

WASHINGTON, D.C.

FDIC-17-0086k

¹ 42 U.S.C. § 4012a(f) authorizes the FDIC to impose civil money penalties for pattern or practice violations independent of section 8(i) of the Federal Deposit Insurance Act, 12 U.S.C. § 1818(i). R.D. 26 n.18.

12 C.F.R. Part 339, which implements the requirements of the NFIA and FDPA. As a result, the Notice sought a civil money penalty against the Bank pursuant to section 102(f) of the FDPA, 42 U.S.C. § 4012a(f), and section 8(i) of the Federal Deposit Insurance Act (“FDI Act”), 12 U.S.C. § 1818(i). R.D. 2.

On June 7, 2017, the Bank filed an Answer (“Answer”) admitting that the Bank is an insured depository institution subject to the oversight of the FDIC (Answer ¶¶ 3-7), but denying the majority of the FDIC’s material allegations. R.D. 2. The Answer also asserts that the present enforcement action is an improper attempt to remove G. Harrison Scott (“Scott”) as the Chairman of the Bank’s board of directors. Answer ¶¶ 25, 31; R.D. 2. The Bank alleges that the real motivation for the FDIC’s action is age discrimination and animosity towards Scott. Answer ¶¶ 25, 31; R.D. 2.

On January 2, 2018, FDIC Enforcement Counsel (“Enforcement Counsel”) filed a Motion for Summary Disposition or Partial Summary Disposition. R.D. 3. Enforcement Counsel’s motion was supported by a 30-page memorandum and two sworn declarations accompanied by nearly 300 exhibits. R.D. 8. Three weeks later, the Bank filed an 8-page Response accompanied by 3 exhibits. *Id.* On July 19, 2018, while the motion was pending, the Board issued an omnibus Resolution and Order (“Resolution”) reassigning this case from ALJ Christopher McNeil to ALJ Miserendino “for a fresh reconsideration of all prior actions, including summary dispositions, and for all other purposes going forward” Resolution 1.

On December 11, 2018, ALJ Miserendino issued a 35-page Recommended Decision recommending that the Bank be ordered to pay a CMP of \$136,100. The same day, ALJ Miserendino certified the record to the Executive Secretary pursuant to 12 C.F.R. § 308.38. Neither the Bank nor Enforcement Counsel filed written exceptions to the Recommended

Decision.² Pursuant to 12 C.F.R. § 308.40(c)(2), the Executive Secretary submitted the record to the Board for final decision on February 28, 2019.

Upon careful review and consideration of Enforcement Counsel's motion, memorandum and supporting declarations and exhibits, the Bank's response and its exhibits, and for the reasons stated below, the Board finds that there is no genuine issue as to any material fact and that the FDIC is entitled to summary disposition as a matter of law. Because ALJ Miserendino 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 discussion below, however, provides a brief overview of the applicable statutes and regulations and the Bank's violations as alleged in the Notice and corroborated by testimonial and documentary evidence in the record.³

III. FACTUAL OVERVIEW

A. Applicable Flood Insurance Statutes and Regulation

"In response to increased flood damage, the escalating costs of disaster relief for taxpayers, and the lack of affordable flood insurance, Congress enacted the National Flood Insurance Act (NFIA) in 1968." R.D. 5 (internal citation omitted). The NFIA created the National Flood Insurance Program ("NFIP") to provide flood insurance in communities that voluntarily adopt and enforce flood plain management ordinances that meet minimum NFIP requirements. The FDPA made the purchase of flood insurance mandatory for the protection of property located in Special Flood Hazard Areas ("SFHA"), as designated by the Federal

² On January 8, 2019, the Bank filed a Motion for Interlocutory Review ("Motion") challenging the Board's July 19, 2018 Resolution by which the Board reassigned the case to ALJ Miserendino. The Board declines to consider this Motion because it does not seek review of any interlocutory order of the ALJ and it has neither the form nor content required for exceptions. *See* 12 C.F.R. §§ 308.28(a), 308.39.

³ The Recommended Decision includes detailed citations to the voluminous record. In the interest of efficiency and, except where otherwise noted, the Board cites only to the numbered pages in the Recommended Decision. When necessary, the Board cites to the underlying supporting evidentiary documents.

Emergency Management Agency ("FEMA"). Section 102(b) of the FDPA requires federal banking regulators to issue regulations prohibiting institutions under their supervision from making, increasing, extending, or renewing any loan secured by improved real estate or mobile homes in a SFHA where flood insurance is available under the NFIP, unless the building or mobile home and any personal property securing the loan are covered by flood insurance for the term of the loan. Part 339 of the FDIC Rules and Regulations, 12 C.F.R. Part 339, implements the requirements of the NFIA and FDPA for FDIC-supervised banks. R.D. 5-6. In addition to stating the general prohibition on making Designated Loans⁴ unless the collateral is fully covered by flood insurance, the regulation also imposes certain other requirements with which banks are required to comply.

1. SFHA Determination and Form

In determining whether a structure is located, or will be located in a SFHA for which NFIP flood insurance is available, Section 339.6(a) requires banks to use a standard flood hazard determination form developed by the Administrator of FEMA. 12 C.F.R. § 339.6(a); R.D. 7. The bank is required to retain copies of these forms for as long as the bank owns the loan. 12 C.F.R. § 339.6(b); R.D. 7.

2. Written Notice of SFHA

If the bank determines that property securing a loan is or will be located in a SFHA, the bank must provide written notice to the borrower and the servicer, regardless of whether NFIP flood insurance is available. 12 C.F.R. § 339.9(a). The notice must contain a warning that the property is or will be located in a SFHA; a description of the NFIA's flood insurance purchase requirements; a statement, when applicable, that flood insurance is available under the NFIP and from private insurers; and a statement on the availability of federal disaster relief assistance. 12

⁴ A "Designated Loan" is a loan secured by a building or mobile home that is located or to be located in a SFHA in which flood insurance is available under the FDI Act. 12 C.F.R. § 339.2.

C.F.R. § 339.9(b)(1)-(6). Notably, section 339.9(c) requires the bank to provide the written notice to the borrower within a reasonable time before the transaction is completed. *See also* 42 U.S.C. § 4104a(a)(1). In addition, section 339.9(d) requires the bank to keep a record (such as a signed copy of the notice or a certified mail receipt) of the borrower's and servicer's receipt of the notice for the period of time that the bank owns the loan. R.D. 7-8.

3. Forced Placement Flood Insurance

If at any time during the term of the loan a bank or its servicer determines that the collateral has less flood insurance coverage than required by regulation, it must notify the borrower in writing that the borrower is required to obtain the required insurance at the borrower's expense in an amount at least equal to the amount required by section 339.3 for the remaining term of the loan. 12 C.F.R. § 339.7(a); *see also* 42 U.S.C. § 4012a(e)(1). If the borrower has not purchased the necessary flood insurance within 45 days after the notice, then the bank or the servicer must purchase insurance on the borrower's behalf. A bank or servicer may comply with the force placement requirement by purchasing a NFIP Standard Flood Insurance Policy or an appropriate private flood insurance policy in the amount required by section 339.3. *See also* 42 U.S.C. § 4012a(e)(2); R.D. 8.

B. The Bank's Compliance History

The Bank is an insured State nonmember bank subject to FDIC supervision. R.D. 3-4. On November 18, 2013, the FDIC commenced a compliance examination to assess the Bank's Compliance Management System ("CMS") and whether the Bank complied with various consumer protection laws and regulations. R.D. 10-11. The FDIC found and cited several violations of Part 339 of the FDIC Rules and Regulations in its 2013 Compliance Report of

Examination (“2013 Compliance ROE”). *Id.* at 11.⁵ The Bank confirmed each of the flood insurance violations cited in its response to the ROE. *Id.*

On June 8, 2015, the FDIC commenced the 2015 Compliance Examination. R.D. 11. The 2015 examination team’s initial review revealed multiple violations of Part 339 of the FDIC Rules and Regulations, many of which (*e.g.*, failure to obtain or maintain flood insurance coverage, failure to obtain a sufficient amount of flood insurance coverage, failure to properly notice borrowers of discrepancies in coverage) were repeats of those cited in the 2013 Compliance ROE. Indeed, flood insurance violations were cited in the 2015 Compliance ROE, the 2013 Compliance ROE, and the 2012 Report of Visitation.⁶ The 2015 examination team made a preliminary determination that these violations constituted a pattern or practice of violations. R.D. 14.

The 2015 examination team instructed the Bank to conduct a file review of all Designated Loans made, increased, extended, or renewed in the four-year period prior to the date of the 2015 Compliance Examination. *Id.* at 15. The Bank initially resisted, asserting that it did not have the resources to undertake such a review. *Id.* Eventually, it agreed to allow the 2015 examination team to perform the file review. *Id.*

The FDIC examiners remained onsite in the Bank for approximately four weeks after the examination concluded to scan the Bank’s loan files to perform an offsite review. *Id.*

Throughout the offsite file review, the FDIC gave the Bank an opportunity to supplement the

⁵ For example, the 2013 Compliance ROE cited the Bank for failure to obtain an adequate amount of flood insurance coverage for the term of the loan (§ 339.3(a)); failure to notify the borrower to obtain flood insurance (§ 339.7); failure to maintain a copy of the completed standard flood hazard determination (§ 339.6(b)); failure to provide a borrower with notice regarding availability of flood insurance under the FDI Act at origination (§ 339.9(a)); and failure to provide the borrower with a SFHA Notice within a reasonable time before closing (§ 339.9(c)). Declaration of Senior Compliance Examiner Helen Johnson (“Johnson Decl.”) ¶ 20 (citing Exhibit 1HJ).

⁶ The 2012 Report of Visitation cited the Bank for failing to obtain flood determinations (§ 339.6(a)), and failing to send customers a 45-day notification letter prior to force placement of flood insurance (§ 339.7). Johnson Decl. ¶ 47 (citing Exhibit 9HJ).

flood insurance documentation that was collected onsite. R.D. 15. After the offsite file review was completed, in September 2015, the FDIC provided the Bank with the file review findings for the Bank to review and to either confirm or refute the findings with evidentiary support. *Id.* (citing Johnson Decl. ¶¶ 60-63). The Bank retained an independent consultant to review the FDIC's findings and to provide a response. *Id.* The Bank provided the FDIC a spreadsheet prepared by the consultant noting agreements or disagreements with the FDIC's findings as well as two batches of documents supporting the Bank's response. *Id.*

On April 6, 2016, the 2015 examination team held an exit meeting with senior Bank management to discuss the examination findings, the ROE, and the FDIC's recommendations. The Bank confirmed each of the violations cited, and agreed to increase management oversight of the Bank's flood insurance compliance through increased monitoring procedures and more effective training. Johnson Decl. ¶¶ 49-50; Exhibit 11HJ; *see also* R.D. 14.⁷

Based on the results of the file review and the Bank's response, the FDIC concluded that multiple flood insurance violations had occurred and that many were repeat violations. R.D. 15-16.

IV. ANALYSIS

A. The ALJ's Factual and Legal Findings are Fully Supported by the Record

Under 12 C.F.R. § 308.29(a), summary disposition is appropriate

if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that: (1) there is no genuine issue as to any material fact; and (2) the moving party is entitled to a decision in its favor as a matter of law.

⁷ The Recommended Decision mistakenly notes that the exit meeting took place on August 6, 2015, which was the date of an earlier findings meeting. Johnson Decl. ¶ 49.

Id. The standard for summary disposition is similar to that for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *See Matter of Cirino*, FDIC-99-011e, 2000 WL 1131919, at *23 (May 10, 2000); *see also Scott v. FDIC*, 684 F. App'x 391, 394 (5th Cir. 2017) (citing *Abbott v. Equity Grp., Inc.*, 2 F.3d 613, 618 (5th Cir. 1993)) (articulating the summary judgment standard), *cert. denied*, 138 S. Ct. 1261 (2018).

“The movant has the initial burden of demonstrating the absence of material fact issues.” *Abbott*, 2 F.3d at 619 (citation omitted). To avoid summary judgment, the nonmovant must adduce evidence which creates a material fact issue concerning each of the essential elements of its case for which it will bear the burden of proof at trial. “[A] dispute about a material fact is ‘genuine’ . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). “We resolve all factual inferences in favor of the nonmovant.” *Id.* (citation omitted). Unsubstantiated assertions are not competent summary judgment evidence. *Id.* (citation omitted).

The Recommended Decision offers extensive support for its conclusions that there is no genuine issue of material fact. R.D. 16-22. As ALJ Miserendino lays out in the Recommended Decision, the FDIC provided voluminous, un rebutted evidence that the Bank regularly and repeatedly violated various flood insurance statutes and regulations. The Bank, in turn, offered unsupported denials and conclusory statements that the violations were mere mistakes. Having reviewed the record, the Board agrees with the ALJ that summary disposition is appropriate as a matter of law and a CMP is warranted.

1. Failure to obtain required flood insurance coverage

The record supports ALJ Miserendino’s conclusion that, in 26 instances, the Bank made, increased, extended, or renewed loans without flood insurance coverage for the collateral being in place at or before loan origination, in violation of section 102(b)(1) of the FDPA, 42 U.S.C.

§ 4012a(b)(1), and section 339.3(a) of the FDIC Rules and Regulations, 12 C.F.R. § 339.3(a).

R.D. 16. The Bank submitted no evidence to the contrary. R.D. 17. Rather, some of the Bank's exhibits concede that, in several cases, flood insurance was acquired *after* origination. *Id.* The FDPA and section 339.3(a) are clear that flood insurance coverage must be obtained at or before loan origination.

2. Failure to maintain full flood insurance coverage for the term of the loan

The record supports ALJ Miserendino's conclusion that in at least 14 instances the bank failed to maintain full flood insurance for the loan's term in an amount at least equal to the outstanding principal balance or the maximum limit of coverage in violation of section 102(b)(1) of the FDPA, 42 U.S.C. § 4012a(b)(1) and section 339.3(a) of the FDIC Rules and Regulations, 12 C.F.R. § 339.3(a). R.D. 17-18. In addition to those deficiencies, in 11 of those 14 instances, the Bank failed to force place flood insurance within 45 days after notification of insufficient coverage to the borrower in violation of section 102(e)(2), 42 U.S.C. § 4012a(e)(2) and section 339.7 of the FDIC Rules and Regulations, 12 C.F.R. § 339.7. R.D. 17-18.⁸ Again, the Bank did not dispute that flood insurance coverage was not maintained for the term of these loans, and it presented no contradicting evidence. *Id.* at 18.

3. Failure to obtain a sufficient amount of flood insurance coverage

The record also supports the ALJ's finding that in 20 instances the Bank failed to ensure that collateral securing loans had a sufficient amount of flood insurance coverage, in violation of section 102(b)(1) of the FDPA, 42 U.S.C. § 4012a(b)(1), and section 339.3(a) of the FDIC Rules and Regulations, 12 C.F.R. § 339.3(a). R.D. 18-19. The Bank did not dispute that the amount of flood insurance coverage was insufficient in these instances and, again, presented no contradicting evidence. *Id.* at 19.

⁸ See *infra* p.10 (detailing instances in which the Bank failed to provide the preliminary notice required under section 102(e)(1)).

4. Failure to notify the borrower of force-place flood insurance coverage

The Board agrees with ALJ Miserendino that in 36 instances, where flood insurance was insufficient or lapsed, the Bank failed to send force place insurance notices to borrowers, in violation of section 102(e)(1) of the FDPA, 42 U.S.C. § 4012a(e)(1), and section 339.7 of the FDIC Rules and Regulations, 12 C.F.R. § 339.7. R.D. 19-20. The Bank did not dispute that it failed to provide the required notices or submit any evidence to the contrary. *Id.* at 20.

5. Failure to provide borrower with SFHA Notice

The record further shows in 40 instances, the Bank made, increased, extended, or renewed loans without mailing or delivering the SFHA notice to the borrower, in violation of section 1364(a)(1) of the NFIA, 42 U.S.C. § 4104a(a)(1), and section 339.9(a) of the FDIC Rules and Regulations, 12 C.F.R. § 339.9(a). R.D. 20-21. The Bank raised no material issues of fact and submitted no evidence to dispute these violations. *Id.* at 21.

6. Failure to provide borrower with SFHA Notice within a reasonable time before completion of the transaction

Finally, the record reflects that in 60 instances, the Bank failed to mail or deliver the required SFHA Notice to the borrower within a reasonable time before the completion of the transaction, in violation of section 1364(a)(1) of the NFIA, 42 U.S.C. § 4104a(a)(1), and section 339.9(c) of the FDIC Rules and Regulations, 12 C.F.R. § 339.9(c). R.D. 21-22. The Bank did not assert any material issues of fact in dispute nor provide any evidence to dispute these violations. *Id.* at 22.

B. The CMP Assessment is Appropriate

Under Section 102(f) of the FDPA, 42 U.S.C. § 4012a(f), the FDIC is required to assess a CMP against any institution that it finds to have engaged in a “pattern or practice” of violations of the FDPA and its implementing regulations involving the making, increasing, extending or renewing loans in violation of Part 339 and 42 U.S.C. § 4012a(b), the notice requirements of 42 U.S.C. § 4104a, or the notice of force placement requirements of 42 U.S.C. § 4012a(e). The Board agrees with ALJ Miserendino’s finding that the Bank engaged in a “pattern or practice” of violations of the FDPA and its implementing regulations warranting a CMP. For example, the record shows that the Respondent committed multiple violations of 42 U.S.C. § 4012a(b)(1) and section 339.3(a), 42 U.S.C. § 4012a(e)(1) and section 339.7, 42 U.S.C. § 4104(a)(a)(1) and sections 339.9(a) and 339.9(c). The violations took place over an extended period of time dating as far back as the 2012 Report of Visitation. The violations were neither isolated nor unrelated and the total number was significant in comparison to the total number of applicable transactions. Moreover, the conduct resulted from a common cause within the Bank’s control and was grounded in an established practice, namely, the Bank board’s and management’s failure to oversee flood insurance policies, processes, and procedures. *See* R.D. 23-25.

ALJ Miserendino recommended a CMP of \$136,100. R.D. 22-31. The FDPA states that a lending institution found to have a pattern or practice of committing flood insurance violations may be assessed a penalty not to exceed \$2,133 per violation. 42 U.S.C. § 4012a(f); Adjusting Civil Money Penalties for Inflation, 83 Fed. Reg. 1293-01, 1294 (Jan. 11, 2018). As noted by the Assistant Regional Director for Compliance, the 2015 Compliance Examination cited the violations as Level 2/Medium Severity. Declaration of Assistant Regional Dir. for Compliance G. Chris Finnegan (“Finnegan Decl.”) ¶ 47. The violations exposed the Bank to potential vulnerability, resulted in a deficient CMS, and were likely to recur given an inexperienced staff,

which lacked adequate training to perform effective oversight. *Id.* The Board generally gives deference to examiner's assessments, and the Bank has provided no contrary evidence that would give the Board reason to question the examiner's judgment here. *See Sunshine State Bank v. FDIC*, 783 F.2d 1580, 1583 (11th Cir. 1986) ("Th[e] exercise of informed judgment on the part of commissioned examiners is entitled to deference, and should not be disregarded in the absence of compelling evidence that it is without rational basis."). Consistent with the FDIC's normal policies and procedures regarding the assessment of flood insurance civil money penalties, penalties of \$401 to \$1000 per violation were proposed, totaling \$136,100, which is well below the maximum penalty allowed.⁹ Although the Bank argued in its Response that the CMP was disproportionately high and ALJ Miserendino should take mitigating factors into account, the Bank submitted no evidence showing that it had taken mitigating measures and showing its effect. R.D. 24. Accordingly, the Board agrees with ALJ Miserendino that the evidence in the record fully supports a CMP for \$136,100.

V. THE BANK HAS WAIVED ITS OPPORTUNITY TO FILE EXCEPTIONS

On December 11, 2018, ALJ Miserendino issued the Recommended Decision and certified the record in this matter to the Executive Secretary. 12 C.F.R. § 308.38. Pursuant to 12 C.F.R. § 308.39(b), the Bank waived its opportunity to file written exceptions within 30 days after the service of the Recommended Decision.¹⁰

⁹ Civil money penalties of \$1,000 per violation were proposed where the violation was substantive in nature, meaning flood insurance was not obtained, not maintained, or not obtained or maintained in a sufficient amount, and the violation exposed the Bank and the borrower to potentially significant monetary harm in the event of a flood. R.D. 28-29. Civil money penalties of \$401 per violation were proposed where the violation involved a failure to provide a SFHA Notice to the borrower or a failure to provide a timely SFHA Notice to the borrower. *Id.* at 30.

¹⁰ As previously discussed, *supra* n.2, to the extent the Bank intended its Motion for Interlocutory Review to serve as exceptions, the Board declines to consider it because it identifies no specific objections to the Recommended Decision and does not satisfy the form or content requirements for exceptions in the FDIC's Rules. 12 C.F.R. § 308.39.

VI. CONCLUSION

After a thorough review of the record in this proceeding, and for the reasons set forth previously, the Board finds that a CMP is warranted against the Bank. The record clearly shows that the Bank was engaged in a pattern or practice of committing regular and repeated violations of the NFIA, FDPA, and Part 339 of the FDIC Rules and Regulations for an extended period of time. Based on the foregoing, the Board affirms the Recommended Decision, adopts the findings of fact and conclusions of law therein, and issues the following CMP.

ORDER TO PAY CIVIL MONEY PENALTY

On May 19, 2017, the Federal Deposit Insurance Corporation ("FDIC") issued a Notice of Assessment of Civil Money Penalty ("Notice") against the Bank of Louisiana, New Orleans, Louisiana. The Respondent timely filed an Answer and Request for a Hearing.

On January 2, 2018, the FDIC filed a Motion for Summary Disposition or Partial Summary Disposition. On January 22, 2018, the Respondent filed its Response.

Having considered the evidence submitted in connection with the Motion for Summary Disposition or Partial Summary Disposition, the arguments of both parties, and the Recommended Decision issued by the presiding administrative law judge ("ALJ"),

Pursuant to section 102(f) of the Flood Disaster Protection Act of 1973, 42 U.S.C. § 4012a(f):

IT IS HEREBY ORDERED THAT, Respondent, Bank of Louisiana, be assessed a civil money penalty of \$136,100.

Remittance of the civil money penalty shall be payable to the Treasury of the United States and delivered to the Executive Secretary of the FDIC, Washington, D.C.

This ORDER will become effective thirty (30) days from the date of its issuance.

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

IT IS FURTHER ORDERED that copies of this Decision and Order shall be served on Respondent Bank of Louisiana, FDIC Enforcement Counsel, the ALJ, and the Louisiana Office of Financial Institutions.

IT IS SO ORDERED.

Dated at Washington, D.C. this 28th day of May, 2019.

085774

/s/

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation

CERTIFICATE OF SERVICE

The undersigned certifies that on May 29, 2019 the Decision and Order were served by Certified Mail Return Receipt Requested upon the following:

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Chairman of the Board
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New Orleans, LA 70130

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Executive Secretary / Secretary to the Board
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John P. Ducrest
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The undersigned further certifies that on May 29, 2019 the Decision and Order were served by email upon the following:

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May 29, 2019