FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

In the Matter of	)	
STEVEN D. HAYNES, individually, and as an institution-affiliated party of	)	DECISION AND ORDER TO PROHIBIT FROM FURTHER PARTICIPATION AND ASSESSMENT OF CIVIL MONEY PENALTIES
SILVER STATE BANK HENDERSON, NEVADA	)	FDIC-11-370e
	)	FDIC-11-371k
(In Receivership)	)	

I. INTRODUCTION

This matter is before the Board of Directors ("Board") of the Federal Deposit Insurance Corporation ("FDIC") following the issuance on February 18, 2014, of a Recommended Decision ("Recommended Decision" or "R.D.") by Administrative Law Judge C. Richard Miserendino ("ALJ"). The ALJ recommended that the respondent, Steven D. Haynes ("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 ALJ's Recommended Decision, to the extent it is consistent with this Decision, and issues against Respondent an Order of Prohibition and Order to Pay a CMP in the amount of $75,000.

II. PROCEDURAL HISTORY

The FDIC initiated this action on August 3, 2011, when it issued against Respondent, individually, and as an institution-affiliated party of Silver State Bank, Henderson, Nevada (the

("Bank")[1], a Notice of Intention to Remove and Prohibit from Further Participation, Notice of Assessment of Civil Money Penalties, Findings of Fact and Conclusions of Law, Order to Pay, and Notice of Hearing. The FDIC issued an Amended Notice of Intention to Remove and Prohibit from Further Participation, Notice of Assessment of Civil Money Penalties, Findings of Fact and Conclusions of Law, Order to Pay, and Notice of Hearing on October 22, 2012 ("Amended Notice"). During the pertinent time period, Respondent was a senior vice president and business banking manager of the Bank. Amended Notice ¶ 5; R.D. at 3.[2] The Amended Notice charged Respondent with engaging and participating in unsafe and unsound banking practices and breaches of fiduciary duty. The Amended Notice also alleged that Respondent acted recklessly, demonstrated willful or continuing disregard for the safety and soundness of the Bank, and obtained financial gain from his unsafe and unsound practices and breaches of duty. The Amended Notice included an Order to Pay a CMP in the amount of $75,000. Amended Notice ¶¶ 9-86; R.D. at 1-2.

Among other things, the Amended Notice alleged that Respondent violated the Bank's lending policies by approving loans with deficient loan applications that did not contain sufficient information to permit a meaningful assessment of the proposed borrowers' creditworthiness, failing to verify or document the borrowers' financial condition, and misrepresenting the loans and the existence of a takeout mortgage to the Bank's Senior Loan Committee. Amended Notice ¶¶ 32-75. Such conduct, as alleged in the Amended Notice, was reckless and constituted unsafe and unsound banking practices and breaches of Respondent's

[1] On September 5, 2008, the State of Nevada closed the Bank and appointed the FDIC as receiver.

[2] Citations to the factual findings of the R.D. encompass the record citations on the cited pages of that decision, and those record citations accordingly are not repeated here. The transcript of the January 2013 hearing before the ALJ is cited as "Tr." The joint exhibits at that hearing are cited as "Jt. Ex.," the FDIC's exhibits are cited as "FDIC Ex.," and Respondent's exhibits are cited as "Resp. Ex." Respondent's exceptions to the ALJ's findings are cited as "Exceptions."

fiduciary duties. *Id.* ¶¶ 75, 78-79, 83-84. The Amended Notice also charged that Respondent acted with willful or continuing disregard for the safety and soundness of the Bank, and that he also benefited personally from his conduct by and obtaining Bank-paid commissions on the loans in the approximate amount of $11,000. Amended Notice ¶¶ 80-82.

On November 2, 2012, Respondent filed a timely Answer to the Amended Notice, denying the material allegations therein. R.D. at 1. Following extensive discovery, a five-day hearing on the merits of the charges was held in Las Vegas, Nevada, in January 2013. At the hearing, the ALJ received sworn testimony from Respondent as well as from seven witnesses called by FDIC Enforcement Counsel ("Enforcement Counsel") and two witnesses called by Respondent.

On February 18, 2014, the ALJ issued a 75-page Recommended Decision recommending that Respondent be prohibited from participation in the banking industry and be ordered to pay a CMP as assessed in the Amended Notice. Respondent timely filed exceptions, and FDIC Enforcement Counsel notified the Board that it did not intend to file exceptions. On April 16, 2014, pursuant to 12 C.F.R. § 308.40(c)(2), the FDIC Assistant Executive Secretary transmitted the record in the case to the Board for final decision.

III. FACTUAL OVERVIEW

Because the ALJ provided a lengthy, detailed, and well-reasoned opinion with extensive citations to the record in support of his conclusions, the Board finds it unnecessary to reiterate in full the contents of the Recommended Decision. The following discussion, however, provides a brief overview highlighting certain aspects of Respondent's misconduct as alleged in the Amended Notice, corroborated by supporting testimonial and documentary evidence, and recounted in the Facts section of the Recommended Decision.

A. Lending Practices

FDIC-insured banks are required to establish lending policies consistent with safe and sound banking practices and prudent underwriting standards. 12 U.S.C. § 1828(o); 12 C.F.R. § 365.1 *et seq.* The banking agencies have adopted the Interagency Guidelines for Safety and Soundness, requiring insured banks to establish and maintain loan documentation practices that, *inter alia*, "assess the ability of the borrower to repay the indebtedness in a timely manner" and "[e]nsure that any claim against a borrower is legally enforceable." 12 C.F.R. Part 364, App. A. Those Guidelines also require banks to adopt underwriting practices that, *inter alia*, "Provide for consideration, prior to credit commitment, of the borrower's overall financial condition and resources, the financial responsibility of any guarantor, the nature and value of any underlying collateral, and the borrower's character and willingness to repay as agreed." *Id.*

In addition, the federal banking agencies have adopted the Interagency Guidelines for Real Estate Lending Policies requiring banks to "adopt and maintain a written policy that establishes appropriate limits and standards for all extensions of credit that are secured by liens on or interests in real estate or made for the purpose of financing the construction of a building or other improvements." 12 C.F.R. Part 365, App. A. Under the Guidelines, banks' lending policies must set forth underwriting standards that take account of the following key factors:

> Prudently underwritten real estate loans should reflect all relevant credit factors, including:
>
> - The capacity of the borrower, or income from the underlying property, to adequately service the debt.
> - The value of the mortgaged property.
> - The overall creditworthiness of the borrower.
> - The level of equity invested in the property.
> - Any secondary sources of repayment.
> - Any additional collateral or credit enhancements (such as guarantees, mortgage insurance or takeout commitments).

Id. For construction loans, the Guidelines specify the following additional considerations that lending policies must address:

- Requirements for feasibility studies and sensitivity and risk analyses (e.g., sensitivity of income projections to changes in economic variables such as interest rates, vacancy rates, or operating expenses).
- Minimum requirements for initial investment and maintenance of hard equity by the borrower (e.g., cash or unencumbered investment in the underlying property).
- Minimum standards for net worth, cash flow, and debt service coverage of the borrower or underlying property.
- Standards for the acceptability of and limits on non-amortizing loans.
- Standards for the acceptability of and limits on the use of interest reserves.
- Pre-leasing and pre-sale requirements for income-producing property.
- Pre-sale and minimum unit release requirements for non-income-producing property loans.
- Limits on partial recourse or nonrecourse loans and requirements for guarantor support.
- Requirements for takeout commitments.
- Minimum covenants for loan agreements.

Id.

The Bank operated 17 full-service branches in Nevada and Arizona and had assets of $1.96 billion at the time of its closure in 2008. The Bank maintained a construction loan portfolio. Pursuant to the above guidelines, the Bank's board of directors ("Bank's Board") adopted a Loan Manual setting forth the Bank's lending policies. Any changes to the Bank's lending policies had to be approved by the Bank's Board. R.D. at 4.[3]

Pursuant to procedures in the Loan Manual, the Bank's loan officers were permitted to make loans within lending limits without the Bank's Board approval. Loan officers approving

[3] Respondent takes exception (Exception 4) to the ALJ's findings regarding the Loan Manual, stating that, at times, loan policies were implemented by the Bank before they were added to the Loan Manual. Exceptions at 12-13. Respondent's exception is immaterial; nothing in the record indicates that the Bank had implemented a policy of approving the type of stated-income construction loans at issue here and had simply neglected to add it to the Loan Manual.

loans in that scenario were responsible for obtaining all documentation needed to evaluate the loan, along with monitoring the loan's performance and complying with regulatory mandates. R.D. at 5. As a prerequisite to the approval of any loan, loan officers were required to find that (1) the borrower "has a strong potential for developing a long-term, desirable relationship with the bank," (2) the loan "has a sound, non-speculative purpose," (3) the borrower "has sufficient financial capacity to repay the indebtedness in full from the primary source of repayment, and a secondary source of repayment exists that would provide repayment should the primary source fail," (4) the borrower "has an established record of integrity and a good credit history," (5) the loan "complies with Silver State Bank policies and follows established guidelines," and (6) the loan "complies with Silver State Bank credit approval and review process." Jt. Ex. 239-004-05. Loan officers were required to submit the following information to the Bank's Senior Credit Officer: (a) the Loan Approval Application, (b) an Affiliated Debt Schedule (where applicable), (c) a Loan Memorandum, (d) a Guideline Exception Form documenting any relevant exceptions to the lending policies, (e) borrower financial statements, and (f) any other relevant information. R.D. at 8-9. Loan officers were also required to submit a Credit Authorization report (known as the "B-2") upon approval, amendment, extension, renewal, or report of a loan; the B-2 forms discussed the parameters of the credit and provided analysis and comments, and the pertinent documents were attached. R.D. at 8.

As to loans for the construction of residential homes in particular, the Bank's internal policies required that borrowers and guarantors for such loans have sufficient net worth and cash flow to support the loan, and further required annual submissions of financial statements and tax returns. R.D. at 7. The Bank also required "takeout" commitments (prearranged permanent financing to repay the lender upon completion of the house) for construction of residences. *Id.*

Loan officers were charged with keeping the Bank's Credit Administration department fully informed about loans; relevant information included financial statements, tax returns, credit reports, accounts receivable and accounts payable, property appraisals, takeout commitment letters, and any other information pertinent to the loan's performance and repayment potential. *Id.* Loan officers were responsible for assigning loans appropriate grades (E=Excellent, G=Good, T=Satisfactory, A=Acceptable, and W=Watch), signifying the adequacy of the reserve for that loan. *Id.*

The Bank's Senior Loan Committee was responsible for overseeing large loans. All loans exceeding $100,000 were reported to the Committee, and such loans were divided into "for reporting" and "for approval" categories: loans within the loan officer's lending limit were "for reporting," and loans exceeding that limit had to be approved by a majority vote of the Committee. R.D. at 9.

Respondent was hired as a vice president in 2001. At all relevant times, he was a senior vice president and business banking manager. R.D. at 10. He reported to Corey Johnson ("Johnson"), the Bank's President, Chief Executive Officer ("CEO"), and Senior Credit Officer. Respondent was authorized to approve loans up to $750,000 if secured and $200,000 if unsecured. *Id.* at 11.

B. Stated-Income Construction Loans

In early 2006, Humarock Mortgage, a mortgage broker, began encouraging various borrowers to apply for construction loans on a stated-income basis, meaning that the borrower's income and assets would not be verified by the lender. R.D. at 12.[4] Humarock told the

[4] Respondent takes exception (Exceptions 24 and 25) to the ALJ's findings regarding Humarock's loan origination practices, noting that only two of the borrowers testified. Exceptions at 75. The ALJ acted within his discretion when he drew conclusions based on a limited subset of the borrowers rather than requiring cumulative testimony from dozens of witnesses, particularly on a point that is tangential to the

borrowers that they would not have to commit any of their personal funds, other than a $1,000 payment to initiate the process. *Id.*; Tr. at 777; Resp. Ex. 126.[5] Humarock contacted Greystone Financial, a residential mortgage lender, about financing for stated-income construction loans, and Greystone contacted Respondent at the Bank, informing him that Greystone was aware of borrowers who had already been approved for stated-income residential mortgages (not construction loans), and suggesting that the Bank could use the information already compiled for the residential mortgages to qualify the borrowers for construction loans. *Id.* at 12-13. Greystone suggested that it could provide a buyback guarantee under which Greystone would purchase the Bank's note if the borrowers did not receive permanent financing within 12 months, and it stated that any contractor profits would be subordinated to the Bank. *Id.* at 13. At that time, the Bank had not previously made stated-income loans of any kind, and the Bank's lending policies did not address those loans or provide loan officers guidance on how to underwrite them. *Id.* at 14.

Greystone sent 30 stated-income construction loan packets to Respondent for underwriting. R.D. at 19.[6] Neither Respondent nor anyone else at the Bank contacted the borrowers directly prior to approval of the loans. *Id.* The packets contained unsigned Uniform Residential Loan Applications, and signed, but blank, Bank loan applications. *Id.* at 19-20 & n.18. The packets also contained verifications of the borrowers' employment, without salary verification (four of the packets contained no salary information at all); property descriptions,

---

primary factual findings regarding Respondent's conduct. Respondent also complains that the record does not establish that Humarock sought out borrowers, Exceptions at 75, but the record shows that individuals with knowledge of Humarock's business referred potential borrowers to Humarock, supporting the ALJ's inference. Tr. at 768-70, 808-10.

[5] In one of the credit memoranda, Respondent indicated that the borrowers would make a down payment of $43,408, but the borrowers did not make any such payment. Tr. at 621, 625; Jt. Ex. 82-004.

[6] This matter addresses 18 of those 30 loans; the borrowers on those 18 loans ultimately defaulted. R.D. at 16 n.14.

title reports; credit reports; and Greystone's conditional pre-approvals of takeout mortgages. *Id.* at 20. The packets also included "as completed" value appraisals of the houses, an analysis of the likely construction costs, and information on the builders. *Id.*

For 10 of the 18 loans at issue, the packets from Greystone included "Mortgage Loan Commitments" ("MLCs") stating that the borrowers' loan applications had been approved with certain conditions, though the Commitments did not clearly state whether Greystone or the ultimate lender was approving the applications. R.D. at 21, 27 n.29.[7] The MLCs expired 12 months from issuance, meaning that, if the house was not completed and the specified conditions met by that point, the commitment was void. *Id.* at 27. Those conditions included "Updated borrower credit package with no significant changes in financial situation," indicating that Greystone was not bound by the commitment if the borrower's credit worsened before construction was complete, and "FINAL Underwriter Approval within Investor Guidelines," indicating that the lender making the financing commitments reserved the right to withdraw the commitments if its underwriters did not support the financing. *Id.* at 28; *see also id.* at 49 (citing Greystone witness's explanation that, if the borrower's qualifications did not meet investors' requirements at the time Greystone was trying to sell the loan on the secondary market, Greystone would not originate the loan). Respondent did not understand all of the conditions in the MLCs. *Id.* Eight of the packets did not contain MLCs at all. *Id.* at 27 n.29.

For 13 of the 18 loans, the packets included an "Addendum to Mortgage Loan Commitment," stating that the Bank had the right to demand that Greystone purchase the loan after 12 months. R.D. at 22; Jt. Ex. 252; Tr. at 580-81. Respondent did not obtain an updated

[7] The Bank's outside counsel raised a concern with Respondent about whether Greystone could enter into the Commitments, as Greystone would not be the ultimate lender on the loans, but Respondent did not follow up with Greystone on that issue. R.D. at 21-22.

financial statement for Greystone, however, nor did he obtain any other information verifying that Greystone was likely to have sufficient funds to make those purchases. R.D. at 30.

To underwrite the loans, Respondent relied primarily on sources of repayment other than the borrowers themselves, namely the takeout commitment, the buyback agreement (i.e., the Addendum), and the value of the collateral. R.D. at 22-23. As to the collateral, Respondent stated in internal memoranda provided to the Committee that, for the 18 loans at issue, the loan-to-value ("LTV") ratio was 80 percent (above the 75 percent maximum permitted by the Bank's lending policies for residential construction loans), but did not analyze the loan-to-cost ("LTC") ratio for most of those loans (and erred in one of the two where he made that computation). The LTC ratios ranged from 89.75 percent to 100 percent. *Id.* at 24-25. (The Bank's loan policy did not specify an LTC ratio limit.) He reviewed the borrowers' credit reports but did not personally verify the borrowers' employment information, income, or cash flow. *Id.* at 23.

Respondent submitted B-2 packages to the Senior Loan Committee for the 18 loans at issue (loans were submitted to the Committee for "reporting" even if approved by the loan officer). R.D. at 34. In those packages, Respondent graded all of those loans "A," deeming the potential credit risk to the Bank acceptable, and did not indicate any exceptions on the Guideline Exception Forms, even though the loans' underwriting deviated from the Bank's lending policies in several respects. R.D. at 26. In particular, Bank policy required that construction loans "be supported by acceptable, firm takeout commitments for term financing," but the packages submitted to the Committee did not contain or reflect any such "firm" commitments, as noted above. *Id.* at 26 n.27.[8] Respondent represented in each package that Greystone had approved a

[8] Respondent takes exception (Exception 51) to this finding, but does not dispute the significance of obtaining acceptable, firm takeout commitments; he simply argues that the Bank was aware that borrowers' repayment potential was not being evaluated. Exceptions at 137. That is far from clear from

"permanent" loan for the borrower but did not discuss the conditions in the MLC. *Id.* at 27; *see, e.g.*, Jt. Ex. 82-001.[9] Bank policy also required three years of borrower financial information for any new loan, but Respondent did not include that information in the packages submitted to the Committee. *Id.* at 27 n.28. Respondent also did not indicate that the LTV ratio for the loans exceeded the Bank's maximum. *Id.* at 24, 26. At no point did Respondent inform the Committee that the loans were underwritten as stated-income loans, or that he had not verified the borrowers' financial information. *Id.* at 27; Tr. at 607-09.

Respondent stated to the Committee, in the packages submitted with the loans in 2006, that Greystone had a $50 million warehouse line of credit ("WLOC") with U.S. Bank that it would use to buy back the loans. R.D. at 30. The funds actually available under the WLOC by late 2006 were between $7 million and $14 million, however. *Id.* at 31. Respondent later stated to the Committee that Greystone had $15 million in available funds in the WLOC, but at that time Greystone in fact had less than $7 million. *Id.* at 31-32. At any rate, the WLOC was not available as a source of buyback funds; the purpose of the WLOC was temporary funding of mortgages that Greystone originated, pending the sale of those mortgages on the secondary market. *Id.* at 29-30. Respondent did not obtain any information from Greystone or U.S. Bank about restrictions on the use of the WLOC. *Id.* at 29. Respondent did not provide Greystone financial statements to the Committee, and his statements to the Committee about Greystone's financial condition were out of date when made. *Id.* at 32-34. Respondent did not conduct an independent analysis of Greystone's finances to determine whether Greystone had sufficient

---

the record, and at any rate it is not relevant here. The ALJ's finding dealt with Respondent's failure to obtain adequate takeout commitments, not with the evaluation of borrowers' repayment potential.

[9] Respondent takes exception (Exception 53) to what Respondent deems a conclusion that "in order for a takeout to be permanent, it cannot be 'conditional,'" Exceptions at 138, but that conclusion does not appear in the Recommended Decision, and in any event the Board does not so find. Rather, the ALJ concluded, and the Board agrees, that the conditions in the MLCs made those commitments less than "acceptable" and "firm."

liquid assets to repay the loans. *Id.* at 27-28; Tr. at 73-74, 592-94. Had he done so, he would have concluded that it did not: as of March 2006 Greystone had $209,000 in liquid assets, and as of November 2006, Greystone had $201,000 in liquid assets, not enough to buy back even one loan. R.D. at 30 n.33, 31 n.35.[10]

The Committee relied on the information submitted by Respondent in connection with the approval of the loans. None of the loans were rejected. R.D. at 36. The Committee recognized that the borrowers did not commit personal funds, and it allowed the loans to proceed based on the MLCs and the buyback commitments. *Id.* at 36-37. When Respondent submitted 13 stated-income construction loans in a single month (February 2007), the Committee began requesting more information about Greystone's financial condition and about the construction plans. *Id.* at 37-39.[11] Tom Russell ("Russell"), the Chair of the Committee, informed Respondent that, going forward, all Utah stated-income construction loans would have to be submitted to the Committee for approval, and that the Committee wanted the borrowers to put more cash into the loans. *Id.* at 39.

Greystone did not provide permanent financing for any of the loans, nor did it buy them back. R.D. at 39. Russell inquired with Respondent about demanding that Greystone purchase the loans under the MLC. Respondent suggested instead that the Bank try to work out the loans,

---

[10] For the loans approved after February 21, 2007, Respondent advised the Committee that Greystone had a "net profit" of $591,325 as of November 30, 2006. *See, e.g.*, Jt. Ex. 100-005. The basis for this assertion is unclear; the Greystone financials as of that date indicate liquid assets of $200,672. Jt. Ex. 312. At best, Respondent's assertions about Greystone's "net profit" were misleading. As of April 22, 2007, Respondent began including references to Greystone's December 2006 financials in his credit approval memoranda, failing to mention that Greystone's net income in the first quarter of 2007 was $27,030. FDIC Ex. 209-014.

[11] Respondent disputes whether the increase began in January or February 2007, Exceptions at 179-80, but the precise date is not material.

and Russell indicated that the Committee would not be receptive. *Id.* at 39. The loans ultimately defaulted, and the Bank closed in 2008. *Id.* at 4, 40.

IV. ANALYSIS

A. A Prohibition is Warranted.

As noted in the Recommended Decision, Enforcement Counsel -- to carry their burden in a prohibition action -- must show 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). Enforcement Counsel must also demonstrate that such misconduct evidences personal dishonesty or a willful or continuing disregard for the safety and soundness of the Bank (culpability). 12 U.S.C. § 1818(e)(1); R.D. at 21; *see In the Matter of Ramon M. Candelaria*, 1997 WL 211341, at *3 (FDIC), *aff'd. mem., Candelaria v. FDIC*, 134 F. 3d 382 (10th Cir. 1998) (unpublished decision); *In the Matter of Leuthe*, 1998 WL 438323, at *11 (FDIC), *aff'd mem.*, 194 F. 3d 174 (D.C. Cir.1999). As discussed below, the Board finds that the activities of Respondent during the pertinent time period satisfy the three standards necessary to impose a prohibition.

Misconduct

Misconduct under section 8(e) encompasses participation in activity deemed to be an unsafe and unsound banking practice or in breach of a party's fiduciary duty. 12 U.S.C. § 1818(e)(1)(A). The record clearly establishes Respondent's unsafe and unsound practices and breaches of fiduciary duty.

1. Unsafe and Unsound Practices

An unsafe and 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 v. FDIC*, 687 F.3d 337, 352 (7th Cir. 2012); *see also Seidman v. OTS*, 37 F.3d 911, 932 (3d Cir. 1994) ("imprudent act" posing an "abnormal risk of financial loss or damage to an institution, its shareholders, or the agencies administering the insurance funds" is unsafe and unsound practice). Some courts have further required that an unsafe and unsound banking practice have a "reasonably direct effect on an institution's financial soundness," *see, e.g.*, *Frontier State Bank v. FDIC*, 702 F.3d 588, 604 (10th Cir. 2012); *De La Fuente II v. FDIC*, 332 F.3d 1208, 1222 (9th Cir. 2003), while others have declined to impose that requirement. *See, e.g.*, *Greene County Bank v. FDIC*, 92 F.3d 633, 636 (8th Cir. 1996); *Doolittle v. NCUA*, 992 F.2d 1531, 1538 (11th Cir. 1993). In this case, the facts support a finding of unsafe and unsound conduct by either standard.

a. Failure to Verify Borrower's Repayment Ability

Approving loans without determining the borrower's ability to repay constitutes an unsafe and unsound practice. *In re Ronald J. Grubb*, FDIC-88-282k & 89-111e, 1992 WL 813163, *29 (FDIC Aug. 25, 1992); *see also First State Bank of Wayne County v. FDIC*, 770 F.2d 81, 82 (6th Cir. 1985) ("extending unsecured credit without first obtaining adequate financial information" and "extending secured credit without obtaining complete supporting documentation" constitutes unsafe and unsound practice); *Gulf Fed. Sav. & Loan Ass'n v. FHLBB*, 651 F.2d 259, 264 (5th Cir. 1981) (legislative history of section 1818(e) indicates that "disregarding a borrower's ability to repay" is an unsafe and unsound practice); *In re William Marvin Clark*, FDIC-89-199e, 1991 WL 757819, *2 (FDIC Jan. 19, 1991) (failure to follow

"standard underwriting practices regarding the determination of a borrower's ability to pay" constituted unsafe and unsound practice);[12] *In re *** Bank of *** County*, FDIC-83-132b, 1984 WL 273927 (FDIC June 18, 1984) (unsecured loans without adequate financial information on obligors and secured loans without complete supporting documentation is an unsafe and unsound practice).

Respondent's failure to obtain accurate and updated financial information for the borrowers on the 18 loans at issue constitutes an unsafe and unsound banking practice. Respondent did not contact any of the borrowers directly. Instead, he relied on the information submitted to him by Greystone, which contained unsigned Uniform Residential Loan Applications ("URLAs") and blank, signed Bank loan applications. That information had, in turn, been obtained by Humarock. R.D. at 44. Because Respondent had never done business with Greystone and Humarock, he was not in a position to treat information gathered by them as reliable. Therefore, his reliance on that information was an unsafe and unsound practice. *Clark*, 1991 WL 757819, *10 (failure to make "creditworthiness judgments as to individual borrowers" unsafe and unsound practice).

In fact, the information obtained was not adequate on its face to permit an evaluation of the borrowers' creditworthiness, as the URLAs were unsigned, and four of them did not contain any salary information for the borrowers at all. Respondent apparently took no steps to verify any of the information in the URLAs: he did not request pay stubs, tax returns, current mortgage

[12] Respondent argues that *Clark* stands for the proposition that removal is not appropriate absent "personal dishonesty, fraud, or malevolence," Exceptions at 231-32, but Respondent misreads that case. The Bank's Board did in fact remove the Respondent there, and simply indicated that he could seek the consent of the FDIC to waive the removal under section 1818(e)(7)(B). 1991 WL 757819, *11.

statements or anything else. R.D. at 45 n.40.[13] His only evaluation of borrowers' creditworthiness was a review of their credit reports. *Id.* As it turned out, some of the borrower information submitted was not accurate.[14] The Respondent's failure to verify borrowers' financial information led to the extension of credit to borrowers with minimal ability to repay, causing an abnormal risk of loss to the Bank. Similarly, Respondent's failure to verify the information in the loan packets submitted by Greystone constitutes an unsafe and unsound banking practice. *See In the Matter of Doolin Security Sav. Bank*, 1996 WL 33414779 (OTS Apr. 19, 1996) (reliance on another entity for underwriting of loans is unsafe and unsound).[15]

Respondent contends that he did not approve the loans in question; rather, Respondent testified, he merely "recommended" them for approval because he did not have authority to approve them independently. Tr. at 31, 56-57. The ALJ declined to credit his testimony on this point, R.D. at 34-36, and the Board finds no basis for setting aside the ALJ's conclusions. It is undisputed that all of the loans were within Respondent's lending authority, and the Committee

---

[13] There appears to have been an internal disagreement at the Bank regarding whether borrower tax returns were required for these loans. *See* Jt. Ex. 299; Tr. at 365-70. That dispute is largely immaterial, however, as Respondent took no steps to obtain any adequate form of verification of borrowers' creditworthiness or ability to repay the loans.

[14] Respondent takes exception (Exception 56) to the ALJ's conclusion, R.D. at 44, 46 & n.41, that some of the borrower information submitted was inaccurate. Exceptions at 211-29. Respondent does not appear to dispute the falsity of the information, however, merely that Respondent was unaware of the falsity. This misses the point. The FDIC did not allege that Respondent knew that any of the borrowers were misrepresenting their creditworthiness, but rather that Respondent did not take any steps to verify borrowers' financial information. Nor, contrary to Respondent's contention, was it necessary to present, in cumulative fashion, each and every falsity in the borrowers' applications. The evidence presented showed the types of inaccurate representations that Respondent passed along to the Committee due to the lack of verification.

[15] Respondent asserts that the lack of verification was approved by Russell on behalf of the Committee, Exceptions at 29-30, 124-26, but Russell testified that he understood Respondent to have checked on Greystone's verification process. Tr. at 313. Respondent also argues that Russell became aware at some point that Respondent had not obtained tax returns for the borrowers on these loans, Exceptions at 30-35, 181-83, but, again, tax returns are only a part of the verification picture. *See supra* at 8, 15 n.15. Moreover, whether Russell had knowledge of Respondent's conduct is immaterial because alleged failings of other Bank officers, even if proven to be true, would not excuse Respondent's conduct.

agenda reflects that the loans were submitted for "reporting," not for "approval," which is consistent with approval of loans by a loan officer.[16] Russell testified that he reviewed and approved the information to be submitted to the Committee, not the loans themselves, *see* Tr. at 218-60, 282-86. Beginning in April 2007, Russell directed Respondent to submit stated-income construction loans to the Committee for approval—an indication that this had not previously been Respondent's practice. Jt. Ex. 189. At any rate, the parties have stipulated that Respondent "approved the loans," Jt. Ex. 311 ¶ 23, so it also is now too late for Respondent to argue that he did not do so.[17]

Respondent also claims that the Committee conducted a thorough independent review of loans he approved, Exceptions at 17-24, 34-35, but the record does not support that contention. Rather, it reflects that Russell reviewed loans that lending officers had approved; the review was conducted in order to verify that the amount of a loan was within the officers' lending authority. Tr. at 105. No independent review of the loan documentation was made. *Id.* at 401-03. Russell also verified that the underwriting of the loan appeared to comply with Bank policy, *id.* at 288-89, 351-53, but relied on the information submitted by Respondent to conduct that verification. *Id.* at 403. Nor is it true, as Respondent contends, *see* Exceptions at 20-21, that when the Senior Loan Committee initialed the loan package, that signified full and independent approval. Russell explained that the Committee initialed all loan packages that came before them, whether "For Reporting" or "For Approval." Tr. at 375-76.

---

[16] Respondent appears to suggest that the loans were above his approval limits, Exceptions at 20-24, but Respondent is misreading the documentation. Loans greater than $100,000 (as all of the loans at issue were) had to be reported to the Committee, and the memoranda submitted by Respondent stated that the loans were "over reporting limits." *See, e.g.*, Jt. Ex. 82-001. The Committee did not independently approve all loans reported to it, however. Tr. at 112-13.

[17] Respondent contends in his Exceptions that he was not solely responsible for approving the loans at issue, *see* Exceptions at 177-78, but the above discussion shows that Respondent could, and did, approve them on his sole authority.

Respondent also seizes on a statement by Russell in August 2007 expressing concern that Respondent was not asking Greystone to honor its takeout commitment because "[t]his whole deal was sold on the fact Greystone would pay us off if the customer did not," Jt. Ex. 298, as indicating that the Committee independently approved that loan when it was made in August 2006. *See* Exceptions at 28. The more natural reading of that e-mail exchange, however, is that Russell was concerned that Greystone was not honoring its commitments as a general matter ("this whole deal"). By that time, at Johnson's direction, the Committee had begun conducting full reviews of Greystone construction loans, so Russell and the Committee were extremely familiar with the "whole [Greystone] deal" and had reason to be concerned that the "deal" was not being honored.[18]

b. Failure to Obtain Adequate Repayment Agreement

Respondent's failure to ensure that an adequate repayment agreement was in place for the 18 loans at issue likewise constitutes an unsafe and unsound banking practice. *First State Bank of Wayne County*, 770 F.2d at 82 ("extending credit that was not adequately secured" unsafe and unsound); *In the Matter of the Stephens Security Bank*, 1991 WL 789326, *1 (FDIC Aug. 9, 1991). The MLCs indicated a commitment by Greystone to repay the loans if they were not fully repaid within 12 months, but the conditions included in the MLCs shifted most of this risk to the

[18] Respondent has also pointed (in a contention raised in multiple exceptions, including Exceptions 6, 15 and 35) to confusion in Russell's testimony to suggest that the Committee approved all of the loans at issue. *See, e.g.*, Exceptions at 24-27. Specifically, when Russell was asked when the buyback agreement was finalized, Russell thought it was "when Corey [Johnson] wanted the loans to come through Senior Loan Committee for approval." Tr. at 361. In fact, the record is clear that the buyback agreement was finalized long before Johnson directed that Greystone's loans be approved by the full Committee. *Compare* Resp. Ex. 954-001 (agreement final on August 7, 2006) *with* Tr. at 171 (on April 24, 2007, at Johnson's request, Russell directed Respondent to submit all Greystone loans to the Committee for approval). Russell's lack of specific memory on the exact date when the approval process changed does not alter the clear documentary evidence. Other ambiguous references to "approval" in Russell's testimony, *see* Exceptions at 28-29, likewise do not change his clear statements that loans within loan officers' lending limits did not ordinarily have to be approved by the full Committee.

Bank. In particular, Greystone reserved the right to have its own underwriters conduct a review of the borrowers' credit and to refuse to repay if the underwriters did not approve a permanent loan. The conditions also included "no significant changes" in the borrower's "financial situation," meaning that, if a borrower's creditworthiness worsened, Greystone could decline to repay. Respondent did not advise the Committee of these conditions, and, indeed, Respondent acknowledged that he did not even understand what the conditions meant and did not inquire with Greystone about their meaning. Tr. 63-69, 451-52.

The Addenda to the MLCs, executed for 13 of the 18 loans at issue, appeared to give the Bank the right to demand that Greystone repurchase the loans. It is not clear for those 13 loans, however, whether the Addenda overrode the conditions in the MLCs. Assuming *arguendo* that it did, those 13 loans still did not have adequate repayment agreements, as Respondent failed to ensure that Greystone had the resources to repay the loans. Greystone's WLOC with U.S. Bank was not, contrary to Respondent's statements to the Committee, available for repayment of the loans, and Greystone did not have available funds apart from the WLOC that could be used for that purpose. R.D. at 29, 30 n.33, 31 n.35. Respondent's reliance on Greystone's takeout and buyback commitments without verification that the commitments were binding and meaningful, and his failure to accurately advise the Committee regarding Greystone's financial condition, created an abnormal risk of loss to the Bank with a reasonably direct effect on the Bank's safety and soundness, and therefore constituted an unsafe and unsound banking practice.

c. Violation of Federal Guidelines and Bank Lending Policies

Federal lending guidelines require banks to establish loan documentation practices for the assessment of borrowers' creditworthiness and to create guidelines for loan underwriting that take into account borrowers' and guarantors' financial conditions. 12 C.F.R. Part 364, App. A,

§§ II C.2, II.D.3. The Bank's "Credit Control Plan" addressed those requirements, requiring loan officers to obtain all necessary documentation for evaluation of the loan and provide such documentation to the Bank's Credit Administration department. R.D. at 47. Documentation to be provided included signed financial statements, tax returns, credit reports, accounts payable and receivable, appraisals, takeout commitments, and any other information pertinent to repayment ability. Respondent's use of the stated-income method for underwriting the 18 loans at issue was inconsistent with the dictates of federal guidelines and with the Bank's policy, as the information required by the Credit Control Plan was largely not provided for those loans. Nor did Respondent inform the Committee that those loans were underwritten as stated-income loans or that they did not follow the Bank's lending rules. Respondent's violations of federal lending guidelines and Bank lending policy increased the risk of loss to the Bank by removing the protections that the guidelines and policy were intended to provide and by preventing the Committee from adequately assessing the appropriateness of the loans. Respondent's failure to follow the federal guidelines and Bank policy created an abnormal risk of loss to the Bank with a reasonably direct effect on the Bank's safety and soundness, and therefore constituted an unsafe and unsound banking practice.

2. Breaches of Fiduciary Duties

The foregoing misconduct constituting unsafe and unsound practices also constituted breaches of Respondent's fiduciary duties to the Bank. Directors and officers of banks have fiduciary duties to act in the best interests of the institution. *See FDIC v. Appling*, 992 F.2d 1109, 1113 (10th Cir. 1993). Breaches of fiduciary duties arise from knowledge of the pertinent facts and can include a deliberate failure to investigate matters that fall within the officer's responsibilities. *Id.* at 1115; *see also De la Fuente II*, 332 F.3d at 1222 ("[A] person can breach

a fiduciary duty by failing to disclose material information, even if not asked . . . De La Fuente had a fiduciary duty to disclose everything he knew relating to the transaction.").

Respondent's duties included a duty of care. Bank officers have a duty to "act diligently, prudently, honestly, and carefully in carrying out their responsibilities and must ensure their bank's compliance with state and federal banking laws and regulations." *Grubb*, 1992 WL 813163, *8; *see also In re Charles E. Baker*, 1993 WL 853609, *7 (FDIC Apr. 8, 1993) (fiduciary duty requires exercise of care "which ordinary prudent and diligent men would exercise under similar circumstances").[19] Bank officers are held to a higher standard of care than other corporate officers because they are ultimately responsible for the safety of depositor funds. *Baker*, 1993 WL 853609, *7. Discharging fiduciary duties requires, *inter alia*, a "knowledge of state and federal banking laws" and "constant concern for the safety and soundness of the bank." *In re* ***, 1988 WL 583064, *9 (FDIC Mar. 1, 1988). As a senior vice president and business banking manager at the Bank, Respondent had a duty to the Bank to act "diligently, prudently, honestly, and carefully" in carrying out his functions as a loan officer, and the conduct described above did not meet that standard.

Respondent was aware that it was his duty to ascertain the borrower's ability to repay prior to approving a loan, Tr. at 26, but Respondent nevertheless approved loans without verifying borrowers' financial information—and, in some cases, without obtaining any such

[19] Respondent argues that the federal law standard articulated in *Baker* no longer applies, *see* Exceptions at 239, but the Board has held that state law does not apply in Section 8 enforcement proceedings, *see, e.g.*, *Leuthe*, 1998 WL 438323, *14 n.26. At any rate, that issue need not be resolved here as Respondent cites no cases suggesting that the fiduciary duties imposed by Nevada on bank officers are materially different from those imposed by federal law.

Respondent also argues, on similar grounds, that his conduct was protected by the Nevada business judgment rule. Exceptions at 242-44. The ALJ correctly noted that the rule does not apply to Section 8 proceedings. R.D. at 56 n.48. Moreover, the rule applies to corporate officers; bank officers are held to a higher standard than non-bank corporate officers. *In the Matter of Haggard & Tomczyk*, 2010 WL 3234237, *40 (FDIC Aug. 2, 2012). Respondent cites no Nevada case law applying the rule to bank officers.

information at all. The information that he did have consisted of statements on unsigned loan applications. Respondent also did not request pay stubs or other documentary support for borrowers' income; rather, he relied on the information submitted by Greystone. Given the uncertainties surrounding the borrowers' ability to repay the loans, it was all the more important that Respondent verify an independent repayment source, but Respondent took no steps to assure himself that the MLCs, and the Addenda to the MLCs, constituted a meaningful and binding commitment to repay or purchase the loans in the event of a default. When the loans came due, furthermore, Respondent did not attempt to enforce Greystone's buyback commitments. (Again, even if the MLCs and Addenda were sufficient, eight of the loans did not have the MLCs and five did not have the Addenda. Thus, the risk was even greater for those loans—and the reliance on Greystone as the sole verified source of repayment, assuming that such verification occurred, *still* violated Bank policy, which required that loan officers identify multiple repayment sources. Jt. Ex. 239-004.) Respondent's failure to underwrite the loans in compliance with federal lending guidelines and the Bank's policies in a diligent, prudent, honest and careful manner constituted a breach of his duty of care. Since he was aware of his responsibilities, his failures were knowing.

Respondent's lack of candor also breached his duty of care to the Bank. Respondent did not inform the Committee about the nature of the stated-income loans, the lack of borrower commitment, or the various deviations from federal guidelines and Bank lending policy. The Guideline Exception Form provided a method for Respondent to apprise the Committee of any concerns, but none of these matters were reflected on the forms submitted to the Committee. R.D. at 26-27. Furthermore, Respondent did not advise the Committee regarding the lack of borrower financial information or the conditions in the MLCs, and the information Respondent

provided regarding Greystone's finances was inaccurate. *Id.* at 30-34. Those failures breached Respondent's duty of care. *See In the Matter of Henry P. Massey*, 1993 WL 853749, *5 (FDIC May 24, 1993) (concealment of information from bank's loan committee constituted breach of fiduciary duty).

Effects

The record supports a finding that the Bank suffered or will probably suffer economic loss as a result of Respondent's acts, and that Respondent obtained a financial gain or other benefit, either of which is sufficient to satisfy the "effects" prong of section 8(e). The Bank failed in 2008, and the FDIC as receiver inherited the 18 loans at issue upon the Bank's failure. The FDIC has since sold 14 of the 18 loans at issue in a structured sale for substantially less than their face value. FDIC Ex. 221-002. The remaining four loans sustained significant losses as well. Tr. at 646-48. In all, the losses on those loans exceeded $2.5 million. Tr. at 854-55.[20]

Furthermore, Respondent obtained a personal benefit, as he received ten percent of the Bank fees collected for each loan he originated. In all, he earned approximately $11,000 in personal benefits for his approval of the 18 loans at issue. Tr. at 659-63.

Culpability

Culpability, for purposes of section 1818(e), can be shown by a "willful or continuing disregard for the safety and soundness of the financial institution." 12 U.S.C. § 1818(e)(1).

[20] Respondent argues that he could not have foreseen the losses because the economy played a role in causing them. Exceptions at 236-38. Respondent relies on *De La Fuente II*, but misreads that case: the court there did not hold that the losses must be foreseeable, but rather that the *risk* of loss be "reasonably foreseeable," and went on to say that "the exact series of events that cause injury or loss to the institution" need not be "perceived or even perceivable." 332 F.3d at 1223. Here, it was foreseeable to Respondent, an experienced bank officer, that failing to verify borrower financial information and relying on alternative payment commitments that were conditioned to the point of meaninglessness and made by a thinly capitalized mortgage lender increased the risk of loss to the Bank. The precise series of events that turned that risk into a loss to the Bank need not have been foreseeable at the time the loans were approved.

Courts have held that "willful or continuing disregard" signifies, at least, "'a mental state akin to recklessness.'" *Kim v. OTS*, 40 F.3d 1050, 1054 (9th Cir. 1994) (quoting *Brickner v. FDIC*, 747 F.2d 1198, 1203 & n.6 (8th Cir. 1984)); *see also De La Fuente II*, 332 F.3d at 1223 ("willful disregard" refers to "deliberate conduct which exposed the bank to abnormal risk of loss or harm contrary to prudent banking practices"); *In the Matter of *** Bank *** Bank*, 1986 WL 379636, *18 (FDIC July 17, 1986) ("continuing conduct" is "that conduct which is voluntarily engaged in over a period of time with heedless indifference to the consequences"). An officer acts "willfully" when he is aware of his conduct; "willfulness" does not require a showing that Respondent was aware of the law. *In the Matter of Michael D. Landry*, 1998 WL 34083421 (FDIC Aug. 14, 1998).

Respondent approved stated-income construction loans over a nine-month period, from August 2006 through May 2007, *see* Jt. Ex. 311 ¶ 18, so the "continuing" aspect of his conduct is plain. *In the Matter of Ramon M. Candelaria*, 1997 WL 211341, *6 (FDIC Mar. 11, 1997) ("continuing disregard" shown by two nominee loans over a period of six months); *In the Matter of Frank E. Jameson*, 1990 WL 711218, *8 (FDIC June 12, 1990), *aff'd*, 931 F.2d 290 (5th Cir. 1991) (two incidents of falsifying loan records within three months constituted "continuing disregard"). His conduct was also "willful," as the acts in question were undertaken deliberately, were contrary to prudent banking practices, and posed an abnormal risk of loss to the Bank, as discussed previously.

Respondent argues that, to show "willful or continuing disregard," the FDIC must show that Respondent knew that his conduct was unsafe and unsound. Exceptions at 246-47. Respondent misreads the case law. The cited cases simply state that violations must be more than "technical or inadvertent" to satisfy the culpability standard, *see Oberstar v. FDIC*, 987

F.2d 494, 503 (8th Cir. 1993), and specifically reject the argument that this standard "require[s] the FDIC to establish that petitioners intentionally did something to endanger the safety of their bank." *Brickner v. FDIC*, 747 F.2d 1198, 1202 (8th Cir. 1984). Nor do the cases holding that violations "must have weight commensurate with a finding of personal dishonesty," *see, e.g., Doolittle v. NCUA*, 992 F.2d 1531, 1539 (11th Cir. 1993), signify that such dishonesty is necessary to show culpability, as Respondent suggests. They indicate that the misconduct must be as serious as dishonesty. The ALJ was not required to find that Respondent knew that his conduct was harming the Bank.[21]

Respondent also contends that Johnson, the Bank's president and CEO, was aware of his approval of the loans using stated-income underwriting, but the ALJ declined to credit those contentions, R.D. at 14-19, and the Board agrees with the ALJ's conclusions. Respondent takes exception to the ALJ's credibility determination, Exceptions at 99-102, but the ALJ had broad discretion in making his credibility judgments, *see, e.g., Amanda J. ex rel. Annette J. v. Clark Cnty. Sch. Dist.*, 267 F.3d 877, 889 (9th Cir. 2001), and nothing about the record here indicates

[21] Even assuming *arguendo* that the FDIC was required to show that Respondent knew that his conduct was unsafe and unsound, that showing has been made. Respondent's disregard for the Bank's safety and soundness is clear from the discussion of the nature of that conduct. It is not credible that an experienced bank officer would not be aware of the importance to his bank of verifying borrowers' financial information, assessing borrowers' creditworthiness, obtaining a meaningful alternative repayment commitment, and following federal lending guidelines and internal Bank lending policy whenever possible. There appears to be no dispute that Respondent did none of those things in approving the 18 loans. Nor is it credible that Respondent was not aware that any deviations from these practices should have been brought to the Committee's attention. Respondent's submissions to the Committee also were misleading in several respects, since Respondent did not state that the loans were stated-income loans. He also represented that Greystone had already approved a permanent loan (without informing the Committee of the conditions on that approval) and would buy back the loan after 12 months (representing that Greystone had significantly more resources than it did), and he provided the unverified borrower information as if the borrower were the primary expected source of repayment. Jt. Ex. ¶¶ 27-29; *see, e.g., De La Fuente II*, 332 F.3d at 1227 ("shocking disregard of sound banking practices" indicated culpability).

that the ALJ abused his discretion.[22] Furthermore, even if Johnson was aware of the loans, that does not change the conclusion that Respondent engaged in "willful and continuing disregard" of the Bank's safety and soundness and failed to inform the Committee of his many deviations from Bank policy and federal lending guidelines. The documentary evidence shows what Respondent submitted to the Committee, and nothing in that documentation reflects a candid acknowledgment of Respondent's failure to verify the borrowers' financial information, or of the lack of binding and meaningful commitments for repayment from alternative sources. Nor do the failings of other Bank officers, even if shown, absolve Respondent of his violations, or make his conduct something other than "willful and continuous disregard." *In the Matter of Michael D. Landry*, 1999 WL 440608, *14 (FDIC May 25, 1999) (respondent need not be sole wrongdoer to justify order of removal and prohibition), *petition denied*, 204 F.3d 1125, 1139 (D.C. Cir. 2000) (no defense in section 8(e) action that "others may have been more guilty"); *see also In the Matter of Kenneth E. Haggard*, 2012 WL 3234237, *51 (FDIC Aug. 2, 2012) ("[T]he culpability of others, if it exists, is not a mitigating factor.").

[22] Respondent takes exception to the ALJ's drawing of an adverse inference regarding Johnson's testimony. The ALJ concluded that Respondent's decision not to call Johnson as a witness gives rise to an inference that his testimony would have been unfavorable to Respondent. R.D. at 18-19. Respondent argues that, because the FDIC could also have called Johnson as a witness, no inference adverse to Respondent was appropriate. Exceptions at 102-04. The case law is split on this issue. *Compare International Union v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) *with NLRB v. Massachusetts Machine & Stamping, Inc.*, 578 F.2d 15, 20 (1st Cir. 1978). The Ninth Circuit has held that ALJs have broad discretion in determining whether to draw adverse inferences, *Underwriters Labs. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998), and has upheld an ALJ's adverse inference from a failure to call a witness, saying that such an inference may be drawn "against the party who is relying on the statements of the uncalled witness." *NLRB v. Cornell of California, Inc.*, 577 F.2d 513, 517 (9th Cir. 1978). It does not appear to the Board that the ALJ abused his discretion here, but it is not necessary to resolve the dispute on this issue because the ALJ's credibility determination stands independently of any adverse inference. The ALJ found that the absence of separate corroborating documentary evidence for discussions between Respondent and Johnson, along with "demeanor," supported his determination that Respondent's claims were not credible. R.D. at 14-19.

The Board therefore adopts the ALJ's recommendation that an Order of Removal and Prohibition be entered against Respondent.

B. The CMP Assessment is Appropriate.

Civil money penalties 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); *In the Matter of Richard D. 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 $75,000, and the evidence in the record supports that penalty.

A second-tier CMP is appropriate where there has been (1) misconduct in the form of, *inter alia*, reckless engagement in an unsafe or unsound practice in conducting a financial institution's affairs, or a breach of a fiduciary duty, and (2) effects which include either a pattern of misconduct, or conduct which caused or was likely to cause more than minimal loss to the institution, or which resulted in a gain or benefit to the respondent. 12 U.S.C. § 1818(i)(2(B); *see, e.g., In the Matter of James L. Leuthe,* 1998 WL 438323, *16-17 (FDIC June 26, 1998). 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.

The Board has already discussed Respondent's unsafe and unsound banking practices and breaches of fiduciary duty and the effects of those acts and need not repeat that discussion here. Section 8(i) requires, however, that any unsafe and unsound banking practice be conducted "reckless[ly]" for a second-tier CMP to be imposed. The Board finds that standard is met here.

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").[23]

Respondent approved 18 separate stated-income construction loans without verifying borrowers' financial information or investigating their creditworthiness, and without obtaining binding, meaningful alternative repayment commitments from other sources. The risk of substantial harm to the Bank from default on those loans was "known or obvious," and Respondent's repeated approvals of loans following this pattern indicated, at the very least, "conscious indifference" to that risk. Certainly, Respondent had more than enough information to raise concerns about the potential risk arising from the loans as approved—and, as an experienced loan officer, Respondent had more than enough knowledge to understand the importance of ensuring a reliable source of repayment. Respondent just did not act on that information. Respondent's failure to make significant efforts to enforce Greystone's repayment commitments is a further indication that Respondent knew that the conditional terms—as well as Greystone's financial deterioration—made the commitments largely meaningless.

As for the amount of the CMP, Respondent is responsible for up to $37,500 for each day his violations persisted uncorrected. *United States v. Marine Shale Processors*, 81 F.3d 1329, 1357 (5th Cir. 1996). As Respondent's misconduct began in August 2006 and continued until September 2008, a CMP could potentially greatly exceed the $75,000 penalty recommended by

[23] Respondent takes exception (Exception 56) to the CMP on grounds that *Simpson* addresses a restitution order rather than a section 8(i) CMP, Exceptions at 251-54, but nothing about restitution orders, as opposed to civil money penalties, gives rise to a different definition of recklessness. At any rate, if Respondent's conduct met the standard for "willful or continuing disregard" under section 8(e), it was *a fortiori* reckless as well. *Dodge v. OCC*, 744 F.3d 148, 162 (D.C. Cir. 2014) ("recklessness" in section 8(i) is established by same showing as "willful or continuing disregard" under section 8(e)).

the ALJ. Other relevant considerations in setting the amount of a CMP include Respondent's financial resources and good faith, the gravity of the violation, and Respondent's history of previous violations. The ALJ concluded that Respondent's financial resources and the harm to the Bank (losses in excess of $2.5 million) support a significant CMP, and he found that Respondent did not act in good faith given his failure to apprise the Committee of the nature of the state-income construction loans. The ALJ also found no history of prior violations, and cited certain factors set forth in interagency guidance as relevant. R.D. at 66-67; *see* Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies, 63 Fed. Reg. 30226-02. Specifically, the ALJ cited the following factors identified in the interagency guidance as supporting augmentation of the CMP:

> (1) Evidence that the violation or practice or breach of fiduciary duty was intentional or was committed with a disregard of the law or with a disregard of the consequences to the institution;
> (2) The duration and frequency of the violations, practices, or breaches of fiduciary duty;
> . . .
> (5) Evidence of concealment of the violation, practice, or breach of fiduciary duty or, alternatively, voluntary disclosure of the violation, practice or breach of fiduciary duty;
> (6) Any threat of loss, actual loss, or other harm to the institution, including harm to the public confidence in the institution, and the degree of such harm;
> (7) Evidence that a participant or his or her associates received financial gain or other benefit as a result of the violation, practice, or breach of fiduciary duty;
> [and]
> (12) Tendency to engage in violations of law, unsafe or unsound banking practices, or breaches of fiduciary duty.

R.D. at 68. The above discussion of Respondent's misconduct fully supports the ALJ's conclusion regarding the applicability of these factors. The ALJ also cited the following factors as mitigating the CMP:

> (10) Previous criticism of the institution or individual for similar actions;
> (11) Presence or absence of a compliance program and its effectiveness.

Id. Likewise, the ALJ properly identified these as mitigating factors, given that nothing in the record reflects any similar previous misconduct by Respondent, nor was a compliance program pertaining to these violations in place.

Respondent takes exception (Exception 57) to the amount of the CMP, arguing that the ALJ did not examine his present net worth. Exceptions at 254-55. The ALJ did review Respondent's income and investments, however, and concluded that Respondent was likely to be able to pay a $75,000 penalty. Respondent could have offered contrary evidence, but he did not make any showing on this issue. The Board therefore adopts the ALJ's recommendation of a $75,000 CMP to be imposed on Respondent.

C. Respondent's Exceptions

Respondent filed 58 exceptions to the Recommended Decision challenging virtually every aspect of the ALJ's findings of fact and legal conclusions. Respondent's exceptions take the form of a narrative covering 256 pages. Many of the 58 exceptions encompass multiple arguments or contentions, while others repeat, verbatim, the same multiple-page arguments. The supporting brief contains many exceptions that do not appear to be enumerated in the list of 58 exceptions.

Respondent's exceptions do not raise any factual or legal errors or point to any discrepancies in the record establishing that either the prohibition order or the CMP assessment is not warranted. Many of his exceptions simply challenge the ALJ's credibility judgments, some address trivial omissions or inconsistencies that do not affect the overall decision, and others raise meritless disputes regarding the ALJ's factual conclusions. To the extent that they are pertinent to matters already addressed, the Board has in the context of the discussion above disposed of certain objections. Respondent's remaining exceptions are addressed following.

Many of Respondent's exceptions (such as Exceptions 6, 15, 35, 45, 50, 51, 54, and 55) reiterate his contention that Russell, Johnson, and other Committee members approved the loans at issue and were aware of their nature. *See, e.g.*, Exceptions at 15-44, 46-54, 59-69, 98-108, 111-15, 124-27, 135-36, 158-78, 187-95. As discussed previously, however, Respondent's claims are not supported by the record. Significantly, Respondent has stipulated that he approved the loans, *see* Joint Exhibit 311 ¶ 23, and all of the loans at issue were listed on the Committee's "For Reporting" rather than "For Approval" agenda. FDIC Exs. 242-058, -071, -080, -082, -087, 243-011, -016, -018, -037. Russell explained the distinction (loans above $100,000 but within an officer's lending limit were sent "For Reporting," whereas loans above that threshold *and* above the lending limit were sent "For Approval"), and went on to note that "For Reporting" loans were reviewed to ensure that they were under the officers' lending limits. Tr. at 105, 108-09. Approval of "For Reporting" loans occurs when the loan officer signs off, Russell explained. *Id.* at 109. None of the stray comments in the testimony regarding the Committee's review of "For Reporting" loans can reasonably be taken as a statement that, contrary to this process, the Committee, or any of its members, conducts an independent review of those loans once the loan officer approves them. Furthermore, even if the Committee, contrary to Bank policy, conducted an independent review, such a review would not excuse Respondent's conduct, as Respondent was responsible for engaging in safe and sound banking practices and honoring his fiduciary duties whether or not other Bank officers did the same.

Respondent also takes exception (Exception 6) to the ALJ's findings regarding loan officers' approval authority, stating that he was required to obtain the approval of Johnson, the Senior Credit Officer, for real estate loans. Exceptions at 16. Respondent's exception is rejected, as the relevant allocation of responsibility at issue here is between the lending officer

and the Senior Lending Committee. Respondent did not need the Committee's approval for loans within his lending limit. Furthermore, nothing in the record reflects that Johnson was consulted about the stated-income nature of the loans, and even if Johnson failed to object, that would not excuse Respondent's misconduct. Respondent's approval of the loans was an unsafe and unsound banking practice, whether or not Johnson concurred in the approval. Johnson did not have the authority to override Bank policy. Tr. at 189, 489.

Respondent also takes exception (Exception 16) to the ALJ's finding that "for reporting" loans were for "informational purposes." R.D. at 9; Exceptions at 66-67. The record indicates that the loans were submitted for "reporting purposes" but that the Credit Administration Department also verified that the lending limits were not exceeded and that the underwriting appeared to follow Bank policy. Tr. at 105, 287. Respondent's exception is ultimately unavailing, as the record is clear that the Committee did not independently approve the loans. *Id.* at 105-08. Respondent also notes that the ALJ found that the Committee relied on the information submitted by Respondent in the B-2 packages, R.D. at 36, and argues that this contradicts the ALJ's conclusion that Respondent submitted that data for informational purposes, rather than to enable the Committee to independently approve the loans. Exceptions at 178-79. The Board finds no contradiction. The record indicates that the Committee relied on Respondent's submissions to satisfy itself that no independent action on the loans was necessary.

As to the approval of loans whose LTV ratio exceeded the Bank's threshold, Respondent takes exception (Exception 48) to the ALJ's finding that the maximum LTV ratio for residential construction loans was 75 percent, arguing that the 75 percent threshold applied only to construction loan applications from developers or builders and that borrower loans were governed by an 80 percent LTV ratio limit. Exceptions at 128-30. The Bank's lending policies

set a 75 percent limit on "Residential construction (retail)" and an 80 percent limit on "Single Family R/E," and the ALJ reasonably concluded that the former rather than the latter applied. Respondent relies on the testimony of a former Bank officer. That officer does not profess any firsthand knowledge, however. He simply offers an "opinion" that the 75 percent threshold "probably" applied to developer/borrower loans. Tr. at 1174-75. The ALJ did not abuse his discretion in declining to give this testimony weight. Respondent likewise takes exception (Exception 49) to the ALJ's findings regarding the LTC ratio, arguing that the Bank did not expressly impose LTC requirements. Exceptions at 130-31. The ALJ did not state otherwise; rather, he stated that the high LTC ratios raised concerns about the borrowers' "skin in the game," contrary to Bank lending policy. Jt. Ex. 239-004; Tr. at 134 (Committee chair's testimony that 100 percent financing of construction costs gave rise to a "policy exception" to Bank lending guidelines because of the borrower's lack of "money involvement").

The ALJ found that the conditions in the MLCs made them ineffective as a means of securing an alternative source of repayment, and Respondent takes exception (Exceptions 23, 43 and 53), citing the testimony of a Greystone manager, David McMullin (McMullin), for the proposition that Greystone could extend permanent financing even if a borrower's financial situation has changed. Exceptions at 73, 121; Tr. at 468. McMullin did not testify that Greystone was *required* to honor the commitment in that scenario, however—only that it "may." *Id.* The ALJ did not err in concluding that the MLCs did not contain robust repayment commitments. Respondent also argues that Bank policy permitted "normal conditions" in such commitments, Exceptions at 139-41, and points to the testimony of an expert who opined that the conditions imposed were "normal." Tr. at 1179-80. As the ALJ found, however, Respondent's expert did not address the condition that the loan was still subject to "FINAL Underwriter

Approval within Investor Guidelines." R.D. at 49 n.46. Even assuming that all of the conditions imposed were "normal," that would not excuse Respondent's failure to obtain *any* MLCs as to eight of the 18 loans at issue. *Id.* at 27 n.29.

With regard to Respondent's representation that Greystone's WLOC from U.S. Bank amounted to $50 million, Respondent contends that his representation was accurate. Exceptions at 141-43. Respondent represented that sum to be the size of the line of credit as of December 31, 2005; the record indicates that, during much of the time when Respondent was approving the loans at issue, the amount of the line of credit was $45 million. FDIC Ex. 312-001, 312-004, 309-045. The record does not show whether the line was $50 million as of December 31, 2005, but, at the very least, Respondent's repeated statements to the Committee about the size of the line were misleading.[24]

Respondent likewise takes exception (Exception 54) to the ALJ's conclusion that the WLOC was not available to repay the loans, arguing that the FDIC examiner who testified on this issue did not have knowledge of the specific WLOC, *see* Exceptions at 146. The Board finds that the ALJ did not err in relying on the examiner's testimony. The examiner was familiar with warehouse lines of credit generally, and testified that the purposes of such lines of credit is to fund mortgages that can be sold on the secondary market, not to fund defaulted loans. Tr. at 592-93, 731. It was reasonable for the ALJ to rely on that testimony for the proposition that Greystone could not draw on the WLOC to pay off the loans, and Respondent did not offer the

[24] Respondent also argues that the ALJ erred in concluding that $7-14 million was the amount available on the WLOC (assuming that Greystone could even use the WLOC for repayment purposes), Exceptions at 145-46, but the Greystone balance sheet admitted into evidence indicates that Greystone owed approximately $31 million on the $45 million line of credit as of November 30, 2006, and approximately $38 million as of December 31, 2006, supporting the ALJ's conclusion. FDIC Ex. 312-001, 312-004.

note or any other contrary evidence. Nor did Respondent obtain any documents regarding the WLOC at the time, or inquire about any restrictions on the use of the WLOC.[25]

With regard to the ALJ's conclusion that Respondent failed to provide the Committee current Greystone financial data (and thus to advise the Committee that Greystone was not in a position to repay the loans at issue without the WLOC), Respondent takes exception (Exception 54), contending that Bank officers, including Russell, had access to some financial data. Exceptions at 151-56. Respondent does not cite any evidence suggesting that Russell or anyone else received complete updated Greystone financial data before April 2007, and Russell's express request in February 2007 for updated data, Resp. Ex. 745, clearly indicates that Respondent had not provided it as of that time.[26]

The remaining exceptions also are not supported by the record and are therefore, rejected as well. Exceptions 1, 3, 5, 8, 11-13, 20, 25-26, 28-32, 36-40, 44, and 47 challenge various minor factual findings or omissions in the ALJ's Recommended Decision, or cite what Respondent believes to be additional material facts. None of these disputes materially affect the ALJ's ultimate factual conclusions regarding the nature of Respondent's conduct, and they do

[25] Respondent also contends that the Committee members should have realized, when they received Respondent's memorandum stating that the WLOC would be used to pay off the construction loans, that Respondent's statements were inaccurate. Exceptions at 149. Respondent was responsible for understanding any restrictions or limitations on the WLOC and conveying that information to the Committee, *see* Tr. at 190-91, and at any rate, again, any errors or omissions by other Bank personnel do not excuse Respondent's conduct.

[26] The ALJ also found that Respondent advised the Committee that Greystone's finances were sound at a time (January through April 2007) when Greystone in fact had very few liquid assets. *See* R.D. at 33-34. Respondent takes exception (Exception 54), correctly pointing out that the cited evidence, while it addressed the relevant period, was generated after that time; thus, it is unclear whether Respondent was aware of those specific numbers during that period. Exceptions at 156-58. The record shows, however, that Greystone's thin liquidity position at that time was consistent with its recent history, *see, e.g.*, FDIC Ex. 312-001 ($201,000 in cash as of November 30, 2006), and Respondent did not advise the Committee regarding Greystone's condition at that time either.

not affect the Board's decision to adopt the ALJ's Recommended Decision. *See Landry*, 1999 WL 440608, at *30.

Exceptions 7, 9, 10, 14, 17-19, 21-24, 27, 33,[27] 34, 41-42, 45-47, and 50-55[28] question certain factual findings made by the ALJ. The Board, however, has reviewed the cited evidence and finds sufficient evidence in the record to support each of the contested findings.

Exceptions 56 and 57 argue generally that the ALJ erred in recommending an order of removal and prohibition and a civil money penalty. Exceptions at 185-255. To the extent that these exceptions raise factual disputes, they have been addressed previously or raise points that are not material to the ALJ's overall conclusions. To the extent they dispute the applicability of the legal authorities cited in the ALJ's Recommended Decision, those disputes are not well taken. Respondent largely argues that the facts in the cited cases are not identical to the facts here, but the holdings in those cases shed light on the proper disposition of this case. Legal precedent need not arise only from cases with matching facts.

Exceptions 2 and 58 simply consist of conclusory challenges to the ALJ's overall recommendations. As discussed previously, the Board has found the ALJ's decision well-

---

[27] In Exception 33, Respondent objects to the exclusion of Respondent's Exhibit 959, an e-mail that the testifying witness had never seen before, for lack of foundation. The Board finds no error in the exclusion. ALJs presiding over administrative proceedings may rely only on evidence that is "reliable, probative and substantial." 5 U.S.C. § 556(d); *see also Westwood Import Co. v. NLRB*, 681 F.2d 664, 668 n.4 (9th Cir. 1982) (ALJ may exclude "irrelevant or unreliable" evidence). The lack of foundation for Exhibit 959 put its reliability in question, and the ALJ did not abuse his discretion in excluding it. At any rate, Exhibit 959 does not contradict the ALJ's conclusion that, prior to Respondent's approval of the 18 loans at issue, the Bank had not issued stated-income loans; Exhibit 959 is dated a full year later and reflects Bank personnel's desire to *stop* approving stated-income loans. As it is unclear what the Bank personnel in question were referring to (Respondent's loans, other loans approved in the meantime, or something else), Exhibit 959 has little if any relevance.

[28] Exception 52 challenges the ALJ's conclusion that the MLC expired 12 months after the date of issuance, but the supporting brief specifically states that Respondent does *not* challenge that conclusion. Exceptions at 8, 141. At any rate, that finding is supported by the record. Tr. at 574-75; *see, e.g.*, Jt. Ex. 245. Exceptions 54 and 55 address factual findings in the Recommended Decision covering multiple pages. Most of Respondent's specific arguments have been addressed previously, and the remaining findings are well supported by the record.

reasoned and supported, and Respondent's exceptions do not persuade the Board to reject the ALJ's recommendations.

Finally, at various points, Respondent accuses the ALJ of "bias," *see, e.g.*, Exceptions at 84, 129, 130, but identifies no credible evidence supporting his claim of partiality. Instead, Respondent asserts, as proof of bias, the ALJ's acceptance of FDIC witnesses' credibility, rejection of Respondent's view of the case, and evidentiary rulings with which he disagreed. Respondent's "bias" argument amounts to an assertion that because the ALJ ruled against him, the ALJ had to have been biased. The Board concludes that Respondent's charge of bias lacks any colorable legal basis. *See In the Matter of De La Fuente*, 2000 WL 34479990, *7 (FDIC Nov. 21, 2000).

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 Prohibition and Assessment of a CMP is warranted against Respondent. In this case, the record plainly shows that Respondent, over a period of years, put the Bank at risk by approving a series of loans in violation of federal lending guidelines and Bank policies. Ignoring his responsibilities to the Bank and its depositors, Respondent approved stated-income loans with minimal or no information about the borrower's ability to repay, and he failed to apprise the board of directors and the Bank's management of his deficient underwriting practices. Rather, Respondent claims that Greystone Financial would repay any loans that went into default, when in fact Greystone had neither the obligation nor the ability to do so. In view of Respondent's repeated compliance failures and serious breach of his fiduciary duties, the Board is persuaded that he should be permanently barred from the banking industry. Moreover, the Board finds abundant evidence in the record supporting Respondent's

misconduct as to each of the 18 loan approvals, although his involvement in any one of them is alone sufficient to support a prohibition order. Finally, in light of the entire record, the Board finds that the CMP imposed is appropriate and consistent with the statute's intended effects.

Based on the foregoing, the Board affirms the Recommended Decision of the ALJ and adopts in full the conclusions of law and findings of fact therein, to the extent it is consistent with this Decision, and issues the following Orders implementing its Decision.

ORDER TO PROHIBIT

The Board of the FDIC, having considered the entire record of this proceeding and finding that Respondent Steven D. Haynes, formerly the senior vice president and business banking manager of Silver State Bank, Henderson, Nevada, engaged in 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. Steven D. Haynes shall not participate in any manner in any conduct of the affairs of any insured depository institution, agency or organization 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).
2. Steven D. Haynes 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 financial institution, agency, or organization 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. Steven D. Haynes shall adhere to all voting agreements with respect to any insured depository institution, agency, or organization 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).

4. Steven D. Haynes 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, agency, or organization 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).
5. 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 Steven D. Haynes in the amount of $75,000 pursuant to 12 U.S.C. § 1818(i).
2. This ORDER shall be effective and the penalties 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 ORDER TO PROHIBIT FROM FURTHER PARTICIPATION AND ASSESSMENT OF CIVIL MONEY PENALTIES ("DECISION AND ORDER") shall be served on Counsel for Respondent Steven D. Haynes, Enforcement Counsel, the ALJ, and the Commissioner of the Nevada Financial Institutions Division.

By direction of the Board of Directors.

Dated at Washington, D.C. this 15th day of July, 2014.

/s/

Robert E. Feldman
Executive Secretary

(SEAL)

082012