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{{2-28-93 p.A-1578}}

[¶5157] In the Matter of Joseph A. Dazzio, Docket No. FDIC-87-71k(11-13-90).

On remand from the U.S. Court of Appeals, which found the record incomplete concerning Respondent's ability to pay, the Board of the FDIC reconsidered the amount of civil money penalty to be imposed, with consideration of the statutory factors regarding ability to pay. Unable to determine the Respondents' net worth or his current or future ability to pay because of Respondent's lack of cooperation, the Board drew an adverse inference from the lack of evidence and imposed a substantial penalty ($175,000) in order to deprive the Respondent of the financial benefit of his illegal actions, to punish him, and to provide a deterrent to such conduct in the future. *(Reversed and remanded by the Fifth Circuit Court of Appeals, 970 F.2d 71, on 9-1-92.)*

[.1] Practice and Procedure — Scope of Remand Hearing

[Scope of hearing on remand is limited to the issues specified in the remand order.

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[.2] Civil Money Penalties—Amount of Penalty—Ability to Pay

Statutory factors to be considered in determining the amount of a civil money penalty are the financial resources of the respondent, his good faith, the gravity of the violation, any history of previous violations, and such other matters as justice may require. The weight to be accorded the individual factors is a matter for the discretion of the regulatory agency.

[.3] Civil Money Penalties—Amount of Penalty—Gravity of Violation

Violation of lending limits to insiders—with a below normal interest rate, inadequate collateral and insufficient assets or income to repay the loan—is a serious breach of fiduciary duty to the Bank, and justifies imposition of a substantial penalty.

[.4] Civil Money Penalties—Amount of Penalty—Good Faith

Respondent's failure to comply with the specific requirements of a Board order, to provide documentation sufficient to permit an accurate evaluation of his financial resources, constitutes bad faith.

[.5] Practice and Procedure—Burden of Proof—Civil Money Penalties

Since evidence of the extent of Respondent's financial resources is largely within his control, he has the burden of producing evidence to establish his financial condition.

[.6] Evidence—Failure to Produce—Adverse Inference

When Respondent does not produce evidence uniquely within his control as required by the Board, the Board can infer that the evidence, had it been produced, would have been adverse to Respondent.

[.7] Civil Money Penalties—Amount of Penalty—Personal Gain

A substantial penalty is warranted in order to deny the Respondent the economic benefit of his violations and breach of fiduciary duty.

In the Matter of
JOSEPH A. DAZZIO, individually and of
as executive officer and director
METROPOLITAN BANK & TRUST
COMPANY
BATON ROUGE, LOUISIANA
(Insured State Nonmember Bank—In
Receivership)
DECISION AND ORDER

INTRODUCTION

This case is before the Board of Directors of the Federal Deposit Insurance Corporation ("FDIC") ("Board") for reconsideration of the proper amount of a civil money penalty to be imposed after remand by the United States Court of Appeals for the Fifth Circuit, *Bullion v. FDIC*, 881 F.2d 1368 (5th Cir. 1989).[1] With the exception of the amount of the penalty imposed, the Fifth Circuit affirmed all aspects of this Board's determinations that Respondent had violated banking regulations. *Bullion v. FDIC*, 881 F.2d at 1379-80.

The Court specifically stated that it did "not conclude that the amount of the penalty [assessed by the

Board] constitutes an abuse of discretion," but it found that the Board did not "deal adequately with the statutory factor of ability to pay." Accordingly, the Board was ordered to "develop detailed findings that evince a thorough evaluation of all factors which under the statute must enter into the penalty which the Board assesses upon its reconsideration." *Bullion v. FDIC*, 881 F.2d at 1379. Pursuant to the Fifth Circuit's remand, this Board ordered appointment of an Administrative Law Judge "to receive evidence, both oral and documentary, and argument of counsel, written or oral, in his discretion, related solely to the issue of the financial condition of Respondent Joseph A. Dazzio

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[1] The Fifth Circuit heard the appeal of a May 24, 1988, Order in which this Board found that Joseph A. Dazzio ("Respondent") violated 12 U.S.C. § 375b and its implementing regulations, 12 C.F.R. § 215.4(a) and (c) (Regulation O), and assessed a civil money penalty in the amount of $125,000. During Respondent's tenure as chairman of the board of directors of Metropolitan Bank & Trust Company, Baton Rouge, Louisiana ("Bank"), the Bank extended a $1.5 million loan to Sherwood Meadows Properties, Ltd., an entity of which Respondent was a general partner. That loan exceeded the Bank's lending limitations.

{{2-28-91 p.A-1580}}and his current and future ability to pay a civil money penalty." FDIC Board Order at 1–2 (December 12, 1989).

A hearing was held in Baton Rogue, Louisiana on March 27, 1990, before Administrative Law Judge James L. Rose ("ALJ"). Both parties filed Proposed Findings of Fact, Conclusions of Law, Briefs, and Reply briefs. The ALJ filed his Recommended Decision[2] and Order ("Recommended Decision") with the Office of the Executive Secretary on July 11, 1990, recommending that a civil money penalty of $175,000 be assessed. The ALJ opined that, notwithstanding Respondent's limited financial capacity, he should not be allowed to profit from his wrongdoing. R.D. at 15. Respondent's counsel filed Exceptions to the ALJ's Recommended Decision on August 13, 1990.

For the reasons set forth below, the Board agrees with the ALJ's Recommended Decision except as modified herein, adopts that decision as modified, and assesses a civil money penalty in the amount of $175,000. The purpose of this penalty is to deprive the Respondent of the economic and financial benefit of his illegal actions, to punish Respondent, and to provide a significant deterrent to such conduct in the future.

II. *FACTUAL SUMMARY*

Respondent is a well-educated,[3] 52 year old, married man who started in real estate by building residential homes in 1967 while employed by the Department of Labor. Tr. at 139-40. Thereafter, his real estate activities expanded to include the development of townhomes, apartment complexes, and shopping centers. After becoming a licensed real estate agent, Respondent was instrumental in the formation of the Bank and served as chairman of the board while continuing to engage in commercial real estate ventures. Tr. at 142-44.

Respondent obtained a $1.5 million loan from the Bank for the construction, renovation, and operation of the Sherwood Meadows Townhouses by Sherwood Meadows Properties, Ltd., of which he was the sole partner, on November 22, 1985. *Id.* As this Board previously determined, Respondent's economic benefit from this loan which violated Regulation O was in the gross amount of approximately $209,000.[4] Dec. at 13.

RECOMMENDED DECISION

At the hearing on Respondent's ability to pay, an FDIC examiner testified that he is unable to determine Respondent's current and future ability to pay a civil money penalty. Tr. at 53–55. Despite specific directions from the ALJ, Respondent produced only limited records regarding his financial condition. Tr. at 53. FDIC enforcement counsel contends that Respondent's production of documents was not in good faith since Respondent did not produce a verifiable financial statement. Tr. at 29.

Although Respondent reported a net worth of $2.2 million to the Bank when he applied for financing of the Sherwood Meadows transaction, he now claims not to have significant income or assets. R.D. at 9. As the ALJ stated, however, such a conclusion can be based only upon Respondent's "self-serving and not altogether credible testimony." R.D. at 9 and 10. While the record does contain some corroboration of his testimony as to the disposition of some of his assets and his current income, there are also significant discrepancies and a marked lack of objective evidence as to the disposition of other substantial assets identified in his 1985 financial statement. The ALJ found that "the exact amount of Respondent's financial resources cannot be determined, in part because of his failure to cooperate and his inconsistent testimony." R.D. at 10. Respondent is in possession of and was ordered by the Board to produce

evidence as to his current financial condition. This shifted the burden to the Respondent to produce evidence establishing his present financial condition or lack of present ability to pay a civil money penalty. Notwithstanding his findings regarding Respondent's lack of cooperation as the reason for his inability to determine a current ability to pay a civil money penalty, the ALJ

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[2] Citations in this Decision shall be as follows:
May 24, 1988 Decision—"Dec. at _____." Recommended Decision—"R.D. at _____." Transcript—
"Tr. at _____."

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[3] Respondent testified that he has a Bachelors and Masters degree in Microbiology and a Doctorate in Food and Nutrition.

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[4] Respondent benefited from a discounted loan at 7.125% interest when peer institutions were charging 11.43%. Dec. at 12–13. Additionally, he received approximately $8,616 per month in 1986 and a total of $23,700 for February through July of 1987 in rents paid to him by the Bank and benefited from the payment of the 1986 partnership *ad valorem* taxes in the amount of $8,500.
{{2-28-91 p.A-1581}}inexplicably concludes Respondent is currently able to pay no more than $10,000 (the amount suggested by his counsel). R.D. at 9 and 10.

The ALJ then determines that a civil money penalty in the amount of $175,000 should be assessed. R.D. at 15. In reaching this conclusion, the ALJ noted that the Respondent had not been found by the Board to be dishonest, but that the Respondent had profited from the violations of Regulation O in the amount of $175,000 on the transaction. R.D. at 14. The ALJ found that "the seriousness of the offense and the extent of Respondent's profit from the violation makes assessment of a substantial civil money penalty appropriate." R.D. at 14. The ALJ then considered the statutory maximum penalty as found by this Board of $511,000 and discussed a discount of 20 percent for each of the five statutory factors found to favor Respondent. However, he noted correctly that each of the five factors should not necessarily be counted as equal in every case and concluded that ultimately the amount of a penalty and a discount for any of the factors weighing in a respondent's favor are matters of subjective determination. R.D. at 11–12. The Board agrees. Ultimately, it appears that the ALJ concluded that the most important factor based on the facts of this case was to deprive Respondent of the financial gain from his selfdealing while at the same time establishing a penalty in an amount that will provide an effective deterrent against future, similar violations by Respondent and others. R.D. at 15. He therefore recommends a civil money penalty in the amount of $175,000.

III. *RESPONDENT'S EXCEPTIONS*

The Respondent takes exception to a number of matters in the Recommended Decision. The Respondent objects to the ALJ's limitation of discovery and the evidence presented at the hearing on remand to his "ability to pay" (Exception 1). Respondent also objects to the scope of the remand to the ALJ and the fact that he was not permitted to address the other statutory factors (Exception 2); the ALJ's determination that Respondent was not cooperative[5] (Exception 3); and the ALJ's factual determinations relating to Respondent's income and assets (Exception 4). Further, Respondent asserts that the ALJ's recommended decision is "clearly contrary to law and the facts of this particular case" (Exception 5); that the ALJ's adoption of the maximum civil money penalty[6] should be rejected (Exception 6); and that the ALJ derived the penalty mechanically (Exception 7). In light of the entire record before this Board, the Board finds that none of Respondent's exceptions is meritorious.

[.1**]** The scope of the hearing on remand was fixed by this Board to comply with the remand order of the Fifth Circuit. After review of the remand by the Fifth Circuit Court of Appeals and the record, the Board determined that the record was adequate as to all of the statutory factors to be considered in setting a penalty except for the size of Respondent's financial resources. The purpose of the remand was to fill in a gap in the record in this proceeding perceived by the circuit court, not to give the Respondent the opportunity to relitigate the penalty provision generally. Therefore, Respondent's Exceptions 1 and 2 are without merit. The ALJ properly limited the evidence at the hearing to the sole issue of Respondent's "ability to pay" consistent with the Board's order and the decision of the Fifth Circuit, and he properly relied upon the prior determinations relating to the remaining statutory factors. 881 F.2d at 1379-80 and Tr. at 21. The exceptions based on factual determinations does not bar this Board from imposing a substantial civil money penalty upon a Respondent after consideration of all the factors. *See generally Premex, Inc. v. Commodity Futures Trading Comm'n*, 785 F.2d 1403, 1409 (9th Cir. 1986); *Bosma v.*

U.S. Dept. of Agriculture, 754 F.2d 804, 810 (9th Cir. 1984).

[.2**]** Civil money penalties are similar to restitution payments by offenders under the Victim and Witness Protection Act of 1982, 18 U.S.C. § 3580(a).[10] In applying analo-

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[5] The record clearly reflects the fact that Respondent, individually and through counsel, was uncooperative. Tr. at 28–34 and 200-36.

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[6] The Fifth Circuit stated that the maximum fine that could have been assessed is $511,000 and stated that "[t]his figure is not disputed by the petitioners." 811 F.2d at 1378.

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[10] The statutory factors to be considered by a court pursuant to 18 U.S.C. § 3580(a) include:
the amount of the loss sustained by any victim as a result of the offense, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.
{{2-28-91 p.A-1582}}gous statutory factors, several courts have upheld restitution orders despite the fact that a defendant is impecunious. *United States v. Atkinson*, 788 F.2d 900, 904 (2d Cir. 1986); *United States v. Fountain*, 768 F.2d 790 (7th Cir. 1985), *modified on other grounds*, 777 F.2d 345 (7th Cir. 1985); and *United States v. Purther*, 823 F.2d 965, 970 (6th Cir. 1987). In *Atkinson*, the Court of Appeals for the Second Circuit explained why indigency at sentencing does not bar the imposition of a substantial restitution award:

> Although there may be little chance that it will ever be made, if full restitution is not ordered at the time of sentencing, an indigent defendant would evade the statutory purpose of making the victim whole in the event he should subsequently come into sufficient funds. 788 F.2d at 904. Also, in *Fountain*, the Court of Appeals for the Seventh Circuit ordered restitution despite the fact that the defendants would spend the rest of their lives in prison. The court stated in pertinent part:
> Everyone knows that Fountain and Silverstein cannot now make restitution. The point of the order is to make sure that should they ever be able to do so out of earnings from the press or the media, they shall do so.

768 F.2d at 803. The analysis and logic of these cases apply with equal force here.

A. *Gravity of the Violations*

[.3**]** The ALJ concluded, and the Board agrees, that the violations involved in this proceeding are very serious. Respondent used his position and influence as the chairman of the Bank to cause a loan to be made by the Bank that was in violation of its lending limits to insiders. Since the loan was below the normal rate of interest, the Bank was deprived of the income that would have been produced by a normal loan at a time when the Bank was experiencing a negative income flow. Furthermore, the loans were inadequately collateralized and the borrower did not appear to have sufficient assets or income to support repayment of the loan. As a 1988 study complied by the Comptroller of the Currency found:

> insider abuse [occurred] in many of the failed and rehabilitated banks during their decline. Insider abuse—*e.g.*, selfdealing, undue dependence on the bank for income or services by a board member or shareholder, inappropriate transactions with affiliates, or unauthorized transactions by management officials— was a significant factor leading to failure in 35 percent of failed banks.

Bank Failure—An evaluation of the Factors Contributing to the Failure of National Banks, Comptroller of the Currency, at 9 (June 1988). Since the Bank eventually failed with the loan unpaid,[11] the negative effect of this transaction on the Bank is clear.

As the Board found in its May 4, 1988, Decision, and the Court of Appeals affirmed, Respondent Dazzio, as the sole partner in the borrower (Sherwood Meadows), received a financial benefit of about $175,000 at the direct expense of the Bank. This was a serious breach of Respondent's fiduciary duty to the Bank and its depositors.

It is exactly this type of misconduct that Regulation O is intended to prevent. The Respondent's misuse of his position as an insider and breach of his fiduciary duty to the Bank in order to obtain a personal financial benefit alone justifies the imposition of a substantial penalty to punish Respondent and to serve as a deterrent to Respondent and others.[12]

B. *Good Faith*

[.4**]** In the Board's underlying decision, it held that "[t]his case does not involve personal dishonesty on the part of any Respondent." Dec. at 14. The Board noted in the Decision, however, that Respondent had failed to "comply with the subpoena duces tecum" seeking evidence as to his

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[11] Since the Board's earlier decision, the Sherwood Meadows transaction resulted in an actual loss of $1,238,000 in principal and $220,000 in interest to the receivership estate of the Bank upon foreclosure of the apartment complex which was sold for a mere $204,000. Tr. 127-28, 137-38, and 231. The appraisal of $1,780,000, utilized by Respondent to obtain funding from the Bank, was based on the sale price of the apartments if sold as condominiums. Such a sale could not have occurred since the bonds used in the transaction were for the construction of low-income apartments. *Bullion v. FDIC*, 881 F.2d at 1370 and 1375.

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[12] The FDIC's Manual of Examination Policy states that "[c]ivil money penalties are assessed not only to punish the violator according to the degree of culpability and severity of the violation, but also to deter future violations. . .the primary purpose. . .is not to effect remedial action." DBS Manual of Examination Policy, Section U at 1 (FDIC, January 1988).

{{2-28-91 p.A-1583}}financial condition. *Id.* at 11. This Board at the time chose to give Respondent the benefit of the doubt and did not penalize Respondent for a failure to bring to the original hearing in this matter relevant information bearing upon his financial resources. However, in its order of remand, the Board required the Respondent to produce specific records establishing his current financial condition and the disposition of the assets identified in his 1985 and 1986 financial statements (FDIC X-26 and X-27). As the ALJ noted in his Recommended Decision, a conclusion with which this Board agrees:

> In this case, Dazzio's cooperation has been remarkably lacking, although if his testimony is accepted he has a limited financial ability to pay a civil money penalty. Cooperation would seem to have been in Dazzio's interest here. That he was not cooperative and did not comply fully with the Board's order [to produce a financial statement], suggests that his testimony should at least be viewed with circumspection.

R.D. at 6. But the ALJ then determined that the good faith factor "operates in the Respondent's favor." The Board, however, finds that Respondent's failure to provide appropriate documentation sufficient to allow an accurate evaluation of his financial resources in compliance with the specific requirements of the Board's Order of December 12, 1989, coupled with his failure to provide financial information requested by subpoena in the prior proceeding (Dec. at 11) strongly weighs against a finding of Respondent's "good faith".[13] The Board concludes that Respondent's failure to fully cooperate constitutes bad faith which neutralizes any benefit from prior cooperation.

C. *Size of Respondent's Financial Resources*

[.5**]** From a review of the record of the remand proceeding, the testimony of Respondent and the documents produced, it is evident that his "game plan" was to deprive the ALJ and the Board of any current accurate financial information.[14] R.D. at 3. As the ALJ found:

> [T]he Respondent did not produce much of the documentation ordered. Specifically, the Respondent did not furnish a detailed financial statement. He offered handwritten notes stating certain assets and liabilities but assigned no value for them. He furnished some of the requested documentation and gave general testimony concerning his financial condition.

R.D. at 3. Since evidence of the extent of Respondent's financial resources is largely within his own control, the Board placed on him the burden of producing evidence to establish his financial condition. Respondent failed to establish or provide evidence adequate to establish an accurate and complete picture of his financial resources.[15]

At the same time, the bank account records produced by Respondent indicate unexplained cash flow.[16] Further, Respondent alluded in his testimony to his placement of new assets in trusts and use of financial vehicles to avoid attachment. R.D. at 6. For example, Respondent has a lease purchase option on his residence, which he did not list as an asset, and which is not held in his own name. Tr. at 219-23. Respondent admitted that assets are not placed in his own name because his creditors may learn of the assets. Tr. at 223. Respondent also testified that he did not deposit funds received as an insurance settlement in his bank account. Tr. at 214. Respondent's time-share condominium (for three weeks each

year) is not held in his

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[13] Respondent has had more than adequate opportunity to establish his current ability to pay a civil money penalty. He was also provided an opportunity to submit information as to his financial condition before the issuance of the original Notice by the Regional Office's ten-day letter but, as has become characteristic, he stone-walled.

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[14] FDIC expert witness Timothy P. Neeck testified that the documents provided by Respondent were entirely inadequate, contained illegible entries, did not adequately describe and value assets, that the listing of assets is incomplete and that the description of liabilities does not distinguish between real and contingent liabilities. Tr. at 50–88.

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[15] The ALJ states that he does "not credit Dazzio" and that the "documentary evidence available shows that [Dazzio] undervalues his income." Dec. at 7.

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[16] FDIC's expert witness Timothy P. Neeck, C.P.A., Commissioned Bank Examiner, testified that Respondent's account at Citizens and Southern National Bank of Florida for the period of March 2, 1989 to February 12, 1990 reflected deposits of $38,437.64. Tr. at 71–72. However, Respondent testified that his income only consisted of equipment leases of $600 per month and salary from a part time food service position of $600 per month. Tr. at 146 and 244.
{{2-28-91 p.A-1584}}own name and does not provide any income. Tr. at 216. A twenty percent interest he holds in a trust is not in Respondent's name. Tr. 165-66 and FDIC Ex. 103 at c-33 to c-41. Finally, Respondent testified that his interest in the Essen Mall Shopping Center was transferred to a wholly-owned corporation, Gulf States Investments, to avoid creditors and to protect his partners. FDIC Ex. 102 at c-30 and Tr. 223-24.

[.6**]** Respondent's efforts to avoid providing evidence and to obfuscate that evidence of his financial condition which is available leads the Board to conclude, as did the ALJ (R.D. at 6), that his testimony should be viewed not only with circumspection, but also that an inference adverse to Respondent must be drawn.[17] As discussed, *supra*, because the evidence of Respondent's financial condition is uniquely within his control and the Board required that he produce that evidence, the Board can only infer that, had he produced such evidence, it would have been adverse to him and would have allowed Enforcement Counsel to prove that he had the ability to pay a substantial civil money penalty. The Board is unwilling to blindly accept Respondent's unsupported assessment of his current ability to pay a penalty simply because there is insufficient evidence in the record from which to adequately evaluate Respondent's true current financial condition. To do so would put every Respondent on notice that non-cooperation was the means of avoiding a civil money penalty. Therefore, the Board rejects the ALJ's determination that Respondent has a current ability to pay only a $10,000 penalty. Instead, the Board adopts an adverse inference from Respondent's failure on three separate occasions to provide objective evidence of his financial condition.

Even absent the adverse inference, the record in this proceeding supports a finding that Respondent has the ability to pay a civil money penalty in excess of the $10,000 penalty which Respondent concedes he has the ability to pay. The record establishes substantial assets listed on Respondent's 1985 financial statement. In the absence of evidence showing the disposition of those assets, the Board can only conclude that they continue to be assets of the Respondent. The record also indicates deposits of approximately $38,000 to one of Respondent's bank accounts. In the absence of evidence showing disposition of those funds, the Board concludes that they remain available to Respondent for the payment of a civil money penalty. Further, Respondent's admission that he has shifted assets to avoid creditors, without additional evidence does not persuade the Board that such assets are either out of Respondent's control or unavailable to meet his financial obligations.

D. *History of Previous Violations*

The Board agrees with the ALJ[18] that this factor operates in Respondent's favor. R.D. at 14. Therefore, the penalty assessed should reflect this factor.

E. *Other Matters as Justice May Require*

The record reflects that Respondent, through the insider abuse giving rise to this action for a civil money penalty, has caused a loss to the Bank, its receivership estate and ultimately to the deposit insurance fund in excess of $1.2 million. R.D. at 4. Despite the amount of the loss, Respondent has not

attempted to repay the Sherwood Meadows loan nor to make any restitution to compensate the receiver or the insurance fund for the gain he received at the Bank's expense. As the ALJ stated, "[i]n order to have a deterrent effect, the civil money penalty should at least encompass the gain." R.D. at 14.

V. *THE AMOUNT OF THE PENALTY*

[.7**]** While there is no evidence of personal dishonesty and the evidence available does not establish with exactitude Respondent's current financial condition, the Board finds from the adverse inference described above and the evidence of record that Respondent does have the ability to pay a

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[17] The adverse inference rule provides that "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *International Union (UAW) v. N.L.R.B.*, 459 F.2d 1329, 1336 (D.C. Cir., 1972) (citing 2 J. Wigmore, Evidence § 285 (3d ed. 1940). In the *International Union* case the court also stated that "while the adverse inference rule in no way depends upon the existence of a subpoena, it is nonetheless true that the willingness of a party to defy a subpoena in order to suppress the evidence strengthens the force of the preexisting inference." 459 F.2d at 1338. In the instant case, it is not a subpoena that Respondent is defying but an order of the Board. In the Board's view, this makes application of the adverse inference rule not only justified but required. A party who takes the authority of the Board lightly must do so at his own risk.

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[18] There is no evidence of any prior violations of banking regulations by Respondent.

{{5-31-92 p.A-1585}}substantial penalty.[19] The Board has also found that the violations were extremely serious and eventually led to an unrecompensed loss to the receiver and ultimately to the deposit insurance fund of over $1.2 million. These conclusions justify the imposition of a substantial penalty as punishment and as a deterrent to future violations by Respondent and others. The Board also agrees with and adopts the ALJ's determination that a penalty should be imposed which at least denies Respondent the economic benefit of his violations and breach of fiduciary duty.[20] R.D. at 14. The Board found in its earlier decision that the economic benefit to Respondent was approximately $209,000. From this amount, the ALJ deducted amounts to adjust for the lack of previous violations[21] and good faith and recommended the amount of $175,000. While the Board specifically finds that Respondent did not act in good faith because of his intransigent refusal to provide adequate financial information, the Board agrees that this amount essentially will deprive Respondent of the financial benefit conferred upon him as a result of his violations of Regulation O, will provide a sufficient degree of punishment, and will provide an adequate deterrent to Respondent and others from future violations of federal financial regulations.

VI. *CONCLUSION*

Therefore, upon careful consideration of the entire record herein, the Board affirms the ALJ's recommendation of a penalty and finds that a civil money penalty against Respondent in the amount of $175,000 is justified and appropriate.

ORDER TO PAY CIVIL MONEY PENALTY

The Board of Directors of the Federal Deposit Insurance Corporation, having considered the entire record in this proceeding, including briefs filed on behalf of Respondent and the FDIC, the ALJ's Recommended Decision and Order filed by Respondent, and after taking into consideration and appropriateness of the civil money penalty with respect to the statutory factors of size of financial resources, good faith of Respondent, the gravity of the violation, history of previous violations, and such other matters as justice may require, makes the following findings:

That Respondent violated section 22(h) of the Federal Reserve Act (12 U.S.C. § 375B) and sections 215.4(a) and (c) of Regulation O, promulgated thereunder (12 C.F.R. § 215.4(a) and (c)), as previously determined in the Board's Order of May 24, 1989.

ACCORDINGLY, IT IS HEREBY ORDERED THAT, a civil money penalty of $175,000 be, and hereby is, assessed against Joseph A. Dazzio pursuant to section 18(j)(3) of the Federal Deposit Insurance Act, 12 U.S.C. § 1828(j)(3).

IT IS FURTHER ORDERED, that this Order shall be effective and the Civil Money Penalty ordered shall be final and payable twenty (20) days from the date of this Order. The provisions of this Order shall remain effective and enforceable except to the extent that, and until such time as, any provision of this

Order shall have been modified, terminated, suspended or set aside by the Board.

By direction of the Board of Directors.

Dated at Washington, D.C., this 13th day of November, 1990.

RECOMMENDED DECISION

In the Matter of
Joseph A. Dazzio, individually and
and, individually and as executive
officer
and director Metropolitan Bank &
Trust Company
Baton Rouge, Louisiana
(Insured State Nonmember Bank — In
Receivership)

James L. Rose, Administrative Law Judge:

This matter was tried before me on March 27, 1990, at Baton Rouge, Louisiana, upon order of the Board of Directors of the Federal Deposit Insurance Corporation (herein the Board) dated December 12, 1989. Each party was represented by counsel and was given the opportunity to call, examine, and

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[19] Respondent admits that he can pay a $10,000 penalty.

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[20] The Board does not adopt the reduction formula cited by the ALJ (Rec. Dec. 14–15).

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[21] The Board agrees that an adjustment to the penalty to reflect the lack of prior violations is warranted.

{{5-31-92 p.A-1586}}cross-examine witnesses. Upon the record as a whole, including briefs and arguments of counsel, I hereby make the following findings of act, conclusions of law, and recommended order:

I. *Procedural History*

The Respondent herein, Dr. Joseph A. Dazzio, was Chairman of the Board of Directors of the Metropolitan Bank & Trust Company of Baton Rouge. He along with certain officers of the Bank were assessed civil money penalties pursuant to 12 U.S.C. § 1828(j)(4)(A) and (B) for violating 12 U.S.C. § 375b and 12 C.F.R. § 215.4(a) and (c) (respectively Section 22 H of the Federal Reserve Act and Regulation O of the Board of Governors of the Federal Reserve System).

Following an administrative hearing, the Administrative Law Judge recommended a civil money penalty against Dazzio of $10,000. The Board, however, assessed him a penalty of $125,000. Lesser penalties were entered against the other Respondents.

All Respondents appealed this order to the United States Court of Appeals, for the Fifth Circuit. So far as is pertinent here, the Court remanded Dazzio's case to the Board "to reconsider the proper amount of penalty and findings to support its conclusion." Specifically, the Court stated, "On remand the Board is directed to develop detailed findings that evince a thorough evaluation of all factors which under the statute must enter into the penalty which the Board assesses upon its reconsideration." *Bullion v. FDIC*, 881 F.2d 1368 (5th Cir. 1989).

Though holding that the penalty assessed was not necessarily an abuse of discretion, the Court said ". . .we must find that the Board in its assessment did not deal adequately with the statutory factor of ability to pay." The Court objected to the Board's use of what it considered to be an out-of-date financial statement showing substantial net worth on the part of Dazzio without stating why it found unpersuasive his testimony or current information in the record to the effect that his ability to pay is limited.

Pursuant to the Court's remand, the FDIC Board issued an order stating, in material part, that an Administrative Law Judge be appointed to take evidence and hear argument "related solely to the issue of the financial condition of Respondent Joseph A. Dazzio and his current and future ability to pay a civil money penalty." The Board further ordered the Respondent to produce certain documents and records relating to his financial condition, and:

5. Upon receipt and consideration of such evidence, the ALJ shall issue a recommendation to the Board evaluating each of the statutory factors upon which the Board must base its penalty assessment. In formulating such a recommendation, the ALJ shall consider the findings and conclusions contained in the Board's Decision and Order of May 24, 1988, except as to Respondent's ability to pay. The ALJ shall make specific findings of fact regarding Respondent Dazzio's current ability to pay a civil money penalty

and his anticipated ability to pay a civil money penalty.

Finally, the Board ordered that the undersigned might recommend a civil money penalty which exceeds, reduces, or is identical to the penalty established by the Board in its previous decision.

At the outset the Respondent contended, in effect, that the scope of the hearing should include all statutory factors to be considered in arriving at an appropriate civil money penalty, and argued that he had been denied due process in connection with pre-trial discovery.

I ruled, based upon the clear language of the Board's remand, that the scope of the hearing was to be limited "solely to the issue of the financial condition of Respondent." While the other statutory factors are to be considered by me in arriving at a civil money penalty recommendation, their facts are in the record and were considered by the Board in its previous decision.

Accordingly, the hearing was limited to the issue of Respondent's financial condition.

As a preliminary matter, it should be noted that in its remand order the Board set forth in detail certain documents and other evidence relating to the Respondent's financial condition which the Respondent was ordered to "produce for the record." This order was incorporated in my order of January 10, 1990, following a telephone conference with counsel.

Nevertheless, the Respondent did not produce much of the documentation ordered. Specifically, the Respondent did not furnish a detailed financial statement. He offered handwritten notes stating certain {{2-28-91 p.A-1587}}assets and liabilities but assigned no value for them. He furnished some of the requested documentation and gave general testimony concerning his financial condition. In addition the record contains certain evidence produced by the FDIC, including three reports from an intelligence service retained by the FDIC to investigate Dazzio's assets, dated January 16, March 19 and March 22, 1990.

A. *The Facts*

The Respondent testified that he received a Ph.D. in food and nutrition in 1967 and for the next 13 years worked in that field, presumably, for the United States Department of Health and Human Services and the Department of Labor. Even while working for the Department of Labor, he began building residential homes. Subsequently, his work in construction expanded to townhouses, apartments, and ultimately shopping centers. In addition, he became a licensed real estate agent and in 1982 helped establish and became Chairman of the Board of the Bank. Until 1987 the Respondent engaged in commercial real estate ventures. According to his 1985 financial statement, he accrued a net worth of $2.2 million, but this has been reduced to $901,000 by the time of his September 1986 financial statement.

In connection with a project in which he was involved, he obtained a loan from the Bank of $1.5 million in August 1985 (the structure of which is set out in the Board's underlying decision) which was found to be violative of the Federal Reserve Act and Regulation O. On this, the Board found, Dazzio personally netted a profit of over $175,000.

As is reflected by the Respondent's reduced net worth from 1985 to 1986, at about this time his financial condition began to unravel. The Bank failed on November 2, 1986, as a result of which the FDIC currently has a deficiency against him in excess of $1.2 million. In addition, Dazzio has a number of other contingent liabilities in the form of defaulted notes amounting to several hundred thousand dollars, one of which, in the amount of $104,000 exclusive of interest and attorney's fees, was reduced to judgment.

In January 1987, the Respondent moved to Florida where he has been involved in building homes (though he has no license to do so), has a part-time job in the food service industry which pays him about $600 a month, and is involved in selling commercial real estate. The Respondent testified that he owns leases on automobile lift devices which pay him $600 a month. He owns approximately a 5 percent interest in a corporation called Microbe Masters which the FDIC investigator valued at approximately $17,000, but which the Respondent testified has no market. He owns three time shares but states that these do not generate any income—that the money realized from the time shares goes to maintenance fees. He is also a 20 percent owner of an investment group which owns a home and a duplex apartment, and he receives a $200 a month fee for managing these properties which are apparently in Florida. He is a partner in Joseph A. Dazzio and Sons partnership which owns an empty 32,000 square foot supermarket in Baton Rouge and which receives lease payments. He testified, however, that he receives none of this—that the lease payments service a $900,000 note. He also testified that he is a 40 percent owner of Essen Mall Properties in Baton Rouge which has a principal debt of $6 million and another $1 million of debt in side notes.

Dazzio testified that since leaving Baton Rouge he has used for living expenses a $15,000 to $30,000 settlement his wife received from her mother's estate; $15,000 or so from an insurance settlement on furniture in his Baton Rouge home; another $28,000 from a life insurance policy which he cashed; and a $4,000 or so from furniture he sold.

While the Respondent testified that he had a number of contingent liabilities ranging from $45,000 to $500,000, only one of his various outstanding debts has been reduced to judgment.

The Respondent testified that his basic income runs to about $1,200 or perhaps $2,000 a month, that his wife is an artist and occasionally sells a picture, and that he has difficulty making basic living expenses. He has two minor children who are eligible for and do participate in a free lunch program in the Florida schools.

It appears from Dazzio's testimony that he is currently involved in a number of ventures in Florida having to do with com- {{2-28-91 p.A-1588}}mercial real estate; however, his testimony on this was somewhat vague and the investigators retained by the FDIC were unable to find any record evidence of Dazzio's participation in such ventures. But as Dazzio testified, it would not make sense at this time for him to have his name on property because of the likelihood that such would be executed on by one of his many creditors.

Timothy Neeck, an FDIC examiner who reviewed Dazzio's 1986 and 1987 income tax returns as well as other documents including the handwritten financial statement, testified that he could not assess Dazzio's net worth or financial ability to pay any kind of an assessment. He testified that the income tax returns show severe losses with liquidity and cash flow problems; however, since Dazzio's net worth at the beginning of the period these returns cover is unknown, they do not in and of themselves prove an inability to pay. At most these income tax returns show a reduced net worth.

Neeck testified that it is almost impossible to determine one's financial condition without that person's cooperation. In this case, Dazzio's cooperation has been remarkedly lacking, although if his testimony is accepted he has a limited financial ability to pay a civil money penalty. Cooperation would seem to have been in Dazzio's interest here. That he was not cooperative and did not comply fully with the Board's order, suggests that his testimony should at least be viewed with circumspection.

For instance, Dazzio was vague about numbers, not knowing whether his wife's settlement from her mother's estate was $15,000 or $30,000. He also "just remembered" at the time of the hearing the $4,000 or so that he received from selling furniture. He was vague about the time of his employment in Florida, the amount that he receives monthly and, indeed, the ventures in which he now participates. He further stated that his stock holdings amount to less than $1,000 whereas his interest in Microbe Masters is worth approximately $17,000 on a book value basis.

Dazzio's W-2 for 1988 from Arnov Management, Inc., shows income of $15,534.01. This was not one of the sources of income to which he testified. It is unknown from the record precisely what this involves except that it is something that he is doing which generates income, and appears to be involved with commercial real estate.

I do not credit Dazzio. What documentary evidence is available shows that he undervalues his income. Thus, bank statements for the period March 1989 to February 1990, shows deposits of $38,437.64, which is substantially more than he testified he gets monthly from various sources. Further, his testimony is inconsistent. Though claiming to have little resources to live on, in August 1989 he received a $15,000 insurance payment with which "I bought some leases...." This indicates that he had sufficient resources to meet his needs and could therefore invest the $15,000. The five leases in evidence generate about $800 per month.

The 1985 financial statement submitted by Dazzio showed a net worth of $2.2 million. While some of the assets were subsequently discounted, the financial statement did include a $300,000 certificate of deposit and another $174,000 in escrow in the Bank. There is no testimony as to what happened to these funds.

The Respondent's 1986 personal financial statement indicated a net worth of $901,000 and it was based upon this that the Board initially concluded that even discounting some of the assets, such as the bank stock, he nevertheless had the financial ability to pay a substantial penalty.

The Respondent's testimony as well as certain documentary evidence furnished by him show that he has substantial contingent liabilities and one judgment debt of nearly $150,000 ($104,000 plus interest and attorney's fees). Nevertheless, the record also establishes that as of 1986, he had a certificate of deposit valued at $300,000 and $174,000 in an escrow account with the Bank. There is no evidence of what happened to these items. Perhaps they were seized by the FDIC on taking over the assets of the Bank. But had that been the case, presumably Dazzio would have so testified or offered documentary evidence to that effect.

The sum of the record evidence is that in 1985 Dazzio had a substantial net worth which has diminished during the last 5 years, presumably as a result of a number of factors including the insolvency of the Bank, and diminished value of certain assets in Dazzio's various ventures. He has moved from an 8,000 to 9,000 square foot {{2-28-91 p.A-1589}}home in Baton Rouge to a 1,500 square foot house in Florida. He is no longer chairman of the board of a bank but works part time as a food service supervisor.

Since at least 1970, Dazzio has been involved in construction and real estate, but was less than

forthcoming with regard to the extent of these ventures and how much income they are now producing.

The bank statements in evidence from March 1989 through February 1990 show deposits of between $1,000 and $5,000 monthly. Many of the deposits are in even $100 amounts (500, 1,000, 1,700 etc.). According to Neeck, such indicates cash or transfer deposits from another account.

The large number of even $100 deposits was not explained by the Respondent. He testified that "a lot of these lease payments I get in for $125 and something like that— and you go to the bank, and you need a little cash, so you just deduct the $25 from the check, and make the deposit for a hundred dollars, so that is what a lot of those were." The only leases in evidence are for monthly payments of $164.30; 164.30; 142.57; 142.57; and 164.30.

In addition to Dazzio's testimony, documentary evidence shows substantial contingent liabilities. The FDIC investigatory reports do not disclose any substantial assets. The only evidence of record concerning an attempt to execute on a judgment against Dazzio was from attorney Charles Schutt, who stated that he attempted to levy execution on the $104,000 judgment but was unable to find any attachable assets.

Though not without doubt, I conclude that Dazzio does not now have significant income or assets. Therefore, he has a minimal ability to respond to a civil money penalty. It may be that he has additional undisclosed assets, such as the $300,000 CD, the $174,000 escrow account and profit from the townhouse venture.

As to Dazzio's future ability to pay, it does not appear that his income in food service would generate substantial financial resources. However, as he has for the last 20 years, Dazzio is involved in construction and real estate. In the past he has been very successful in these ventures. There is no particular reason to believe that he would not enjoy similar success in the future, but to assign any kind of a monetary figure to his prospects would be highly speculative. His education and experience suggest that he will have significant future financial resources. But this cannot be evaluated with any degree of mathematical certainty.

Though I conclude that Dazzio has minimal financial resources, this is based in part upon his self-serving and not altogether credible testimony. Nevertheless, there is some corroboration of his testimony and there is no contrary objective evidence.

The Respondent's counsel argue that no rule of law required him to furnish documentary information concerning his financial condition. However, it is he who is in the best position to have such information, and it is he who stood to benefit if the documentary evidence corroborated his testimony that his net worth is minimal. FDIC counsel therefore moved that I make an adverse inference against the Respondent. I decline to do this because the documentary evidence of record, including reports done for the FDIC, tend to corroborate Dazzio's testimony. Before this litigation his net worth was declining. The Bank closed and other of his assets lost value. All this supports the Respondent's contention that he has limited financial resources, and makes inappropriate an inference that he has substantial net worth.

While the exact amount of the Respondent's financial resources cannot be determined, in part because of his failure to cooperate and his inconsistent testimony, I do find that his current ability to pay a civil money penalty is no more than $10,000 (the amount suggested by his counsel).

B. *Analysis of the Statutory Factors*

Section 1828(j)(4)(B) provides:

> In determining the amount of the penalty, the Corporation shall take into account the appropriateness of the penalty with respect to the size of financial resources and good faith of the member bank or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require.

In considering this section the Fifth Circuit stated that the Board "did not deal adequately with the statutory factor of ability to pay." Thus it appears that the Fifth Circuit concluded that the phrase "size of financial resources" is identical to the abili- {{2-28-91 p.A-1590}}ty of a respondent to pay whatever civil money penalty is assessed. Ability to pay would seem to be a somewhat more inclusive and subjective concept than financial resources. Financial resources is basically assets minus liabilities, whereas ability to pay would include liquidity of assets, projected cash flow, and ongoing financial responsibilities such as family needs. In any event, the Board acquiesced in this interpretation of the statute.

In addition to ability to pay, the Board also ordered that I consider the other statutory factors in making a recommendation of the amount of the civil money penalty to be assessed.

Section 1828(j)(4)(B) is identical to nine other civil money penalty sections written by Congress in the Financial Institutions Regulatory and Interest Rate Control Act of 1978, P.L. 95–630, 92 Stat. 3641 (1978), the purpose of which to give the banking agencies flexibility to secure compliance with laws and

regulations. The civil money penalty authority was meant to serve as a deterrent to violations of those laws and regulations. H.R. Rep. No. 1383, 95th Cong., 2d Sess. 17 (1978). The factors to be considered were to "assure that the agencies are not arbitrary and capricious in their use of civil money penalties." Legis. History P.L. 95–630 at 18.

Making a civil money penalty assessment is a very difficult matter. The statute lists five factors which must be considered: 1) size of financial resources, 2) good faith, 3) gravity of the violation, 4) history of previous violations, and 5) such other matters as justice may require. It does not, however, give any objective test other than the $1,000 per day maximum applicable here. Nor are there court or agency cases offering guidance on how the presence or absence of one or more factors translates into a sum to be assessed.

Ultimately, therefore, assessment of a civil money penalty must be from someone's subjective judgment, which in this case is the Board.

Since Congress did set forth five factors and seems to have given them equal status, a possible approach would be to assign a 20 percent discount for each factor whose existence would suggest reducing the maximum. For instance, a finding of good faith might justify reducing the possible penalty even if the other four factors were found against a respondent. But these factors are not necessarily equal in each case; therefore, after a preliminary discounting there still would have to be a subjective evaluation.

Applying this kind of analysis here, I conclude that a civil money penalty of $175,000 is appropriate. The maximum penalty is $511,000, the violations found having continued for 511 days.

(a) *Size of financial resources*

Though ability to pay is a statutory factor to be considered, such is not determinative of the penalty to be assessed. Nor must the Board accept the Respondent's testimony of an inability to pay, particularly in light of the Respondent's failure to comply with the Board's order with regard to submitting financial data.

Thus, in the *Matter of * * *, individually as an officer, director, and as an acquiring party and * * *, individually and as a participant in the conduct of the affairs of * * * Bank (Insured State Nonmember Bank)*, 2 FDIC PH Enf. Dec. ¶5080 (1987), the Board rejected the respondent's self-serving statement of his inability to pay a civil money penalty, holding, "Since part of the intended purpose of the civil money penalty is future deterrence, limited financial resources do not necessarily defeat assessment of the penalty." At 7021. However, the Board has held that a modest net worth justifies setting a limited civil money penalty of $10,000 notwithstanding the gravity of the Regulation O violation, where there was no finding that the respondent gained from the violation. *In the Matter of * * * Bank (Insured State Nonmember Bank)*, 2 FDIC PH Enf. Dec. ¶5063 (1987).

In that case the Board also held: "The Board recognizes that this penalty exceeds Respondent's apparent net worth. While financial resources is a factor to be weighed, it must be balanced against the other statutory factors to yield an appropriate penalty. The Board believes that it is clear that an individual's net worth in not necessarily the upper limit for a civil money penalty." At 6614 n. 8.

On the record here I conclude that Dazzio has limited ability to pay a civil money penalty at this time, although he does have a potential for future earnings. And if ability to pay was the only factor, then the {{2-28-91 p.A-1591}}maximum penalty would reasonably be $10,000.

(b) *Good Faith*

In its underlying decision, the Board held that this case did not involve personal dishonesty and management of the Bank undertook to cure the violation, after notice, by selling the overline portion of the loan. This latter act would amount to after-the-fact "good faith" and is relevant to the amount of the penalty. *Fitzpatrick v. FDIC*, 765 F.2d 569 (6th Cir. 1985). Thus, the "good faith" factor operates in the Respondent's favor.

(c) *Gravity of the violation*

On the other hand the violation was grave. Insider abuse is without doubt a very serious matter. The Respondent used his position as chairman of the Bank's board of directors to obtain the use of $1.5 million of other people's money. And he profited from the transaction by more than $175,000. As the Sixth Circuit said in *Fitzpatrick*, in approving a loan forbidden by Regulation O, the respondent "breached his legal and fiduciary duty." Thus the violation is grave even though there was no showing of personal dishonesty. The gravity of this violation would justify a substantial penalty.

The substantial benefit to the Respondent, along with the gravity of insider abuse, led the Board to conclude that a civil money penalty of $125,000 would be appropriate. The Board's order of remand specifically authorized me to assess independently the statutory factors and raise, lower, or assess the

same penalty as found previously.

In effect, Section 375b and Regulation O are meant to prohibit executive officers of banks from using other peoples money as if it is their own, to venture with it as they please. Deterrence of this kind of unlawful activity is the type of thing Congress had in mind in giving civil money penalty authority to the Board. I believe the seriousness of the violation here justifies a substantial assessment to deter the Respondent and others.

(d) *History of previous violations*

There is no showing that the Respondent had previously engaged in violations of Section 375b or Regulation O. Therefore, this factor operates in the Respondent's favor.

(e) *Other matters as justice may require*

While the Board found no personal dishonesty, it did find that the Respondent made a profit on the violative transaction of $175,000, and such, in justice, would militate against reducing the penalty.

Indeed, where one has a significant gain from unlawful activity, it is reasonable that he not be allowed to benefit. In order to have a deterrent effect, the civil money penalty should at least encompass the gain.

Given the seriousness of the offense and the extent of the Respondent's profit from the violation makes assessment of a substantial civil money penalty appropriate. Indeed, I conclude that anything less than a substantial civil money penalty under such circumstances would not deter the Respondent or others from engaging in the same or similar activity in the future.

In summary, limited financial resources, good faith and no history of previous violations would reduce the potential penalty by 60 percent. But the gravity of the violation and the fact that the Respondent made a substantial profit on his self-dealing support a penalty of at least 40 percent of maximum or $204,000.

While I conclude that the facts here would justify such an assessment, I further conclude that a more appropriate amount would be $175,000—the Respondent's profit. Recognizing his limited financial capacity, nevertheless the Respondent should not be allowed to profit from his wrongdoing.

If assessing a civil money penalty is to have a deterrent effect, on the Respondent and others tempted to violate the banking statutes and regulations, then the penalty must be at least as much as any profit from the violations. In this respect, I note that in the two enforcement decisions cited above, both involving Regulation O violations, the Board assessed $10,000 penalties; but there was no finding in either case that the respondent had profited from the unlawful transaction.

Although the Respondent may have some difficulty in paying the amount assessed, particularly in light of other contingent liabilities against him, such is not sufficient in my judgment to reduce the penalty which I find under these circumstances is appropriate.

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I conclude that the Respondent could not now pay all of such a penalty form liquid assets; and, it may be that his financial condition will not sufficiently improve that the penalty will ever be totally collected. But collectability is not a statutory factor.

Upon the foregoing findings and conclusions, it is hereby recommended that the Board of Directors of the FDIC enter the following:

ORDER TO PAY CIVIL MONEY PENALTIES

The Board of Directors of the FDIC having considered the entire record in this proceeding including the record made on March 27, 1990, briefs and arguments of counsel, and the recommended Decision and Order of the Administrative Law Judge dated July 10, 1990, and exceptions thereto, and after taking into consideration the appropriateness of the penalty recommended with respect to the financial resources and good faith of Joseph A. Dazzio, the gravity of the violations which he has been found to have committed, the history of previous violations, and such other matters as justice may require, concludes that a penalty of $175,000 be, and the same hereby is, assessed against Joseph A. Dazzio, pursuant to § 1818(j)(3) of the Federal Reserve Act, 12 U.S.C. § 1828(j)(3).

IT IS FURTHER ORDERED that this Order shall be effective and the penalty orders shall be final and payable 20 days from the date of this Order. The provisions of this Order shall remain effective and enforceable except to the extent that and until such time as any provision of this Order shall have been modified, terminated, suspended, or set aside by the Board.

By direction of the Board of Directors.

Dated, Washington, D.C. July 10, 1990.