found to be warranted by the offense, and within the circumstances of the failure of Respondent to present any evidence, to be within the ability of Song to pay.

## VI. CONCLUSIONS OF LAW

Specific conclusions of law, with transcript and exhibit reference, are presented as part "VII" hereof, and the following is a short and limited summary.

The agency has jurisdiction over the insured non-member state bank, and over Song as an institution-affiliated party. Song's actions constituted violations of regulations, unsafe and unsound banking operations, and breach of fiduciary responsibilities. They further were the cause of the bank's financial loss and other damage, were a continuing disregard for the safety and soundness of the bank, and were both an intentional disregard for the safety and soundness of the bank, and the result of his personal dishonesty. Song should be prohibited from future participation in the affairs of a federally insured financial institution.

In addition, Song's actions over an extended period of time constituted a continuing disregard for the bank, resulted in substantial financial losses, and might have seriously prejudiced the interests of the bank's depositors. A civil money penalty in the sum of \$75,000 should be imposed on Song.

## VI. SPECIFIC FINDINGS OF FACT

1. At all times pertinent hereto, Empire State Bank ("Bank") was a stock corporation organized and chartered under the laws of the State of New York. Hearing Transcript ("Tr.") at 18–19. FDIC Exhibit ("Ex") 1.
2. At all times pertinent hereto, the Bank was insured by the Federal Deposit Insurance Corporation ("FDIC"). The Bank was not a member of the Federal Reserve System. Tr. at 18.
3. At all times pertinent hereto, Respondent In Chul Song ("Song") was a director and person participating in the affairs of the Bank. Tr. at 32–33. FDIC Ex. 2.
4. The Bank was examined by examiners from the FDIC as of the close of business on February 27, 1987, and a report of examination was later prepared ("1987 Report"). Tr. at 22. FDIC Ex. 4.
5. As a result of findings at the examination as of February 27, 1987, the FDIC determined that the Bank's financial condition was severely deteriorating. Tr. at 24, 82.
6. On or about April 17, 1987, the FDIC issued an Order to Cease and Desist ("1987 Order") against the Bank. Tr. at 24–25. FDIC Ex. 5.
7. The 1987 Order became effective on April 27, 1987 and established time periods for the Bank to be restored to a safe and sound condition. Tr. at 25. FDIC Ex. 5.

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<sup>2</sup> See, *Dazzio v. Federal Deposit Insurance Corp.*, 970 F.2d 71 (5th Cir. 1992); *Stanley v. Board of Governors of the Federal Reserve System*, 940 F.2d 267 (8th Cir. 1991); *Bullion v. Federal Deposit Insurance Corp.*, 881 F.2d 1358 (5th Cir. 1989).

<sup>3</sup> *In the Matter of David L. Paul*, OTS Order No. AP 91-50 (August 29, 1991), Final Decision issued December 15, 1993, sheet 64.

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8. The 1987 Report was sent to the Bank with a transmittal letter dated June 10, 1987 in which the FDIC summarized the findings in the report and its concerns about the findings. Tr. at 25–26. FDIC Ex. 6.
9. The Bank was examined by examiners from the FDIC as of the close of business on February 29, 1988, and a report of examination was later prepared ("1988 Report"). Tr. at 27. FDIC Ex. 7.
10. One of the purposes of the 1988 Report was to determine whether the Bank was in compliance with the 1987 Order. Tr. at 27.
11. The 1988 Report was sent to the Bank with a transmittal letter dated July 7, 1988. Tr. at 29–30. FDIC Ex. 8.
12. Respondent Song was elected to the Board of Directors of the Bank on August 31, 1988. Tr. at 32–33. FDIC Ex. 2.
13. At the time Respondent Song became a director of the Bank on August 31, 1988, the 1987 Order was in effect, and was binding and enforceable against the Bank. Tr. at 93. FDIC Exs. 2, 5.
14. On or about September 14, 1988, the FDIC issued an Order to Cease and Desist ("1988 Order")

against the Bank. Tr. at 30–31. FDIC Ex. 69.

15. The terms of the 1988 Order expressly provided at page 11 thereof that "[a]ll provisions of the Order to Cease and Desist issued against Empire State Bank by the FDIC on April 17, 1987, Docket No. FDIC-87-78b, remain fully binding, effective, and enforceable against the Bank, and are in no way modified, terminated, suspended, or set aside by any of the provisions of this ORDER." FDIC Ex. 69.

16. Respondent Song stipulated and consented to the issuance of the 1988 Order by signing a Stipulation and Consent to the Issuance of an Order to Cease and Desist, thereby voluntarily agreeing to be bound by the terms of the 1987 and 1988 Orders. Tr. at 31–32. FDIC Ex. 69.

17. The Bank was examined by examiners from the FDIC as of the close of business on February 28, 1989, and a draft report of examination was later prepared ("1989 Report"). Tr. at 33–34. FDIC Ex. 9.

18. Before the 1989 Report could be finalized and issued, the Bank was closed. Tr. at 34.

19. The 1989 Report was prepared in accordance with established FDIC policies and procedures, was prepared at or near the time of the examination as of February 28, 1989, and was issued in the course of the FDIC's regularly conducted supervisory duties. Tr. at 35. FDIC Ex. 9.

20. One of the purposes of the 1989 Report was to determine whether the Bank was in compliance with the 1987 and 1988 Orders. Tr. at 34.

21. Of the total of ten provisions in the 1987 Order, it was determined by FDIC examiners as of February 28, 1989, that the Bank was in compliance with only one provision of the Order. Tr. at 55–56. FDIC Ex. 9.

22. Of the total of twelve paragraphs in the 1988 Order, it was determined by FDIC examiners as of February 28, 1989 that the Bank was in compliance with only two paragraphs of the order. Tr. at 56–57. FDIC Ex. 69.

23. The 1988 Order required the Bank to increase its primary capital by at least \$2,000,000. Tr. at 84, 86. FDIC Ex. 69.

24. The Bank's attorneys represented to the FDIC that the Bank had increased its total capital by \$2,000,000 through the sale of 125,000 shares of its common stock. Tr. at 86–87. FDIC Ex. 40.

25. Between December 15, 1988 and December 27, 1988, Richard Kim caused the Bank to lend money to Capitaland Corporation, Scientific Industries, Inc., Felco Leasing Co., Safe Time Cleaners, Inc., M & M Development, Inc., Central Wine & Liquor, and Boyang Trading Co., Ltd. (the "Nominee Borrowers"). Tr. at 42. FDIC Exs. 9, 10, 14, 19, 23, 27, 31, 36, 38, 39.

26. From the money Richard Kim caused the Bank to loan to the Nominee Borrowers, \$1,460,000 was transferred by these entities back to the Bank. Tr. at 42–43. FDIC Exs. 9, 13, 17, 21, 30, 38, 39.

27. Richard Kim used a portion of the \$1,460,000 transferred back to the Bank by the Nominee Borrowers to cause 6,250 shares of the Bank's stock to be issued to Respondent Song. Tr. at 44–47. FDIC Exs. 44, 45.

28. Respondent Song paid no consideration for the 6,250 shares of the Bank's stock which Richard Kim caused to be issued to him. Tr. at 47.

29. Respondent Song exercised voting [{{7-31-94 p.A-2450}}](#) rights with respect to the 6,250 shares of the Bank's stock which Richard Kim caused to be issued to him. Tr. at 48–49. FDIC Ex. 46.

30. The Bank failed to increase its primary capital by at least \$2,000,000 and thus failed to comply with the provision of the 1988 Order that it do so. Tr. at 88. FDIC Ex. 9.

31. The funds transferred back to the Bank by the Nominee Borrowers were funds loaned by the Bank itself, and, as such, no new funds were added to the Bank's capital account. Tr. at 88.

32. The term "Substandard" describes a loan asset of a bank that has certain deficiencies concerning the borrower's repayment ability or collateral securing the loan, which, if not corrected, will result in the bank suffering some loss. Tr. at 37.

33. An asset classified "Doubtful" is one in which loss to the bank on the asset is apparent, but the amount of loss cannot be presently determined. Tr. at 37–38.

34. An asset classified "Loss" is one which is of such quality that it is considered a nonbankable asset and must be charged off. Tr. at 38.

35. Whether a loan asset is classified as "Substandard", "Doubtful", or "Loss", or receives no adverse classification, depends upon the documentation in the bank's credit files, including information concerning collateral, repayment ability of the borrower, and the borrower's repayment history. Tr. at 38.

36. All of the loans to the Nominee Borrowers to facilitate the purchase of the Bank stock issued to Respondent Song and others were classified by the FDIC in the draft 1989 Report as of February 28, 1989 as "Loss", except for the loan to Boyang Trading Co., Ltd., which avoided a "Loss" classification only because it was repaid with funds diverted from the loan to Capitaland Corporation, another Nominee Borrower. FDIC Exs. 9, 38, 39.

37. Respondent Song was reelected to the Board of Directors of the Bank on March 31, 1989. Tr. at 53–54. FDIC Ex. 3.

38. While Respondent Song was a member of the Board of Directors of the Bank it was determined as of February 28, 1989, that:

(a) The Bank failed to hire an independent accounting firm to prepare written operating policies and procedures as required by the 1987 Order. FDIC Ex. 9.

(b) The Bank failed to present a written evaluation by a committee of at least three outside directors of the position and performance of each of the Bank's officers and employees, as required by the 1987 Order. FDIC Ex. 9.

(c) The Bank failed to appoint a senior lending officer, and failed to provide written responsibilities for the positions of senior lending officer, operations officer and chief executive officer, as required by the 1987 and 1988 Orders. FDIC Ex. 9.

(d) The Bank failed to eliminate and/or correct all violations, and designate a qualified compliance officer to ensure compliance with all applicable laws and regulations, as required by the 1987 and 1988 Orders. FDIC Ex. 9.

(e) The Bank failed to establish a plan designated to reduce and maintain the ratio of total loans to total deposits to not more than 80 percent, as required by the 1987 Order. FDIC Ex. 9.

(f) The Bank failed to immediately implement written lending and collection policies and procedures and to provide supporting documentation for all outstanding extensions of credit, as required by the 1987 Order. FDIC Ex. 9.

(g) Despite the prohibition by the 1987 Order against the increase or renewal of brokered deposits without prior written notice to the FDIC, the Bank increased its total of brokered certificates of deposits from \$1,091,000 in eleven (11) accounts as of February 28, 1989 to \$2,352,000 in twenty-four (24) accounts as of June 14, 1989. FDIC Ex. 9.

(h) The Bank failed to monitor its compliance with the 1987 and 1988 Orders through documentation and reporting in writing the results of the findings of an independent committee of three outside directors, as required by both the 1987 and 1988 Orders. FDIC Ex. 9.

(i) The Bank failed to provide a copy of a description of either the 1987 or 1988 Order in conjunction with the Bank's notice or proxy statement preceding its March 31, 1988 or March 31, 1989 shareholders' meeting, as required by the 1987 and 1988 Orders. FDIC Ex. 9.

(j) The Bank failed to increase its primary capital by at least \$2,000,000 within [7-31-94 p.A-2451](#) 90 days of the issuance of the 1988 Order, and to maintain its primary capital ratio at not less than 10 percent, as required by the 1988 Order. FDIC Ex. 9.

(k) The Bank failed to eliminate from its books, within ten (10) days from the effective date of the 1988 Order, by collection or charge-off, 100 percent of all assets or portions of assets classified "Loss" and 50 percent of all assets or portions of assets classified "Doubtful" by the FDIC as a result of the 1988 Report which had not been previously charged off or collected. FDIC Ex. 9.

(l) The Bank failed to increase its loan loss reserve as of February 29, 1988 by at least \$500,000 within ten days of the effective date of the 1988 Order, and further failed to increase its reserve for loan losses by an additional \$400,000 by no later than December 31, 1988 and to maintain an adequate reserve for loan losses, all as required by the 1988 Order. FDIC Ex. 9.

(m) Although the 1988 Order required any increases in the reserve for loan losses to be accomplished by charges to operating earnings through the provision for loan losses, the Bank effected increases in the loan loss reserve by debiting retained earnings rather than the provision for loan losses. FDIC Ex. 9.

(n) The Bank advanced additional funds to borrowers whose loans had been classified in the 1988 Report, which was prohibited by the 1988 Order. FDIC Ex. 9.

(o) The Bank failed to implement a written program to address each criticized asset and contingent liability detailed in the 1988 Report so as to eliminate the basis for criticism, as required by the 1988 Order. FDIC Ex. 9.

(p) The Bank failed to limit its past due loan ratio to ten percent of gross loans or less within 180 days, and to no more than 5 percent within 360 days, as required by the 1988 Order. As of February 28, 1989, the Bank's past due loan ratio was 15.7 percent and as of July 5, 1989, the past due loan ratio was 21.2 percent. FDIC Ex. 9.

39. The Arthur Young accounting firm prepared a report and a summary of its findings regarding the Bank's compliance with the 1987 and 1988 Orders, and found that the Board of Directors had not substantially complied with the 1987 and 1988 Orders. Tr. at 58-60, 69. FDIC Exs. 71, 72.

40. The failure of Respondent Song to take action to comply with the 1987 and 1988 Orders contributed to the Bank's closing and to the estimated loss to the FDIC of over \$2,500,000. Tr. at 70, 95.

41. During the period from September 8, 1988 through March 30, 1989, Respondent Song failed to attend twelve (12) meetings of the Board of Directors of the Bank, which were substantially all of the

bank's meetings during such period. Tr. at 65–67. FDIC Exs. 75–86.

42. The FDIC sustained a loss estimated at \$2,654,909 as a result of the Bank's failure and consequent liquidation. Tr. at 99–100. FDIC Ex. 107.

43. As a director and an institution-affiliated party, Respondent Song bears responsibility for the Bank's failure to comply with the 1987 and 1988 Orders. Tr. at 92.

44. Respondent Song failed to respond to the FDIC's request for financial information and, therefore, the FDIC inferred that Respondent Song had the ability to pay the penalty assessed. Tr. at 112–113. FDIC Ex. 108.

45. Respondent Song had the financial ability to pay any civil money penalty recommended by the FDIC. Tr. at 114–116. FDIC Ex. 106.

## VII. SPECIFIC CONCLUSIONS OF LAW

1. The FDIC has jurisdiction over Respondent Song and this action, pursuant to the Federal Deposit Insurance Act, 12 U.S.C. § 1811 *et seq.*, and the FDIC Rules and Regulations, 12 C.F.R. Chapter III.

2. The Bank was at all times relevant herein an insured depository institution subject to the Federal Deposit Insurance Act (12 U.S.C. §§ 1811 *et seq.*) ("Act") and the FDIC Rules and Regulations (12 C.F.R. Chapter III).

3. The FDIC has satisfied all statutory requirements of section 8(e) of the Act, 12 U.S.C. § 1828(e), to prohibit Respondent Song from participating in the conduct of the affairs of any insured depository institution or other organizations enumerated in section 8(e)(7)(A) of the Act, 12 U.S.C. § 1818(e)(7)(A), without the written consent of the FDIC and any other appropriate [{{7-31-94 p.A-2452}}](#) federal financial institutions regulatory agency.

4. The FDIC has satisfied all statutory requirements of section 8(i) and 18(j)(4) of the Act, 12 U.S.C. §§ 1818(i) and 1828(j)(4), to assess civil money penalties against Respondent Song.

5. Respondent Song breached his fiduciary duty owed to the Bank by:

- (a) receiving and voting stock of the Bank without paying for it;
- (b) failing to cause the Bank to comply with the 1987 and 1988 Orders;
- (c) participating in a stock issuance financed with Bank funds, and reporting it as an increase of the Bank's capital when, in fact, no new equity capital was invested; and
- (d) failing to attend meetings of the Board of Directors during the period September 8, 1988 through March 30, 1989.

6. Respondent Song's failure to attend meetings of the Board of Directors during the period September 8, 1988 through March 30, 1989 was reckless, part of a pattern of misconduct and increased the risk of loss to the Bank.

7. Respondent Song's failure to cause the Bank to comply with the 1987 and 1988 Orders represented a pattern of misconduct.

8. Respondent Song engaged in unsafe and unsound banking practices by:

- (a) receiving and voting stock of the Bank without paying for it;
- (b) failing to comply with the 1987 and 1988 Orders;
- (c) participating in a stock issuance financed with Bank funds, and reporting it as an increase of the Bank's capital when, in fact, no new equity capital was invested; and
- (d) failing to attend meetings of the Board of Directors during the period September 8, 1988 through March 30, 1989.

9. Respondent Song violated the requirement set forth in the 1988 Order that the Bank increase its capital by \$2,000,000 when he received and voted stock of the Bank under circumstances in which he knew or should have known, having received the stock for free, it did not represent any investment of equity funds.

10. Respondent Song's conduct in receiving and voting stock of the Bank without paying for it, and in failing to comply with the 1987 and 1988 Orders, evidenced a willful or continuing disregard for the safety and soundness of the Bank.

11. Respondent Song's conduct in receiving and voting stock of the Bank without paying for it, and in failing to comply with the 1987 and 1988 Orders, evidenced personal dishonesty on his part.

12. By reason of Respondent Song's conduct, the Bank suffered financial loss and other damage, and the interests of depositors were prejudiced.

13. While Respondent Song was a member of the Board of Directors of the Bank, he breached his fiduciary duty of the Bank by failing to take action to ensure that the Bank had adequate capital and by failing to take action to attempt to raise capital.

14. While Respondent Song was a member of the Board of Directors of the Bank, he engaged in unsafe and unsound practices by failing to take action to attempt to raise capital.

15. Respondent Song has the burden of persuasion to prove that the size of his financial resources are insufficient or otherwise do not warrant the assessment of a penalty.

16. After providing Respondent Song with the opportunity to furnish information concerning Respondent Song's ability to pay the assessed amount of a civil money penalty, upon Respondent Song's failure to furnish such information, the FDIC has by a preponderance of the evidence proven that Respondent Song has the ability to pay the assessed amount of the penalty.

#### VIII. PROPOSED ORDER

By reason of the above, entry of an order of prohibition, and of assessment of civil money penalties, generally in the form and with the content of that attached hereto and made a part hereof, is recommended.

/s/ Walter J. Alprin

Administrative Law Judge

Office of Financial Institution Adjudication

#### *PROPOSED ORDER*

**In the Matter of**

**RICHARD KWANG-HO KIM**

**BYOUNG HEUNG OH**

**YOON SOO PARK**

**JOSEPH SNAG-HYUP RHEE**

**YOUNG HAK PARK**

[{{8-31-94 p.A-2453}}](#)

**TAE WOO AHN, and IN CHUL SONG**

**Individually, as directors**

**and as persons participating**

**in the conduct of the affairs**

**of**

**EMPIRE STATE BANK**

**NEW YORK, NEW YORK**

**(Insured State Nonmember Bank—In  
Receivership)**

**FDIC-92-140e**

**FDIC-92-350k**

ORDER PROHIBITING IN CHUL SONG  
FROM FURTHER PARTICIPATION  
IN THE AFFAIRS OF FEDERALLY  
INSURED FINANCIAL INSTITUTIONS  
AND ASSESSING A CIVIL MONEY  
PENALTY IN THE SUM OF \$75,000

(Issued \_\_\_\_)

Respondent, In Chul Song, as a director and an institution-affiliated party, having violated laws, regulations, and written agreements entered into with the OTS, having engaged in unsafe and unsound banking practices, and breached his fiduciary duty, by reason of which the institution suffered financial loss and other damage, and the interests of the depositors have been or could be prejudiced, and said practices, violations, and breaches involving personal dishonesty and a willful and a continuing disregard for the safety and the soundness of the institution, shall be and he hereby is prohibited from future participation in the affairs of any federally insured financial institution, and further, is herewith ordered to pay a civil money penalty in the sum of \$75,000.

By direction of the Board of Directors.

Dated at Washington, D.C., this \_\_\_\_ day of \_\_\_\_, 1994.

/s/ Hoyle L. Robinson

Executive Secretary

