[*The following Order has been stayed pending review by the U.S. Court of Appeals for the Fifth Circuit.* See Burgess v. FDIC, --- *F.3d* ----, *2017 WL 3928326 (5th Cir. Sept. 7, 2017).*]

FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

In the Matter of CORNELIUS CAMPBELL BURGESS, individually and as an institution-affiliated party of HERRING BANK, AMARILLO, TEXAS (INSURED STATE NONMEMBER BANK)	DECISION AND ORDER TO REMOVE AND PROHIBIT FROM FURTHER PARTICIPATION AND ASSESSMENT OF CIVIL MONEY PENALTY FDIC-14-0307e FDIC-14-0308k

I. INTRODUCTION

This matter is before the Board of Directors ("Board") of the Federal Deposit Insurance Corporation ("FDIC") following the issuance on January 11, 2017, of a Recommended Decision ("Recommended Decision" or "R.D.") by Administrative Law Judge Christopher B. McNeil ("ALJ"). The ALJ found that Respondent, Cornelius Campbell Burgess ("Respondent"), the Bank's President and Chief Executive Officer ("CEO"), used the Bank's cash, debit, and credit cards for personal expenses for himself and his girlfriend and attempted to appropriate dividends for Bank stock that he knowingly kept off the Bank's books. The ALJ recommended that the Respondent be subject to an order of prohibition pursuant to section 8(e) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1818(e), and be assessed a civil money penalty ("CMP") pursuant to section 8(i) of the FDI Act, 12 U.S.C. § 1818(i). For the reasons discussed following, the Board adopts and affirms the Recommended Decision and issues against Respondent an Order of Removal[1] and Prohibition and Order to Pay a CMP in the amount of $200,000.

[1] Because Respondent remained a member of the Bank's board at the time of the hearing, the Board's order encompasses both a removal and prohibition.

II. PROCEDURAL HISTORY AND BACKGROUND

The FDIC initiated this action on November 21, 2014, when it issued against Respondent, individually, and as an institution-affiliated party of Herring Bank, Amarillo, Texas ("the Bank"), a Notice of Intention to Remove from Office and Prohibit From Further Participation and a Notice of Assessment of Civil Money Penalty, Findings of Fact and Conclusions of Law, Order to Pay, and Notice of Hearing ("Notice"). The charges in the Notice focused primarily on Respondent's improper expense account practices. The FDIC amended its Notice on February 4, 2016 ("Amended Notice" or "Am. Notice") to include additional allegations with respect to Respondent's expense practices and also charges that Respondent concealed the Bank's ownership of certain MasterCard and Visa stock and caused dividends from that stock to be placed into his personal account at the Bank. R.D. at 3.[2] The Amended Notice charged that between November 2009 and April 2012 (the relevant period), Respondent recklessly engaged in unsafe or unsound banking practices, breached his fiduciary duties, and violated Regulation O, 12 C.F.R. Part 215. Am. Notice ¶¶ 150-154. The Amended Notice also alleged that, as a result, the Bank suffered losses and Respondent received financial gain or other benefit. *Id.* ¶¶ 155-156. The Amended Notice further alleged that Respondent demonstrated personal dishonesty and a willful or continuing disregard for the safety or soundness of the Bank. *Id.* ¶ 157.

The FDIC brought this proceeding to remove Respondent from the Bank's board and to prohibit him from further participation in the banking industry. R.D. at 3; Am. Notice at 2. The FDIC also sought to impose a CMP of $200,000 against Respondent pursuant to 12 U.S.C. § 1818(i). *Id.* Among other things, the Amended Notice alleged that Respondent wrongfully

[2] The Board conducted an independent review of the record, including the underlying supporting evidentiary documents and transcripts. The Board cites to either the numbered pages in the Recommended Decision ("R.D.") or to the exhibits ("FDIC Ex." or "JT. Ex.") or transcripts ("Tr."). Enforcement Counsel's and Respondent's Exceptions to the R.D. are cited, respectively, as "Enf. Exceptions" and "R. Exceptions."

misused Bank cash, credit, and debit cards for his personal use; arranged for a non-bank employee (Respondent's girlfriend) to use a Bank-owned credit card; attempted to misappropriate stock dividends belonging to the Bank; created and submitted materially inaccurate expense records and Consolidated Reports of Condition and Income to the Bank, its board of directors, and to the FDIC; and, made material misstatements to the Bank's board and banking regulators in an effort to cover up his misconduct. Am. Notice ¶¶ 14-68, 88-111.

On February 15, 2016, Respondent filed a timely answer to the Amended Notice denying or attempting to minimize many of the FDIC's material allegations and advancing multiple affirmative defenses.[3] Respondent's First Amended Answer and Defenses ("Amended Answer" or "Am. Answer"); R.D. at 3. For example, Respondent insisted that he made reasonable efforts to substantiate the business nature of expenses charged to Bank-owned cards and, at any rate, his efforts were consistent with advice given by accountants and outside legal counsel. *Id.* ¶¶ 24, (15). Respondent admitted to not keeping receipts for specific items or services paid for by the cash that he obtained from cash-out tickets, but he maintained that this cash was used solely for business expenses. Am. Answer ¶ 27. Respondent contended that the placement of Bank-owned stock dividends in his personal account was inadvertent, discussed with the Bank's board, and ultimately reimbursed. *Id.* ¶¶ 16, 19, 20. Respondent asserted that the Bank did not suffer any loss because he reimbursed the Bank for any non-business expenses and he did not benefit from his practices. *Id.* at ¶¶ 147-148, (10), (14). Respondent further alleged that the FDIC's charges were motivated by bias against him. *Id.* ¶ (2).

Following extensive discovery pursuant to the FDIC's Uniform Rules of Practice and Procedure, a seven-day hearing was held in Dallas, Texas, between September 13 and 21, 2016.

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[3] Respondent's Amended Answer states affirmative defenses in a numbered list (1) – (17). Citations to any of Respondent's affirmative defenses will use the same numbers.

R.D. at 3. At the hearing, the ALJ received sworn testimony from more than 20 witnesses including Respondent.

On January 11, 2017, the ALJ issued a 176-page Recommended Decision recommending that Respondent be prohibited from participation in the banking industry and be ordered to pay a CMP of $200,000 as assessed in the Amended Notice. Both Respondent and Enforcement Counsel filed exceptions. On April 25, 2017, Enforcement Counsel sought to re-open the record to file its response to Respondent's Exceptions. On May 2, 2017, the FDIC Executive Secretary, pursuant to delegated authority, granted Enforcement Counsel's motion and further permitted Respondent the opportunity to respond to Enforcement Counsel's submission. On May 16, 2017, Respondent submitted his Reply in Support of His Exceptions to the Administrative Law Judge's Findings of Fact, Conclusions of Law, Analysis, and Recommended Decision. Pursuant to 12 C.F.R. § 308.40 (c)(2), the Executive Secretary on May 26, 2017, transmitted the record in the case to the Board for final decision.

III. FACTUAL OVERVIEW

The following discussion summarizes Respondent's misconduct as alleged in the Amended Notice and corroborated by supporting testimonial and documentary evidence in the record.

A. General Background

Founded in 1899, the Bank is headquartered in Amarillo, Texas, with branches in Texas, Oklahoma, and Colorado. R.D. at 2, 6, 154; Tr. at 1756: 22-23. Since 2002, the Bank was primarily owned by a holding company, Herring Bancorp, Inc., Amarillo, Texas ("HBI"). R.D. at 2, 6. The Bank has been controlled by the Burgess/Herring family since its inception and, at the time of the hearing, Respondent's family owned between 70 and 80 percent of HBI. *Id* at 2,

6, and 145. At all relevant times, the Bank has been a state nonmember bank with the FDIC serving as its primary federal regulator. R.D. at 6, 154. Respondent joined the Bank in 1992 and was appointed the Bank's CEO and President in 2002. Respondent is, by his own admission, a sophisticated and knowledgeable businessman. R.D. at 27, 114; Tr. 1862-63.

During a joint Bank examination conducted in December 2010 by the FDIC and the Texas Department of Banking ("TDOB"), examiners discovered that the Bank allowed Respondent to approve his own expenses. R.D. at 2. The examiners also discovered that Respondent used multiple Bank credit cards for these expenses and could not provide receipts to substantiate that such expenses were Bank-related. *Id.* As a result, regulators performed additional reviews of the Bank's expense records. *Id.* The Bank's 2010 Examination resulted in a downgrade in the Bank's component CAMELS rating for management, in part, because of the Bank's lack of control over Respondent's expenses. *Id.* at 118. These reviews also culminated in a Memorandum of Understanding dated June 14, 2011 ("MOU") by which the Bank agreed to: (1) conduct a management study ("Management Study") to evaluate the roles of Respondent and the Bank's board and (2) perform an independent forensic audit ("Audit") to assess Respondent's expense practices and recover from Respondent any funds not used for Bank purposes. *Id.* at 2.

B. Respondent's Expense Practices

1. Respondent's Misuse of Bank Credit Cards

Pursuant to Bank policy, certain Bank employees were permitted to obtain Bank credit cards for use when traveling in the course of their duties or purchasing good and services for the Bank. JT. Ex. 202A at 47. The Bank paid all charges to Bank credit cards through the cards' automatic payment features. R.D. at 81. Employees, however, were required to adequately document their business expenses and reimburse the Bank for any personal expenses on the cards

in a timely manner. JT. Ex. 202A at 47. The Bank's 2006 employee handbook stated that "Corporate credit card expenditures must be reconciled and submitted with original receipts to the accounting/finance department within ten business days of the statement." *Id.* Card holders who did not comply could lose their card or face other disciplinary actions including termination. *Id.* In response to Respondent's expense practice of routinely failing to provide receipts, the Bank's board made a notable change to the Bank's credit card policy in October 2008. The amended policy read: "Corporate credit card expenditures must be reconciled and submitted with original receipts (or other appropriate documentation if approved by management)...." R.D. at 12. Reimbursement for certain expenses, however, like meals and travel still required additional support such as a receipt, a notation regarding the business purpose of the travel or meal, and the names of those in attendance. R.D. at 9, 10.

Respondent, who possessed numerous Bank credit cards during the relevant period, failed to comply with either the Bank's 2006 credit card policy or the revised policy issued in 2008. R.D. at 53-54. Respondent used more than a dozen Bank credit cards to charge hundreds of thousands of dollars in expenses, many of which appeared on their face to be personal in nature. *See* R.D. 101-102[4]; *see also* FDIC Ex. 64A at 5. He routinely permitted the Bank to pay for these charges with inadequate or inaccurate documentation regarding the charge's purpose. R.D. at 11, 55. He customarily failed to provide receipts to document the business nature of his expenses. R.D. at 18-19, 54. Instead of seeking the kind of specific documentation required by Bank policy, Bank employees such as Respondent's assistant, Sallye Barnes ("Barnes"), followed Respondent's instructions to review and annotate credit card statements with generic terms such as "business development." R.D. at 55, 100. Barnes and other assistants made

[4] More specifically, an FDIC investigator found that between 2008 and 2011, Respondent made approximately $130,000 in charges that appeared to be personal in nature and for Respondent's benefit. R.D. at 101-102.

notations on Respondent's credit card statements, despite having no direct knowledge of all the transactions, and submitted the annotated statements directly to the Operations Department without additional review by Respondent. *Id.*

The record contains many examples of personal charges made by Respondent using Bank credit cards for items such as pet care products, alcohol and clothing, school supplies for his children, personal travel and gym memberships for himself and his girlfriend, Susan Taylor ("Taylor"), and home maintenance. In many of these instances, and as noted above, the Bank paid for these personal charges based on vague and contextually meaningless annotations. For example, Respondent purchased a $1,600 diamond bracelet for Taylor in December 2009 using a Bank credit card. R.D. at 81; Am. Answer ¶ 40. The purchase was described as "business development," and the bank paid the charge. R.D. at 81; Am. Answer ¶¶ 40-41. Respondent did not reimburse the Bank for the cost of the bracelet until early 2012 after his expenses were audited pursuant to the MOU. R.D. at 81; Am. Answer ¶ 42.

Likewise, the Bank repeatedly paid for Respondent's personal travel (including trips with his girlfriend, his family, and his girlfriend's family) improperly deemed business travel. Respondent charged the Bank approximately $3,600 for trips that he and Taylor took to Paris, France, and Hanoi, Vietnam. *See* FDIC Ex. 424A at 23; FDIC Ex. 873A lines 360, 363, 365-379; FDIC Ex. 873A lines 304, 307, 340-44. Although Respondent claimed that these trips were related to his Executive MBA program with the University of Chicago (*See* JT Ex. 132A at 12; Tr. at 532), they were not required under the program's curriculum (R.D. at 123-24). Taylor acknowledged that the Hanoi trip was a vacation for her. Tr. at 459:21-23. Respondent also charged more than $3,800 to Bank credit cards for New Year's Eve trips that he and Taylor took to the Broadmoor Resort in Colorado Springs (with his children in 2010 and with both his and

Taylor's children in 2012). *See* FDIC Ex. 873A lines 22-23, 406-407. Respondent claimed that he was there to meet a Bank customer, but he failed to identify the customer or any particulars that would support the business purpose of the trip and, when the charges came under scrutiny, he transferred some of the expenses to a Bank affiliate. *See* Jt Ex. 401A. Meanwhile, Taylor again acknowledged that the trip was a vacation for her. R.D. at 30-31; Tr. at 465-66.

In addition to the Bank paying for Respondent's personal travel, Taylor's airfare, hotel, and meals were also charged to the Bank when she accompanied Respondent on trips (including those trips mentioned above). R.D. at 9-10, 25; Am. Answer ¶¶ 56-57 (admitting that Taylor accompanied him on at least five occasions in June and July 2010 and expenses, including airfare, were charged to a Bank corporate card); Am. Answer ¶ 100 (admitting that the Bank paid certain of Taylor's "expenses incurred while accompanying Respondent on his degree-related travel for the Bank's benefit"). Respondent insisted (at various times to various sources) that these and similar charges were legitimate because Taylor acted as his personal assistant (Am. Answer at ¶¶ 105, 109; R.D. at 29) and/or the Bank's policy permitted reimbursement for spouse travel (Am. Answer at ¶¶ 107-109). Taylor was neither a Bank employee nor Respondent's spouse. Moreover, the Bank's employee handbook clearly stated that the Bank would not pay for travel expenses incurred by employees' spouses and was silent on employees' significant others. R.D. at 9-10, 25. The Bank also paid for Taylor's gym membership, which totaled $5,313 between 2009 and 2012. R.D. at 29.

Respondent directed others including Bank employees and Taylor to make personal purchases at his behest using Bank credit cards. His assistant, Barnes, and other employees used Bank credit cards to purchase school books and birthday party supplies for his children, dog food, and veterinary services. R.D. at 43; Tr. 708-710, 726-728. Barnes, who was trained by

Respondent to annotate the credit card statements, would later annotate these and similar purchases on credit card statements as "supplies" for Bank accounting purposes. Tr. 713.

Likewise, Taylor used Bank credit cards at retail stores, including Dillards, Target, and T.J. Maxx, but could not precisely identify the nature of these purchases including what she bought, who she bought if for and why—the kinds of details that would support their business purpose. R.D. at 33. Eventually, Respondent advised Taylor "to get a card with [her] name on it." *Id.* Even though she was never a Bank employee, Taylor was issued her own Bank credit card, which she used to purchase whatever Respondent asked her to buy, and the Bank paid the charges. R.D. at 34.

After the Bank's board began scrutinizing Respondent's credit card purchases in March 2011, Respondent directed one of his assistants, Scarlette Blair ("Blair") to cancel four of his Bank credit cards and to inform the board that she was doing so. Blair did as she was told and in a March 22, 2011 letter advised the Bank board that the cards had been cancelled. However, Blair did not advise the Bank board that a Bank credit card had been issued to Taylor one day earlier. R.D. at 85.

At a minimum, the record establishes that Respondent incurred charges for approximately $26,500 in personal expenses to Bank credit cards during the relevant time period. FDIC Post-Hearing Br. 14-20.[5]

2. Respondent's Cash-Out Practices

Bank policy also permitted employees to obtain a cash advance for approved business travel by submitting a request to the cashier. JT. Ex. 202A at 45. Requests were required to contain appropriate detail regarding the purpose of the expense and had to be approved by the

[5] Although Enforcement Counsel represent that personal charges total of $28,093, we find that the exhibits on which they rely support a total of approximately $26,500.

requesting employee's supervisor. *Id.* After the trip was completed, the employee was required to submit an expense voucher or travel voucher to determine whether the employee was required to return any cash to the Bank or be given additional cash. *Id.*

Respondent made regular cash withdrawals from the Bank between 2008 and February 2011 (FDIC Ex. 429A at 2) but did not comply with the Bank's policy. He withdrew from the Bank a total of $40,950 in 2009, $38,800 in 2010, and $8,000 in the first two months of 2011. FDIC Ex. 429A at 7; FDIC Ex. 64A at 15. In each instance, Respondent directed Bank employees to withdraw a certain amount from the Bank's cash account and fill out a "cash out ticket" documenting the purported use of the cash. R.D. at 41-42, 105. He often did this before leaving on a trip, and when he returned, he did not provide vendor receipts or other documentation reflecting how he had used the cash, and rarely, if ever, returned any cash for re-deposit. R.D. at 38-39, 42.

After the FDIC discovered Respondent's cash-out practices, Respondent disclosed the practice to the Bank's board in March 2011. He stated that it had been his practice to make cash withdrawals before taking trips to the Bank's branches. FDIC Ex. 429A at 8.

The minimal documentation that Respondent supplied does not support his contention that all of his cash-outs were used to support Bank-related travel. For example, Respondent provided some receipts to substantiate the use of the $8,000 in cash withdrawals he made in early 2011. The receipts he offered do not appear to be travel-related or reflect expenses that were for Bank purposes (*e.g.*, he provided a Walmart receipt for dog bowls and dog food). Further, some of the receipts were paid for by a credit card, not cash, and dated after Respondent's last cash withdrawal occurred on February 22, 2011. FDIC Ex. 429A at 12. Nothing in the record shows

that Respondent intended to cease his cash-out practice before regulators brought it to the Bank board's attention. R.D. at 46.

Two of Respondent's assistants with prior banking experience expressed concern with Respondent's practice of withdrawing cash without providing receipts. R.D. at 42, 45; Tr. at 800. One said she was uncomfortable with her role in the practice (R.D. at 45; Tr. at 800, 824), and another described it as "kind of scary" (R.D. at 42; Tr. at 699). Catherine Ghiglieri ("Ghiglieri") was retained by the Bank to conduct the Management Study pursuant to the MOU. R.D. at 20. Before opening her consulting firm in 1999, Ghiglieri had served for seven years as Texas Banking Commissioner and previously worked for 18 years as an examiner and in various management positions at the Office of the Comptroller of the Currency ("OCC"). *Id.* When asked to opine on Respondent's cash-out practices, Ghiglieri stated: "[T]his was an improper banking practice, just to go up to the teller window and get cash ... with no documentation. I mean, in my experience, I would call that theft." R.D. at 38-39; Tr. at 55-56.

On October 12, 2011—only after the Bank determined that his cash-out expenses could not be substantiated—Respondent reimbursed the Bank $75,290 for the cash withdrawals made in 2009 and 2011. *Id.*; FDIC Ex. 429A at 11; FDIC Ex. 64A at 15. Additionally, Respondent had the Bank adjust his 2010 W-2 to reflect the $38,800 taken in cash withdrawals that year as additional income. FDIC Ex. 429A at 8; FDIC Ex. 64A at 15.

3. Respondent's Receipt of the Bank's MasterCard and Visa Dividends

In addition to his improper expense practices, Respondent knowingly kept certain MasterCard and Visa stock off the Bank's book and attempted to appropriate the Bank's MasterCard dividends. R.D. at 46-52. Bank consultant Ghiglieri discovered the unbooked stock in 2011 when she was performing the Management Study. R.D. at 47. Respondent initially told

Ghiglieri that the stock was part of his deferred compensation plan. R.D. at 47; FDIC Ex. 566A at 1-2. Neither the Bank's controller nor its board, however, was aware of any deferred compensation plan.[6] R.D. at 47. Moreover, the MasterCard stock, valued at approximately $3 million, did not appear on the Bank's books or in required reports to regulators. *Id.* at 46-47, 50. Respondent later conceded that there indeed was no plan and denied ever saying that there was. R.D. at 47-49.

Around the same time, Randall James ("James"), a consultant charged with reviewing Respondent's alleged deferred compensation plan, discovered that $5,786.40 in MasterCard dividend checks had been deposited in Respondent's personal account at the Bank. R.D. at 51. At the hearing, Respondent's assistant, Barnes, identified a deposit dated May 28, 2010, which included a MasterCard dividend check of $1,446.60. She testified that several of these checks came in within a week and that she deposited them into Respondent's personal account. R.D. at 47. Respondent denied that he gave the checks to Bank employees for deposit into his personal account and blamed his assistants for doing so by mistake. R.D. at 53. At James's urging, Respondent eventually withdrew approximately $7,500 in dividend proceeds from his personal account and re-deposited them into a Bank-owned account. R.D. at 51.

James also told Respondent that the MasterCard and Visa stock needed to be booked on the Bank's balance sheet and that Respondent needed to inform the Bank's board about what had happened. R.D. at 51. Respondent resisted and blamed the Bank's Chief Financial Officer for failing to book the stock. R.D. 50. Ultimately, however, Respondent disclosed the MasterCard

[6] When asked for a copy of the deferred compensation plan, Respondent was unable to produce anything more than a spreadsheet highlighting an entry titled "Value of Deferred Compensation" for 2011 held by the Bank's holding company. R.D. at 49.

and Visa stock and the MasterCard dividend checks to the Bank's board at a meeting on August 26, 2011. JT. Ex. 25A at 6. At the meeting, Respondent informed the Bank board about certain valuation issues, but failed to disclose that the stock had not been on the Bank's books for over five years. *Id.* He also told the Bank board that his secretary had been depositing the dividend checks in his account without his knowledge for the past several quarters. *Id.* He then placed before the Bank board a resolution "approv[ing] the manner in which CEO Burgess has handled the process to date regarding the MasterCard and Visa stock matter." The resolution passed by a unanimous vote. *Id.*

C. The Bank Board's Response and Respondent's Settlement

Pursuant to the MOU, the Bank hired consultants to perform two studies meant to more closely examine Respondent's practices—the Management Study and the Audit. Ghiglieri's Management Study, presented to the Bank board in August 2011, found that the Bank's existing organization, with every senior person reporting to Respondent, was dysfunctional. R.D. at 21. Although it credited Respondent as a "visionary" responsible for the "lion's share" of the Bank's growth during the recession, the Management Study also found that Respondent dominated the Bank board[7] and management team. *Id.* For example, the Management Study noted that the Bank's board was ineffective in supervising management and allowed Respondent to overwhelm the Bank's board during meetings and proceed with plans without adequate discussion. *Id.* at 22. The Management Study also noted that there was a high turnover rate in critical positions, three senior staff had no prior banking experience, and the bank had inadequate staffing in areas of concern to bank regulators. *Id.* at 21-22. In closing, the Management Study recommended that

[7] At the time of the Management Study the bank's board consisted of four Burgess family members and four outside directors. R.D. at 21.

Respondent be restricted to matters of strategy and be replaced as President with an experienced banker who would be in charge of the day-to-day functions of the Bank.

The Audit, conducted by Padgett, Stratemann & Co. LLP ("PSC"), took place over several stages that included a draft and final report. The draft report determined that $149,000 in expenses were charged to Respondent's Bank credit card for which no receipts were available—meaning PSC could not determine if they were Bank-related. Tr. at 274; FDIC Ex. 64A; and *see* R.D. at 91. As a result, Respondent reimbursed the Bank for these expenses. *Id.* at 92. On April 11, 2012, auditors presented the Bank's board with a list of questionable charges that Respondent would not agree to reimburse. *Id.*; JT. Ex. 151A. At board meetings in February and April 2012, the Bank's board ended up ratifying many of these remaining expenses as Bank expenses notwithstanding the lack of documentation supporting this determination. R.D. at 2-3, 5, 92. As a result of the Bank board's actions, the final Audit report resolved the matter by identifying the questionable charges and debits as having been ratified by the Bank's board as business expenses without supporting documentation. R.D. at 92.

Even after the critical findings in the Management Study and the Audit were reported to the Board, Respondent continued to run the Bank. Meanwhile, following a February 2012 joint FDIC and TDOB examination, the Bank's management component was downgraded even further owing to the Bank's lack of control over Respondent's spending. Amended Notice at ¶ 130; Am. Answer at ¶ 130. Finally, eight months after the Management Study recommended his removal from the Bank's day to day operations, Respondent resigned as the Bank's President on April 2, 2012. He resigned as CEO on June 19, 2012. R.D. at 92-93, 138. He remains a member of the Bank's board and HBI's board. R.D. at 6, 154.

After Respondent resigned his leadership positions, the Bank's board continued to investigate Respondent's expense practice. R.D. at 138. In a July 20, 2012 letter to the Bank's board, the FDIC and TDOB stressed that it was critically important that the board obtain reimbursement for Respondent's non-bank related expenses. JT. Ex. 80A at 3. On December 7, 2012, after the Bank's board was also unable to ascertain a business purpose for the expenses flagged by PSC, the Bank's board allowed Respondent to pay a negotiated sum of $238,650 to the Bank as reimbursement for a portion of the expenses that Respondent agreed were not Bank-related.[8] JT. Ex. 139A at 1.

IV. ANALYSIS

A. A Removal and Prohibition Order is Warranted.

The Board may impose a removal and prohibition order if a preponderance of the evidence shows that Respondent engaged in prohibited conduct (misconduct); the effect of which was to cause the Bank to suffer financial loss or damage, to prejudice or potentially prejudice the Bank's depositors, or to provide financial gain or other benefit to the Respondent (effects); and Respondent acted with personal dishonesty or a willful or continuing disregard for the safety and soundness of the Bank (culpability). 12 U.S.C. § 1818(e)(1); *Dodge v. Comptroller of Currency*, 744 F.3d 148, 1562 (D.C. Cir. 2014) (citing *Proffitt v. FDIC*, 200 F.3d 855, 862 (D.C. Cir. 2000)). The Board finds that Respondent's actions during the relevant period satisfy these three elements and concludes that a removal and prohibition order is warranted.

1. Misconduct

[8] In a January 29, 2013 letter to the FDIC and TDOB, Board member William McKinney defends the settlement figure, noting that it was a "negotiated figure," meant to satisfy the concerns of the FDIC and TDOB, and settled upon in part because Respondent agreed to pay the sum immediately. JT. Ex. 131A at 1.

Misconduct under section 8(e) consists of either (1) a violation of any law or regulation; (2) participation in any unsafe or unsound banking practice; or (3) breach of fiduciary duty. 12 U.S.C. § 1818(e)(1)(A). Respondent's use of Bank funds for personal expenses, without providing timely disclosures and reimbursements, clearly breached his fiduciary duty to the Bank, and constitutes an unsafe and unsound practice. To the extent Respondent defends his conduct by asserting an intent to repay the funds he received from the Bank, his conduct also would violate Regulation O, 12 C.F.R. Part 215, which imposes certain requirements on extensions of credit to Bank insiders that were not met here.

While the Board agrees with the ALJ that Respondent engaged in all three forms of misconduct, the Board concludes that any one of them would be sufficient to support imposition of a removal and prohibition order here.

a. Breach of Fiduciary Duty

As President, CEO, and a director of the Bank, Burgess owed a duty of loyalty to the Bank. *See Seidman v. OTS*, 37 F.3d 911, 933 (3d Cir. 1994). At its most basic, this duty includes an obligation to act in good faith and in the best interests of the Bank. *See id.* "Self-dealing, conflicts of interest, or even divided loyalties are inconsistent with fiduciary responsibilities." *Michael v. FDIC*, 687 F.3d 337, 351 (7th Cir. 2012) (quoting *Howell v. Motorola, Inc.*, 633 F.3d 552, 566 (7th Cir. 2011)). "[W]hen directors and officers place their personal interests above the corporation, or utilize corporate resources for personal gain they have committed a serious breach of their common law fiduciary duty." *Matter of Stoller*, 1992 WL 812724 (FDIC Feb. 18, 1992).

The duty of loyalty also encompasses a duty of candor. The duty of candor requires "corporate fiduciaries [to] disclose all material information relevant to corporate decisions from

which they may derive a personal benefit." *Seidman*, 37 F.3d at 935 n. 34 (quotations omitted). In connection with this duty, a bank fiduciary must disclose "everything he knew relating to the transaction," even "if not asked." *De La Fuente v. FDIC*, 332 F.3d 1208, 1222 (9th Cir. 2003); *see also*, *Michael*, 687 F.3d at 350.

The record in this case establishes that during the relevant period,[9] Respondent engaged in numerous instances of self-dealing by using Bank funds for personal expenses through cash-outs and Bank-issued credit cards. Respondent failed to disclose the nature of these expenses or reimburse the Bank for them until he was confronted about his practices several years after many of the expenses were incurred. R.D. at 81. Respondent also trained his assistants to report his expenses under vague business-related categories (*Id.* at 55, 100), but he provided no documentation to support the business nature of the expenses. *Id.* at 18-19, 54. Respondent's misuse of Bank funds and lack of candor with respect to his expenses constitute breaches of fiduciary duty.

Despite the clear evidence of self-dealing and lack of candor in this case, Respondent argues that the Board should find no breach of fiduciary duty because his misuse of funds was not "material" to the Bank's overall financial stability. R. Exceptions at 14-15. Extrapolating from the principle that a fiduciary must disclose all "material" information to comport with the duty of candor, Respondent contends that only breaches of fiduciary duty "material" to the Bank's financial condition can support imposition of a removal and prohibition order. *Id.* Neither the plain language of the statute nor the case law supports such a conclusion.

[9] Respondent takes exception to the ALJ's reliance on certain evidence pre-dating the relevant period in the Recommended Decision. The Board finds it unnecessary to rely on those sources to support its decision, rendering Respondent's exception moot.

Respondent argues that no breach of fiduciary duty should be recognized here based on a statement in *Gulf Federal Savings & Loan Association of Jefferson Parish v. OTS*[10] limiting "unsafe or unsound practice" to practices that threaten a bank's financial condition. *See Gulf Fed.*, 651 F.2d at 265. This argument is flawed for several reasons. First, *Gulf Federal* addresses only the definition of an "unsafe or unsound practice" and does not address breaches of fiduciary duty. In addition, even if *Gulf Federal* could be construed as restricting the definition of breach of fiduciary duty, the decision recognizes that the "careless control of expenses" is an obvious example of an unsafe or unsound practice. *Id.* at 264 (citing 112 Cong. Rec. 26474 (1966)). *Gulf Federal* thus provides no basis for holding that a breach of fiduciary duty must pose a risk to a bank's overall financial condition to satisfy the "misconduct" element for imposition of a removal and prohibition order.

Respondent also disputes the extent of his use of Bank funds for personal expenses, arguing that there is no definitive total in the record, and that the evidence is insufficient to conclusively determine whether the expenses were personal or Bank-related. R. Exceptions at 40-44. Although the analysis in the Recommended Decision is less than a model of clarity, the Board finds sufficient evidence in the record to support a conclusion that Respondent used Bank credit cards and cash-outs for personal expenses, failed to properly identify the expenses as personal, and only reimbursed the Bank for some of them when the issue came to light several years later. Between 2008 and 2011, Respondent made approximately $130,000 in charges that appeared to be personal on their face. R.D. at 102. Further, Respondent did not reimburse the Bank for personal expenses for two to four years after the charges were incurred, and then only when the charge was brought to Respondent's attention. R.D. at 81.

[10] 651 F.2d 259 (5th Cir. 1981).

While the $130,000 total includes expenses incurred outside the relevant period, the record contains sufficient evidence of expenses within the relevant period to support the Board's conclusion that Respondent breached his fiduciary duty to the Bank. As Enforcement Counsel detailed in their Post-Hearing Brief, the most obvious personal charges during the relevant period, not including cash-outs, totaled approximately $26,500, and included charges for jewelry, vacations, home maintenance, school supplies, gym memberships, pet care, clothing, presents to family members, dependent care, and other clearly personal items. FDIC Post-Hearing Br. at 14-20.

Respondent has either offered no explanation for or admitted the personal nature of many of these expenses, and we do not find his "business" justifications for the others to be credible. For example, Respondent has no explanation for his identification of a $1,600 diamond bracelet for Taylor as a "business development" expense other than it was inadvertent. This explanation is undermined by his failure to promptly correct the mistake or reimburse the Bank until more than two years later. R.D. at 81. In addition, Respondent's argument that his Broadmoor Resort expenses were incurred during trips to meet a customer is undermined by the fact that he has never identified the name of the customer and that he brought his and Taylor's children with him, and he transferred some of the expenses to a Bank affiliate when the charges came under scrutiny.

In addition to these personal expenses, Respondent received cash withdrawals of $38,800 in 2010 and $8,000 in early 2011, for which he provided no business justification and which he ultimately acknowledged as personal in nature by having the Bank adjust his 2010 W-2 to report the cash as "additional income," and reimbursing the Bank for the 2011 withdrawals. *See* FDIC Ex. 429A at 11-12. Although Respondent argues in his exceptions that the 2010 withdrawals

were related to his business travel (R. Exceptions at 46-47), this explanation is not credible. One of Respondent's assistants testified that the amounts of the cash withdrawals were "odd" given the length and location of Respondent's trips (Tr. 800:6), and the evidence shows that many of his trip-related expenses were charged to Bank credit cards and were not paid in cash.

Respondent's actions with respect to the Bank's MasterCard and Visa stock provide further support for finding that Respondent breached his fiduciary duty to the Bank. His actions show an attempt to appropriate the Bank's dividends for his personal use. Although Respondent argues in his exceptions that his receipt of the MasterCard dividends was inadvertent,[11] this claim is not credible in light of the use of the stock to fund what Respondent identified as a "deferred compensation plan"—a "plan" for which there is no documentation and of which the Bank's controller was unaware. R.D. 48-49.[12]

b. Unsafe and Unsound Practices

An unsafe or unsound banking practice is one that is "contrary to generally accepted standards of prudent operation" whose consequences are an "abnormal risk of loss or harm" to a bank. *Michael*, 687 F.3d at 352; *see also Seidman*, 37 F.3d at 932 ("imprudent act" posing an "abnormal risk of financial loss or damage to an institution, its shareholders, or the agencies administering the insurance funds" is an unsafe and unsound practice). Because of their inherent danger, breaches of fiduciary duty also constitute unsafe and unsound practices. *See Hoffman v. FDIC*, 912 F.2d 1172, 1174 (9th Cir. 1990). In particular, self-dealing is considered both a breach of fiduciary duty and an unsafe or unsound practice "because of the conflict it creates

[11] R. Exceptions at 35-36.

[12] Respondent argues in his exceptions that he did not owe a fiduciary duty to regulators, so the ALJ erred in finding a breach of fiduciary based in part on Respondent's lack of candor with regulators. R. Exceptions at 15-16. Because the Board finds more than sufficient evidence to support finding a breach of fiduciary duty based on Respondent's self-dealing and lack of candor with the Bank, we do not rely on the ALJ's findings related to Respondent's lack of candor with regulators.

between the interests of the institution and the interests of an individual." *Id.* (citing *First National Bank of Lamarque v. Smith*, 610 F.2d 1258, 1265 (5th Cir. 1980) and *Independent Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164, 1168 (D.C. Cir. 1979)); *see also Gully v. Nat'l Credit Union Admin. Bd.*, 341 F.3d 155, 165 (2d Cir. 2003) (affirming findings of breach of fiduciary duty and unsafe and unsound practices based on a credit union manager's failure to follow up after becoming aware of her father's misuse of a credit union credit card). Thus, Respondent's misuse of Bank funds for personal purposes and his conduct with respect to the MasterCard and Visa stock constitute unsafe and unsound practices as well as breaches of fiduciary duty. *Kaplan v. Office of Thrift Supervision*, 104 F.3d 417, 421 & n.2 (D.C. Cir. 1997) (The same act may be both an unsafe and unsound practice and a breach of fiduciary duty).

Respondent again relies on *Gulf Federal* to challenge the ALJ's finding that he engaged in unsafe and unsound practices. His reliance is misplaced. As discussed previously, *Gulf Federal* recognizes that the legislative history of the FDI Act expressly identified "careless control of expenses" as a quintessential example of an unsafe or unsound practice. *Gulf Fed.*, 651 F.2d at 264. Thus, the *Gulf Federal* limitation does not apply here.

And even if it did, the Board is not bound by *Gulf Federal*, and it declines to apply the *Gulf Federal* standard here. *See Matter of Adams*, 2014 WL 8735096, at *3-*5 (OCC Sept. 30, 2014) (rejecting the *Gulf Federal* standard and explaining why the Law of the Circuit Doctrine did not bind the OCC to apply it). *Gulf Federal*'s "financial condition" limitation appears nowhere in the statute and is not supported by the legislative history, which states only that an "unsafe or unsound practice" is "contrary to generally accepted standards of prudent operation," and, "if continued," would pose an "abnormal risk of loss or damage to an institution, its shareholders, or the agencies administering the insurance funds." 112 Cong. Rec. 26474 (1966).

This definition does not specify a minimum loss that must be met to render a practice unsafe or unsound. The risk of loss need only be "abnormal." A practice of habitually using Bank funds for personal expenses poses an "abnormal risk of loss" to the Bank of the most obvious sort.[13] Although the loss to a bank from one employee's misuse of bank funds might be small in proportion to the bank's total assets, the Board concludes that it would be inconsistent with Congress's intent to deem only misappropriation large enough to drive a bank to the brink of insolvency as "unsafe or unsound." Such a rule would lead to the absurd result that a bank employee could steal millions from a large bank but only a few thousand from a small bank without being subject to the FDIC's enforcement authority. This is not, and cannot, be the rule.

c. Violation of Regulation O

Although Respondent's use of Bank credit cards was clearly improper and appears akin to outright theft from the Bank, Enforcement Counsel alleged only violation of Regulation O in the Notice. Regulation O sets certain limits and requirements for extensions of credit between financial institutions and their executive officers, directors, principal shareholders, and their related interests. 12 C.F.R. Part 215. Personal charges on a bank-owned credit card may constitute an extension of credit subject to Regulation O if "the amount of outstanding personal charges made to the card when aggregated with all other indebtedness of the insider that qualifies for the credit card exception in section 215.3(b)(5) of Regulation O exceeds $15,000." Federal Reserve Board Interpretive

[13] *See, e.g.*, *Matter of Skabardonis*, 2016 WL 8201948 at *5 (FDIC May 10, 2016) (holding that teller's embezzlement of $119,202 involved violations of law, unsafe and unsound banking practices, and a breach of fiduciary duty); *Matter of Vikre*, 2009 WL 2477750 at *3-*4 (FDIC June 23, 2009) (holding that bank president's conversion of $62,630 of bank funds to her own benefit constituted an unsafe and unsound practice and a breach of fiduciary duty); *Matter of Majka*, 2007 WL 4698593 at *2-*3 (FDIC Oct. 16, 2007) (holding that bank controller's conversion of $72,700 of bank funds to his own use constituted an unsafe and unsound practice and a breach of fiduciary duty); *Matter of Bennett*, 2004 WL 2185944 at *2-*3 (FDIC Aug. 16, 2004) (holding that accounting clerk's embezzlement of more than $70,000 constituted an unsafe and unsound practice).

Letter, 2006 WL 4509657 (May 22, 2006). In addition, an indebtedness of $15,000 or less may be subject to Regulation O if the indebtedness was subject to "prior or individual clearance or approval by the bank," or was incurred under terms that are more favorable than those offered to the general public. 12 C.F.R. § 215.3(b)(5).

We agree with the ALJ's conclusion that Respondent's conduct violated Regulation O. Respondent argues that the personal expenses he charged to Bank credit cards were not "extensions of credit" because they were "less than $15,000 at any one time outstanding." R. Exceptions at 19. While this may technically be true because the Bank regularly paid the balance on Respondent's credit cards, the record shows that Respondent incurred at least $26,500 in personal charges with only limited repayments over the course of several years. We therefore conclude that the record supports a finding that Respondent's total indebtedness to the Bank exceeded the $15,000 threshold.

Moreover, even if there were some question as to whether Respondent had exceeded the $15,000 threshold, there is no evidence that Respondent's personal charges were incurred under terms that were not more favorable than those offered to the general public. "[U]se of a bank-owned credit card by an insider for personal purposes may violate the market terms requirement of Regulation O if the card carries a lower interest rate or permits a longer repayment period than comparable consumer credit offered by the bank." FRB Interpretive Letter, 2006 WL 4509657, at *2. Although the ALJ did not specifically address this issue, the fact that Respondent made a large number of personal charges over the course of several years, and repaid only some of those charges when questioned, supports a conclusion that Respondent's indebtedness was incurred under terms significantly more favorable than those offered to the general public. The failure to impose the prevailing interest rate and other generally applicable terms on Respondent both

brings this indebtedness outside the credit card exception and constitutes a violation of Regulation O. *See* 12 C.F.R. § 215.3(b)(5)(B); 12 C.F.R. § 215.4(a)(1) ("No member bank may extend credit to any insider of the bank ... unless the extension of credit ... [i]s made on substantially the same terms (including interest rates and collateral) as ... those prevailing at the time for comparable transactions by the bank with other persons that are not covered by this part and who are not employed by the bank ....").

2. Effects

To show that misconduct had the required "effect" to impose a removal and prohibition order, Enforcement Counsel must show that (1) the Bank "has suffered or will probably suffer financial loss or other damage;" (2) the interests of the Bank's depositors "have been or could be prejudiced;" or (3) the Respondent "received financial gain or other benefit" from his misconduct. 12 U.S.C. § 1818(e)(1)(B)(i). Because the Board finds that the record clearly establishes the Respondent's financial gain and benefit from his misconduct, we need not consider the other types of effects. Respondent clearly received financial gain from his misconduct by using Bank-owned credit cards for at least $26,500 in personal charges and receiving $46,800 in cash for personal expenses. Even though Respondent later reimbursed some of these funds when confronted, this does not affect the Board's conclusion that Respondent benefited from his misconduct. *See Matter of Michael*, 2010 WL 3849537, at *10 (FDIC Aug. 10, 2010) ("[B]ecause they had use of the funds in the interim, Respondents benefited from their misconduct regardless of whether they ultimately repaid any of the wrongfully obtained loans.") *aff'd, Michael v. FDIC*, 687 F.3d 337 (7th Cir. 2012). The Board therefore rejects Respondent's exception to the ALJ's effects finding. R. Exceptions at 21.

3. Culpability

Culpability, for purposes of section 1818(e), can be shown by personal dishonesty or a "willful or continuing disregard" for the safety and soundness of the financial institution. 12 U.S.C. § 1818(e)(1). "Personal dishonesty" refers to conduct evidencing "a disposition to lie, cheat, defraud, misrepresent, or deceive, ... a lack of straightforwardness and a lack of integrity." *Michael*, 687 F.3d at 351 (quoting *Matter of Watts*, 2002 WL 31259465, at *7 (FDIC Aug. 6, 2002)). "Willful disregard" is "deliberate conduct that exposes 'the bank to abnormal risk of loss or harm contrary to prudent banking practices.'" *Michael*, 687 F.3d at 352 (quoting *De La Fuente*, 332 F.3d at 1223). "Continuing disregard" is "conduct that has been 'voluntarily engaged in over a period of time with heedless indifference to the prospective consequences.'" *Michael*, 687 F.3d at 353 (quoting *Grubb v. FDIC*, 34 F.3d 956, 962 (10th Cir. 1994)). "Although inadvertence alone is not sufficient to establish culpability, recklessness suffices." *Id.*[14]

The Board finds that Respondent's behavior exhibited all three forms of culpability, any one of which would be sufficient. For a relevant period spanning several years, Respondent used Bank-owned credit cards and cash withdrawals for personal expenses. Respondent either made the charges himself, or directed others to do so, and the record supports a conclusion that his use of bank funds was deliberate. Respondent does not contend that he was unaware of the charges or withdrawals, and his assertion that he reasonably believed that they were for business purposes[15] is not credible in light of the nature of the items purchased, the frequency with which Respondent engaged in this behavior, and his pattern of reimbursing the Bank for personal expenses only after being challenged. Respondent's behavior shows a clear lack of integrity, as

[14] The Board disagrees with Respondent's contention that something more than recklessness is required to find culpability, and Respondent cites no authority applying such a standard. *See* R. Exceptions at 22.
[15] R. Exceptions at 24.

well as a willful and continuing disregard for prudent banking practices and the potential consequences to the Bank.

Respondent takes issue with the manner in which the ALJ stated his findings, arguing that it appears that the ALJ found that Respondent was merely negligent because the ALJ stated that Respondent "knew or should have known" several facts. R. Exceptions at 23. Regardless of the ALJ's choice of words, however, the Board finds that the circumstantial evidence overwhelmingly supports a conclusion that Respondent's conduct was intentional and deliberate. In addition to the factors considered above, Respondent's consistent failure to comply with Bank policy with respect to his expenses, and his repeated reporting of personal expenses as business-related, demonstrate more than mere negligence.

Respondent also suggests that no finding can be made regarding Respondent's intent because there is no direct evidence of it. R. Exceptions at 40. As the Board has previously explained, "direct evidence of a fact is not required. Circumstantial evidence is not only sufficient, but also may be more certain, satisfying and persuasive." *Matter of Williams*, 2015 WL 3644010, at *11 (FDIC April 21, 2015) (quoting *Michalic v. Cleveland Tankers, Inc.* 364 U.S. 325, 330 (1960)). In addition, it is well-established that direct evidence is not required to prove knowledge and intent, which may be inferred from contemporaneous conduct that often speaks louder than post-hoc explanations. *United States v. MacPherson*, 424 F.3d 183, 189 (2d Cir. 2005); *see also Matter of Landry*, No. FDIC-95-65e, 1999 WL 440608, at *23 (May 25, 1999).

Respondent's objection to the ALJ's reliance on circumstantial evidence also is particularly unjustified here where the Respondent himself is responsible for much of the lack of direct evidence of his expenses. Respondent failed to produce almost all of the vendor receipts

evidencing the details of his purchases. Respondent's failure to save or produce, or—at a bare minimum—provide adequate description for expenses charged at the time that they were billed over an extended period of time, and in the face of a written Bank policy requiring him to support the business nature of his expenses, speaks volumes about his intent.

B. The CMP Assessment is Appropriate.

CMPs are imposed to "serve as deterrents to violations of laws, rules, regulations and orders of the agencies." *Long v. Board of Governors*, 117 F.3d 1145, 1154 (10th Cir. 1997); *Matter of Donohoo*, 1995 WL 618673, *27 (FDIC July 5, 1995) (CMPs authorized to "deprive the violators of any financial benefit derived as a result of the violations, provide a sufficient degree of punishment, and [establish] an adequate deterrent to the respondents and others from future violations of banking laws and regulations"). The ALJ recommended a second tier CMP of $200,000,[16] and the Board agrees that the evidence in the record supports that penalty.

A second tier CMP may be imposed against a party who (1) commits any violation of law, regulation, or certain orders or written conditions imposed by regulators; (2) recklessly engages in an unsafe or unsound practice in conducting the affairs of the institution; or (3) breaches any fiduciary duty, and whose "violation, practice, or breach ... is part of a pattern of misconduct; causes or is likely to cause more than a minimal loss" to the institution; or "results in pecuniary gain or other benefit" to the party. 12 U.S.C. § 1818(i)(2)(B). A second tier CMP carries a penalty of up to $37,500 for each day the violation continues. 12 U.S.C. § 1818(i)(2)(B); 12 C.F.R. § 509.103.[17]

The Board has already discussed Respondent's breaches of fiduciary duty, unsafe or unsound banking practices, and violations of Regulation O as well as the effects of those acts.

[16] *See* R.D. at 165-166, 174.

[17] The second tier penalty under 12 U.S.C. § 1818(i)(2)(B) has been inflation adjusted to $37,500 per day.

Respondent is subject to a second tier CMP as a result of his breaches of fiduciary duty and violations of Regulation O. Although Respondent's breaches of fiduciary duty and violations of Regulation O standing alone would be sufficient to support the recommended CMP, the Board also finds that Respondent's unsafe and unsound practices were committed recklessly, providing an additional basis to support a second tier CMP.

Recklessness is established by acts committed "in disregard of, and evidencing conscious indifference to a known or obvious risk of a substantial harm." *Cavallari v. OCC*, 57 F.3d 137, 142 (2d Cir. 1995); *see also Simpson v. OTS*, 29 F.3d 1418, 1425 (9th Cir. 1994) (similar definition of "recklessness"). As discussed previously, the Board finds that Respondent's conduct easily satisfies this standard, and indeed goes beyond it—his use of Bank resources for personal purposes was not merely reckless, it was intentional and deliberate.

Because Respondent's misconduct persisted throughout the relevant period, the $200,000 penalty recommended by the ALJ is well within the limit authorized by the statute. The ALJ properly considered the statutory mitigating factors in 12 U.S.C. § 1818(i)(2)(G), which include (1) the size of the Respondent's financial resources and good faith; (2) the gravity of the violation; and (3) the history of previous violations. R.D. at 165-166. The Board agrees with the ALJ's assessment. Respondent's financial resources and the gravity of the violation support a significant CMP, and the record does not support a finding that Respondent acted in good faith. The Board therefore adopts the ALJ's recommendation of a $200,000 CMP.

Respondent has not taken exception to the amount of the CMP, arguing only that there are no grounds for a CMP for the same reasons that there are no grounds for a removal and prohibition order. R. Exceptions at 57. Because the Board finds no merit to Respondent's

challenge to the grounds for the removal and prohibition order, it also rejects Respondent's exception to the CMP.

C. Respondent's Remaining Exceptions

Respondent has challenged virtually every aspect of the ALJ's findings of fact and legal conclusions. The Board has addressed many of Respondent's exceptions in the relevant sections above, and finds that they lack merit or have no impact on the Board's ultimate decision. We also are unpersuaded by Respondent's challenges to the adequacy of the process and the ALJ's authority. These exceptions are discussed in further detail following. Any exceptions not addressed here or previously are denied.

1. Due Process

Respondent argues in his exceptions that he was denied due process of law because (1) he was not given notice of certain charges, (2) he was not given a legal standard by which to determine which expenses were bank-related and which were personal, and (3) the ALJ did not permit him to delve into the possible bias of FDIC personnel. R. Exceptions at 25-34. All of these exceptions are without merit.

a. Notice of Charges

Respondent argues that his right to due process was violated because he received inadequate notice of certain evidence and theories that Enforcement Counsel employed against him. R. Exceptions at 26. Respondent identifies a number of conclusions of law reached by the ALJ of which he alleges he had inadequate notice. *Id.* Only one of these conclusions—Respondent's practice of making cash withdrawals in violation of Bank policy—is central to the Board's decision, and we find that practice was adequately alleged in the Amended Notice. Specifically, the Amended Notice alleges, "During the Relevant Period, Respondent routinely

used the Bank's cash-out tickets, at his discretion, to withdraw Bank cash without maintaining any receipts or providing adequate or truthful support for the business nature of the expenses." Am. Notice at 6, ¶27. This allegation clearly put Respondent on notice that his cash withdrawal practices were part of the alleged misconduct.

None of the other conclusions Respondent identifies are new "charges" against him. All of them concern factual matters developed at the hearing to support the core charges of misconduct alleged in the Amended Notice. Enforcement Counsel is not required to allege in the notice every fact and event that the ALJ may rely on in making his decision. *See Matter of First Bank of Jacksonville*, 1998 WL 363852, at *13 (May 26, 1998), *aff'd, First Bank of Jacksonville v. FDIC*, 180 F.3d 269 (11th Cir. 1999); *Matter of The Stephens Security Bank*, 1991 WL 789326, at *9 (Aug. 9, 1991). We conclude that the Amended Notice was more than adequate to put Respondent on notice of the charges against him.

b. Lack of Standard for Personal Expenses

Respondent also argues that his right to due process was violated because the FDIC never informed him, either by publication or otherwise, of its standard for distinguishing between a personal and a Bank expense. R. Exceptions at 27-29. There is nothing unique or technical about the "standard" the ALJ employed to determine the personal nature of Respondent's expenses. While a published definition might be helpful for ambiguous expenses, no definition is needed for the common sense judgment that jewelry and travel expenses for one's girlfriend, food for one's dog, textbooks for one's child, supplies for one's home, and similar items do not benefit the Bank. A person of ordinary intelligence, and surely one with Respondent's education, experience, and sophistication, is able to make such distinctions.

c. Bias

Respondent takes exception to the ALJ's determination that he did not need to consider Respondent's proffered evidence of "bias" on the part of FDIC examiners because the evidence was not probative.[18] R. Exceptions at 29-32; R.D. at 153-154. At most, Respondent's proffered evidence suggests that the Bank's examination reports might have been overly harsh to the Bank. However, these reports are not needed to prove Respondent's misconduct or any other required element, and the Board does not rely on them. The most compelling evidence instead is the objective evidence of Respondent's expenses, his own admissions, and the testimony of Bank employees and consultants hired by the Bank. This evidence provides substantial support for the Board's Decision and Order. Moreover, contrary to Respondent's assertion that the ALJ "effectively deprived Respondent of a fundamental right to confront those who investigated him and participated in the FDIC's decision to seek his prohibition from banking,"[19] he had the opportunity to question the FDIC employee who investigated Respondent's misconduct at the hearing.

2. The ALJ's Constitutional Authority

Respondent argues that the administrative proceedings violated the U.S. Constitution because the ALJ is an "inferior officer" who was not properly appointed under the Appointments Clause. R. Exceptions at 33-34. The Board disagrees. The D.C. Circuit has held that an FDIC ALJ is not an "inferior officer" subject to the Appointments Clause because the FDIC Board, not the ALJ, makes the final decision in these matters. *Landry v. FDIC,* 204 F.3d 1125, 1134 (D.C. Cir. 2000). While Respondent cites the Tenth Circuit's decision in *Bandimere v. SEC*[20] and the

[18] Respondent admits that the FDIC's Dallas Regional Office worked together with TDOB, but he does not argue that TDOB was biased against him. Tr. 1915–16.
[19] R. Exceptions at 30.
[20] 844 F.3d 1168 (10th Cir. 2016).

D.C. Circuit's rehearing *en banc* in *Raymond J. Lucia Co. v. SEC*[21] as calling *Landry*'s holding into question, both of these cases involve ALJs employed by the U.S. Securities and Exchange Commission, not the FDIC. Given the different context and the evenly split *en banc* decision in *Lucia*, we find no reason to depart from *Landry* at this time. *See Lucia*, 2017 WL 2727019, at *1.

3. Enforcement Counsel's Exceptions

Enforcement Counsel raises three exceptions to the Recommended Decision. First, Enforcement Counsel asks the Board to expressly state, for the sake of clarity, that the Respondent is removed from his offices at the Bank and HBI in addition to the general prohibition language suggested by the ALJ. Because Respondent continues to serve on the board of the Bank, the Board's final order, attached hereto, explicitly directs that Respondent shall be removed from that position and prohibited from further participation in the banking industry. Because the FDIC is not the primary federal regulator for bank holding companies, the order does not state that Respondent is removed from his position at HBI, but the prohibition order effectively reaches the same result. Under 12 U.S.C. § 1818(e)(7)(A), any person subject to a removal or prohibition order "may not, while such order is in effect, continue or commence to hold any office in, or participate in any manner in the conduct of the affairs of," among other entities, a bank holding company. *See* 12 U.S.C. § 1818(e)(7)(A); 12 U.S.C. § 1818(b)(3) (treating bank holding companies as insured banks). Accordingly, the Board grants Enforcement Counsel's first exception in part, and has included language in the Order that explicitly removes Respondent from his position as director of the Bank.

Enforcement Counsel's second exception asks the Board to modify the ALJ's proposed conclusions of law to expressly reference the Respondent's personal dishonesty. Because the

[21] 2017 WL 2727019 (D.C. Cir. June 26, 2017).

Board has independently reviewed the record and has expressly stated its own finding of Respondent's personal dishonesty, we find it unnecessary to grant Enforcement Counsel's exception.

Enforcement Counsel's final exception argues that the ALJ erred in declining to consider Enforcement Counsel's arguments based on Sections 23A and 23B of the Federal Reserve Act because they were not raised in the original or amended Notice of Charges. Enforcement Counsel argues that Respondent's exhibits and the testimony he elicited from witnesses at trial "opened the door" to the Section 23A and 23B charges and that by not objecting at trial Respondent consented to the FDIC's pursuit of these charges.

The proceeding in this matter extended over multiple days with seven volumes of trial transcript and hundreds of exhibits and stipulations. That some of the testimony Respondent offered in his defense on other charges may have been probative on an element of an offense under Section 23A and 23B is not unlikely. However, that does not mean that Respondent "opened the door" or consented to the FDIC's pursuit of these charges. Moreover, Enforcement Counsel has not given any reason why these charges were not included in the Amended Notice. Accordingly, the Board denies this exception.

V. CONCLUSION

After a thorough review of the record in this proceeding, and for the reasons set forth previously, the Board finds that an Order of Removal and Prohibition and Assessment of a CMP is warranted against Respondent. The record plainly shows that Respondent, over a period of years, exploited his leadership and management positions and put the Bank at risk by engaging in deliberate improper practices for his own benefit. In light of Respondent's repeated transgressions and serious breaches of his fiduciary duties, the Board is persuaded that

Respondent should be removed from the Bank's board and permanently barred from the banking industry. Moreover, in light of the entire record, the Board finds that the CMPs imposed are appropriate and consistent with the statute's purpose.

ORDER TO REMOVE AND PROHIBIT

The Board of the FDIC, having considered the entire record of this proceeding and finding that Respondent Cornelius Campbell Burgess, formerly the Chief Executive Officer and President of Herring Bank, Amarillo, Texas ("Bank"), and currently a member of the Board of Directors of the Bank and its holding company, Herring Bancorp Inc. ("HBI"), engaged in violations of federal law, unsafe or unsound banking practices, and breaches of his fiduciary duties resulting in loss to the bank and a personal benefit to him, and that his actions involved willful and continuing disregard for the safety and soundness of the Bank, hereby ORDERS and DECREES that:

1. Cornelius Campbell Burgess is hereby removed from the Bank.

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

3. Cornelius Campbell Burgess shall not solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent or authorization with respect to any voting rights in any insured depository institution, or any other institution, credit union, bank or agency enumerated in section 8(e)(7)(A) of the FDI Act, 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D).

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

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

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

ORDER TO PAY CIVIL MONEY PENALTY

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

1. A civil money penalty is assessed against Cornelius Campbell Burgess in the amount of $200,000 pursuant to 12 U.S.C. § 1818(i).

2. This ORDER shall be effective and the penalty shall be final and payable thirty (30) days from the date of its issuance.

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

IT IS FURTHER ORDERED that copies of this Decision and Orders shall be served on Counsel for Respondent Cornelius Campbell Burgess, Enforcement Counsel, the ALJ, and the Commissioner of the Texas Department of Banking.

By direction of the Board of Directors.

Dated at Washington, D.C. this 7th day of August, 2017.

/s/
Robert E. Feldman
Executive Secretary

(SEAL)

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