

**UNITED STATES OF AMERICA
BEFORE THE
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
WASHINGTON, D.C.**

In the Matter of

FRANK E. SMITH and MARK A. KIOLBASA

Institution-affiliated parties of FARMERS STATE BANK, Pine Bluffs, Wyoming, a state-member bank

Docket No. 18-036-E-I

Christopher B. McNeil
Administrative Law Judge

**FINDINGS OF FACT, CONCLUSIONS OF LAW, ANALYSIS, RECOMMENDED
DECISION, AND PROPOSED ORDERS**

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Part I

A. Nature of the Case

Following periods where they had been employed at Central Bank & Trust, Lander, Wyoming (Central), Frank E. Smith and Mark A. Kiolbasa, the Respondents in this administrative enforcement action, left Central, acquired ownership interests in Commercial Bancorp, Pine Bluffs, Wyoming (Commercial), a registered bank holding company, and took leadership positions in Commercial's subsidiary, Farmers State Bank, Pine Bluffs, Wyoming (Farmers).

This enforcement action concerns actions attributed to Respondents as they transitioned from Central to Farmers. Respondents have been charged with engaging in unsafe and unsound banking practices: specifically, that in this transition, Respondents misappropriated Central's confidential and proprietary information for use at Farmers. The charges also allege that their conduct breached fiduciary duties Respondents owed to Central, and that through their misconduct Respondents benefitted while both Central and Farmers suffered either financial loss or other damage.

Upon its review of the facts alleged against Respondents, the Board of Governors of the Federal Reserve System notified Respondents that it proposed to issue orders permanently prohibiting Respondents from engaging in regulated banking activity.

B. Public Access to this Recommended Decision - Submissions Under Seal

Some of the motions and supporting exhibits in this administrative enforcement action are being maintained in the record under seal. Enforcement Counsel's submissions were presented to the Office of Financial Institution Adjudication (OFIA) as sealed pursuant to 12 C.F.R. § 263.33(b),¹ upon Enforcement Counsel's determination that their submissions "contain identities of third-party individuals and customer-specific information relating to third-party individuals and entities connected to Respondent's [*sic*] misconduct," the disclosure of which "would be contrary to the public interest."²

Similarly, upon submitting responses to Enforcement Counsel's motion for summary disposition and preparing prehearing submissions, Respondents jointly averred that disclosure of their submissions would be "contrary to the public interest" for the "same reasons set forth by Enforcement Counsel" in their Notice of Filing Under Seal."³

Without determining whether the submissions should remain under seal once the administrative record is transferred from the Office of Financial Institution Adjudication to the Executive Staff of the Board of Governors of the Federal Reserve System, I approved Respondents' joint proposal to file under seal,⁴ and all submissions responsive to Enforcement Counsel's summary disposition motion and Statement of Material Facts that were submitted under seal or under a joint proposal to file under seal shall be maintained under seal until other

¹ See Enforcement Counsel's Notice of Filing Under Seal, dated August 2, 2019.

² *Id.* at 1-2.

³ Respondents' Proposal to File Under Seal, dated August 22, 2019, at 1.

⁴ Order Regarding Enforcement Counsel's Motion for Summary Disposition issued October 24, 2019 at 4.

orders are entered by the Board of Governors of the Federal Reserve System.⁵ This Recommended Decision, however, includes no references that would warrant a non-disclosure order and as such shall be maintained in the public record of this administrative enforcement action unless the Board of Governors of the Federal Reserve System determines otherwise.⁶

C. Summary

Central and Farmers are banks located in or near Cheyenne, Wyoming. In 2013, Respondents, while working at Central, collaborated on a common goal, that of moving from Central to take ownership and leadership interests in another bank. Through this collaboration, they determined that Farmers would serve their purposes, and in furtherance of this goal they developed a business plan that, when presented to Farmers' Board of Directors, led to their acquisition of interests in Farmers' holding company and securing positions as directors and executive officers of Farmers.

In the process, Respondents reached out to Central's customers and sought to determine whether customers with whom they had good working relationships would be interested in investing in Farmers (through its holding company). Respondents gathered information from Central's records regarding these customers – including information Central regarded as confidential and proprietary. Respondents also copied operational information used by Central to perform its banking functions, and brought that information to Farmers during the transition.

When evidence of customer migration from Central to Farmers came to the attention of Central's management, Central's President asked Respondent Smith, who was then serving as Central's Chief Financial Officer and its Customer Information Security Officer, to investigate the migration of these customer accounts. Respondent Smith withheld from Central's President information that was material to this inquiry, keeping silent about his intentions to leave Central and about his on-going efforts to secure investors for Farmers.

Once the true nature of Respondents' collective efforts became clear to Central's management (by which time both Respondents were working at Farmers), Central initiated a civil lawsuit charging Farmers' Board of Directors and both Respondents with misappropriation of trade secrets and other proprietary information, and charging Respondents with breaching fiduciary duties they owed to Central.

Following a two-week trial in state court, a jury determined that Respondents (but not Farmers or Farmers' Board) willfully and maliciously misappropriated Central's trade secrets; willfully and wantonly committed tortious interference with Central's contract or prospective economic advantage; and willfully and wantonly breached their fiduciary duties to Central. The jury found that Central was entitled to damages of \$300,000 from Respondents for the willful and wanton misappropriation of trade secrets; \$625,000 from Respondents for the tortious interference with Central's contract or prospective economic advantage; \$205,000 from Smith and \$93,000 from Kiolbasa for the willful and wanton breach of fiduciary duties, and punitive damages of \$50,000 from Smith and \$25,000 from Kiolbasa.

⁵ Enforcement Counsel has the authority, exercised in this instance, to determine whether their submission is to be maintained under seal, and do not require ALJ approval in making this determination. See 12 C.F.R. § 263.33.

⁶ See 12 C.F.R. § 263.33(b), which provides that the ALJ "shall take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public."

In the course of its investigation into the events reflected in the state court proceedings, the staff of the Federal Reserve System commissioned expert examinations of the evidence presented during the state court trial. Those examinations led to determinations that Respondents had engaged in unsafe banking practices, and had breached fiduciary duties they owed to Central and to Farmers. Drawing from the analyses by Reserve System staff, the Board of Governors presented to Respondents its charges, and from those charges it now proposes to issue orders permanently barring Respondents from engaging in regulated banking activity.

The charging document thus is based on two sets of evidence: first, evidence presented in the form of the jury's verdicts against Respondents, which Enforcement Counsel assert should through the doctrine of collateral estoppel (also known as issue preclusion) preclude any effort by Respondents to deny or relitigate those issues that led to the jury's findings adverse to Respondents. Second, Enforcement Counsel presented the analyses performed by the Reserve System's commissioned experts, who opined that the evidence presented in the course of the civil litigation established that Respondents had engaged in unsafe practices and breached fiduciary duties they owed to Central and Farmers. This second prong thus uses evidence presented during the civil litigation, but does not depend on the jury's verdict and is not based on issue preclusion.

Responding in opposition, Respondents have posited that inasmuch as Central is an institution subject only to the regulatory jurisdiction of the Federal Deposit Insurance Corporation, the Board of Directors of the Federal Reserve System has no jurisdiction over the issues presented in the charging document. Further, they asserted that the verdict reached by the state court jury should be given no weight, inasmuch as Respondents have settled the state court claims in a way that will render the verdict void – by payment of \$1.4 million to Central.

Respondents further assert that when examined point by point, the documents and transactions identified by the Reserve System's examiners do not establish any misappropriation of confidential documents from Central, and do not establish any breach of duties owed to either Central or Farmers. They also aver that some of the documents identified by Enforcement Counsel were taken from Central at the request of a supervisory examiner of the Federal Reserve System.

Upon my review of the evidence, and after considering the arguments of the parties, I found preponderant evidence established that Respondents had engaged in misconduct, both because they engaged in unsafe banking practices in their misappropriation of Central's confidential and proprietary information, and because their conduct constituted breaches of fiduciary duties owed to both Central and Farmers. Upon these findings, I recommend the Board of Governors of the Federal Reserve System issue orders prohibiting Respondents from engaging in regulated banking activity.

Contents

Part I 2

A. Nature of the Case 2

B. Public Access to this Recommended Decision - Submissions Under Seal 2

C. Summary 3

Part II..... 8

A. Procedural History 8

B. Summary of Findings 8

C. Grounds for Section 8(e) Orders - Prohibition..... 9

D. Nature of the Enforcement Proceeding 10

E. The Two Theories of the Government’s Case: Preclusive Effects of a State Civil Judgment, and the Evidence Examined by the Reserve Board’s Expert Witnesses 10

F. Respondents’ Theories in Opposition 13

1. Respondents Assert that the Federal Reserve Board Lacks the Authority to Commence this Enforcement Action..... 13

2. Respondents Assert that the Civil Litigation Provides No Basis for Judgment 13

3. Respondents Assert that Evidence Adduced During the Civil Litigation is Insufficient to Support an Adverse Judgment 14

4. Respondents Assert that Material Facts are Controverted, Precluding Summary Disposition..... 14

5. Respondents Affirmative Defenses 15

Part III 16

A. Admitted Factual Claims 16

1. Admitted Facts Relating to Respondents’ Course of Employment between Central and Farmers 16

2. Admitted Facts Relating to Efforts by Respondents to Secure Employment at Farmers..... 16

3. Admitted Facts Concerning the Migration of Central’s Customers to Farmers..... 17

4. Admitted Facts Relating to Terms of Respondents’ Employment at Central 18

B. Issue Regarding the Jurisdiction of the Federal Reserve Board over Respondents	19
1. Respondents are Affiliated with Farmers – an Insured Institution	20
C. Issues Regarding Collateral Estoppel.....	23
1. Characterizing Conduct as Unsafe or Unsound – Rejection of the <i>Gulf Federal Standard</i>	25
2. Misconduct Through Breaches of Fiduciary Duties of Loyalty, Care, and Candor	27
3. Respondents are Estopped from Controverting the Central Litigation Determination that Respondents Breached Fiduciary Duties Owed to Central	28
4. Respondents Were Highly Motivated to Litigate the Issues Raised in Central that are also Raised in this Enforcement Action.....	31
5. Relevance of Respondents’ Appeal of the Central Judgment and of the Settlement of the State Court Claims.....	32
6. Collateral Estoppel Issues are Determined by State Law	34
Findings of Fact Based on Issue Preclusion and Collateral Estoppel	36
Conclusions of Law Based on Issue Preclusion and Collateral Estoppel.....	36
Findings of Fact Based upon the State Court Judgment.....	36
Part IV	38
A. Findings Based on the Record.....	38
1. Enforcement Counsel’s Evidence Apart from Preclusion Based on the Central Litigation.....	38
Conclusions Regarding Effect	38
Conclusions Regarding Culpability	39
2. Factual Premises Established through the Reserve Board’s Expert Witness, Douglas L. Gray.....	40
3. Breaching Central’s Employment Policies Constituted Unsafe and Unsound Practices by Respondents and Breached Fiduciary Duties Owed to Central	43
a. Violations of Central’s Policies	43
b. Respondents’ Duty to Act with Honesty, Integrity, and Loyalty	44
c. Specific and Uncontroverted Instances of Conduct that Breached Central’s Employment Policies.....	45

d. Conduct Specific to Mr. Smith	47
e. Engaging in Unsafe and Unsound Banking Practices not Based on Central’s Employment Policies.....	49
f. Mr. Gray’s Credentials as an Expert.....	50
4. What Constitutes an Unsafe or Unsound Practice.....	51
a. Respondents’ Conduct was Contrary to Generally Accepted Standards of Prudent Banking Operations.....	52
b. Actions that Led to the Transfer of Loans Away from Central	53
c. Breaches of Fiduciary Duties Owed to Central.....	54
d. Respondents Breached the Duty of Care Owed to Central	55
e. Respondents Breached the Duties of Loyalty & Candor Owed to Central	58
f. Breaches of Loyalty and Candor Specific to Smith.....	60
g. Identifying the Harm to Central and Farmers.....	61
h. Mr. Schwartz’ Analysis of Financial Harm to Central and Benefit to Respondents and to Farmers	61
1. Financial Benefit to Respondents	62
2. Financial Harm to Central.....	62
Part V - Respondents’ Opposition.....	63
A. Respondents’ Burden when Opposing Enforcement Counsel’s Statement of Undisputed Material Facts	64
1. Review of Respondents’ Statement of Disputed Material Facts.....	64
a. Claim of General Dispute.....	65
b. Claims that Constituted Legal Averments	65
c. Factual Claims not Supported by References to the Record	65
d. Factual Claims that were not Disputed	67
e. Presentation of Factual Claims that were not Material to Disputed Issues	68
B. Analysis of Averments Related to Material Disputed Facts.....	69
C. Analysis of Respondents’ Arguments.....	83
D. Findings and Conclusions Based on Enforcement Counsel’s Motion for Summary Disposition.....	85
1. Conclusions Regarding Misconduct.....	86
a. Respondents Engaged in Unsafe and Unsound Banking Practices	86

b. Respondents Breached Fiduciary Duties Owed to Central and Farmers .	86
2. Findings and Conclusions Regarding Effect	87
3. Findings and Conclusions Regarding Culpability	89
E. Weighing Evidence Regarding Respondents’ Claim that Mr. Smith Produced Documents to Mr. Kiolbasa at the Federal Reserve’s Request.....	100
Conclusions of Law	101
Recommended Orders of Prohibition	102

Part II

A. Procedural History

By a submission dated August 2, 2019, Enforcement Counsel moved for summary disposition of all issues and claims presented in this administrative enforcement action.⁷ Accompanying the Motion were 110 exhibits and Enforcement Counsel’s Statement reflecting the facts Enforcement Counsel aver are uncontested and support a finding that judgment in Enforcement Counsel’s favor is warranted.⁸

On August 22, 2019, Respondents timely filed a response in opposition to the Motion.⁹ Accompanying Respondents’ response was their joint Statement identifying facts that Respondents aver are both material and disputed, along with sixteen exhibits.¹⁰

B. Summary of Findings

In an Order issued on October 24, 2019, Enforcement Counsel’s Motion was granted in part and denied in part.¹¹ Pursuant to the Reserve Board’s Uniform Rules of Practice and Procedure,¹² because I found that Enforcement Counsel were entitled to summary disposition as to certain claims only, I deferred submitting a recommended decision as to those claims, and directed the parties to address the remaining claims during a hearing that was held on December 3, 2019, in Cheyenne, Wyoming.

The findings presented in the October 24, 2019 Order are incorporated by reference, as if fully rewritten here. Portions of that Order are presented here, for the convenience of the Board of Governors.

⁷ Enforcement Counsel’s Motion for Summary Disposition, dated August 2, 2019.

⁸ Statement of Undisputed Facts in Support of Enforcement Counsel’s Motion for Summary Disposition, dated August 2, 2019.

⁹ Respondents’ Opposition to Enforcement Counsel’s Motion for Summary Disposition and Motion to Dismiss, dated August 22, 2019.

¹⁰ Statement of Disputed Material Facts in Opposition to Enforcement Counsel’s Motion for Summary Disposition, dated August 22, 2019.

¹¹ Order Regarding Enforcement Counsel’s Motion for Summary Disposition, issued October 24, 2019.

¹² See 12 C.F.R. § 263.30.

Upon this record, I find uncontroverted and preponderant evidence establishes, over Respondents' objections, that the Federal Reserve Board has jurisdiction over the parties and the subject matter of this enforcement action, as alleged in Paragraphs 1 through 4 of the Notice of Intent.

Further, I find the uncontroverted and preponderant evidence establishes that as individuals and as collaborators, Respondents engaged in *misconduct*, as defined under section 8(e)(1)(A) of the FDI Act, as alleged in the Notice of Intent at Paragraphs A and B, and Paragraphs 5 through 25, 28 and 30, and Enforcement Counsel's Motion at Part V (B).

I further find that preponderant evidence has now been presented establishing the adverse *effects* of Respondents' misconduct, and finding that Respondents acted with the requisite *culpability*; and that upon this evidence cause has been shown to recommend the Board of Governors enter orders prohibiting Respondents from engaging in regulated banking activity, as proposed in the Notice of Charges.

C. Grounds for Section 8(e) Orders - Prohibition

The Federal Deposit Insurance Act authorizes the entry of a removal and prohibition order barring future "participation . . . in the conduct of the affairs of any insured depository institution" when the appropriate federal banking agency finds that a party affiliated with an insured institution (1) violated "any law or regulation," "engaged or participated in any unsafe or unsound practice," or breached a fiduciary duty; (2) that the violation, practice, or breach caused the bank to "suffer[] or ... probably suffer financial loss or other damage," prejudices or could prejudice depositors' interests, or gives the party "financial gain or other benefit;" and (3) that "involves personal dishonesty . . . or . . . demonstrates willful or continuing disregard . . . for the safety or soundness of [the bank]." ¹³ These three prongs of the prohibition action are known respectively as "misconduct," "effects," and "culpability." ¹⁴ For each prong, any one of multiple alternative grounds can support an adverse finding. An order of prohibition is supportable upon proof of each prong by a preponderance of the evidence, so long as the misconduct creates a "reasonably foreseeable" risk to the financial institution. ¹⁵

The "misconduct" prong of 12 U.S.C. § 1818(e)(1)(A) may be satisfied by a finding of violation of law or regulation, unsafe or unsound practices, or breach of fiduciary duty. ¹⁶

The "effects" prong may be satisfied by a finding that "by reason of" the misconduct, the bank "has suffered or will probably suffer financial loss or other damage; the interests of the insured depository institution's depositors have been or could be prejudiced; or such party has received financial gain or other benefit." ¹⁷ It is satisfied by evidence of either potential or actual

¹³ 12 U.S.C. § 1818(e)(1). Note that although this statute authorizes enforcement actions that would include an order of removal, the Notice of Intent did not indicate removal was included in the relief sought. See Notice of Intent at ¶31.

¹⁴ See *Proffitt v. FDIC*, 200 F.3d 855, 862 (D.C.Cir.2000).

¹⁵ *Kaplan v. OTS*, 104 F.3d 417, 421 (D.C.Cir.1997); see *Kim v. OTS*, 40 F.3d 1050, 1054 (9th Cir.1994).

¹⁶ *Dodge v. Comptroller of Currency*, 744 F.3d 148, 156 (D.C. Cir. 2014), citing *Landry v. FDIC*, 204 F.3d 1125, 1138 (D.C. Cir. 2000).

¹⁷ *Dodge*, 744 F.3d at 158, quoting 12 U.S.C. § 1818(e)(1)(B).

loss to the financial institution, and the exact amount of harm need not be proven.¹⁸

The “culpability” prong may be satisfied by a finding of personal dishonesty or “willful or continuing disregard ... for the safety or soundness of” the bank.¹⁹ The personal dishonesty element of § 1818(e) is satisfied when a person disguises wrongdoing from the institution’s board and regulators, or fails to disclose material information.²⁰ Both the personal dishonesty and willful or continuous disregard elements “require some showing of scienter.”²¹ “[W]illful disregard” is shown by “deliberate conduct which exposed the bank to abnormal risk of loss or harm contrary to prudent banking practices,” and “continuing disregard” requires conduct “over a period of time with heedless indifference to the prospective consequences”.²²

D. Nature of the Enforcement Proceeding

Through its Notice of Intent, the Board of Governors of the Federal Reserve System seeks to prohibit Respondents Frank E. Smith and Mark A. Kiolbasa from participating in any manner in the conduct of the affairs of any institution specified in 12 U.S.C. § 1818(e)(7)(a), pursuant to section 8(e) of the Federal Deposit Insurance Act, as amended (the “FDI Act”), 12 U.S.C. § 1818(e) (hereinafter Prohibition Order).²³

The Notice alleged that while still employed by Central Bank & Trust, Lander, Wyoming (Central), Smith and Kiolbasa conspired to misappropriate Central’s proprietary business information in connection with their plan to acquire an ownership interest in Commercial Bancorp, Pine Bluffs, Wyoming (Commercial), a registered bank holding company in which Farmers State Bank, Pine Bluffs, Wyoming (Farmers) is a subsidiary, and in connection with their plan to leave Central in order to take management positions at Farmers.²⁴

E. The Two Theories of the Government’s Case: The Preclusive Effects of a State Civil Judgment, and the Evidence Examined by the Federal Reserve Board’s Expert Witnesses

Enforcement Counsel presented two core bases for judgment in their favor: first, they presented evidence of a judgment having been entered adverse to Respondents that Enforcement Counsel aver resulted from a prior adjudication in which the issues decided were identical to the issues presented in this enforcement action.²⁵ Enforcement Counsel aver that in jury proceedings

¹⁸ *Dodge*, 744 F.3d at 158, citing *Pharaon v. Bd. of Governors of the Fed. Reserve Sys.*, 135 F.3d 148, 157 (D.C.Cir.1998); *Proffitt*, 200 F.3d at 863.

¹⁹ 12 U.S.C. § 1818(e)(1)(C).

²⁰ *Dodge*, 744 F.3d at 159–60 citing *Landry*, 204 F.3d at 1139–40, *Greenberg v. Bd. of Governors of the Fed. Reserve Sys.*, 968 F.2d 164, 171 (2d Cir.1992); see also *Van Dyke v. Bd. of Governors of the Fed. Reserve Sys.*, 876 F.2d 1377, 1379 (8th Cir.1989).

²¹ *Dodge*, 744 F.3d at 159–60 quoting *Landry*, 204 F.3d at 1139 (citing *Kim*, 40 F.3d at 1054–55).

²² *Dodge*, 744 F.3d at 160, quoting *Grubb v. FDIC*, 34 F.3d 956, 961–62 (10th Cir.1994),

²³ Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, dated December 11, 2018, at 2.

²⁴ *Id.* at ¶5.

²⁵ Enforcement Counsel’s Memorandum of Points and Authorities in Support of its Motion for Summary Disposition at 30-38.

conducted in the State District Court of the First Judicial District of Wyoming,²⁶ judgment was entered finding that Respondents willfully and maliciously appropriated Central's trade secrets, willfully and wantonly engaged in tortious interference with a contract or prospective economic advantage of Central, and willfully and wantonly breached their fiduciary duties to Central.²⁷

Upon these and related findings adduced during the state civil litigation, Enforcement Counsel aver "issues decided in the Central Litigation are identical with the relevant issues presented in these proceedings and satisfy each element required for an order of prohibition under section 8(d) of the FDI Act."²⁸ Considered in conjunction with the averments that the state court adjudication "resulted in a judgment on the merits," that as defendants in the state court litigation Respondents were either a party or in privity with a party in the state court litigation, and that as defendants in that litigation Respondents "had a full and fair opportunity to litigate" the material issues in the state court litigation, Enforcement Counsel assert the state court judgment "should be given preclusive effect" in this federal administrative enforcement action.²⁹ From this, Enforcement Counsel further assert that the state court judgment "satisfies the requirements for obtaining a Prohibition Order against Respondents."³⁰

Enforcement Counsel's second core theory is that Respondents' actions violated Wyoming's Trade Secrets Act, and upon this factual premise the evidence establishes Respondents' misconduct constituted both a violation of law, and unsafe and unsound banking practices – either one of which would provide a sufficient basis to find misconduct under the FDI Act.³¹

Under this theory, there need be no reliance on the jury's findings in the state court litigation, but instead misconduct would be identified through evidence presented in the state court proceedings and presented through submissions in support of Enforcement Counsel's summary dismissal motion and during the evidentiary hearing conducted on December 3, 2019 in Wyoming. Such evidence consists of the record in this proceeding, including exhibits offered during the state court proceeding as well as evidence presented by the parties through the summary disposition process and during the December 3, 2019 hearing.³² Evidence to be considered includes authenticated copies of Central's internal policies for employees, and

²⁶ *Central Bank & Trust v. Frank Smith et al.*, Docket No. 186-671, District Court, First Judicial District of the State of Wyoming. See EC SD Ex. 8 at 1.

²⁷ Enforcement Counsel's Memorandum of Points and Authorities in Support of its Motion for Summary Disposition at 32, citing EC SD Ex. 79 at FRB-Farmers-005705-06.

²⁸ Enforcement Counsel's Memorandum of Points and Authorities in Support of its Motion for Summary Disposition at 35.

²⁹ *Id.* at 37-38.

³⁰ *Id.* at 38.

³¹ *Id.* at 39.

³² Pursuant to the Notice Regarding Errata Submission and Post-Hearing Briefs dated January 6, 2020, Enforcement Counsel on February 5, 2020 filed without objection Enforcement Counsel's Proposed Errata Amendments to the Certified Hearing, and on February 5, 2020, Respondent Kiolbasa filed the Hearing Errata Sheet of Mark A. Kiolbasa. The amendments therein are approved, without determining the accuracy of the amendments as proposed. Further, in those instances following the objection of a party, where the Court Reporter reported "State," the text should read "Basis?". See, e.g., Tr. at 66, 13-14, 116, 10-11.

evidence establishing Respondents' alleged breach of those policies (particularly those policies requiring honesty, integrity, loyalty, and restrictions on outside activities) – evidence that had in part been presented during the state court litigation and in part had been developed outside of those proceedings.³³

Separately, Enforcement Counsel aver misconduct has been shown establishing that Respondents breached fiduciary duties owed to Central.³⁴

Apart from alleging Respondents' collective actions constituted *misconduct* (by violation of law, by engaging in unsafe banking practices, or by breaching fiduciary duties, or any combination thereof), Enforcement Counsel aver Respondents' misconduct satisfied the *effect* prong of the FDI Act upon a claim that as a result of the misconduct, either that Central suffered (or probably will suffer) either financial loss or other damage, or that Respondents received a financial gain or other benefit from their conduct. Evidence presented through the summary disposition process, coupled with evidence adduced during the hearing, established by a preponderance the adverse effects consequent to Respondents' misconduct.

Enforcement Counsel aver the evidence establishes both loss to Central and gain by Respondents. Also, referring specifically to Respondent Kiolbasa, Enforcement Counsel aver that the effect prong has been satisfied upon a showing of Kiolbasa's misconduct while employed at Farmers – specifically, that as a result of Kiolbasa's conduct, Farmers has suffered damage occasioned by the costs Farmers bore defending its Directors in the Central litigation, and that both Smith and Kiolbasa received a financial gain or other benefit from their conduct.³⁵

With respect to Respondents' *culpability*, Enforcement Counsel aver that Respondents' misconduct evidenced either personal dishonesty, or a willful or continuing disregard for Central's safety and soundness (or a combination thereof).³⁶

Regarding allegations attesting to Respondents' personal dishonesty, Enforcement Counsel aver that throughout the process during which Respondents transitioned from Central and sought positions at Farmers, Respondents coordinated their efforts to copy and transfer data from Central for use by Farmers, without informing anyone at Central and without obtaining authorization for the transfers.³⁷ According to Enforcement Counsel, while Smith was still employed at Central, he lied to or deceived multiple Central employees on several occasions in order to “cover up the assistance he provided to Farmers,” while Kiolbasa advised Smith he was downloading data to his Central computer for use at Farmers, and described steps both had taken to conceal from Central the data transfer.³⁸

While the *culpability* element in a Section 8(e) enforcement action may be satisfied with either proof of personal dishonesty or a willful or continuing disregard for the institution's safety

³³ Enforcement Counsel's Memorandum of Points and Authorities in Support of its Motion for Summary Disposition at 44.

³⁴ *Id.* at 50-56.

³⁵ *Id.* at 56-57.

³⁶ *Id.* at 61-72.

³⁷ *Id.* at 62.

³⁸ *Id.* at 62-63.

or soundness, Enforcement Counsel aver both are shown here. According to Enforcement Counsel, Respondents demonstrated a willful and continuing disregard for Central’s safety and soundness by “deliberately misappropriate[ing] Central’s confidential and proprietary documents” and disclosing them, along with confidential customer information, to Farmers’ board members and, in Smith’s case, to Farmers’ employees.³⁹ Enforcement Counsel further aver Respondents represented to Farmers’ board members – even before taking positions with Farmers – that they had “approached Central’s customers and that the customers had agreed to move their loans from Central to Farmers, evidencing willful disregard for financial risks to Central.”⁴⁰

Beyond presenting averments of fact and legal claims in support of their summary disposition motion, Enforcement Counsel further presented arguments and factual claims pertaining to Respondents’ affirmative defenses, asserting that those affirmative defenses not already waived should be rejected as not supported based on the undisputed evidence presented through the summary disposition motion.⁴¹

F. Respondents’ Theories in Opposition

1. Respondents Assert that the Federal Reserve Board Lacks the Authority to Commence this Enforcement Action

Respondents jointly responded to Enforcement Counsel’s summary disposition motion, presenting four core arguments: First, Respondents aver that inasmuch as Respondents were employees – i.e., institution-affiliated parties – of *Central*, “a Wyoming nonmember state bank, at the time of the alleged conduct giving rise to the request for Prohibition,” the *FDIC* and not the Federal Reserve Board has exclusive jurisdiction to regulate the alleged unsafe and unsound practices identified in the Notice of Intent.⁴² Respondents aver Enforcement Counsel “concedes that at the time of the alleged misconduct, Respondents were IAPs of Central and, as a result, the Board does not have the jurisdiction to seek the prohibition.”⁴³

2. Respondents Assert that the Civil Litigation Provides No Basis for Judgment

Second, Respondents aver that collateral estoppel cannot provide a basis for judgment here because the issues decided in the Central litigation were not identical to the material issues in this enforcement action.⁴⁴ According to Respondents, the state litigation concerned harm sustained by *Central* and duties owed to *Central*, and did not determine if they engaged in an unlawful act, nor if they engaged in unsafe and unsound banking practices, nor if they breached fiduciary duties owed to *Farmers*, nor if by their actions either *Farmers* was adversely affected or Respondents benefitted.⁴⁵ Further, Respondents aver the jury in the state litigation did not

³⁹ *Id.* at 65-66.

⁴⁰ *Id.* at 66-70.

⁴¹ *Id.* at 73-74.

⁴² Respondents’ Memorandum of Points and Authorities in Support of its Motion for Summary Disposition at 10.

⁴³ *Id.* at 13.

⁴⁴ *Id.* at 14-22.

⁴⁵ *Id.* at 18-20.

determine if Respondents engaged in an unlawful act that was accompanied by a culpable state of mind; and aver that because the state court litigation was then on appeal, the prior adjudication “did not result in a final judgment on the merits.”⁴⁶ Further, Respondents point to a “pending settlement agreement” which, according to Respondents, “will vacate the Jury’s verdict” such that the verdict will not constitute a “final determination on the merits.”⁴⁷ This theory was addressed during the December 3, 2019 hearing, at which time Farmers Board members testified that the civil litigation had indeed been settled with the payment from the Farmers’ holding company to Central in the amount of \$1.4 million, accompanied by the dismissal of the pending appeal of the jury’s verdict in that litigation.⁴⁸

Respondents also aver they did not have a “full and fair opportunity to litigate the issues,” because the role of an issue relevant to the second action (i.e., Respondents’ ability to engage in their chosen profession) was not a foreseeable issue in the first action – specifically averring that Respondents “could not have anticipated that they would be barred from their chosen professions when they were defending against claims [in the state court litigation] seeking solely money damages”.⁴⁹

3. Respondents Assert that Evidence Adduced During the Civil Litigation is Insufficient to Support an Adverse Judgment

Third, Respondents aver that even if collateral estoppel is applied to the facts that were litigated in the state court proceeding, “those facts do not constitute ‘substantial evidence’ of Respondents’ violation of 1818(e).”⁵⁰ Elaborating on this point, Respondents aver that the facts at issue in the state court litigation do not establish they committed unlawful acts, or that the acts had an adverse effect on Farmers or its depositors, or conferred any benefits on Respondents, or that the unlawful acts identified in the state court litigation “were accompanied by a culpable state of mind”.⁵¹

4. Respondents Assert that Material Facts are Controverted, Precluding Summary Disposition

Fourth, Respondents aver that Enforcement Counsel’s summary dismissal motion should have been denied because “there are genuine issues of material facts in dispute” precluding summary dismissal.⁵² Under the Reserve Board’s Uniform Rules of Practice and Procedure, summary disposition is available only if the undisputed evidence presented through such a motion establishes that “[t]here is no genuine issue as to any material fact” and “[t]he moving party is entitled to a decision in its favor as a matter of law.”⁵³ Included in the disputed facts identified by Respondents are whether Respondents actually misappropriated Central’s

⁴⁶ *Id.* at 22-23.

⁴⁷ *Id.* at 24-25.

⁴⁸ Tr. Dec. 3, 2019 at 119 (Gross); and p. 235 (Lamons).

⁴⁹ *Id.* at 26-27.

⁵⁰ *Id.* at 27.

⁵¹ *Id.*

⁵² *Id.* at 27-28.

⁵³ 12 C.F.R. § 263.29(a).

confidential and propriety information; whether the factual claims presented by Enforcement Counsel actually identified trade secrets as defined by Wyoming law; whether there are any factual allegations establishing that Respondents misappropriated the purported confidential and proprietary information; and whether Respondents' plans to compete were lawful.⁵⁴

Respondents also describe certain provisions of Central's employee handbook, in order to "dispute whether Respondents' alleged violations of the policies" constituted unsafe or unsound banking practices or breaches of any fiduciary duties owed by Respondents.⁵⁵ Further, Respondents asserted there were material factual issues regarding whether any of their conduct "resulted in an adverse effect" on either Central or Farmers, and whether that conduct actually conferred a benefit on Respondents.⁵⁶

Respondents also aver genuine issues of material facts remain with respect to whether either Respondent acted with the "requisite culpability" – particularly whether the undisputed evidence shows Respondents acted with personal dishonesty or with a willful or continuing disregard of Central's safety and soundness.⁵⁷

5. Respondents' Affirmative Defenses

In their respective Answers, Respondents advanced a series of defenses premised on the assertion that as written, the Notice of Intent failed to state any claim upon which relief may be granted (First Affirmative Defense).⁵⁸ Included were subordinate claims averring that the charging document stated no claim because Respondents acted properly at all times (Second Affirmative Defense); because their conduct did not cause loss or other damage or make such loss or damage probable (Third and Fourth Affirmative Defenses); because their conduct could not and did not prejudice the interests of the depositors of either Central or Farmers (Fifth and Sixth Affirmative Defenses); because their conduct did not result in Respondents' receiving any financial gain or other benefit (Seventh Affirmative Defense); because their conduct did not involve their personal dishonesty (Eighth Affirmative Defense); and because their conduct did not demonstrate either willful or continuing disregard for the safety or soundness of either Central or Farmers (Ninth and Tenth Affirmative Defenses). (Respondents expressly waived prosecution of their Eleventh through Thirteenth Affirmative Defenses.⁵⁹) For their Fourteenth Affirmative Defense, Respondents separately averred that the injuries asserted in the Notice were the result of the conduct of persons or entities other than Respondents.

⁵⁴ Respondents' Memorandum of Points and Authorities in Support of its Motion for Summary Disposition at 28-44.

⁵⁵ *Id.* at 45-46.

⁵⁶ *Id.* at 46-49.

⁵⁷ *Id.* at 49-53.

⁵⁸ See Answer of Frank E. Smith to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at 14-16; and Answer of Respondent Mark A. Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at 13-15.

⁵⁹ See March 1, 2019 email to OFIA transmitting Respondents' list of potential fact witnesses, in which Kelsey O'Neil stated: "Respondents do not intend to seek summary disposition on their Eleventh, Twelfth, and Thirteenth Affirmative Defenses."

Those defenses not expressly waived do not constitute properly pleaded affirmative defenses. Respondents' First Affirmative Defense is merely a heading that contains no facts and is therefore insufficient as a matter of law.⁶⁰ The remaining Defenses are insufficiently pleaded. For an affirmative defense to be properly presented, the factual allegations must be sufficient to raise the possibility of relief above the "speculative level," assuming that all of the allegations are true and must be more than a denial of elements that must be proved in order for the prohibition order to be warranted.⁶¹ Given the record before me and without more, I find the non-waived Affirmative Defenses do not contain a sufficient factual basis to permit judgment in Respondents' favor, and are general denials of claims Enforcement Counsel must prove.

Part III

A. Admitted Factual Claims

1. Admitted Facts Relating to Respondents' Course of Employment between Central and Farmers

Respondents Smith and Kiolbasa admitted that Farmers State Bank is a state-member bank and a subsidiary of Commercial Bancorp, Pine Bluffs, Wyoming, which they acknowledged is a registered bank holding company.⁶²

Respondent Smith admitted that from April 27, 2015 to the present he has been employed by Farmers at its Pine Bluffs, Wyoming location; that throughout which time he has been Farmers' Chief Executive Officer; and that he has been both a member of its Board of Directors and a shareholder of Commercial Bancorp.⁶³ He admitted that prior to March 18, 2015, he was Central's Chief Financial Officer,⁶⁴ and that on June 5, 2015 he was appointed Farmers' CEO and President.⁶⁵

2. Admitted Facts Relating to Efforts by Respondents to Secure Employment at Farmers

Respondent Kiolbasa admitted that he is employed at Farmers and is a member of the Farmers' Board of Directors as well as a shareholder of Commercial.⁶⁶ He admitted he was a

⁶⁰ See *Park v. Hudson*, No. 15-2136, 2016 WL 11608507, at *3 (C.D. Ill. May 12, 2016).

⁶¹ *Mandel Metals, Inc. v. Walker Grp. Holdings*, No. 14 CV 8493, 2015 WL 3962005, at *3 (N.D. Ill. June 26, 2015), quoting *E.E.O.C. v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir.2007) (quoting *Twombly*, 550 U.S. at 555). "A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

⁶² Answer of Respondent Frank Smith to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶¶A, 1; Answer of Respondent Mark A. Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶¶A, 1.

⁶³ Answer of Respondent Frank Smith to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶2.

⁶⁴ Answer of Respondent Frank Smith to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶2, 17.

⁶⁵ *Id.* at ¶17.

⁶⁶ Answer of Respondent Mark A. Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended at *Id.* at ¶¶B, 2.

branch President at Central prior to September 22, 2014,⁶⁷ then became employed at Farmers as a Loan Officer from September 22, 2014 to June 4, 2015.⁶⁸ He admitted that after receiving approval from the Federal Reserve to hold the position of Executive Vice President at Farmers, he has been employed in that position from June 5, 2015 to the present, at its location in Pine Bluffs, Wyoming; and that he also serves on Commercial's Board of Directors and is a shareholder of the holding company.⁶⁹

Both Respondent Smith and Respondent Kiolbasa admitted they met with Farmers' Board of Directors in June 2014 (while employed at Central) for the purpose of discussing the possibility of purchasing an interest in and being employed by Farmers.⁷⁰ They further stipulated that between July 7 and 11, 2014, Respondents and their advisors conducted a due diligence review of Farmers at its offices in Pine Bluffs.⁷¹

Respondent Smith admitted that he sought approval from the Federal Reserve to work at Farmers as an executive officer, prior to accepting that position.⁷² In addition, Respondent Smith admitted in his Answer that while working at Central, he personally advised a Farmers cashier in preparing several call reports for Farmers.⁷³

Both Respondents Smith and Kiolbasa admitted that each executed a Stock Purchase Agreement with Commercial dated March 6, 2015, averring the agreement was not executed until April 29, 2015, after receiving regulatory approval from the Federal Reserve.⁷⁴

3. Admitted Facts Concerning the Migration of Central's Customers to Farmers

Respondent Kiolbasa stipulated that while employed at Central, he spoke with several of his existing customers to gauge their interest in investing in Farmers,⁷⁵ and admitted that certain customers he "managed" at Central moved their business to Farmers after he began working at Farmers – but denied having "knowledge or information sufficient to form a belief regarding" what the terms "many" or "shortly" as used in the claim in the Notice of Intent that avers: "Shortly after Kiolbasa began his employment at Farmers, many of the loans he managed while employed at Central began moving to Farmers."⁷⁶ Supplementing this admission, Respondent

⁶⁷ *Id.* at ¶3.

⁶⁸ *Id.* at ¶¶3, 9.

⁶⁹ *Id.* at ¶¶3, 9, 17.

⁷⁰ Answer of Respondent Frank Smith to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶6; Answer of Respondent Mark A. Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended at ¶¶6, 9.

⁷¹ Enforcement Counsel's and Respondents' Joint Stipulations at ¶10.

⁷² Answer of Respondent Frank Smith to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶7.

⁷³ *Id.*

⁷⁴ *Id.* at ¶16; Answer of Respondent Mark Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶16.

⁷⁵ Enforcement Counsel's and Respondents' Joint Stipulations at ¶11.

⁷⁶ Answer of Respondent Mark A. Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended at ¶11.

Kiolbasa stated “the referenced customers were friends and acquaintances of Kiolbasa most of whom had previously been customers of Wells Fargo while Kiolbasa was employed with Wells Fargo and who had moved their business from Well [sic] Fargo to Central after Kiolbasa was working at Central.”⁷⁷

Respondent Smith, likewise, was unable to form a belief with respect to the meaning of “many” or “shortly” in the above-referenced allegation, but admitted that certain customers that Kiolbasa “managed” at Central moved their business to Farmers after Kiolbasa began working at Farmers.⁷⁸

Respondent Kiolbasa averred that to the extent he received any information from Respondent Smith (as alleged in Paragraph 12 of the Notice of Intent), such information was not confidential or proprietary, but that instead it constituted payoff information that was requested and authorized by the respective customers, or was specifically requested by representatives of the Federal Reserve in conjunction with Smith’s application to purchase stock in and become present and CEO of Farmers.⁷⁹ Respondent Smith averred that the only information he would have transmitted from Central to Farmers would have been payoff information requested by customers in conjunction with their requests to transfer their business from Central to Farmers.⁸⁰

4. Admitted Facts Relating to the Terms of Respondents’ Employment at Central

Both Respondent Smith and Respondent Kiolbasa admitted receiving the Employee Handbook issued by Central in January 2009, but averred that they did not have any agreement with Central that prohibited them from accepting employment with a competitor or soliciting customers of Central.⁸¹

Both Respondents Smith and Kiolbasa admitted that Central filed a lawsuit against Farmers, Smith, Kiolbasa, and other members of Farmers’ Board of Directors on September 29, 2016; that it was captioned Central Bank & Trust v. Frank Smith, et al., No. 186-671, and that it was filed by Central after a prior action that had been filed by Central in federal court had been dismissed.⁸² Both Respondents further stated that they filed appeals from the decisions of the court in the state court civil litigation.⁸³ Evidence gathered during the hearing held on December 3, 2019 established that the state civil litigation has now been settled, and while no express

⁷⁷ *Id.* at ¶11.

⁷⁸ Answer of Respondent Frank Smith to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶11.

⁷⁹ Answer of Respondent Mark A. Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended at ¶12.

⁸⁰ Answer of Respondent Frank Smith to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶11.

⁸¹ *Id.* at ¶¶13, 14, 15; Answer of Respondent Mark A. Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended at ¶¶13, 14, 15.

⁸² *Id.* at ¶18; Answer of Respondent Mark Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶18.

⁸³ *Id.* at ¶20; Answer of Respondent Mark Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶20. Testimony taken on December 3, 2019 established that the appeals had been terminated following the settlement of the civil litigation.

statement exists regarding the status of the appeal, the record suggests the appeal has been dismissed with Respondents (or Farmers' holding company, or some combination thereof) paying \$1.4 million to Central.⁸⁴

B. Issue Regarding the Jurisdiction of the Federal Reserve Board over Respondents

Jurisdiction over Respondents is predicated on their relationship with Farmers State Bank, which Respondents admit is a state-member bank and a subsidiary of Commercial Bancorp, Pine Bluffs, Wyoming (which they acknowledged is a registered bank holding company).⁸⁵ Respondents further admitted that they each currently are employed by Farmers, with Smith acknowledging his position as Farmers' CEO and President began effective June 5, 2015,⁸⁶ and Kiolbasa as its Executive Vice President since that date; and with both also serving on Commercial's Board of Directors and as shareholders of the holding company.⁸⁷

The parties stipulated that Farmers is, and was at all material times relevant to these proceedings, a state member bank subject to the supervision and regulation of the Board of Governors of the Federal Reserve System; and that Farmers is a subsidiary of Commercial Bancorp, Pine Bluffs, Wyoming, a registered bank holding company subject to the supervision and regulation of the Board of Governors of the Federal Reserve System.⁸⁸ They further stipulated that Central Bank & Trust was a state non-member bank with its principal office located in Lander, Wyoming, and a branch office in Cheyenne, Wyoming, during the entire time period relevant to this matter;⁸⁹ that from approximately 2008 to March 18, 2015, Smith was employed as Chief Financial Officer of Central;⁹⁰ and that from approximately 2010 until September 22, 2014, Kiolbasa was employed as President of Central's Branch in Cheyenne, Wyoming.⁹¹

The parties stipulated that from April 27, 2015, to the present, Smith has been employed by Farmers at its location in Pine Bluffs, Wyoming; and that since June 5, 2015, Smith has held the position of President and Chief Executive Officer of Farmers and is a member of its Board of Directors and a shareholder of Commercial.⁹² They further stipulated that between September 22, 2014, and June 4, 2015, Kiolbasa was employed at Farmers as a Loan Officer, and that since

⁸⁴ See Tr. Dec. 3, 2019 at 119 (Gross); and p. 235 (Lamons).

⁸⁵ See Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶¶A, B, 1-2; Answer of Respondent Frank Smith to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶¶A, 1; Answer of Respondent Mark A. Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶¶A, 1.

⁸⁶ Answer of Respondent Mark A. Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended at ¶17.

⁸⁷ Answer of Respondent Frank Smith to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶2; Answer of Respondent Mark A. Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶¶3, 9, 17.

⁸⁸ Enforcement Counsel's and Respondents' Joint Stipulations at ¶2.

⁸⁹ *Id.* at ¶5

⁹⁰ *Id.* at ¶6

⁹¹ *Id.* at ¶4

⁹² *Id.* at ¶3.

June 5, 2015, Kiolbasa has been serving as Executive Vice President of Farmers, at its location in Pine Bluffs, Wyoming, and is also a member of its Board of Directors and a shareholder of Commercial.⁹³

Respondents assert that because they were employees of Central at the time of the alleged conduct giving rise to the prohibition enforcement action, only the FDIC, and not the Federal Reserve Board, may exercise jurisdiction of this action and Respondents.⁹⁴

Respondents argue that the Federal Deposit Insurance Corporation is the exclusive regulatory agency with jurisdiction to seek a prohibition order against Respondents.⁹⁵ They cite in support 12 U.S.C. 1813(q)(3) for the proposition that because Respondents were institution-affiliated parties of *Central*, a Wyoming state nonmember bank, at the time of the alleged conduct giving rise to the prohibition request, only the FDIC has jurisdiction to regulate alleged unsafe and unsound practices “occurring at a nonmember state bank.”⁹⁶

Citing *Jameson*,⁹⁷ *Wheeler*,⁹⁸ and *DLG Fin. Corp.*,⁹⁹ Respondents reason that notwithstanding that they currently work at Farmers, and thus admittedly are institution-affiliated parties of Farmers,¹⁰⁰ “the FDIC retains jurisdiction over the alleged actions at Central pursuant to Section (8)(i)(3) Financial Institutions Reform, Recovery, and Enforcement Act [FIRREA].”¹⁰¹ According to Respondents, because the FIRREA “extended the FDIC’s jurisdiction over individuals who are no longer affiliated with an insured institution,” it, and not the Federal Reserve, has exclusive jurisdiction of Respondents.¹⁰²

1. Respondents are Affiliated with Farmers – an Insured Institution

The record reflects, however, that Respondents do not fall within the scope of the provision of FIRREA just cited, because, as Respondents acknowledge, they *are* affiliated with an insured institution – Farmers. Nothing in 12 U.S.C. 1813(q)(3), or more broadly in FIRREA, supports Respondents’ proposition that by migrating to Farmers, they are subject only to the

⁹³ *Id.* at ¶4

⁹⁴ Respondents’ Memorandum of Points and Authorities in Support of its Motion for Summary Disposition at 10-14.

⁹⁵ Respondents’ Opposition to Enforcement Counsel’s Motion for Summary Disposition and Motion to Dismiss at 10.

⁹⁶ *Id.*

⁹⁷ *Jameson v. Fed. Deposit Ins. Corp.*, 931 F.2d 290 (C.A.5 1991).

⁹⁸ *Wheeler v. Office of the Comptroller of the Currency of the U.S.*, No. CIV.A.3-98-CV-2708-P, 1998 WL 872945, at *5 (N.D. Tex., Dec. 1998).

⁹⁹ *Bd. of Governors of Fed. Reserve Sys. v. DLG Fin. Corp.*, 29 F.3d 999 (5th Cir. 1994).

¹⁰⁰ Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act at ¶¶2-3; Answer of Respondent Frank Smith to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶¶2-3; Answer of Respondent Mark A. Kiolbasa to the Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended at ¶¶2-3.

¹⁰¹ Respondents’ Opposition to Enforcement Counsel’s Motion for Summary Disposition and Motion to Dismiss at 11.

¹⁰² *Id.*

regulatory enforcement authority of the regulator having authority over their *former* employer (*i.e.*, the FDIC as regulator for Central), or that the Federal Reserve Board is precluded from maintaining a prohibition action against Respondents – who presently are admittedly IAPs employed by a financial institution over which the Federal Reserve Board has jurisdiction.

Nothing in the cases cited by Respondents warrants a contrary conclusion.

In *Jameson*,¹⁰³ the court held:

The FDIC correctly determined that FIRREA gives the FDIC enhanced jurisdiction over individuals who are no longer affiliated with an insured depository institution and that this enlarged jurisdiction applies to pending cases.

Sec. 905(a) of FIRREA states:

(3) Notice under this section after separation from service.

The resignation, termination of employment or participation, or separation of an institution-affiliated party (including a separation caused by the closing of an insured depository institution) shall not affect the jurisdiction and authority of the appropriate Federal banking agency to issue any notice and proceed under this section against any such party, if such notice is served before the end of the 6–year period beginning on the date such party ceased to be such a party with respect to such depository institution (*whether such date occurs before, on, or after August 9, 1989*) (emphasis *sic*).¹⁰⁴

There is no factual basis to find Respondents are “no longer affiliated with an insured depository institution,”¹⁰⁵ rendering Respondents’ reliance on *Jameson* misplaced.

Equally significant, the allegations in the present enforcement action identify conduct attributed to Respondents occurring not only during the time they were employed by Central, but also throughout their service at Farmers. Allegations of concerted action between Smith and Kiolbasa while the latter was employed by Farmers, and then again after the former began working there, make plain the factual basis for the Reserve Board’s exercise of jurisdiction over both Respondents.¹⁰⁶

Further, the record reflects that the culmination of circumstances attributed to Respondents was a lawsuit naming Farmers as a defendant that allegedly benefitted from Respondents’ misconduct. While the jury found that Farmers itself had not engaged in misappropriation of trade secrets or tortious interference,¹⁰⁷ Farmers nonetheless had to defend

¹⁰³ Respondents’ Opposition to Enforcement Counsel’s Motion for Summary Disposition and Motion to Dismiss at 11, citing *Jameson v. Fed. Deposit Ins. Corp.*, 931 F.2d 290 (C.A.5 1991).

¹⁰⁴ *Jameson*, 931 F.2d at 291.

¹⁰⁵ *Id.*

¹⁰⁶ See Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶¶10-12, 16-17, and 21-23.

¹⁰⁷ See SD Ex. 79 at FRB-FARMERS-005706.

itself in the state litigation. To the extent Respondents' conduct leading to that lawsuit constituted unsafe banking practices, or reflected Respondents' violation of law, or involved breaches of fiduciary duties Respondents owed to Farmers, the record demonstrates that Central wasn't alone in sustaining damage: the threat of the lawsuit against Farmers as reflected in the averments contained in the Notice of Intent is a factor that gives rise to the Reserve Board's jurisdiction over such conduct.

*Wheeler*¹⁰⁸ posits no legal basis to find otherwise and does not support Respondents' argument. Offered for the proposition that an institution-affiliated party (IAP) was subject to the Office of the Comptroller of the Currency's jurisdiction because he was employed by an institution regulated by the OCC "at the time of the alleged violations,"¹⁰⁹ Respondents disregard the fact that as alleged in the present Notice of Intent, misconduct attributed to Respondents in the charging document includes multiple allegations of misconduct occurring while Respondents were working at Farmers.¹¹⁰

Respondents note that conduct attributed to Respondents includes misconduct alleged to have occurred while Respondents were IAPs of Central.¹¹¹ They then cite *DLG Fin. Corp.*¹¹² for the proposition that "strict adherence" to the FDI Act is necessary "for orderly review of the various stages of enforcement" because "different banking agencies derive their authority to regulate unsafe and unsound banking practices specifically from their authority to regulate certain financial institutions."¹¹³

Apart from the circularity of the premise as presented in Respondents' Memorandum, the suggestion that the Federal Reserve Board would in some way be unable to investigate and prosecute misconduct attributed to IAPs working for Farmers because some of the misconduct involved IAPs from other financial institutions has no legal footing – certainly not from *DLG Fin. Corp.* In that case, the Fifth Circuit held that enforcement actions undertaken by both the FDIC and the Federal Reserve Bank of Dallas could not be enjoined through declaratory and injunctive actions sounding in, *inter alia*, tortious interference with prospective contractual and business relations.¹¹⁴

Included in the findings cited by Respondents was the Court of Appeals' determination that the regulatory process created under Section 1818 "is not to be disturbed by untimely

¹⁰⁸ Respondents' Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 11, citing *Wheeler v. Office of the Comptroller of the Currency of the U.S.*, No. CIV.A.3-98-CV-2708-P, 1998 WL 872945, at *5 (N.D. Tex., Dec. 1998).

¹⁰⁹ Respondents' Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 12, citing *Wheeler*, 1998 WL 872945, at *4.

¹¹⁰ Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended, at ¶¶10-12, 16-17, 21-23.

¹¹¹ Respondents' Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 13.

¹¹² *Id.* at 13, citing *Bd. of Governors of Fed. Reserve Sys. v. DLG Fin. Corp.*, 29 F.3d 999 (5th Cir. 1994).

¹¹³ Respondents' Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 13, quoting *DLG Fin. Corp.*, 28 F.3d at 999.

¹¹⁴ *DLG Fin. Corp.*, 28 F.3d. at 997.

judicial intervention” – which is the relief respondents in that case were seeking through injunction and declaratory judgment.¹¹⁵ The “orderly review” at issue in *DLG* was to be performed by the enforcement agencies, absent cause shown for intervention by the judicial branch. The holding in this case does not advance Respondents’ legal argument.

No different result is warranted upon considering the premises presented by Respondents from *Investment Co. Institute*.¹¹⁶ Respondents offer *Investment Co.* for the proposition that “each of the three regulators only have the authority to regulate unsafe or unsound practices having adverse effects on the financial institutions falling within their regulatory powers.”¹¹⁷

The quoted text makes clear the distinction that while the FDIC insures the deposits of financial institutions regulated by the Federal Reserve System, the Office of the Comptroller of the Currency, and the FDIC, “[the FDIC] regulates directly only the third group.”¹¹⁸ Nothing presented in the cited case establishes a barrier that would prevent the Federal Reserve Board from enforcement action based on the misconduct attributed to individuals who were affiliated with institutions regulated by both it and by the FDIC.

Upon the foregoing analysis, I find no legal or factual basis that would deprive the Federal Reserve System’s Board of Governors of jurisdiction over Respondents in this enforcement action.¹¹⁹

C. Issues Regarding Collateral Estoppel

Enforcement Counsel assert that the results of the civil lawsuit tried in Wyoming state court should have preclusive effect in this federal administrative enforcement action.¹²⁰ Enforcement Counsel present the legal premise that “once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.”¹²¹

The court in question is the State District Court of the First Judicial District, Laramie County, Wyoming, and the Final Judgment relied upon by Enforcement Counsel determined the following, *inter alia*, in a judgment that was final as of April 2, 2018:

- Frank Smith and Mark Kiolbasa were found to be jointly and severally liable to Central Bank in the amount of \$300,000 for misappropriation of trade secrets; and

¹¹⁵ *Id.* at 999.

¹¹⁶ *Investment Co. Institute v. F.D.I.C.*, 815 F.2d 1540 (C.A.D.C., 1987).

¹¹⁷ Respondents’ Opposition to Enforcement Counsel’s Motion for Summary Disposition and Motion to Dismiss at 13-14, quoting *Investment Co. Institute*, 815 F.2d at 1542,

¹¹⁸ Respondents’ Opposition to Enforcement Counsel’s Motion for Summary Disposition and Motion to Dismiss at 13-14, quoting *Investment Co. Institute*, 815 F.2d at 1542, citing 12 U.S.C. § 1811, 1815.

¹¹⁹ See also Determination on Requests for Interlocutory Appeal dated March 9, 2020, at 3: “The Board’s jurisdiction is predicated on Respondents’ relationship with Farmers State Bank, which is indisputably a state-member bank that currently employs Respondents.”

¹²⁰ Enforcement Counsel’s Motion for Summary Disposition at 30-38.

¹²¹ *Id.* at 30, quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citing *Montana v. United States*, 440 U.S. 147, fn. 5 (1979)).

in the amount of \$625,000 for tortious interference with a contract of a prospective economic advantage.¹²²

- A judgment was entered in Central’s favor against Frank Smith, in the amount of \$205,000 for breach of fiduciary duty.¹²³
- A judgment was entered in Central’s favor against Mark Kiolbasa, in the amount of \$93,000 for breach of fiduciary duty.¹²⁴
- There was a judgment against Frank Smith finding willful and malicious misappropriation of trade secrets, willful and wanton tortious interference with a contract or a prospective economic advantage, and willful and wanton breach of fiduciary duty, upon which there was an award against Smith in Central’s favor in the amount of \$50,000.¹²⁵
- There was a judgment against Mark Kiolbasa finding willful and malicious misappropriation of trade secrets, willful and wanton tortious interference with a contract or a prospective economic advantage, and willful and wanton breach of fiduciary duty, upon which there was an award against Smith in Central’s favor in the amount of \$25,000.¹²⁶

Enforcement Counsel assert that the three elements required to obtain a prohibition order under section 8(e) of the FDI Act – misconduct, effect, and culpability – have been met through the judicial determinations made in the state court litigation.¹²⁷

First, regarding the *misconduct* element, they assert that the allegations in the Notice of Intent – that Respondents misappropriated trade secrets and breached fiduciary duties they owed to Central – are identical to allegations litigated and determined in the Central litigation.¹²⁸

Next, they allege the *effects* element is reflected in the Notice of Intent through allegations that Respondents’ misconduct either precipitated actual or probable financial loss to Central, or financial or other gain to Respondents, and that the same claims were litigated and determined in the state court action leading to the judicial finding that the awarded damages in that action based on either actual loss by Central or Respondents’ unjust enrichment (or both).¹²⁹

Third, they allege the *culpability* element under Section 8(e) as alleged in the Notice of Intent is identical to the allegations litigated in the Central litigation that led to a judgment that Respondents’ misappropriation was willful and malicious, their tortious interference was willful

¹²² EC SD Ex. 79 at FRB-FARMERS-005705-06.

¹²³ *Id.* at 005705.

¹²⁴ *Id.*

¹²⁵ *Id.* at 005705-06.

¹²⁶ *Id.* at 005706.

¹²⁷ Enforcement Counsel’s Motion for Summary Disposition at 38.

¹²⁸ *Id.* at 33.

¹²⁹ *Id.* at 35.

and wanton, and that Respondents willfully and wantonly breached fiduciary duties owed to Central.¹³⁰

Upon these premises, Enforcement Counsel assert that the issues decided in the Central litigation “are identical with the relevant issues presented in these proceedings and satisfy each element required for an order of prohibition under section 8(e) of the FDI Act.”¹³¹

Respondents assert that the issues in the Central litigation are not identical to issues that are material to this administrative enforcement action.¹³² In this action, Respondents assert, the issue is whether Respondents engaged in unsafe or unsound banking practices, where such practices are defined as an “imprudent act” that “places an abnormal risk of financial loss or damage on a banking institution.”¹³³ Respondents aver the findings presented through the state court litigation do not support an inference that “Respondents’ alleged conduct created an abnormal risk of financial loss which would threaten the financial stability of Central or Farmers.”¹³⁴

1. Characterizing Conduct as Unsafe or Unsound – Rejection of the *Gulf Federal* Standard

Initially, care should be taken to accurately reflect controlling jurisprudence regarding the definition of an “unsafe or unsound practice.” Respondents’ reliance on a definition that is limited to “practices with a reasonable direct effect on an association’s financial soundness” – as presented in *Gulf Federal* – is misplaced, and the holding in that case is held to be inapplicable here.¹³⁵

Because the requirement that an imprudent act actually pose an abnormal risk to the *financial stability* of a regulated institution is not found in the FDI Act itself, some attention must first be paid to the authorities that in the past have recognized such a definition (referred to here as the *Gulf Federal* standard), relied upon by Respondents.

In *Gulf Federal*, the only risks the regulators identified were “Gulf Federal’s potential liability to repay overcharged interest, and an undifferentiated ‘loss of public confidence’ in the bona fides of Gulf Federal’s operations.”¹³⁶ The court in *Gulf Federal* held that the FDI Act requires Enforcement Counsel to prove by substantial and preponderant evidence the existence of practices that threaten the very stability of the depository institution.

¹³⁰ *Id.* at 33-34.

¹³¹ *Id.* at 35.

¹³² Respondents’ Brief in Support of Their Opposition to Enforcement Counsel’s Motion for Summary Disposition and Motion to Dismiss at 15-22.

¹³³ *Id.* at 16, quoting *Matter of Seidman*, 37 F.3d 911, 929–30 (3d Cir. 1994).

¹³⁴ Respondents’ Brief in Support of Their Opposition to Enforcement Counsel’s Motion for Summary Disposition and Motion to Dismiss at 18, citing *Seidman*, 37 F.3d at 932, and *Fed. Sav. and Loan Ins. Corp v. Bass*, 576 F.Supp. 848, 852 (N.D. Ill. 1983).

¹³⁵ Respondents’ Brief in Support of Their Opposition to Enforcement Counsel’s Motion for Summary Disposition and Motion to Dismiss at 17, quoting *Fed. Sav. and Loan Ins. Corp. v. Bass*, 576 F. Supp. 848, 852 (N.D. Ill. 1983) (citing *Gulf Federal S&L v. FHLBB*, 651 F.2d 259, 264 (5th Cir. 1981)).

¹³⁶ *Gulf Fed. Sav. & Loan Ass’n of Jefferson Par. v. Fed. Home Loan Bank Bd.*, 651 F.2d 259, 264 (5th Cir. 1981).

The test was first articulated in the Third Circuit in *In the Matter of Seidman*, which held that “[t]he imprudent act must pose an abnormal risk to the financial stability of the banking institution. This is the standard that the case law and legislative history indicates we should apply in judging whether an unsafe or unsound practice has occurred.”¹³⁷

I found no authority, however, indicating that either the Board of Governors of the Federal Reserve System or the Tenth Circuit Court of Appeals has applied or approved the definition of “unsafe and unsound” banking practices articulated in *Gulf Federal* or *Seidman*.

Instead, regulators generally have applied the following definition of “unsafe and unsound” banking practices:

Generally speaking, an “unsafe or unsound practice” embraces any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds.¹³⁸

Resorting to its review and interpretation of legislative history, the court in *Gulf Federal* rejected the construction applied by the Federal Home Loan Bank Board and restricted applications of the phrase “unsafe and unsound” practices to those practices that have a demonstrable effect on the depository institution’s financial condition.¹³⁹

There is cause, however, to reject the *Gulf Federal* legal premise relied upon by Respondents. There is no authority establishing the acceptance by either the Reserve Board or the courts in the Tenth Circuit of the *Gulf Federal* standard. To the contrary, the narrow reading of what constitutes “unsafe and unsound” banking practices articulated in *Gulf Federal* has been rejected by at least one of the banking regulators. This rejection occurred in *In the Matter of Patrick Adams*, where the Office of the Comptroller of the Currency expressly rejected the application of the narrower *Gulf Federal* standard in favor of a standard that defines “unsafe or unsound” banking practices as:

any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds.¹⁴⁰

¹³⁷ *In the Matter of Seidman*, 37 F.3d 911, 928 (3d Cir. 1994).

¹³⁸ *In the Matter of Marine Bank & Trust Company* (FDIC March 19, 2013) 2013 WL 2456822, at *5.

¹³⁹ *Id.* See also *Johnson v. Office of Thrift Supervision*, 81 F.3d 195, 204 (D.C. Cir. 1996) (“Clearly, the fact that an act results in an “actual loss” does not, by itself, establish that the act posed an abnormal risk to the financial stability or integrity of the institution.”); *First Nat. Bank of Bellaire v. Comptroller of the Currency*, 697 F.2d 674, 685 (5th Cir. 1983) (“Unsafe and unsound banking practices “encompass what may be generally viewed as conduct deemed contrary to accepted standards of banking operations which might result in abnormal risk or loss to a banking institution or shareholder”) (quoting *First National Bank of Eden, South Dakota v. Department of the Treasury, Office of the Comptroller of the Currency*, 568 F.2d 610, 611 n. 2 (8th Cir.1978).

¹⁴⁰ *In the Matter of Patrick Adams*, (OCC September 13, 2014) 2014 WL 8735096, at *3.

There is in *De la Cuesta*¹⁴¹ and *Patrick Adams*¹⁴² persuasive authority establishing that Enforcement Counsel may meet their burden of establishing that Respondents have engaged in unsafe or unsound banking practices, as that term is used in the FDI Act, by demonstrating that they have engaged in any action, or have failed to take action, in a manner that is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds.¹⁴³

Under this body of law and through the analysis that follows, I find that such proof may be made through preponderant evidence of Respondents' misappropriation of Central's trade secrets, or of Respondents' breach of fiduciary duties owed to either Central or Farmers (or both) – because “the same act may be both an unsafe or unsound practice and a breach of fiduciary duty.”¹⁴⁴

2. Misconduct Through Breaches of Fiduciary Duties of Loyalty, Care, and Candor

Misconduct under the FDI Act may, as has already been noted, be established by a sufficient showing of unsafe or unsound practices, or by a sufficient showing that Respondents' breached fiduciary duties owed to either Central or Farmers.¹⁴⁵ These duties include an obligation to act in good faith and in the best interests of Central.

As one federal financial regulator put it:

It is now hornbook law that directors and officers of a bank have a fiduciary duty to the bank. American Bankers Association, Focus on the Bank Director, 97-125 (1984); Schlichting, Rice & Cooper, Banking Law, § 6.04 (1984). Generally, the duty requires that bank officials, such as Chairman of the Board * * *, act as prudent and diligent persons would act safeguarding the bank's property, complying with state and federal banking laws and regulations, and ensuring that the bank is operated properly. The duty is owed to the bank, and not to persons with controlling interests in the bank. It requires the proper supervision of subordinates, a knowledge of state and federal banking laws, and the constant concern for the safety and soundness of the bank. While the standard of care for bank directors and officers, like the standard of care in negligence cases, is expressed in consent terms, the nature of the duty varies according to the facts. The greater the authority of the director or officer, the broader the range of his duty; the more complex

¹⁴¹ *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982).

¹⁴² *In re Patrick Adams*, 2014 WL 8735096, at *3.

¹⁴³ See also *Johnson v. Office of Thrift Supervision*, 81 F.3d 195, 204 (D.C. Cir. 1996); *First Nat. Bank of Bellaire v. Comptroller of the Currency*, 697 F.2d 674, 685 (5th Cir. 1983) (quoting *First National Bank of Eden, South Dakota v. Department of the Treasury, Office of the Comptroller of the Currency*, 568 F.2d 610, 611 n. 2 (8th Cir.1978)).

¹⁴⁴ *Michael v. F.D.I.C.*, 687 F.3d 337, 351 (7th Cir. 2012), citing *Kaplan v. U.S. Office of Thrift Supervision*, 104 F.3d 417, 421 & n. 2 (D.C.Cir.1997); *Hoffman v. FDIC*, 912 F.2d 1172, 1174 (9th Cir. 1990) (because of their inherent danger, breaches of fiduciary duty also constitute unsafe and unsound practices).

¹⁴⁵ 12 U.S.C. § 1818(e)(1)(A).

the transaction, the greater the duty to investigate, verify, clarify, and explain.¹⁴⁶

The fiduciary duty of *loyalty* “requires directors and officers to administer the affairs of the bank with candor, personal honesty and integrity. They are prohibited from advancing their own personal or business interests, or those of others, at the expense of the bank.”¹⁴⁷ The duty of *candor* requires a corporate fiduciary to disclose “everything he knew relating to the transaction,” even “if not asked.”¹⁴⁸ The duty of *care* requires directors and officers to “act as prudent and diligent business persons in conducting the affairs of the bank.”¹⁴⁹

Specifically, because they owe a duty of care:

[D]irectors are responsible for selecting, monitoring, and evaluating competent management; establishing business strategies and policies; monitoring and assessing the progress of business operations; establishing and monitoring adherence to policies and procedures required by statute, regulation, and principles of safety and soundness; and for making business decisions on the basis of fully informed and meaningful deliberation.¹⁵⁰

3. Respondents are Estopped from Controverting the Central Litigation Determination that Respondents Breached Fiduciary Duties Owed to Central

When examined in the light of the factual claims presented in the state court litigation,¹⁵¹ I find the state court’s judgment against Respondents – that they misappropriated trade secrets of Central, that they were proved to have tortiously interfered with either a contract or prospective economic advantage inuring to Central, and that they breached fiduciary duties each owed to Central - provided sufficient proof, standing alone, to establish that actions attributed by the jury to Respondents constituted “misconduct” as that term is used in section 8(e) of the FDI Act, as alleged in the Notice of Intent.

¹⁴⁶ *In the Matter of * * **, Individually and as an Officer and/or Director and/or Participant in the Conduct of the Affairs of * * * Bank (Insured State Nonmember Bank), 1988 WL 583064, at *9 (FDIC).

¹⁴⁷ Federal Deposit Insurance Corporation, Statement of Policy Concerning the Responsibilities of Bank Directors and Officers, FIL--87--92 (Dec. 3, 1992), available at <https://www.fdic.gov/regulations/laws/rules/5000-3300.html>, last accessed 4/9/20.

¹⁴⁸ *De La Fuente II v. FDIC*, 332 F.3d 1208, 1222 (9th Cir. 2003) (fiduciary duty breached by failure to disclose relevant information to bank’s board of directors when it was considering a loan even though the bank’s board did not ask); *Michael*, 687 F.3d at 350; *Seidman*, 37 F.3d at 935 n.34.

¹⁴⁹ Federal Deposit Insurance Corporation, Statement of Policy Concerning the Responsibilities of Bank Directors and Officers, FIL--87--92 (Dec. 3, 1992), available at <https://www.fdic.gov/regulations/laws/rules/5000-3300.html>.

¹⁵⁰ *Id.*

¹⁵¹ See Amended Complaint in *Central Bank & Trust v. Smith et al.*, Civil No. 186-671, factual allegations at ¶¶1-3, 5, 15-33, 36-85, 87-90, 92-113; conspiracy claim at ¶¶114-119; claim of tortious interference with contract or prospective economic advantage at ¶¶120-125; claim of breach of fiduciary duty and duty of fidelity and loyalty at ¶¶126-130; claim of unjust enrichment at ¶¶156-160.

For the reasons that follow, I find unpersuasive Respondents' arguments to the contrary.¹⁵²

At the outset, it is clear that under Wyoming case law collateral estoppel is available to preclude a party from relitigating issues in administrative enforcement actions that were actually and necessarily determined in a prior action:

The doctrines of *res judicata* and collateral estoppel apply to final adjudicative determinations by administrative tribunals. *Salt Creek Freightways v. Wyoming Fair Employment Practices Comm'n.* 598 P.2d 435, 437 (Wyo. 1979); *Joelson v. City of Casper*, 676 P.2d 570, 572 (Wyo. 1984). The collateral estoppel doctrine is otherwise known as the 'issue preclusion' doctrine. *RKS v. SDM*, 882 P.2d 1217, 1221 (Wyo. 1994). The Wyoming Supreme Court has recognized estoppel is an appropriate doctrine to apply in an administrative context, since it bars relitigation of previously litigated issues. *Salt Creek Freightways*, 598 P.2d at 438 (quoting *Roush v. Roush*, 589 P.2d 841, 843 (Wyo. 1979)). The Wyoming Supreme Court has further recognized since administrative decisions deal primarily with causes of action or claims, collateral estoppel is the appropriate doctrine. *Salt Creek Freightways*, 598 P.2d at 437. The collateral estoppel doctrine prevents relitigation of issues which were involved actually and necessarily in a prior action between the same parties. *Willowbrook Ranch, Inc. v. Nugget Exploration, Inc.*, 896 P.2d 769, 772 (Wyo. 1995).¹⁵³

Thus, issues actually and necessarily litigated in the Central state court litigation will not be re-litigated here. Further, "[s]ince administrative agency decisions deal primarily with issues rather than with causes of action or claims, collateral estoppel is the appropriate preclusion doctrine."¹⁵⁴

Respondents' first assertion, that the doctrine of issue preclusion cannot apply here because the issues decided in the Central litigation are not identical to the issues presented in this enforcement action, must be considered in the light cast by the foregoing authorities.¹⁵⁵

Respondents assert that because the Central litigation did not determine whether Respondents should be prohibited from banking, Enforcement Counsel cannot rely on collateral estoppel.¹⁵⁶ I do not construe Wyoming case law regarding issue preclusion so narrowly. Instead, I find that under the language set forth above, where the record in this administrative proceeding

¹⁵² See Respondents' Brief in Support of Their Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 14-27.

¹⁵³ *Rose v. Garland Light & Power Co.*, Wyoming Public Service Comm'n No. 10003-CC-04-20, 2005 WL 1536274 (Apr. 25, 2005).

¹⁵⁴ *Slavens v. Uinta Board of County Commissioners* 854 P.2d 683, 685-86 (Wyo. 1993); *Bender v. Uinta County Assessor*, 14 P.3d 906 (Wyo. 2000).

¹⁵⁵ Respondents' Brief in Support of Their Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 15-22.

¹⁵⁶ *Id.* at 15, citing *Slavens*, supra; *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1093 (10th Cir. 2003); and *Stan Lee Media, Inc. v. Walt Disney Co.*, 774 F.3d 1292, 1297-98 (10th Cir. 2014).

demonstrates that issues presented in the Federal Reserve Board’s Notice of Intent were “actually and necessarily” litigated in the state court proceeding, Respondents are precluded from relitigating those issues here.

I agree with Respondents’ averment that the Central litigation did not determine whether Respondents’ breached fiduciary duties they owed to Farmers.¹⁵⁷ As noted above, however, I reject as not supported by a legal or factual basis Respondents’ assertion that “the only possible alleged breach of fiduciary duty appropriately before the Board is whether Respondents breached their fiduciary duties to Farmers.”¹⁵⁸ I find, instead, that the issues determined in the Central litigation included whether Respondents misappropriated Central’s trade secrets¹⁵⁹ – an allegation that is presented in the Reserve Board’s Notice of Intent at Paragraphs A, B, 22, 25, and 28. These allegations were actually and necessarily litigated in the Central litigation.

On March 23, 2018, after a two-week trial, the state court jury returned a verdict finding, by a preponderance of the evidence, that Respondents: willfully and maliciously misappropriated Central’s trade secrets; willfully and wantonly committed tortious interference with Central’s contract or prospective economic advantage; and willfully and wantonly breached their fiduciary duties to Central.¹⁶⁰ As part of the Central litigation verdict, as a result of Respondents’ misconduct, the jury found that Central was entitled to damages of \$300,000 from Respondents for the willful and wanton misappropriation of trade secrets; \$625,000 from Respondents for the tortious interference with Central’s contract or prospective economic advantage; \$205,000 from Smith and \$93,000 from Kiolbasa for the willful and wanton breach of fiduciary duties, and punitive damages of \$50,000 from Smith and \$25,000 from Kiolbasa.¹⁶¹

The record thus supports a finding that the issues of whether Respondents willfully and maliciously misappropriated Central’s trade secrets, whether they willfully and wantonly committed tortious interference with Central’s contract or prospective economic advantage; and whether they willfully and wantonly breached their fiduciary duties to Central, all have been actually and necessarily litigated in the state court proceedings, and in each instance the determinations were that Respondents had engaged in misconduct. Upon such circumstances, Enforcement Counsel is entitled to a determination that the misconduct alleged in the Reserve Board’s Notice of Intent at Paragraphs A, B, 22, 25, 28 has been established, and Respondents are estopped from relitigating those findings.

¹⁵⁷ Respondents’ Brief in Support of Their Opposition to Enforcement Counsel’s Motion for Summary Disposition and Motion to Dismiss at 19.

¹⁵⁸ *Id.*

¹⁵⁹ See Final Judgment, EC Exhibit 79 (FRB-FARMERS-005705-06); Verdict, EC Exhibit 77 (FRB-FARMERS-005638-43).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

4. Respondents Were Highly Motivated to Litigate the Issues Raised in Central that are also Raised in this Enforcement Action

Respondents further aver they “did not have a full and fair opportunity to litigate the issues.”¹⁶² In support, they aver they “could not have anticipated that they would be barred from their chosen profession when they were defending against claims seeking solely money damages in the Central litigation.”¹⁶³

Respondents’ reliance on *Butler*¹⁶⁴ is unavailing. After holding that “[i]ssue preclusion not only promotes judicial efficiency and repose but also prevents the embarrassment resulting from inconsistent determinations of the same question,”¹⁶⁵ the Court of Appeals in *Butler* stated that the “role of the issue in the second action” must be “foreseeable in the first action.”¹⁶⁶ No further analysis regarding this generally recognized principle is presented in *Butler*.

In the case at hand, Respondents knew, or should be charged with knowing, that breaches of fiduciary duties as alleged in the Central Complaint constitute a basis for adverse enforcement actions under the FDI Act at section 8(e).¹⁶⁷ Nothing more is required under *Butler*, or under *Parklane Hosiery*.¹⁶⁸ In *Parklane*, the Supreme Court noted that “it may be unfair to a defendant [if] a defendant in the first action is sued for small or nominal damages, [because] he may have little incentive to defend vigorously, particularly if future suits are not foreseeable.”¹⁶⁹ Those conditions do not exist here.

I find that where experienced bankers such as Respondents face claims in a state court alleging misappropriation of proprietary banking information and breaches of fiduciary duties owed to their employer bank, those bankers have a significant incentive to defend vigorously in anticipation of collateral regulatory action like that presented by the Notice of Intent here. Further, not only do bankers generally have an incentive to vigorously defend, the specific bankers here did, in fact, vigorously defend claims presented in the state court litigation that are also present in this administrative enforcement action.

¹⁶² Respondents’ Brief in Support of Their Opposition to Enforcement Counsel’s Motion for Summary Disposition and Motion to Dismiss at 26.

¹⁶³ *Id.* at 27.

¹⁶⁴ *Id.* at 26, citing *Butler v. Pollard*, 800 F.2d. at 225, presumably referring to *Butler v. Pollard*, 800 F.2d. 223 (10th Cir. 1986).

¹⁶⁵ *Butler*, 800 F.2d at 225 (10th Cir. 1986), citing *Heyman v. Kline*, 456 F.2d 123, 130–31 (2d Cir.), *cert. denied*, 409 U.S. 847 (1972).

¹⁶⁶ *Butler*, 800 F.2d at 224.

¹⁶⁷ See 12 U.S.C.A. § 1818(e)(1)(A)(iii) authorizing enforcement action where any institution-affiliated party has, directly or indirectly, “committed or engaged in any act, omission, or practice which constitutes a breach of such party’s fiduciary duty”.

¹⁶⁸ Respondents’ Brief in Support of Their Opposition to Enforcement Counsel’s Motion for Summary Disposition and Motion to Dismiss at 26, citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979) (citing *The Evergreens v. Nunan*, 141 F.2d 927, 929 (2d Cir. 1944)) (denying application of offensive collateral estoppel where defendant did not appeal an adverse judgment awarding damages of \$35,000 and defendant was later sued for over \$7 million)).

¹⁶⁹ *Parklane Hosiery Co.*, 439 U.S. at 330.

5. Relevance of Respondents' Appeal of the Central Judgment and of the Settlement of the State Court Claims

Respondents further assert that preclusion is unavailable here because the final judgment from the state civil action had been on appeal, and because the jury's verdict "will likely be vacated due to a pending settlement agreement by and between the parties in the Central litigation."¹⁷⁰ Subsequent to the briefing of these issues, settlement was reached and presumably the pending appeal was dismissed based on the settlement. Neither the appeal nor such a settlement would, however, compel a finding that avoids the preclusive effect of the jury's verdict and the trial court's final judgment.

During the hearing on December 3, 2019, Respondents established that indeed the civil lawsuit had been settled, with Farmers' holding company, Commercial BankCorp, paying \$1.4 million to Central.¹⁷¹ Presumably, this settlement included the ending of any appeal of the state verdict.

Regarding the appellate status of the civil judgment, Respondents cite to *Bowen* for the proposition that a judgment "should not be afforded collateral estoppel effect if it is on appeal."¹⁷² Acknowledging that the holding was presented as *dicta* and that the Wyoming Supreme Court "had not directly answered the question of whether the application of collateral estoppel should be affected by the fact that the underlying judgment was on appeal,"¹⁷³ Respondents nevertheless aver that the only case cited by the *Bowen* court on this topic was *Rantz*, which held that "for the purposes of issue preclusion, a judgment that is still pending on appeal is not final."¹⁷⁴

Rantz, however, provides insufficient support for Respondents here. In *Rantz*, the Colorado Supreme Court, construing Colorado common law, was asked by attorneys who had represented a client in a criminal matter whether the former client must obtain post-conviction relief before filing a malpractice claim against them.¹⁷⁵ The court addressed whether, if post-conviction relief has been sought and denied on the merits, the court's denial of relief may have a preclusive effect on the malpractice suit under appropriate circumstances.¹⁷⁶ The Court then applied Colorado Rule 54 (Civil Procedure, Judgments) to find that a judgment could be deemed final for issue preclusion purposes notwithstanding that multiple claims or parties may be involved, where fewer than all the claims have been determined.¹⁷⁷ Neither the factual predicates

¹⁷⁰ Respondents' Brief in Support of Their Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 22-25.

¹⁷¹ Tr. Dec. 3, 2019 at 119 (Testimony of John Gross).

¹⁷² *Id.* at 23, citing *Bowen v. State, Dept. of Transp.*, 245 P.3d 827 (Wyo. 2011).

¹⁷³ Tr. Dec. 3, 2019 at 22.

¹⁷⁴ Respondents' Brief in Support of Their Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 22, quoting *Rantz v. Kaufman*, 109 P.3d 132, 141 (Colo. 2005).

¹⁷⁵ *Rantz v. Kaufman*, 109 P.3d 132, 133 (Colo. 2005).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 141, citing *Carpenter v. Young*, 773 P.2d 561, 568 (Colo.1989) "In *Carpenter*, we decided that C.R.C.P. 54(b) certification was not necessary for a judgment to be deemed final for issue preclusion purposes."

nor the legal premises applying and construing Colorado common law presented in *Rantz* apply here.

Nothing in *Bowen* suggests that a pending appeal prevents the preclusive effect of a civil judgment in the context of an administrative enforcement action. To the contrary, the *Bowen* court *affirmed* such preclusion on the issue in that case – *i.e.*, whether a state trooper who had administered a blood alcohol test in connection with a driving under the influence had been properly trained on the BAC instrument.¹⁷⁸ Finding that the driver raised the same issue in both the criminal and administrative proceedings, the court *allowed* preclusion where the appellant-driver had “a full evidentiary hearing wherein he offered evidence, examined witnesses, and made arguments.”¹⁷⁹ Nothing in *Bowen* serves to limit the application of issue preclusion in this administrative enforcement action.

I also find unpersuasive Respondents’ assertion that settlement of the claims presented in the Central litigation would render collateral estoppel unavailable.¹⁸⁰ Respondents cite *Van Dyke*¹⁸¹ and *Lacey*¹⁸² for the proposition that “a judgment that has been vacated through a settlement cannot be used for purposes of collateral estoppel.”¹⁸³ Current jurisprudence on this point compels a contrary conclusion.

In determining whether issues that have been determined in prior litigation retain their preclusive effect following a subsequent vacatur, care must be taken to consider what led to the vacatur. In *Lacey*, the Court of Appeals determined the preclusive effect “of a judgment vacated by a trial court,” not by settlement, but by the trial court’s reconsideration on motion, leading the court to set aside its amended judgment.¹⁸⁴ Thus, the Court in review did not have an instance where the vacatur was the product of a settlement – but instead an instance where the prior judgment warranted judicial reconsideration. Such reconsideration gave rise to equitable principles to the effect that the prior judgment was in some measure unsound and thus should be given no preclusive power. Those equitable principles clearly have no place here, where through settlement Respondents hope to *avoid* the consequences of a jury’s verdict and a court’s judgment.

I also find unpersuasive Respondents’ reliance on *Van Dyke*.¹⁸⁵ In *Van Dyke* (an unappealed decision of the trial court), summary judgment was determined to be unavailable to the movant/plaintiff who sought preclusive effect in her wrongful death action against

¹⁷⁸ *Bowen v. State, Dep’t of Transp.*, 2011 WY 1, ¶ 3, 245 P.3d 827, 828 (Wyo. 2011).

¹⁷⁹ *Id.* at 831 (Wyo. 2011).

¹⁸⁰ Respondents’ Brief in Support of Their Opposition to Enforcement Counsel’s Motion for Summary Disposition and Motion to Dismiss at 24-25.

¹⁸¹ *Estate of Van Dyke by Van Dyke v. GlaxoSmithKline*, No. 05-cv-153-j, 2006 WL 8430904 (D. Wyo. 2006).

¹⁸² *U.S. v. Lacey*, 982 F.2d 410 (10th Cir. 1992).

¹⁸³ Respondents’ Brief in Support of Their Opposition to Enforcement Counsel’s Motion for Summary Disposition and Motion to Dismiss at 24, quoting *Van Dyke*, 2006 WL 8430904, at *4.

¹⁸⁴ *United States v. Lacey*, 982 F.2d 410, 411-12 (10th Cir. 1992)

¹⁸⁵ Respondents’ Brief in Support of Their Opposition to Enforcement Counsel’s Motion for Summary Disposition and Motion to Dismiss at 24.

GlaxoSmithKline on theories of strict liability, negligence, and breach of warranty.¹⁸⁶ Rejecting plaintiff's attempt to draw from a verdict in a prior litigated case (the *Tobin* case), the trial court in *Van Dyke* noted that "[b]ecause of the different facts, doses, time frames, diagnoses, warnings and research, to instruct the jury that they should disregard the myriad questions surrounding the issues, and should instead assume that causation and fault have already been proven, would undoubtedly cause prejudice and confusion."¹⁸⁷ These factors are not present here, where the factual and legal issues determined by through the Central litigation are presented not to a jury but to an administrative tribunal.

On the point raised by Respondents, the trial court rejected preclusive effect based on the *Tobin* litigation because the *Tobin* verdict had been vacated through settlement. Offering no authority in support of the proposition, the trial court held:

This Court denies Van Dyke's Motion for Partial Summary Judgment on the issues of causation and fault for three primary reasons. First, the *Tobin* verdict was vacated, and it is clear that a vacated judgment is deprived of its conclusive effect, which means that it cannot be used for purposes of collateral estoppel. That the *Tobin* judgment was vacated pursuant to a settlement does not make a difference, especially considering that the vacatur order stated that the verdict would be "vacated for all purposes."¹⁸⁸

There was nothing in the court's determination indicating the source of authority for the court's finding – particularly, there was no showing that the legal premises applied in *Van Dyke* would apply in any other proceeding in any other jurisdiction. Without more, this determination is insufficient as a basis in law for sustaining Respondents' assertion that preclusion is not available in the present case.

6. Collateral Estoppel Issues are Determined by State Law in this Enforcement Action

The availability of collateral estoppel is a legal issue, one to be determined through an application of state law;¹⁸⁹ and neither party presented citations to state authority from Wyoming determining the merits of the issue.¹⁹⁰ In the absence of authority from Wyoming case law, I am persuaded by the rationale presented in *Watermark Senior Living Ret. Communities, Inc. v. Morrison Mgmt. Specialists, Inc.*, 905 F.3d 421 (6th Cir. 2018). There, the Court of Appeals provided an in-depth and relevant analysis regarding whether preclusive effects may survive after a judgment is vacated due to settlement.

In *Watermark*, even though "there was no final judgment in the state case because the appellate court reversed it on different grounds and the plaintiff voluntarily dismissed his suit

¹⁸⁶ *Estate of Van Dyke*, 2006 WL 8430904, at *1.

¹⁸⁷ *Id.* at *5.

¹⁸⁸ *Id.* at *4.

¹⁸⁹ See *Abbott v. Michigan*, 474 F.3d 324, 330 (6th Cir. 2007) ("Federal courts must give the same preclusive effect to a state-court judgment as that judgment receives in the rendering state") (citing 28 U.S.C. § 1738).

¹⁹⁰ Enforcement Counsel's Motion for Summary Disposition at 37-38; Respondents' Brief in Support of Their Opposition to Enforcement Counsel's Motion for Summary Disposition and Motion to Dismiss at 24-26.

before the trial court decided it on remand,” the Court of Appeals held that “a court’s decision may remain sufficiently firm to be given preclusive effect”.¹⁹¹ The Court of Appeals cited with approval the following rationale:

The subsequent settlement of a dispute after the entry of a dispositive order does not defeat finality. . . . If settlement revoked the preclusive effect of an earlier judgment, this would have the effect of allowing losing parties to pay money for the option to not have the doctrine of collateral estoppel applied to them. The purpose of the doctrine—to improve the procedural efficiency of the legal system and avoid repetitive litigation of decided issues—counsels against plaintiff’s argument.¹⁹²

The same logic applies here, wherein Respondents, through settlement, paid money (or persuaded Farmers’ holding company to pay money) to Central in an attempt to avoid the preclusive effects arising from the Central litigation applied in this enforcement action.

The Court of Appeals in *Watermark* elaborated on the reasons against an outcome that would vitiate preclusive effect, distinguishing between cases where a judgment is vacated due to post-trial judicial insight, versus a judgment vacated by a strategic settlement:

Equitable considerations also help to explain why a principled distinction can be drawn between the potential preclusive effects of different kinds of vacated judgments. When a judgment is vacated because a court has decided that the ruling was faulty, see *Erebia [v. Chrysler Plastic Prods. Corp.]*, 891 F.2d [1212,] 1215 [(6th Cir. 1989)], it obviously makes no sense to treat the vacated judgment’s determination of that issue as conclusive. It is similarly inappropriate to give preclusive effect to the judgment in a case that becomes moot through no fault of the party against whom issue preclusion is asserted. See [*United States v.*] *Munsingwear*, 340 U.S. [36] at 39–40. Because “happenstance,” *id.* at 40, or the unilateral actions of the opposing party, see *Azar v. Garza*, — U.S. —, 138 S.Ct. 1790, 1792–93, 201 L.Ed.2d 118 (2018) (per curiam), have deprived the losing party of the opportunity to contest the underlying judgment, fairness counsels against barring that party from having a second chance to litigate the relevant issue.

But the equities are otherwise when a litigant elects to settle rather than appeal after receiving an adverse judgment. In such circumstances, the losing party acquiesces in the court’s decision, even if he disagrees with it. The party has had his day in court and waived his right to an appeal. See *Monat [v. State Farm. Ins. Co.]*, [469 Mich. 679,] 677 N.W.2d [843] at 847 [(2004)] (applying issue preclusion when party negotiated away its right to appeal prior to judgment in first action). That is all that fairness requires:

¹⁹¹ *Watermark Senior Living Ret. Communities, Inc. v. Morrison Mgmt. Specialists, Inc.*, 905 F.3d 421, 427–29 (6th Cir. 2018)

¹⁹² *Watermark*, 905 F.3d at 427–29, quoting *ChriMar Sys., Inc. v. Foundry Networks, Inc.*, No. 06-13936, 2010 WL 3431606, at *2, 2010 U.S. Dist. LEXIS 89335 (E.D. Mich. Apr. 23, 2010) (Special Master Mark A. Lemley).

“One bite at the apple is enough.” *Emps. Own Fed. Credit Union [v. City of Defiance]*, 752 F.2d [245] at 245[(6th Cir. 1985)].¹⁹³

Here, the circumstances upon which Enforcement Counsel seek preclusive effect reflect that Respondents have had their day in court – and by settlement, presumably, have waived their right to appeal the state court judgment. Respondents have thus been afforded “[a]ll that fairness requires.” Upon these factual and legal premises, there is an insufficient basis to find that any settlement, even one that vacated the jury’s verdict in the Central litigation, deprives Enforcement Counsel of the ability to apply principles of collateral estoppel in order to preclude relitigation of the issues determined in that litigation.

Findings of Fact Based on Issue Preclusion and Collateral Estoppel

Finding of Fact #1: I find the evidence presented through the jury’s findings and the court’s judgment in the Central litigation establishes by a preponderance that Respondents’ action, or lack of required action, was contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would include abnormal risk or loss or damage to Central, its shareholders, or the agencies administering the insurance funds.

Conclusions of Law Based on Issue Preclusion and Collateral Estoppel

Conclusion of Law No. 1: Respondents are, under the doctrine of issue preclusion, estopped from relitigating the findings of the jury in the Central litigation.

Conclusion of Law No. 2: Based on the findings of the jury in the Central litigation, preponderant evidence establishes that Respondents willfully and maliciously misappropriated Central’s trade secrets; and willfully and wantonly interfered with a contract or a prospective economic advantage, harming Central.¹⁹⁴

Conclusion of Law No. 3: Based on the findings of the jury in the Central litigation, preponderant evidence establishes that Respondents willfully and wantonly breached fiduciary duties owed to Central.¹⁹⁵

Conclusion of Law No. 4: Based on the findings of the jury in the Central litigation, preponderant evidence establishes that Respondents engaged in misconduct, as that term is used in the FDI Act at 12 U.S.C. § 1818(e)(1)(A). Specifically, the jury’s findings in the Central litigation establish by a preponderance that Respondents engaged in unsafe and unsound practices by misappropriating confidential and proprietary information, including trade secrets, of Central Bank & Trust, by conspiring together to acquire Central’s confidential and proprietary information, and by aiding and abetting one another in the acquisition of such information for their use at Farmers, as alleged in Paragraphs A, 22 and 25 of the Notice of Intent.

Findings of Fact Based upon the State Court Judgment

Finding of Fact #2: Officers and directors of financial institutions are deemed to be fiduciaries of the institution and, as such, owe the institution duties of care and loyalty.¹⁹⁶ The

¹⁹³ *Watermark*, 905 F.3d at 427–29.

¹⁹⁴ EC SD Ex. 79 at FRB-FARMERS-005705-06.

¹⁹⁵ *Id.* at 005705.

duty of care requires directors and officers to act as prudent and diligent business persons in conducting the affairs of the bank. The duty of loyalty generally prohibits them from putting their personal or business interests above the interests of the bank, and requires that they administer the affairs of the bank with candor, personal honesty, and integrity.¹⁹⁷ The duty of loyalty also requires that they put the interests of the bank before their own, and not use their positions at the bank for their own personal gain.¹⁹⁸ Further, “[t]he duty of candor requires ‘corporate fiduciaries to “disclose all material information relevant to corporate decisions from which they may derive a personal benefit.’”¹⁹⁹ Officers must also refrain from self-dealing at the expense of the bank.²⁰⁰

Finding of Fact No. 3: By willfully and maliciously misappropriated Central’s trade secrets; and by willfully and wantonly interfered with a contract or a prospective economic advantage, harming Central, Respondents failed to act as prudent and diligent business persons in conducting Central’s affairs.

Finding of Fact No. 4: Respondents put their personal or business interests above the interests of the bank, and failed to administer the affairs of the bank with candor, personal honesty, and integrity.

Finding of Fact No. 5: Respondents failed to disclose all material information relevant to corporate decisions from which they may derive a personal benefit.

Conclusion of Law No. 5: Upon these findings, preponderant evidence establishes that Respondents engaged in misconduct as that term is used in the FDI Act, as alleged in the Notice of Intent at Count I, Paragraph 25 (regarding Respondent Smith) and Count III, Paragraph 28 (regarding Respondent Kiolbasa).

Conclusion of Law No. 6: Preponderant evidence establishes that Respondents breached fiduciary duties owed to Central, through the misappropriation of confidential and proprietary information, including trade secrets, of Central, conspiring with one another to acquire Central’s confidential and proprietary information, and by contacting Central borrowers, while at Central, to obtain their consent to transfer their loans to Farmers once Respondents were employed at Farmers, as alleged in Paragraphs B and 28 of the Notice of Intent.

Conclusion of Law No. 6: Preponderant evidence establishes that Respondents owed and breached the fiduciary duties of care, candor and loyalty to Central, as alleged in the Notice of Intent at Count II, Paragraph 27 (regarding Smith) and Count IV, Paragraph 30 (regarding Respondent Kiolbasa).

These findings do not determine whether Respondents breached fiduciary duties owed to Farmers, as the Central litigation did not include any claim to that effect.

¹⁹⁶ *In re Constance C. Cirino*, 2000 WL 1131919 at *4 (FDIC May 10, 2000) (citing *In the Matter of Ramon M. Candelaria*, FDIC Enf. Dec. and Orders at A-2847 (1997)).

¹⁹⁷ *Id.* at *50.

¹⁹⁸ *Seidman v. Office of Thrift Supervision*, 37 F.3d 911, 933-34 (3d Cir. 1994).

¹⁹⁹ *Seidman*, 37 F.3d at 935 n.34.

²⁰⁰ *Indep. Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164, 1168 (D.C. Cir. 1979).

Part IV

A. Findings Based on the Record

Independent of the analysis urged by Enforcement Counsel whereby the outcome of the Central Bank litigation supplies a factual basis for finding misconduct on Respondents' part, the material facts now established in the record – facts not dependent on the state court jury's verdict – also provide a basis for finding misconduct, effects, and culpability, supporting a recommendation adverse to Respondents.

1. Enforcement Counsel's Evidence Apart from Preclusion Based on the Central Litigation

In advance of the December 3, 2019 hearing, Enforcement Counsel presented (through their summary disposition motion) 110 exhibits in support. These exhibits were supplemented by reports by Douglas L. Gray, Assistant Vice President, Division of Supervision and Risk Management of the Federal Reserve Bank of Kansas City, Oklahoma City Branch, each report separately evaluating documents and testimony with respect to claims against Mr. Smith and those against Mr. Kiolbasa (EC SD Ex. 4, hereafter Gray Report-Smith and EC SD Ex. 3, hereafter Gray Report-Kiolbasa).²⁰¹

Through these reports, Enforcement Counsel presented Mr. Gray's expert analysis of the evidence presented during the Central litigation. References in Mr. Gray's report included citations to transcripts of testimony from the trial and exhibits introduced during the trial, reflecting the source of the testimony and any exhibits used during the trial in conjunction with that testimony.

Through the summary disposition process, Enforcement Counsel presented preponderant and uncontroverted evidence establishing that Respondents had engaged in misconduct, that the misconduct had the requisite adverse effect on both Central and Farmers to meet the requirements found in the FDI Act, and that Respondents' culpability was of such character as to also meet the requirements found in the Act.

Unresolved through the summary disposition process were questions raised by Respondents regarding the nature and extent of adverse effects sustained by Farmers, and whether those adverse effects should be attributed to Farmers board members, rather than to Respondents.

The Summary Disposition Order included the following language on this point:

Conclusions Regarding Effect

I agree with Respondents' assertion that the uncontroverted evidence of reputational harm to Farmers is insufficient to meet a preponderance standard, as is the record's evidence of monetary loss to Farmers.²⁰² The record is not clear with respect to either form of harm to Farmers, as the

²⁰¹ See, e.g., Enforcement Counsel's Motion for Summary Disposition and Enforcement Counsel's Memorandum of Points and Authorities in Support of its Motion for Summary Disposition, at 65 n.304-06; 66 at n.11.

²⁰² Respondents' Memorandum of Points and Authorities in Support of its Motion for Summary Disposition [*sic*] at 46-48 and citations to the record therein.

issue of harm to Farmers was not among those presented during the Central litigation. Harm to Central, however, has been shown by preponderant and uncontroverted evidence and thus will not be within the scope of the hearing to be held on December 3, 2019.

Similarly, notwithstanding the analyses of Mr. Gray and Mr. Schwartz, the present record is insufficient to permit a proper allocation of harm that should be attributed to Respondents, rather than the other named defendants in the Central litigation, including Farmers and its Board of Directors. As a result, summary disposition is not available with respect to the extent and nature of the effects of Respondents' misconduct versus harm caused by the misconduct of Farmers and members of its Board of Directors. Thus, while no further evidence will be considered regarding whether Respondents engaged in misconduct as alleged in the Notice of Intent, the parties shall be permitted to present evidence regarding the allocation of harmful effects occasioned by Respondents' misconduct versus harm brought about by Farmers and its board of directors.²⁰³

Also unresolved through summary disposition were culpability questions raised by Respondents in their assertion that their appropriation of some of Central's proprietary information was in response to requests by Federal Reserve staff members – that an employee of the Federal Reserve, James Echtermeyer, expressly asked Respondents to produce documents that now constitute evidence against Respondents.

The Summary Disposition Order included the following language on this point:

Conclusions Regarding Culpability

Charges in the Notice of Intent include allegations of both personal dishonesty and either a willful or continuing disregard for the safety and soundness of either Central or Farmers. In answering these charges, Respondents aver, *inter alia*, that their delivery of Central's documents was, in part, "specifically requested by representatives of the Federal Reserve in conjunction with Smith's application to purchase the stock in and to become president and chief executive officer of Farmers."²⁰⁴ As preponderant and uncontroverted evidence on this point is not present in the record, a determination of Respondents' culpability will depend, in part, on whether Respondents' acquisition of Central's documents was in response to requests by the Reserve Board's examiners, as alleged by Respondents. Determining this issue will require additional evidence.²⁰⁵

As a result, the hearing provided the parties with the opportunity to present evidence on these two points: first, regarding the nature and extent of adverse effects sustained by Farmers as a result of Respondents' misconduct vis-à-vis any conduct properly attributed to members of the Farmers Board of Directors; and second, regarding Respondents' claim that their culpability

²⁰³ Order Regarding Enforcement Counsel's Motion for Summary Disposition at 74-75.

²⁰⁴ Answer of Kiolbasa at ¶12; Answer of Smith at ¶12.

²⁰⁵ Order Regarding Enforcement Counsel's Motion for Summary Disposition at 75.

must be considered in the light of any evidence tending to show that their delivery of proprietary information belonging to Central was in response to requests for such information by an employee of the Federal Reserve.

The hearing afforded the parties the opportunity to address these controverted claims. Upon consideration of the evidence presented during the hearing, and upon consideration of the findings set forth in the Summary Disposition Order, the following findings and conclusions are warranted.

2. Factual Premises Established through the Reserve Board's Expert Witness, Douglas L. Gray

Although his reports recognize the judgments entered in the Central litigation, Mr. Gray's opinions are not dependent upon those judgments, but instead are drawn from the evidence that had been presented during the state court litigation. For example, Mr. Gray reported that evidence presented during the Central trial established that on July 25, 2014, Kiolbasa emailed to Farmers' President, its Board members, and Smith, a list of potential co-investors and customers that included confidential information about twenty-one Central customers, including customers' names, loan balances, and in multiple cases, a description of the collateral on the loans and amortization terms.²⁰⁶

In support of this factual assertion, Mr. Gray cited evidence introduced during the Central litigation: first, he cited a transmission by Respondent Smith to John Gross, then Farmer's President and Board Chairman.²⁰⁷ The transmission shows that on July 25, 2014, Respondent Smith provided to Mr. Gross "a listing of investors and potential customers" which included twenty-one Central customers, providing detailed information regarding each customer – including the customers' names, loan balances, and, in more than half the cases, a description of the collateral on the loans and amortization terms.²⁰⁸

Mr. Gray then referred to Mr. Kiolbasa's testimony in the Central litigation: when asked whether he ever spoke with these customers about moving their loans to Farmers – to get their permission to disclose their details to Farmers – Mr. Kiolbasa answered: "I don't remember them giving me explicit permission to talk about their relationships, no."²⁰⁹

Mr. Gray's use of the evidence adduced in the Central litigation comes as no surprise. Throughout prehearing motion practice in this administrative enforcement action, Respondents noted, indeed argued repeatedly, that this administrative enforcement action was based, almost entirely, on claims presented and evidence admitted in the Central litigation.²¹⁰

²⁰⁶ Gray Report-Kiolbasa at 7, citing EC SD Ex. 35.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* citing EC SD Ex. 9 (state court trial testimony (Kiolbasa) at 592).

²¹⁰ See, e.g., Response to Central Bank & Trust's ("CB&T") Motion to Quash Respondents' Subpoena Duces Tecum at 1: "The Enforcement Action is based exclusively on a state court action in Laramie County, Wyoming, captioned Central Bank & Trust v. Frank Smith, et al., No. 186-671 (the "CB&T Litigation")."; Response to Lewis Roca Rothgerber Christie LLP's Motion to Quash Respondents' Subpoena Duces Tecum at 2 (same); Respondents' Response to Enforcement Counsel's Motion to Compel Production of Documents and Application for Issuance of Third Party Subpoenas, and to Submit a Supplemental Expert Report and Respondents' Request to

Through his analysis of the evidence presented in that litigation, Mr. Gray applied his expertise to evaluate the nature of the misconduct described in that litigation, and through such evaluation he offered his opinions regarding whether such misconduct reflected violations of law, unsafe or unsound practices, or breaches of fiduciary duties owed by Respondents, each of which may be cause for enforcement action under the FDI Act.

In this way, by referring to trial testimony and exhibits presented during that trial, Mr. Gray reported that the evidence presented during the Central litigation established (among other things):

- On October 2, 2014 and again on November 10, 2014, Kiolbasa, as a Farmers employee, emailed Smith, then still a Central employee, to request information about several Central loans that Kiolbasa was seeking to move to Farmers. Smith in response provided Kiolbasa proprietary Central information, including customer loan balances, rates, and terms. Through testimony at the Central litigation, Smith acknowledged that while Smith was still a Central employee, he discussed with Kiolbasa ways to convince a Central loan customer to move their loan to Farmers, using information Smith obtained from Central's computer system to support the effort.²¹¹ Mr. Gray opined that "the nature of the November 10, 2014 emails listed above makes clear that Respondents were consulting on ways to lure Central customers to move to Farmers (for example, by saying, "what are your thoughts if we match that rate and term").²¹²
- On February 13, 2015, Smith, as a Central employee, emailed Kiolbasa, then a Farmers employee, providing Central reports related to liquidity and interest rate risk. From Mr. Gray's review of the reports, he determined they contained financial information proprietary to Central.²¹³

Extend Discovery Deadlines at 3 (same); Respondents' Response to Enforcement Counsel's Motion to Strike Requests 3, 4, and 5 of Respondents' First Request for Production of Documents at 2.

²¹¹ Gray Report-Smith at 8, citing EC SD Ex. 45 (FRB-Farmers-004346, aka CBT Ex. 257) (email chain dated 10/2/14 where Kiolbasa wrote to Smith "Frank – I don't know if I can get these loans or not, but wanted your input before I call the customer. [D] and [K] [Z] have about \$708M in total on about 4 residential properties. Their rates are 4.05, and I would try the whole "I'll match what you have." Their rates adjust in about 42 months. Of course I will only be able to book about \$350M of these loans if they choose to move. I don't think they will move without us offering something more. What do you think about 48 months at 4.05%?"; response dated 10/2/14 by Smith to Kiolbasa "Sure. I think we could do that. You could take two of them one is at 236,369.88 and another is \$100,977.89. I've been thinking about the 6.50 loan you mentioned last night. Was that for Natalie? How long again was it? 84 months? What was the balance?"; response dated 10/2/14 by Kiolbasa to Smith "check Natalie's loan out. it is with cb&t. also, the family company is good with participating in the boobie bar. how should we split the origination? I say we throw them a bone by splitting it based on loan balance. also, john's well is junk. I think he is a little distraught"; EC SD Ex. 53 & 54 (FRBFARMERS-004363 and FRB-FARMERS-4364) (11/10/14 email from Kiolbasa to Smith "need payoffs" on two [D] [N] loans; response provided balance, accrued interest; and 11/10/14 email from Smith to Kiolbasa asking re: [J] and [S] [F] loan when the current rate expires, and response provided) EC SD Ex. 11 (Trial testimony (Smith) at 902-03, 1018-20 and 1045-46).

²¹² Gray Report-Smith at 11, quoting EC SD Ex. 54 (FRB-FARMERS-004364) (11/10/14 email from Kiolbasa to Smith re: [J] and [S] [F] loan).

²¹³ Gray Report- Smith at 8, citing EC SD Ex. 64 ("Central Bank & Trust Liquidity Report – Three Month Cash Flow Analysis – Worse Case" dated June 30, 2014; Public Funds & Repurchase Agreements Report dated July 31, 2014, etc.); Trial testimony (Kiolbasa) at 598.

- Between September 15, 2014 and February 24, 2015, Smith, while a Central employee, provided to Kiolbasa, while a Farmers employee, forms used at Central in its banking business, including Central’s loan processing form, Central’s appraisal checklist form, Central’s Participation Agreement form, Central’s Customer Information Profile, Central’s Other Real Estate listing from its general ledger (which included property addresses, book and appraised values), Central’s Dormant Account Procedures, forms Central used to balance pending and holding accounts, a memo from Central’s President to Central’s Board regarding a lookback analysis containing bank-specific financial data and managerial information of Central.²¹⁴
- Upon leaving employment at Central, Kiolbasa brought with him and delivered to Farmers certain forms and documents – including a debt service-to-credit ratio form, a commercial risk rating form, an agricultural risk rating form and a real estate valuation form – doing so without authorization from Central.²¹⁵

Mr. Gray also offered opinion analysis establishing that Central’s employment policies, introduced as evidence in the Central litigation, “are consistent with generally accepted standards of prudent banking for community banking institutions and are expected to be maintained by the Board of Directors and senior management at these institutions.”²¹⁶ He added that “[f]ailure to adopt or abide by these policies, including those precluding outside activities for a competitor, would be inconsistent with safe and sound banking practices.”²¹⁷ Through his analysis of the records presented to him,²¹⁸ Mr. Gray opined that Respondents violated Central’s employment

²¹⁴ Gray Report-Smith at 8-9, citing EC SD Ex. 41 (FRB-FARMERS-004305) (9/15/14 email from Kiolbasa to Smith “Where do you think Megan keeps the appraisal checklist form? Michelle asked me to get a copy.”); EC SD Ex. 42 (FRB-Farmers-004306-12) (9/15/14 email from Smith to Thomas re: Is this the form you asked Mark for?); EC SD Ex. 49 (FRB-FARMERS-004353-55) (10/30/14 email from Smith to Thomas encl. Participation Sold Agreement); EC SD Ex. 52 (FRB-FARMERS-004361-62) (11/6/14 email from Smith to Thomas encl. Customer Information Profile form used at Central Bank & Trust); EC SD Ex. 6 (FRB-FARMERS-004361-62) (Von Holtum Deposition “Q: I believe your testimony is that this is a customer information profile that Central Bank and Trust purchased from LaserPro? A: Yes, that’s correct. Q: To your knowledge, does the bank spend money to purchase forms such as this from LaserPro? A: Yes, we do. Q: And to your knowledge . . . would the Bank suffer adverse consequences if it provides this form free of charge to other banks? A: Yes.”); EC SD Ex. 60 (FRB-FARMERS-004425-26) (1/6/15 email from Smith to Thomas encl. Central’s 2014 Other Real Estate –G/L #1850); EC SD Ex. 61 (FRB-FARMERS-004427-28) (1/7/15 email from Smith to Kiolbasa & Thomas encl. Central’s Dormant Account Procedures); EC SD Ex. 62 (FRB-FARMERS-004429–32) (1/8/15 email from Smith to Thomas encl. Central’s ATM Clearing forms etc.); EC SD Ex. 65 (FRBFARMERS-004456-65) (2/24/15 email from Smith to Kiolbasa encl. copy of Assumption Review dated March 18, 2014, written by Thomas McCarvel, Chief Financial Officer to Smith, re: Memo on Asset-Liability Management and Central’s Interest Rate Sensitivity) EC SD Ex. 11 (Trial testimony (Smith) at 1008 (“Q: And during this time you also provided Mark [Kiolbasa] and Michelle [Thomas] with a number of forms? A: That is correct. Q: And you didn’t get authorization from anyone at Central Bank & Trust to do that? A: I didn’t get any authorization from anyone.”), and 1060-61.

²¹⁵ Gray Report-Kiolbasa at 7, citing EC SD Ex. 9 (FRB-FARMERS-000348 at 633) (State trial testimony of Kiolbasa) at 591, 603-04.

²¹⁶ Gray Report-Smith at 4; Gray Report-Kiolbasa at 5.

²¹⁷ Gray Report-Smith 4; Gray Report-Kiolbasa 5.

²¹⁸ See Gray Report-Smith at 39-40; Gray Report-Kiolbasa at 31-32.

policies, engaged in unsafe and unsound banking practices, and breached fiduciary duties owed to Central.²¹⁹

3. Breaching Central's Employment Policies Constituted Unsafe and Unsound Practices by Respondents and Breached Fiduciary Duties Owed to Central

Mr. Gray explained how, in his opinion, the referenced conduct constituted unsafe and unsound practices and violated fiduciary duties Respondents owed to Central. He stated that Central's policies required that information about its customers "be held in strictest confidence."²²⁰ Central's policies included within the scope of this requirement restrictions on disclosures by means of email or telephone, the use of Central's computers to access such information, and – specific to Respondent Smith, who was Central's Customer Information Security Officer – the responsibility for maintaining systems in the bank to ensure compliance with the Customer Information Security Policy.²²¹

Having reviewed Central's policies and evidence regarding Respondents' conduct, Mr. Gray opined that Respondent Smith improperly disseminated "information related to Central's finances, operations, and customers, to individuals who were not Central employees at the times of such disclosures."²²² He further opined that Kiolbasa, while a Central employee, also improperly disseminated Central's financial, business, and customer information to individuals who were not Central employees.²²³

a. Violations of Central's Policies

As noted above, it was Mr. Gray's expert opinion that failure to adopt or abide by provisions set forth in Central's Employment Handbook "would be inconsistent with safe and sound banking practices."²²⁴ The record further reflects that Respondents acknowledged receipt of the Central Employment Handbook at the time they began their employment at Central.²²⁵ The undisputed evidence cited by Mr. Gray reflected that both Respondents affirmed that by acknowledging their receipt of the Handbook, they understood that it was their responsibility "to read and abide by the policies described in the Employee Handbook."²²⁶

²¹⁹ Gray Report-Smith at 11; Gray Report-Kiolbasa at 11.

²²⁰ Gray Report-Smith at 5, citing EC SD Ex. 75 (FRB-FARMERS-005558-76 at 5562).

²²¹ Gray Report-Smith at 5-6, citing EC SD Ex. 63 (Central Bank & Trust, Customer Information Security Policy (Feb. 2015) (FRB-FARMERS-004435-41); EC SD Ex. 10 (FRB-FARMERS-000690 at 977) (Trial testimony of Smith).

²²² Gray Report-Smith at 7.

²²³ Gray Report-Kiolbasa at 6-7.

²²⁴ *Id.* at 5.

²²⁵ Gray Report-Smith at 5, citing EC SD Exhibits 74; EC SD Exhibit 13 (Central Bank & Trust, Frank Smith's Acknowledgments (Feb. 24, 2009, and May 30, 2013) (FRB-FARMERS-005577 and FRB-FARMERS-004113); EC SD Exhibit 76 (Central Bank & Trust, Mark Kiolbasa's Acknowledgments (Dec. 16, 2010, and May 30, 2013) (FRB FARMERS-005580 at 5582 and 5580).

²²⁶ *Id.*

Mr. Gray reported that policies in Central’s Handbook require confidential treatment of financial, business, and customer information.²²⁷ Quoting from the Handbook, Mr. Gray noted that Central’s policy stated “Information regarding our customers must be held in strictest confidence” and that employees “must take care not to discuss with family, friends, neighbors, or any other person who is not an employee of the Bank, information about the Bank’s finances, business plans and operations, production, facilities, customers, suppliers . . . unless you are required to do so in the normal course of your job duties.”²²⁸

Mr. Gray opined that, based on the conduct described during the Central litigation, as reflected above, Respondent Kiolbasa discussed or disseminated information related to Central’s customers to individuals who were not Central employees at the relevant times, and improperly took with him Central’s proprietary forms when he left Central, thereby violating Central’s policies.²²⁹ According to Mr. Gray, while the sensitivity of the forms and data that Kiolbasa took and shared outside may vary, “all were subject to the Central Handbook, should not have been shared outside the bank, and in my experience, could have negatively impacted Central in the hands of a competitor.”²³⁰

Similarly, Mr. Gray opined that based on the conduct described during the Central litigation, as reflected above, Respondent Smith violated Central’s privacy policy, which provided that the resources he appropriated from Central were “the sole property of the Bank and are intended for business use.”²³¹ After noting Smith’s position as Central’s Customer Information Security Officer, Mr. Gray opined that Smith “was exchanging information in violation of the same policy he was responsible for enforcing.”²³²

b. Respondents’ Duty to Act with Honesty, Integrity, and Loyalty

Beyond applying Central’s policies regarding privacy and confidentiality, Mr. Gray also considered more broadly-stated policies – those requiring Central’s employees to act with honesty, integrity, and loyalty. Noting that the “entire banking business is built” on customer trust, the policy requires “absolute honesty” as an incident of integrity.²³³ Also, regarding loyalty, Central’s policy required that employees “will be loyal to the institution with which they are associated and will on no occasion publicly dishonor either their employer or their fellow employee.”²³⁴

Mr. Gray coupled these provisions of Central’s Handbook with provisions that addressed outside activities – including requirements binding employees to provide notice and secure

²²⁷ Gray Report-Kiolbasa at 5, citing Central Handbook, Confidentiality, EC SD Exhibit 75 (FRB-FARMERS-005558-76 at 5562).

²²⁸ *Id.*

²²⁹ Gray Report-Kiolbasa, citing references set forth above.

²³⁰ *Id.* at 7-8.

²³¹ Gray Report-Smith at 4, quoting Central Handbook, Privacy, EC Exhibit 75 (FRB-FARMERS-005558-76 at 5572)

²³² Gray Report-Smith at 12.

²³³ *Id.*, citing Central Handbook, Integrity, EC SD Ex. 75 (FRB-FARMERS-005558 at 5562).

²³⁴ *Id.*, citing Central Handbook, Loyalty EC SD Ex. 75 (FRB-FARMERS-005563).

written consent from Central prior to accepting or performing outside work.²³⁵ He noted in particular the requirement that employees “avoid all situations in which their personal interests conflict or appear to conflict with the Bank’s interests,” and avoid engaging in any activity “that would require you to disclose confidential, trade secret information belonging to the Bank.”²³⁶

Mr. Gray opined that individually and with respect to their collective action, by engaging in efforts to facilitate the transfer of loans from Central to Farmers, and to otherwise assist Farmers, Respondents violated Central’s policies regarding honesty, integrity, loyalty, and restrictions on outside activities.²³⁷

c. Specific and Uncontroverted Instances of Conduct that Breached Central’s Employment Policies

Mr. Gray provided these specific instances of such violations:

- Conduct in late 2013 – where Respondents collectively began working on a plan to acquire an interest in Farmers’ parent holding company, Commercial Bancorp, and to take management positions at Farmers.²³⁸ After noting that Farmers was located “about 42 miles from Cheyenne, Wyoming, where Central had a branch,” Mr. Gray opined that “during the time period relevant to the conduct set forth in the Notice of Charges, Central and Farmers were competing banks.”²³⁹
- In a December 17, 2013 email to Smith, Kiolbasa outlines a series of questions relating to their business plan, including raising the question of “at what time it would be appropriate for me to start talking to my customers” about “jump[ing]” from Central to Farmers; expressing the concern that “if I don’t get the customers to jump within the first six months, I may not get them at all”; also stating that “the easy answer” about when he should start contacting his customers “is as soon as I resign”; expressing the concern that he did not “want to be over confident in the amount of loans that I can bring in. Depending on the timing and interest rates, things might go slow (at least until customers’ rates start to adjust which begins in 2 years for the customer that I brought to CB&T), so it would really hurt if I got one of my \$1MM relationships to move and we were only able to put \$250M on the books.”²⁴⁰

²³⁵ *Id.*, citing Central Handbook, Outside Employment/Activities, EC SD Ex. 75 (FRB-FARMERS-005574).

²³⁶ *Id.* at 13, quoting Central Handbook, Outside Employment/Activities, EC SD Ex. 75 (FRB-FARMERS-005574).

²³⁷ Gray Report-Smith at 13; Gray Report-Kiolbasa at 9.

²³⁸ Gray Report-Smith at 13, citing EC SD Ex. 20 (FRB-FARMERS-004174-86) (1/23/14 “preliminary business plan” of Frank Smith and Mark Kiolbasa “including projections, on the purchase and expansion of the Farmers State Bank located in Pine Bluffs, Wyoming.”)

²³⁹ Gray Report-Smith at 14. Kiolbasa stipulated he resigned from Central on September 11, 2014 effective September 19, 2014, and started working at Farmers as a loan officer on September 22, 2014. Enforcement Counsel’s and Respondents’ Joint Stipulations at ¶¶15-16. Smith tendered his resignation from Central on March 18, 2015, effective that day. Enforcement Counsel’s and Respondents’ Joint Stipulations at ¶19

²⁴⁰ *Id.* at 14, citing EC SD Ex. 14 at FRB-FARMERS-004115.

- In a series of email exchanges, Respondents between March 25, 2014 and June 14, 2014, reveal efforts they have undertaken to encourage Central customers to move their loans from Central to Farmers – including evidence that, in Mr. Gray’s opinion, demonstrated Respondents went beyond “mere planning activities” toward a potential acquisition of Farmers, while still Central employees.²⁴¹
- In a June 13, 2014 email to Smith, Kiolbasa reported on his discovery that the “Dropbox program” – a storage protocol created in connection with their Business Plan – stores a copy of documents associated with the Plan.²⁴² Respondents have stipulated that shortly after Kiolbasa created the Dropbox account, Farmers documents were loaded into the account, and then Respondents deleted information relating to Farmers that they accidentally placed on Central’s computers.²⁴³

As Kiolbasa rather excitedly explained to Smith:

So I got to researching this dropbox program today. That damn thing downloads a folder to your computer that syncs with the cloud. **Everything** going into those folders is also being saved on my work computer . . . everything, even what [Farmers] is uploading!!! I’m deleting the program and putting it on my home computer. But I wanted to tell you in case you accessed it from your work computer. When you delete the program, I’m not sure if the folder also gets deleted. But if you buzz me Monday, I’ll show you how to tell the path of where it is saving all the information . . . and maybe it is saving it to mine since I am the owner of the folders, but still, I don’t want to get caught with our pants down on this. Imagine Bill [Von Holtum, Central’s Chairman] walking into John’s [Gross, Farmers Chairman and President] office with a copy of all of their info.²⁴⁴

Mr. Gray opined that the June 13, 2014 email evidenced that “Respondents were aware that their actions conflicted with Central’s interests.”²⁴⁵

In support, Mr. Gray noted that Smith testified, with respect to the June 13, 2014 email message, that he “‘deleted some documents’ related to the Business Plan from his Central work computer” and admitted that he thought if he were caught ‘doing what [he was] doing at Central Bank & Trust [he] would have been fired’” This testimony, in Mr. Gray’s opinion, “demonstrated that Smith was aware of the impropriety of his actions, and reflected dishonesty.”²⁴⁶

²⁴¹ Gray Report-Smith at 15.

²⁴² The record reflects that Kiolbasa set up the Dropbox account on June 10, 2014, and later that day added Smith to the account. EC SD Ex. 11 (Smith’s Trial Testimony) at 949 (FRB-FARMERS-001068).

²⁴³ Enforcement Counsel’s and Respondents’ Joint Stipulations at ¶¶12-13

²⁴⁴ Gray Report-Smith at 15, quoting EC SD Ex. 30 (FRB-FARMERS-004268) (emphasis *sic*).

²⁴⁵ Gray Report-Smith at 19.

²⁴⁶ Gray Report-Smith at 16, quoting Smith’s Trial Testimony at 952:1–19, 953:13–19, Mar. 15, 2018 (FRB-FARMERS-001032 at 1071–73).

Similarly, Mr. Gray noted that Kiolbasa's statement that he "didn't want to get caught with our pants down" evidences that Respondents were aware that their actions conflicted with Central's interests. It also reflects dishonesty."²⁴⁷

d. Conduct Specific to Mr. Smith

Apart from conduct both Respondents engaged in together, evidence adduced during the trial also concerned Smith's unilateral actions. Significant in these, according to Mr. Gray, were instances where Smith, while working at Central, emailed John Gross and another Farmers director to inform them "of his discussions, on behalf of Farmers, with Federal Reserve Bank of Kansas City staff, in support of Kiolbasa's move from Central to Farmers."²⁴⁸

Mr. Gray observed that Smith's actions – encouraging Reserve Bank staff to permit Kiolbasa's move from Central to Farmers – demonstrated that Smith was "aware that he was representing the interests of Farmers to bank regulators while employed at Central," and (because such a move would leave Central without a loan officer overseeing its largest loan portfolio) such actions "on Farmers' behalf were to the detriment of his employer, Central."²⁴⁹ This was coupled with evidence that during September 2014, Gross authorized Smith to speak on Farmers' behalf in support of Kiolbasa's move from Central to Farmers, which, in Mr. Gray's opinion, "resulted in Smith acting as an agent of Farmers, even though he was Central's CFO at the time."²⁵⁰

Mr. Gray also summarized Smith's trial testimony regarding his actions in September 2014, when Central's President, Carl Huhnke, discovered that Kiolbasa was working at Farmers and Central's loan payoffs were coming from Farmers.²⁵¹ Upon this discovery, Huhnke asked Smith to research Farmers – to find out who they were, and what was going on.²⁵²

Even though by the time of this request Smith had already signed a letter reflecting his intention to buy Farmers, and had been providing forms and information about Central to Kiolbasa for the past months in furtherance of Respondents' business plan, and had been preparing Call Reports for Farmers – despite all of these dealings having an impact on

²⁴⁷ Gray Report-Kiolbasa at 11, quoting from EC SD Ex. 30 (FRB-FARMERS-004268).

²⁴⁸ Gray Report-Smith at 16, citing EC SD Ex. 71 (FRB-FARMERS-004594-98)

²⁴⁹ Gray Report-Smith at 16, citing EC SD Ex. 71 (9/5/14 email chain from Smith to Gross et al re: E-Mail to John Clark at Federal Reserve Applications Department) (FRB-FARMERS-004594-97 at 4594); EC SD Ex. 9 (Kiolbasa's Trial Testimony at 594:20–24), Mar. 14, 2018 (FRB-FARMERS-000348 at 636).

²⁵⁰ Gray Report-Smith at 16, citing EC Exhibit 12 (Testimony of John Gross) (FRB-FARMERS-001363 at 1656:10-25).

²⁵¹ Gray Report-Smith at 17.

²⁵² *Id.*, citing EC SD Ex. 11 (Smith's Trial Testimony at 1028:17–1030:7, Mar. 16, 2018 (FRB-FARMERS-001032 at 1147–49).

Central, Smith disclosed none of this to Huhnke in response to Huhnke's request for information about Farmers.²⁵³

When asked during the trial about the reason for not disclosing this set of circumstances to Huhnke – whether “the reason is obvious. It is because it was wrong, and you would be fired for that?” Smith answered: “The reason I didn't do it is because I could not go to work at Farmers State Bank.” With the next question – “Okay. And you knew you would be fired from Central Bank & Trust for doing what you were doing?” Smith answered “Yes.”²⁵⁴

As noted above, Huhnke had been alerted to payoff checks arriving at Central by which loans that had originated at Central were being paid off by Farmers. The parties have stipulated that after Central expressed concerns to Smith that several customers had paid off their mortgages with Central and moved them to Farmers, Smith did not tell Central management of his future plans to join Farmers.²⁵⁵

Mr. Gray noted that on October 7, 2014, Smith, Kiolbasa and a former Central employee, Michelle Thomas, exchanged emails about this, discussing the fact that Central's staff “had become aware that of Thomas' employment at Farmers due to her signature on a cashier's check drawn on Farmers and payable to Central.”²⁵⁶

In his review of a series of email exchanges, Mr. Gray reported that in response to this set of events, “Smith, who was then Central's CFO, tried to determine who at Central knew about the signature on the cashier's check and talked about misleading Huhnke regarding the signature, demonstrating dishonesty and an abdication of loyalty to Central.”²⁵⁷ Mr. Gray also noted that through this series of email exchanges, Smith told Kiolbasa that if Huhnke asked about Ms. Thomas's signature on the payoff checks, Smith would falsely report that Farmers

²⁵³ Gray Report-Smith at 17, citing EC SD Ex. 11 (Smith's Trial Testimony at 1030:13–16, Mar. 16, 2018 (FRB-FARMERS-001032 at 1149). See also Enforcement Counsel's and Respondents' Joint Stipulations at ¶14: “During the time period that he was employed at Central, Smith assisted Farmers with preparing its Call Reports.”

²⁵⁴ EC SD Ex. 11 (Smith's Trial Testimony at 1031, Mar. 16, 2018 (FRB-FARMERS-001032 at 1150).

²⁵⁵ Enforcement Counsel's and Respondents' Joint Stipulations at ¶17.

²⁵⁶ Gray Report-Smith at 17.

²⁵⁷ *Id.* at 17-18, citing EC SD Exhibit 46 (FRBFARMERS-004347-48) (10/7/14 email from Smith to [Thomas] at 11:30 AM. (Subject: Oops!) “I guessed you signed the Cashier's checks from [Farmers] that paid off [Central] loans. They recognized it in Cheyenne. Trying to come up with an answer before [Central President] Carl [Huhnke] gets there today.”; EC SD Exhibit 47 (FRB-FARMERS-004349) (10/7/14 email from Smith to Kiolbasa at 12:53 PM. “Mark – Who all from [Central] knows about the checks? Who called you? Frank.”); EC SD Exhibit 48 (FRB-FARMERS-004350-51) (10/7/14 email from Kiolbasa to Smith at 3:43 PM. “So Peggy [a Central employee] is texting me to let me know that Kathy Brashear [a Central employee] went through the work to find those checks. She then asked Peggy what the last name was of Michelle from Lander. Peggy claims to be acting stupid.”); EC DC Exhibit 9 (FRB-FARMERS 000348 at 636:20-24) (From Smith to Kiolbasa at 3:51 PM. “Sounds good. I am going to tell [C]arl if he asked that [Farmers] hired Michelle as contractor to teach [Farmers] about Sparak and loan documents. She has mentioned consulting a few times and talked to Wyoming Community and Bank of Commerce about it in the past.” (*Id.* at 4350-51).

had “hired Michelle [Thomas] as a contractor to teach [Farmers] about Sparak and loan documents.”²⁵⁸

Also while still Central’s CFO, Smith spent time between October 2014 and March 2015 at Farmers’ offices in Pine Bluffs. According to Mr. Gray, the evidence (including Smith’s own description of what services he performed there) constituted service “to a competing bank,” such that Smith “was disloyal to Central by acting in conflict with Central’s interests, and was performing outside activities without the required prior approval by Central.”²⁵⁹ Even if Smith was not being compensated by Farmers for the services performed there, in Mr. Gray’s opinion, “the Business Plan and other evidence shows that Smith performed these services with an expectation of financial gain once moving to Farmers.”²⁶⁰

Summarizing his perceptions drawn from this exchange, Mr. Gray opined that both Smith and Kiolbasa violated Central’s policies regarding honesty, integrity, and loyalty.²⁶¹ In addition, Mr. Gray opined that Respondents’ active pursuit of the Business Plan, which involved acquiring an ownership interest in Farmers and which included the execution of a confidentiality agreement and meetings with Farmers directors, constituted outside activities prohibited by Central’s policies, and reflected Respondents’ disloyalty to Central.²⁶²

e. Engaging in Unsafe and Unsound Banking Practices not Based on Central’s Employment Policies

Approaching the evidence from a separate perspective – beyond relying on Central’s published employee policies – Mr. Gray offered opinions regarding whether the trial proceedings produced evidence of unsafe or unsound banking practices attributable to Respondents.²⁶³

Beyond references to breaches of Central’s policies, Mr. Gray opined that Respondents’ participation in a series of specific instances – standing alone – constituted evidence of Respondents’ unsafe or unsound banking practices. Both Respondents, in Mr. Gray’s opinion, were actively involved in a series of transactions intended to facilitate the transfer of loans away from Central, “directly contravening their obligations to safeguard Central’s earning assets.”²⁶⁴

²⁵⁸ Gray Report-Smith at 18, citing EC SD Exhibit 48 (FRB-FARMERS-004350-51 at 4351). Note that the reference to Sparak is obscure and not clear in the present record.

²⁵⁹ Gray Report-Smith at 19 citing EC SD Ex. 50 (FRB-FARMERS-004356-59 at 4358) (10/30/14 chat transcript between April Hughes and Smith Q by Hughes: “How was your trip?” A by Smith: “It was good. Spent two days at the bank. Got their call report done, had staff meetings, gave them homework, and was a bit of a cheerleader. It was fun.”); EC SD Ex. 11 (Smith’s Trial Testimony) at 1006-08, 1035-37, (FRB-FARMERS-001032 at 1155-56); Smith’s Trial Testimony at 1006:4-1007:22, Mar. 16, 2018 (FRB-FARMERS-001032 at 1125-26) (assisted with the preparation of Farmers’ call reports for September, December 2014 and , March and June 2015).

²⁶⁰ Gray Report-Smith at 19; EC SD Ex. 20 (FRB-FARMERS-004176) (“Our proposition [as documented in the Business Plan] is to purchase [Farmers] and to open an LPO (loan production office) in Cheyenne, Wyoming. We will grow the bank’s loan portfolio by \$12,000,000 in quality, performing loans within the first three years, at which time a full service branch would be opened in Cheyenne.”).

²⁶¹ Gray Report-Smith at 20; Gray Report-Kiolbasa at 11.

²⁶² Gray Report-Smith at 20; Gray Report-Kiolbasa at 11-12.

²⁶³ Gray Report-Smith at 20.

²⁶⁴ *Id.* at 16; citing EC SD Ex. 14 (FRB-FARMERS-004114-16 at 4115) (12/16/13 email from Kiolbasa to Smith re: concerns regarding the Business Plan); EC SD Ex. 22 (FRB-FARMERS-004218-21 at 4219) (3/25/14

f. Mr. Gray's Credentials as an Expert

Here, it bears mentioning the credentials Mr. Gray brought to this process – particularly his deep familiarity with banking regulations, processes, and dynamics.

From the curriculum vitae which accompanied both the Smith and Kiolbasa reports, we know Mr. Gray, as Assistant Vice President of Supervision and Risk Management at the Federal Reserve Bank of Kansas City, is responsible for oversight of the safety and soundness supervision program for approximately 50 state-chartered, Federal Reserve member banks (community banks) and approximately 175 bank holding companies (total assets less than \$10 billion), including evaluating the adequacy of examination-scoping procedures and examination planning; proving ratings and supervisory conclusions from community bank examinations and inspections; representing the Federal Reserve Bank of Kansas City in official supervisory meetings and correspondence with bankers, bank holding company officials, and representatives from other regulatory agencies; providing training related to liquidity risk management evaluations for banking regulators in other countries/jurisdictions as part of the Federal Reserve System's initiatives to support central bankers in other jurisdictions; overseeing training and development programs for Tenth District examiners and managers; and implementing the key strategic initiatives for Reserve Bank supervision.²⁶⁵

Further, between 2006 and 2015 Mr. Gray, while serving as a Managing Examiner, was responsible for daily oversight of examination activities and examiner development with activities including providing oversight of Oklahoma City community bank central points of contact for state member banks, reviewing and editing all outgoing examination reports, correspondence, and other communications with banks, bank holding companies, and other regulatory agencies, serving as the Tenth District representative to the Federal Reserve System's Market and Liquidity Risk coordinators group, which was responsible for monitoring emerging asset/liability management trends in the banking industry and recommending to Reserve Bank and Board of Governors officers supervisory responses to emerging or existing risks; and serving as an asset/liability management training course developer and instructor for examiners throughout the Federal Reserve System (teaching the course approximately 20 times in 8 years).²⁶⁶

email attaching Kiolbasa's report to John Gross reflecting his proposal to "quickly resolve all of Farmers' outstanding regulatory issues and have an immensely successful future".); EC SD Ex. 26 (FRB-FARMERS-004241-54 at 4242) (6/1/14 transmission by Kiolbasa to Farmers attaching Respondents' Business Plan); EC SD Ex. 24 (FRB-FARMERS-004236-38 at 4236) (4/10/14 email from Smith to "spring1996@yahoo.com attaching Kiolbasa's letter to Gross describing Respondents' business plan); EC SD Ex. 25(FRB-FARMERS-004239-40) (6/1/14 meeting agenda with business plan highlights, noting in the meeting agenda that Respondents' goals included "loan growth/profitability/expansion"); Kiolbasa's Trial Testimony at 535:19-536:7, Mar. 14, 2018 (FRB-FARMERS-000348 at 577-78) (reflecting that meeting involved Respondents, Thomas, and Farmers' board); EC SD Ex. 9 (Kiolbasa's Trial Testimony) at 539-40 (FRB-FARMERS-000348 at 581- 82); EC SD Ex. 12 (J. Gross's Trial Testimony) at 1506-07 (FRB-FARMERS-001363 at 1663) (when asked "if you saw one of your officers at your bank speaking with a competing bank about confirming commitments to move over customers, you wouldn't be happy about that, would you?" answered "No, I wouldn't."); EC SD Ex. 29 (FRB-FARMERS-004262-67 at 4262); EC SD Ex. 11 (Smith's Trial Testimony) at 949 (FRB-FARMERS-001032 at 1068).

²⁶⁵ Gray Report-Smith at Appendix A, 1.

²⁶⁶ *Id.*

Further, between 2000 and 2005, he served as a Community Bank Examiner, responsible for various leadership and examination assignments at community bank examinations and bank holding company inspections, including service as examiner-in-charge for examinations of state member banks with assets less than \$500 million. In this capacity, he developed elevated subject matter expertise related to evaluation of interest rate risk, liquidity risk, investment securities, and Bank Secrecy Act (BSA) compliance at institutions of all sizes; provided oversight of a portfolio of bank holding companies designated as active Financial Holding Companies as defined in the Gramm-Leach-Bliley Act of 1999; served in other leadership and trainer capacities for less experienced examiners; and provided BSA training to several financial institutions and the Oklahoma Banking Department.²⁶⁷

This, plus service between 1994 and 2000 as Assistant Vice President/Supervisor/Analyst for Midland Mortgage Company of Oklahoma City, Oklahoma, his experience as a course developer for the Federal Reserve System's Principles of Asset/Liability Management training course, and his certification as a Chartered Financial Analyst in 2005, constitutes a sufficient background of both academic development and practical experience in relevant fields to qualify Mr. Gray as an expert in areas relevant to this enforcement action.²⁶⁸

Upon these credentials, and upon my review of the in-depth analysis presented through his reports, I find Mr. Gray is qualified to provide expert opinions and testimony in the fields of regulatory practice pertaining to financial institutions, including the areas of compliance with banking policies and regulations, identification of unsafe or unsound banking practices, breaches of fiduciary duties owed to financial institutions, and violations of laws (both statutes and regulations) relating to the FDI Act.

4. What Constitutes an Unsafe or Unsound Practice?

In determining what constitutes an unsafe or unsound practice, Mr. Gray reported as follows:

An unsafe and unsound practice is generally defined as conduct that is "contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance fund."²⁶⁹ Further, federal regulations that apply to federally supervised institutions lay out specific safety and soundness standards for bankers.²⁷⁰

Reflecting on the preceding report of Respondents' repeated and continued violations of Central's policies on confidentiality, privacy, integrity, loyalty, and restrictions on outside

²⁶⁷ *Id.* at 2.

²⁶⁸ *Id.* at 2-3.

²⁶⁹ Gray Report-Kiolbasa at 12, quoting Financial Institutions Supervisory Act of 1966, Hearings on S 3158 Before the H. Committee on Banking and Currency, 89th Cong., 2nd Sess. 49-50 (1966) (memorandum submitted by John Horne).

²⁷⁰ Gray Report-Kiolbasa at 12, citing 12 C.F.R. § 208 App. D-1 (setting forth interagency guidelines establishing standards for safety and soundness); accord, *In the Matter of Patrick Adams*, (OCC September 13, 2014) 2014 WL 8735096, at *3.

activity, and noting specifically policies against conflicts of interest, Mr. Gray opined that these violations, in and of themselves, were unsafe and unsound banking practices.²⁷¹ He explained that circumventing the internal controls presented in Central's policies jeopardized customer trust in the Bank, subjecting the Bank to harm – including potential financial and reputational harm, and legal risk.²⁷²

a. Respondents' Conduct was Contrary to Generally Accepted Standards of Prudent Banking Operations

Addressing Respondents' claims that Central failed to enforce these policies, Mr. Gray noted that the duties at issue here were personal to the individual employee. As he explained with respect to Respondent Smith:

Smith acted contrary to generally accepted standards of prudent banking operations, regardless of whether Central properly enforced its policies, failed to adopt recommended improvements to these policies, or failed to take action against other violations of them. Evidence that Central did not actively enforce their policies, failed to adopt policy improvements, or that other Central employees beyond Respondents were also engaged in violations of Central's policies, would not constitute evidence that Smith was acting in a prudent manner or in compliance with Central's policies. Instead, Smith had an individual obligation to act in a prudent manner and comply with Central policies.²⁷³ In my opinion, Smith's continued violations of Central's policies, as described above, circumvented Central's controls, and constituted an unsafe and unsound banking practice.²⁷⁴

Mr. Gray offered similar conclusions regarding Mr. Kiolbasa.²⁷⁵ He also opined that by soliciting and obtaining confidential customer information and proprietary information of Central while employed at Farmers, Mr. Kiolbasa engaged in unsafe and unsound banking practices.²⁷⁶

Elaborating on this point, Mr. Gray opined as follows:

Generally accepted standards of prudent banking operations preclude a bank employee from coordinating with an employee of a competing bank to obtain confidential customer and proprietary information of the competing bank. Continued efforts to do so could expose the bank where the employee works to legal liability, and thus jeopardize its safety and soundness. Here,

²⁷¹ Gray Report-Smith at 21; Gray Report-Kiolbasa at 12-13.

²⁷² Gray Report-Smith at 21; Gray Report-Kiolbasa at 13.

²⁷³ Gray Report-Smith at 22, citing Smith's Acknowledgements, dated February 24, 2009, and May 30, 2013 ("I understand that it is my responsibility to read and abide by the policies described in the Employee Handbook.").

²⁷⁴ Gray Report-Smith at 22. See also Gray Report-Kiolbasa at 13, citing Kiolbasa's Acknowledgements, dated December 16, 2010, and May 30, 2013 ("I understand that it is my responsibility to read and abide by the policies described in the Employee Handbook.").

²⁷⁵ Gray Report-Kiolbasa at 13-14.

²⁷⁶ *Id.* at 18.

such actions led to Central suing Farmers, resulting in significant legal expenses to Farmers.²⁷⁷

b. Actions that Led to the Transfer of Loans Away from Central

Further, identifying individual actions by Smith and Kiolbasa, Mr. Gray noted three courses of conduct attributed to Respondent Smith, and two attributed to Kiolbasa, that warranted review. In each instance, Mr. Gray opined that Respondents “took improper steps to facilitate the transfer of loans away from Central, directly contravening their obligations to safeguard Central’s assets.”²⁷⁸ He opined that Smith²⁷⁹ and Kiolbasa²⁸⁰ “improperly transferred Central’s proprietary information or documents outside the bank, and in doing so, failed to safeguard other assets of Central.”²⁸¹

Elaborating on this point, Mr. Gray explained:

Respondents’ seeking of commitments from Central customers to invest in Farmers constitutes an unsafe and unsound practice under the circumstances. For the following reasons, Respondents’ actions communicated an implied request to transfer Central loans to Farmers, in direct contravention of his responsibility to safeguard Central’s (his employer’s) assets.

First, the success of the Central customer’s investment would have been tied to the viability of the Business Plan, which included growth of Farmers’ loan portfolio as an important objective. Second, the solicitation was integrally tied to the Business Plan, which called for Respondents to be co-owners and top executives at Farmers, which would naturally induce any would-be co-investor customers to consider moving their banking business to Farmers, to Central’s detriment.

Third, by soliciting Central customers as co-investors prior to departing Central, Respondents were telegraphing to these customers that Farmers might be a better place for them to conduct their banking, again, to the detriment of Central, their employer at the time. Thus, the mere solicitation of these Central customers as co-investors, while Respondents still worked

²⁷⁷ *Id.* at 18, citing the Report at Section III E (discussing harm to Farmers resulting from Kiolbasa’s conduct).

²⁷⁸ Gray Report-Smith at 25; Gray Report-Kiolbasa at 16.

²⁷⁹ Gray Report-Smith at 25, citing EC SD Ex. 45 (FRB-FARMERS-004346); EC SD Ex. 11 (Smith’s Trial Testimony) at 1018-1020, 1032; EC SD Ex. 64 (FRB-FARMERS-004442-55) (2/13/15 email from Smith to Kiolbasa attaching the following: “Central Bank & Trust Liquidity Report – Three Month Cash Flow Analysis – Worse Case” dated June 30, 2014; Public Funds & Repurchase Agreements Report dated July 31, 2014, etc.); Kiolbasa’s Trial Testimony at 598:2-17, Mar. 14, 2018 (FRB-FARMERS-000348 at 640); and Smith’s Trial Testimony at 1008:17-22, Mar. 16, 2018 (FRB-FARMERS-001032 at 1127).

²⁸⁰ Gray Report-Kiolbasa at 16, citing EC SD Ex. 42 (FRB-FARMERS-004306-12 at 4306) (9/15/14 email from Smith to Thomas attaching Central checklist form); EC SD Ex. 41 (FRB-FARMERS-004305) (9/15/14 email from Kiolbasa to Smith asking where “Megan keeps the appraisal checklist form” at Central); and EC SD Ex. 9 (Kiolbasa’s Trial Testimony) at 603-04 (FRB-FARMERS-000348 at 645-46).

²⁸¹ Gray Report-Smith at 25; Gray Report-Kiolbasa at 16.

for the bank, contained an implied request for a commitment to transfer their Central loans to Farmers, and was likely to lead to a loss of business by Central.

Actions by bank officers or management that could be reasonably expected to result in a loss of business to their employer would constitute an unsafe and unsound practice, as such actions contravene generally accepted standards of prudent banking operations, and could result in abnormal risk, financial losses, and/or reputational harm to the bank.²⁸²

Describing the evidence presented during the trial as demonstrating Respondents' efforts to facilitate a customer's plans to move their loans from Central to Farmers, Mr. Gray noted that "[t]o the extent that bankers in senior positions of trust, such as Respondents, engage in these types of actions, they can reasonably be expected to result in a risk of loss to their employer. In this case, Respondents' actions apparently led to loss of business to their employer."²⁸³ From the foregoing, Mr. Gray opined that "these solicitations were contrary to generally accepted standards of prudent banking operations, and constituted unsafe and unsound practices."²⁸⁴

c. Breaches of Fiduciary Duties Owed to Central

In the Notice of Intent, the Reserve Board alleged Respondents breached the fiduciary duties of care, candor and loyalty they owed to Central; and breached the fiduciary duty of care they owed to Farmers.²⁸⁵ The allegations are based on the claim that Respondents "scheme[d] to misappropriate confidential and proprietary information" for their mutual benefit and to Central's detriment.²⁸⁶

As noted above, the duty of loyalty "requires directors and officers to administer the affairs of the bank with candor, personal honesty and integrity. They are prohibited from advancing their own personal or business interests, or those of others, at the expense of the bank."²⁸⁷ The duty of candor requires a corporate fiduciary to disclose "everything he knew

²⁸² Gray Report-Smith at 26, citing EC Ex. 11 (Smith's Trial Testimony) at 903-04 (FRB-FARMERS-000690 at 984) (Smith testified that in early 2014, while both were still Central employees, Respondents went on two or three business calls together to discuss investments in Farmers with Central customers, where Respondents would tell these customers that they were going to fix Farmers' profitability by increasing its loan portfolio, among other things.); EC SD Ex. 25 (FRB-FARMERS-004241-54 at 4245) ("There are three key managers that are critical to the accomplishment of the purchase and expansion: Frank Smith, Mark Kiolbasa, and Michelle Thomas.")

²⁸³ Gray Report-Smith at 26.

²⁸⁴ *Id.*

²⁸⁵ Notice of Intent to Prohibit at ¶¶27, 30.

²⁸⁶ *Id.*

²⁸⁷ Federal Deposit Insurance Corporation, Statement of Policy Concerning the Responsibilities of Bank Directors and Officers, FIL--87--92 (Dec. 3, 1992), available at <https://www.fdic.gov/regulations/laws/rules/5000-3300.html>.

relating to the transaction," even "if not asked."²⁸⁸ The duty of care requires directors and officers to “act as prudent and diligent business persons in conducting the affairs of the bank.”²⁸⁹

Mr. Gray opined that as a Chief Financial Officer and Central branch President, Smith owed these fiduciary duties to Central.²⁹⁰ In his opinion, Smith had the obligation to be aware of bank policies and applicable statutes and regulations – and refrain from violating these.²⁹¹ Further, according to Mr. Gray, Smith had the duty to “limit the bank’s risk profile by promoting compliance with bank policies, applicable laws and regulations, and generally accepted standards of prudent banking operations.”²⁹²

In his capacity as Central’s CFO and its Customer Information Security Officer, Smith had, in Mr. Gray’s opinion, the “duty of care to act as an ordinary prudent business person by complying with Central’s policies” and applicable statutes and regulations.²⁹³ This duty required that Smith treat Central’s financial, business, and customer information as confidential.²⁹⁴

d. Respondents Breached the Duty of Care Owed to Central

In Mr. Gray’s opinion, both Smith and Kiolbasa breached the fiduciary duty of care owed to Central.²⁹⁵ In support, Mr. Gray cited to a series of circumstances already presented, including the following:

- The evidence adduced during the Central litigation included evidence that the Business Plan developed by Smith and Kiolbasa in late 2013 “contemplated opening a loan production office to directly compete with Central’s branch” in Cheyenne, Wyoming;
- The email Kiolbasa sent to Smith on December 17, 2013, indicated Kiolbasa’s intention to transfer the loan portfolio Kiolbasa was responsible for at Central to Farmers;
- The email Kiolbasa sent to Smith on March 25, 2014 indicated concrete steps taken by Kiolbasa and Smith to move Central’s business to Farmers;
- Testimony by Kiolbasa and documents presented during the Central litigation established that on June 1, 2014, while Smith and Kiolbasa were still working at Central, both met with the Farmers’ Board of Directors, at which time

²⁸⁸ *De La Fuente II v. FDIC*, 332 F.3d 1208, 1222 (9th Cir. 2003) (fiduciary duty breached by failure to disclose relevant information to bank’s board of directors when it was considering a loan even though the bank’s board did not ask); *Michael*, 687 F.3d at 350; *Seidman*, 37 F.3d at 935 n.34.

²⁸⁹ Federal Deposit Insurance Corporation, Statement of Policy Concerning the Responsibilities of Bank Directors and Officers, FIL--87--92 (Dec. 3, 1992), available at <https://www.fdic.gov/regulations/laws/rules/5000-3300.html>.

²⁹⁰ Gray Report-Smith at 27.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.* at 27-28.

²⁹⁴ *Id.* at 28.

²⁹⁵ *Id.*; Gray Report-Kiolbasa at 21.

Respondents represented that they had approached Central customers “relating to a potential move of Respondents to Farmers, and had customers agree that they would move their loans from Central to Farmers.”²⁹⁶

- Smith’s trial testimony established that on June 11, 2014, Respondents entered into a Confidentiality Agreement with Farmers and Farmers’ holding company, Commercial, that thereafter while still working at Central he received Farmers’ documents marked “confidential” and thereafter Farmers “began loading some items into Dropbox,” and that Smith thereafter deleted three or four of them from his Central computer.²⁹⁷
- Testimony by both Smith and Kiolbasa established that while both were still employed by Central, they spoke with, and presented their Business Plan, to Central customers, seeking co-investors in Commercial.²⁹⁸
- Evidence that on July 25, 2014, Kiolbasa provided Farmers (through John Gross) a list of potential investors and customers, including twenty-one Central customers – including the customers’ names, loan balances, and collateral information; and further identified seventeen Central customers who told Kiolbasa they would move from Central if and when he moved banks; and that in some of these instances, the customer information was sent to Farmers without the consent of the Central customers.²⁹⁹
- Evidence regarding Respondent Kiolbasa established that at least in some instances, he provided Central customer information to the Farmers board members without customer authorization.³⁰⁰

²⁹⁶ Gray Report-Smith at 29, Gray Report-Kiolbasa at 21 citing EC SD Ex. 25 (FRB-FARMERS-004239–40 at 4239) (noting in the meeting agenda that Respondents’ goals included “loan growth/profitability/expansion”); EC SD Ex. 9 (Kiolbasa’s Trial Testimony) at 535-36 (FRB-FARMERS-000348 at 577-78) (reflecting Respondents met at Farmers with Farmers’ board and with one of Central’s customers, Mr. [K]); EC SD Ex. 9 (Kiolbasa’s Trial Testimony) at 539-40 (FRB-FARMERS-000348 at 581–82) (indicating that at the meeting Kiolbasa identified seven out of seventeen investors in Respondents’ Business Plan were Central’s customers); EC SD Ex. 12 (J. Gross’s Trial Testimony) at 1506 (FRB-FARMERS-001363 at 1663) (testimony by Mr. Gross acknowledging that in Kiolbasa’s letter (EC SD Ex. 22 (FRB-FARMERS-004218–21 at 4219) (3/25/14 email attaching Kiolbasa’s report to John Gross), Gross acknowledged that in June 2014, Respondents told Gross they had approached Central’s customers and agreed they would “move their business upon transition”). See also Enforcement Counsel’s and Respondents’ Joint Stipulations at ¶9: “At a June 1, 2014, meeting between Respondents and Farmers’ directors, Respondents presented the directors a list of potential co-investors in Commercial, which included some Central customers.”

²⁹⁷ Gray Report-Smith at 29, Gray Report-Kiolbasa at 22 citing EC SD Ex. 11 (Smith’s Trial Testimony) at 949-51 (FRBFARMERS-001032 at 1068-70).

²⁹⁸ Gray Report-Smith at 30, Gray Report-Kiolbasa at 22, citing EC SD Ex. 9 (Kiolbasa’s Trial Testimony) at 493-94 (FRB-FARMERS-000348 at 535–36) and EC SD Ex. 11 (Smith’s Trial Testimony) at 944-46 (FRB-FARMERS-001032 at 1063–65).

²⁹⁹ Gray Report-Smith at 30, Gray Report-Kiolbasa at 23, citing EC SD Ex. 35 (7/25/14 email from Kiolbasa to Gross attaching “a listing of investors and potential customers”) (FRB-FARMERS-004287-90 at 4288); EC SD Ex. 9 (Kiolbasa’s Trial Testimony) at 591 (FRB-FARMERS-000348 at 633).

³⁰⁰ Gray Report-Kiolbasa at 24, citing EC SD Ex. 9 (Kiolbasa’s Trial Testimony) at 591 (FRB-FARMERS-000348 at 633).

- Evidence regarding Respondent Smith established that between October 2, 2014 and February 24, 2015, while still a Central employee, Smith repeatedly provided to Farmers confidential and proprietary information belonging to Central (in some instances by sending them to Michelle Thomas and in other instances by sending them to Kiolbasa). These included, on October 2, 2014, confidential Central loan information; on October 30, 2014, Central's Participation Agreement form; on November 6, 2014, Central's Customer Information Profile form; on November 10, 2014, detailed Central loan customer-specific information related to loan balances, rates and terms; on January 6, 2015, Central's Other Real Estate listing from its general ledger; on January 7, 2015, Central's Dormant Account Procedures protocol; on January 8, 2015, forms Central used to balance pending and holding accounts; on February 13, 2015, Central's reports related to liquidity and interest rate risk; and on February 24, 2015, a copy of a memo from Central's President to Central's Board, regarding a lookback analysis containing bank-specific financial data, long with a memo prepared for Central by an affiliate regarding modeling assumptions containing Central's bank-specific financial data.³⁰¹

Upon this quantum of evidence, Mr. Gray opined that Respondents failed to use appropriate care in preserving Central's information security, thereby violating confidentiality and privacy requirements presented in Central's Handbook. Further, Mr. Gray opined the evidence established that while still employed at Central, Respondents disseminated Central's proprietary and confidential information without Central's consent, for use when Respondents began working at Farmers, for the benefit of both Farmers and Respondents.³⁰²

³⁰¹ Gray Report-Smith at 32, citing EC SD Ex. 45 (2/2/14 email from Kiolbasa to Smith re: Loans) (FRB-FARMERS-004346); EC SD Ex.11 (Smith's Trial Testimony) at 1018-20 (FRB-FARMERS-001032 at 1137-39); EC SD Ex.49 (10/30/14 email from Smith to Thomas re: Participation Agreement) (FRB-FARMERS-004353-55); EC SD Ex. 52 (11/6/14 email from Smith to Thomas re: Customer Information Profile request) (FRB-FARMERS-004361-62); EC SD Ex. 11 (Smith's Trial Testimony) at 1008 (FRB-FARMERS-001032 at 1127); EC SD Ex.53 (11/10/14 email from Kiolbasa to Smith re: [NC] and [NP] loans at Central) (FRB-FARMERS-004363); EC SD Ex. 54 (11/10/14 email from Kiolbasa to Smith re "Chris' loan customer) (FRB-FARMERS-004364); EC SD Ex. 11 (Smith's Trial Testimony) at 1045-46 (FRB-FARMERS-001032 at 1164-65); EC SC Ex.60 (1/6/15 email from Smith to Thomas re: ORE) (FRB-FARMERS-004425-26); EC SD Ex. 11 (Smith's Trial Testimony) at 1059-60 (FRB-FARMERS-001032 at 1178-79); EC SD Ex. 61 (1/7/15 email from Smith to Kiolbasa re: Dormant) (FRB-FARMERS-004427-28); EC SD Ex. 11 (Smith's Trial Testimony) at 1060-61(FRB-FARMERS-001032 at 1179-80); EC SD Ex. 62 (1/8/15 email from Smith to Thomas re: "forms we use for balancing pending/holding accounts) (FRB-FARMERS-004429-32); EC SD Ex. 64 (2/13/15 email from Smith to Kiolbasa re: liquidity, public funds, GAP reports) (FRB-FARMERS-004442-55); EC SD Ex. 9 (Kiolbasa's Trial Testimony) at 598 (FRB-FARMERS-000348 at 640); EC SD Ex. 66 (2/22/15 email from Smith to Kiolbasa re: ALCO Lookback) (FRB-FARMERS-004466-80); and EC SD Ex.65 (2/24/15 email from Smith to Kiolbasa re: review of assumptions)(FRB-FARMERS-004456-65). Note that in his testimony Mr. Kiolbasa stated Mr. Smith was emailing him liquidity (of public funds and GAP reports because regulators – specifically the Federal Reserve - were asking him to get them. See EC SD Ex. 9 at 598 (FRB-FARMERS-000640). According to Mr. Kiolbasa, the regulators were asking for this information because they "wanted to see how Mr. Smith's – Frank's knowledge – what kind of knowledge he had on liquidity." *Id.* at 599 (FRB-FARMERS-000641). Mr. Gray opined that "it would not be in accordance with Federal Reserve examination processes for an examiner to make such a request, particularly seeking confidential information of a bank, Central, not supervised by the Federal Reserve." Gray Report-Smith at 32.

³⁰² Gray Report-Smith at 30 and Gray Report-Kiolbasa at 23, and citations therein.

Further, specific to Respondent Smith, Mr. Gray opined:

I have concluded, based on the evidence described above, that Smith took steps to market loans in Central's loan portfolio to Farmers while working at Central, and to help Farmers, a competitor of his employer, by improperly disseminating or taking his employer's confidential and/or proprietary information to Farmers. In doing so, it is my opinion that Smith breached his duty of care to Central.³⁰³

Specific to Respondent Kiolbasa, Mr. Gray opined:

I have concluded, based on the evidence described above, that Kiolbasa, while employed by Farmers, took steps to solicit and obtain confidential customer and proprietary information of Central. In doing so, it is my opinion that Kiolbasa breached his duty of care to Farmers by engaging in unsafe and unsound banking practices.³⁰⁴

e. Respondents Breached the Duties of Loyalty and Candor Owed to Central

Mr. Gray also opined that Respondents had breached the duties of loyalty (the prohibition against advancing personal interest at the expense of the bank) and candor (the duty to disclose everything known relating to a transaction).³⁰⁵ Elaborating, Mr. Gray reported that through their efforts to market loans in Central's portfolio to Farmers, while working at Central, Respondents put their own interests above Central's interests.³⁰⁶ He first incorporated the above-referenced breaches of Central's policies regarding honesty, integrity, and loyalty, as well as Central's restrictions on outside activities, in support of his opinion that these violations constituted breaches of duties of loyalty and candor Respondents owed to Central.³⁰⁷

Mr. Gray then identified specific examples related to the duties of loyalty and candor.

- First, Mr. Gray noted the previously cited evidence establishing that beginning in March 2014, Respondents sought to advance a Business Plan that provided for Respondents' move to Farmers and their attempt to convince Central loan customers to invest in Farmers.
- Next, Mr. Gray noted the July 11, 2014 Confidentiality Agreement Respondents entered into with Farmers regarding Respondents' potential acquisition of an interest in Commercial.
- Next, Mr. Gray noted that Respondents failed to disclose these actions to Central.
- Next, Mr. Gray noted the actions attributed to Smith, and those separately attributed to Kiolbasa (as described above), opining that these were dishonest and disloyal to Central – in that Respondents attempted to mislead Central's senior

³⁰³ Gray Report-Smith at 33.

³⁰⁴ Gray Report-Kiolbasa at 25.

³⁰⁵ Gray Report-Smith at 34-38; Gray Report-Kiolbasa at 26-29.

³⁰⁶ Gray Report-Smith at 34; Gray Report-Kiolbasa at 26.

³⁰⁷ *Id.*

officials about matters that had potential adverse implications to Central's financial condition and performance – to the extent that Central's loans could move to Farmers.

- Last, Mr. Gray noted that the evidence established that Respondents misappropriated Central forms, its policies, and other proprietary documentation, by taking them to Farmers as a way to facilitate their ability to do their jobs at Farmers; and that they inappropriately disseminated this information for Farmers' benefit and, consequently, for their own benefit, as they had plans to acquire an ownership interest in Farmers.³⁰⁸

In Mr. Gray's opinion, in doing so both Respondents elected to advance their own personal gain over serving Central.³⁰⁹ Elaborating on this point, Mr. Gray observed that the success of the Central customers' investment in Respondents' Business Plan would have been tied to that Plan, and "would naturally induce any would-be co-investor customer to consider moving their banking business to Farmers, to Central's detriment."³¹⁰

Mr. Gray elaborated on this point:

Thus, the mere solicitation of these Central customers as co-investors, while Respondents still worked for the bank, contained an implied request for a commitment to transfer their Central loans to Farmers, and was likely to lead to a loss of business for Central. Actions by bank officers or management that could be reasonably expected to result in a loss of business to their employer, in furtherance of their conflicting interests, would constitute a breach of their duty of loyalty.³¹¹

This would be true, opined Mr. Gray, even if the solicitation is not to move loans, but only to invest in Commercial (and Farmers):

Moreover, Respondents' solicitations of Central customers to be co-investors in Farmers can be reasonably viewed as a means to induce customers to commit to transfer their Central loans to Farmers, without overtly asking the customers for such commitments. This would indirectly lead to the same result as directly seeking such commitments, which is to facilitate a customer's plans to move their loans from Central to Farmers.

In fact, that is what appears to have happened with respect to Respondents' Business Plan, as there is evidence that none of the would-be co-investors solicited by Respondents while they were Central employees actually invested in Farmers, but several of them moved their Central loans to Farmers. To the extent that bankers in senior positions of trust, such as Respondents, engage in these types of actions, they can reasonably be

³⁰⁸ Gray Report-Smith at 34-35 and references cited therein; Gray Report-Kiolbasa at 26-27 and references cited therein.

³⁰⁹ Gray Report-Smith at 35; Gray Report-Kiolbasa at 27.

³¹⁰ *Id.*

³¹¹ Gray Report-Smith at 35-36.

expected to result in a risk of lost business to their employer. In this case, Respondents' actions apparently led to loss of business to their employer.³¹²

Upon this evidence, it was Mr. Gray's opinion that both Smith and Kiolbasa breached their duties of loyalty and candor to Central by failing to be candid with Central about their respective actions in concert with one another, and by prioritizing their respective self-interests and personal gain over Central's success.³¹³

f. Breaches of Loyalty and Candor Specific to Smith

Further, now separately referring to Respondent Smith, Mr. Gray supplemented the bases for finding Smith violated duties of loyalty and candor.

First, he noted Mr. Smith's "failure to be candid with Central's management" about his actions in providing to Farmers (through Mr. Kiolbasa and Ms. Thomas) confidential and proprietary information belonging to Central.³¹⁴ Further in this line, Mr. Gray noted evidence establishing that Smith had "sought to dissuade Central's management from seeking to acquire a competing bank because, based on information acquired at Central, Smith thought it was an opportunity that he and Kiolbasa might wish to explore for themselves while at Farmers."³¹⁵

Next, Mr. Gray noted evidence that established Smith "fail[ed] to disclose to Central's President information he knew about Farmers, or actions he had taken on behalf of Farmers, when Central's President asked Smith for information about Farmers."³¹⁶ According to Mr. Gray, "[t]he duty of candor required Smith to inform his employer of all relevant material facts he knew pertaining to Farmers, not solely to answer the specific questions that his management posed to him."

Last, Mr. Gray noted evidence establishing that Smith had provided services to Farmers, a competitor of Central, between September 2014 and March 2015, by helping Farmers prepare its Call Reports and attending staff meetings at Farmers, answering questions that drew upon Smith's experience as CFO.³¹⁷

³¹² *Id.* at 36, citing EC SD Ex. 11 (Smith's Trial Testimony) at 946 (FRB-FARMERS-001032 at 1065).

³¹³ Gray Report-Smith at 36; Gray Report-Kiolbasa at 29.

³¹⁴ Gray Report-Smith at 37.

³¹⁵ *Id.* citing SD Ex. 43 (9/29/14 email chain between Smith and Kiolbasa ("Carl [Huhnke, Central's President] said he passed on the information and Bill [Von Holtum, Central's Chairman] to see if he wanted to investigate [the opportunity]. I talked to Bill and Carl this morning and talked down the idea as much as I could.")(FRB-FARMERS-004313-14 at 4313).

³¹⁶ Gray Report-Smith at 37, citing EC SD Ex. 11 (Smith's Trial Testimony) at 1028-31 (FRB-FARMERS-001032 at 1147-50).

³¹⁷ Gray Report-Smith at 37, citing EC SD Ex. 50 (chat transcript between Smith and April Hughes et al. describing Smith's participation at banking functions conducted at Farmers) (FRB-FARMERS-4356-59); EC SD Ex. 11 (Smith's Trial Testimony) at 1006-07 ("Q: But there's no dispute you worked – you did actual work for Farmers State Bank, A: I did. I assisted with some call report preparation") (FRB-FARMERS-001032 at 1125-26) and 1036-37 (FRB-FARMERS-001032 at 1155-56), 1007:23-1008:16, Mar. 16, 2018 (FRB-FARMERS-001032 at 1126-27). See also

g. Identifying the Harm to Central and Farmers

Two expert witnesses – Mr. Gray and Gary M. Schwartz – provided opinions regarding the harmful effects of Respondents’ practices, with respect to both Central and Farmers.

First, Mr. Gray opined that “Central was exposed to, and may have experienced, reputational harm as a result of Respondents’ conduct.”³¹⁸

Elaborating on the risk of reputational harm to Central implicated by Respondents’ actions, Mr. Gray opined as follows:

In my experience as a bank supervisor, a public lawsuit involving a community bank employee’s misappropriation of customer information from that bank would have posed a risk of that bank’s customers losing confidence in the bank’s ability to safeguard their information, and had the potential to cause customers to end their relationship with the bank out of fear that their information could be transferred outside the bank without their authorization. In fact, often a banking institution’s customers may become concerned about maintaining a relationship with their current banking institution when an officer or manager communicates that they are leaving employment at the bank, and seeks to convince the customer to move their banking relationship. Central’s policies highlighted both the importance of maintaining the confidentiality of customer information to the competitive position of the bank, and the overall importance of customers’ ability to have confidence in the bank and its employees. It is my opinion that such reputational harm was caused at least in part by Respondents’ violations of Central policies, their unsafe and unsound practices, and breaches of their fiduciary duties.³¹⁹

Further, and with respect only to Respondent Kiolbasa, Mr. Gray opined that “Farmers suffered financial harm, and was exposed to, and may have suffered, reputational harm as a result of Kiolbasa’s conduct.”³²⁰ He explained that Central sued not only Respondents, but also Farmers, “and caused it to incur significant legal expenses.”³²¹

h. Mr. Schwartz’ Analysis of Financial Harm to Central and Benefit to Respondents and to Farmers

Also presented with respect to harm occasioned by Respondents’ conduct is an expert report by Gary M. Schwartz.³²² Mr. Schwartz was retained by the Federal Reserve to review

³¹⁸ Gray Report-Kiolbasa at 29.

³¹⁹ *Id.* at 29-30, citing *Central Bank & Trust v. Smith*, No. 186-671 (Wyo. 1st D. Ct., 2018), Final Judgment (Apr. 2, 2018) (FRB-FARMERS-005705); see also Gray Report-Smith at 38-39.

³²⁰ Gray Report-Kiolbasa at 30.

³²¹ *Id.* at 30, citing EC SD Ex. 78 (7/10/18 email from Smith to Mark Schofield indicating the Farmers had accrued and paid \$156,421.14 since the inception of the lawsuit, and had “expensed through income \$206,421.14 since the inception of the lawsuit”) (FRBFARMERS-005644).

³²² EC SD Ex. 5, supplemented on April 22, 2019.

documents “and calculate harm incurred by CB&T as a result of the actions of Smith and Kiolbasa.”³²³ The analysis considered both benefits to Farmers and damage to Central.³²⁴

In completing this analysis, Mr. Schwartz drew upon his experience and expertise in the banking industry.³²⁵ He described his qualifications in a fourteen page CV that reflected substantial technical experience in the fields related to loan reviews, due diligence reviews, organizational reviews, and general bank consulting engagements for banks ranging in size from less than \$15 million to over \$3 billion.

Upon my review of the credentials presented, I find Mr. Schwartz’s experience and expertise is in areas that are relevant and helpful here, particularly as related to the valuation of harm to Central and benefit to Farmers occasioned by actions attributed to Respondents.

1. Financial Benefit to Respondents

Included in his analysis was a description of the benefits inuring to Respondents. Mr. Schwartz noted that both Respondents sought to acquire an ownership interest in Farmers. He noted that after performing due diligence and engaging in negotiations with the Farmers board and existing shareholders, a stock purchase agreement dated March 6, 2015 was executed with Farmers’ holding company, Commercial Bancorp.³²⁶ Shortly thereafter, change of control of Commercial was noted in an Interagency Notice of Change of Control dated March 9, 2015. The Notice described Smith’s investment of \$200,000 and Kiolbasa’s investment of \$500,000 in Commercial, in order for Kiolbasa to acquire 50,000 shares (a 19.04% ownership) and for Smith to acquire 20,000 shares (a 7.76% ownership).³²⁷

Based on these ownership percentages and as contemplated in the Interagency Notice filed in this regard, Mr. Schwartz calculated that – based on the multiple of earnings methodology described in his report – the appreciation in value of Kiolbasa’s interests would be \$356,767 in 2015, and \$548,455 in 2016; and for Smith it would be \$142,707 in 2015 and \$219,382 in 2016.³²⁸

2. Financial Harm to Central

Regarding lost income to Central, Mr. Schwartz noted the loan payoffs and lost lending opportunities reflected in the record.³²⁹ He presented amortization tables for the Direct Payoff loans based on the original promissory note terms and payoff data from loan histories. He then calculated payments in accordance with loan terms or as specified in the promissory notes and rates through maturity, adjusting the outstanding balance of each loan to the amount at payoff, per the loan histories, “in order to capture accelerated payments and or additional advances.”³³⁰

³²³ EC SD Ex. 5 at 4.

³²⁴ *Id.*

³²⁵ *Id.* at 6.

³²⁶ *Id.* at 10, citing Exhibit E attached to the Report.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.* at 11.

³³⁰ *Id.*

His analysis continued:

Monthly projected future cash flows based on interest income less cost of funds were calculated for each loan from the dates the loans were paid off by FSB (Direct Payoff) through their stated maturity. The net present value (NPV) of the annual cash flows, less taxes, for each loan was calculated based on a discount rate derived from an average of CB&T's [Net Interest Margin] as found in the FDIC database for the periods December 31, 2014, December 31, 2015, December 31, 2016, and March 31, 2017. These NPV amounts are shown under column (k) at Exhibit D.19 The NPV of lost interest income, net of [Cost of Funds or COF] and taxes, for individual loans in the Related group was pulled from column (s) Exhibit C, plus the interest income earned through June 13, 2017, less COF and taxes. We reasonably assumed these loans would have been made by CB&T had the Direct Payoff relationships not been moved.

The Derouche loans at CB&T were at or near maturity at CB&T when they were refinanced via LOCs at FSB. We reasonably assumed that, but for the interference by FSB, these credits would have been renewed in one form or another at CB&T. We pulled the actual interest income as reported by FSB at Exhibit C. We then deducted the COF and taxes to arrive at total lost net interest income as reflected at Exhibit D. Additionally, no NPV discount was calculated, as all of the Derouche LOCs were paid off at FSB as of June 13, 2017.

Based on our methodology and assumptions as described above and detailed at Exhibit D for the lost income on the four loan groups, we calculated net losses incurred by CB&T of \$820,939.³³¹

Mr. Schwartz also calculated the benefit to Farmers, opining that Farmers realized a "total financial benefit" of \$1,169,793.05.³³²

Part V - Respondents' Opposition

Also pursuant to the Board's Uniform Rules, respondents to summary disposition motions may oppose the motion.³³³ In such opposition briefing – and because summary disposition is unavailable if the record includes disputed material facts – responding parties must submit a statement setting forth those material facts as to which the party contends a genuine dispute exists – and the party must support that statement with the same type of evidence required of movants, as described above.³³⁴

Drawing analogies from jurisprudence pertaining to summary judgment under the Federal Rules of Civil Procedure, we know Enforcement Counsel must present support as to every one of the essential elements of each of the claims on which they bear the burden of proof at the

³³¹ *Id.* at 6, 12.

³³² *Id.* at 8.

³³³ 12 C.F.R. § 263.29(b)(2).

³³⁴ *Id.*

hearing.³³⁵ Further, although this tribunal must consider the evidence with all reasonable inferences in the light most favorable to Respondents for the purposes of Enforcement Counsel's Motion, as the non-movants Respondents must produce specific facts to demonstrate that a genuine issue exists for trial.³³⁶ The non-movants must go beyond the pleadings and use affidavits, depositions, or other evidence to establish a genuine issue.³³⁷ The mere existence of a scintilla of evidence in support of the non-movant's position is insufficient to defeat a properly supported motion for summary disposition.³³⁸ Conclusory rebuttals by Respondents, either in their pleadings or in their supporting affidavits, are insufficient to avoid summary disposition.³³⁹

A. Respondents' Burden when Opposing Enforcement Counsel's Statement of Undisputed Material Facts

In their response in opposition, Respondents were permitted to challenge Enforcement Counsel's averments as to undisputed facts and Enforcement Counsel's assertion that the uncontroverted record permits the factual findings asserted by Enforcement Counsel – but such challenge must be based on evidence of the same quality as that required of Enforcement Counsel – specifically, the challenges must be supported by documentary evidence, with citations to the record.³⁴⁰

To the extent the averments (either those in the Statement of Disputed Facts or Respondents own affidavits in support of their Memorandum in Opposition) were conclusory allegations or unsubstantiated assertions, the averments could not preclude granting the relief sought by Enforcement Counsel and were given no weight.³⁴¹ To the extent the averments asserted facts not material to the issues and claims present in this enforcement action, they too could not preclude a determination on the merits and were given no weight. To the extent the averments were not supported by documentary evidence, any weight given to the averment must be determined by the record as a whole.

1. Review of Respondents' Statement of Disputed Material Facts

In their response in opposition, Respondents included a Statement of Disputed Material Facts that “generally disput[ed] the Statement of Undisputed Facts submitted by Enforcement Counsel,” and offered a series of factual and legal premises.³⁴² Such a general claim, however, made no attempt to identify averments appearing in Enforcement Counsel's Statement of Undisputed Facts which, by Respondents' reckoning, should be treated as in dispute.

³³⁵ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1444 (5th Cir.1993).

³³⁶ *Webb v. Cardiothoracic Surgery Associates of North Texas*, 139 F.3d 532, 536 (5th Cir.1998).

³³⁷ *Id.*

³³⁸ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 252 (1986).

³³⁹ *Best Buy RV's, Inc. v. Bourget's of the S., L.L.C.*, No. CIV.A. 07-4376, 2008 WL 1835296, at *2 (E.D. La. Apr. 23, 2008), citing *Travelers Ins. Co. v. Liljeberg Enter., Inc.*, 7 F.3d 1203, 1207 (5th Cir.1993).

³⁴⁰ 12 C.F.R. § 263.29(b)(2).

³⁴¹ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

³⁴² Statement of Disputed Material Facts in Opposition to Enforcement Counsel's Motion for Summary Disposition.

In my review of Respondents' submission of disputed material facts, the following determinations were warranted.

a. Claim of General Dispute

First, the averment that Respondents "generally dispute" Enforcement Counsel's statement of uncontroverted material facts is not supported by sufficient citations to the record and is given no weight.

b. Claims that Constituted Legal Averments

Second, in certain averments, the Statement of Disputed Material Facts presented legal, rather than factual, averments. That was the case with Paragraph 1, which averred:

The Federal Reserve Board is not the appropriate Federal Banking Authority to institute and maintain this Enforcement Action since the actions which form the basis of the Enforcement Action allegedly occurred while Respondents were employed at Central Bank & Trust ("Central"), a state chartered, nonmember bank which is not regulated by the Federal Reserve. [Respondents' Opposition, at pp. 10-14.]³⁴³

While legal claims may be presented through declarations such as these, they do not constitute a *factual* basis for denying summary disposition. Inasmuch as the foregoing is not a factual averment, it cannot constitute a basis upon which Enforcement Counsel's Motion may be defeated. The same conclusion applies with respect to Respondents' Statement No. 39, which avers Respondents "properly deleted information relating to Farmers State Bank that Respondents accidentally placed on Central's computers." Further, this averment lacked any citation to the record. Accordingly, it was given no weight.

c. Factual Claims not Supported by References to the Record

Third, Respondents' Statement of Disputed Material Facts in repeated instances lacked references to the record – i.e., the averments were not supported by documentary evidence identified by references to the record.

For example, Respondents aver that "All of the actions Enforcement Counsel alleges Respondents engaged in occurred while Respondents were employees of Central. [EC's SOF, generally; EC's Motion, generally.]"³⁴⁴ Without specific references to the record, no weight may be given to this averment. Further, the averments included in Enforcement Counsel's Statement of Undisputed Facts expressly addressed conduct attributed to Respondents while they were employed at Farmers.³⁴⁵ Given Respondents' failure to specify documentary evidence in support of their contrary averment, and given the concrete references supplied by Enforcement Counsel contradicting Respondents' averment, no weight can be given the claim.

Additional averments lacking reference to the record include the following:

³⁴³ *Id.* at ¶1.

³⁴⁴ *Id.* at ¶2.

³⁴⁵ *E.g.*, Statement of Undisputed Facts in Support of Enforcement Counsel's Motion for Summary Disposition at ¶¶98-126, 131 and references to the record cited therein.

- That both Respondents were eligible and would have received bonuses during the time prior to leaving Central.³⁴⁶
- That “Smith never provided Kiolbasa with the mortgage release form referenced in Paragraph 108 of Enforcement Counsel’s Statement of Undisputed Facts, nor is there any evidence of such in the record”. Respondents supported the averment by referring to Enforcement Counsel’s Statement of Undisputed Facts at Paragraph 108.³⁴⁷ Paragraph 108, however, does not support Respondents’ averment – it refers to Enforcement Counsel Exhibit 51, which affirmatively states that the mortgage release form had been placed on the “share drive” and includes Kiolbasa’s request that Smith send the form to him. If there is evidence that Smith never provided Kiolbasa with the form, such evidence was not tendered in Respondents’ Statement of Disputed Material Facts.³⁴⁸
- Respondents averred that “Contrary to Paragraph 142 of Enforcement Counsel’s Statement of Undisputed Facts, Respondents did not receive any gain from moving from Central to Farmers State Bank.”³⁴⁹ In support of this factual claim, Respondents cited to Resp. Ex. 5 at Paragraph 11, and Respondents’ Exhibit 8 at Paragraph 7. Respondents Exhibit 5 is Respondent Smith’s affidavit in support of the Respondents’ Memorandum in Opposition, and Paragraph 11 is a statement, unsupported by any reference to the record, that the affiant “did not receive any gain” from the move from Central to Farmers. Similarly, Respondents’ Exhibit 8 is Respondent Kiolbasa’s affidavit, and his statement that he did not receive any gain from the move – again, without any supporting references to the record. Self-serving factual claims that are not supported by references to the record will not constitute a basis for avoiding summary disposition.
- Respondents offered the assertions that they “took a reduction in pay” and “collectively invested \$700,000 of their personal savings” by investing it at Farmers – again, without the only citation in support being their own affidavits, which lacked any reference to documentary evidence in the record.³⁵⁰ Further, the amount of such investment is not a material fact in issue here, and as such the factual claim would not preclude summary disposition in Enforcement Counsel’s favor.
- Respondents aver that Farmers “was not a competitor of Central during the relevant time period as Farmers was located more than forty-five (45) miles from the nearest Central Branch.”³⁵¹ The averment is inapposite here – both because it does not constitute a disputed fact, and because is it one whose materiality is not

³⁴⁶ *Id.* at ¶45.

³⁴⁷ *Id.* at ¶54.

³⁴⁸ *Id.*

³⁴⁹ Statement of Disputed Material Facts in Opposition to Enforcement Counsel’s Motion for Summary Disposition at ¶56.

³⁵⁰ *Id.* at ¶57-58, citing Respondents’ Exhibits 5 (at ¶12-13), and 8 (at ¶9 and 10).

³⁵¹ *Id.* at ¶5.

established (or even mentioned) in Respondents' supporting Memorandum. While Mr. Gray's opinion referred to the distance as being material, nothing in Respondents' Memorandum addressed or challenged this opinion – beyond Respondents' unsupported and self-serving declaration. If Respondents sought to demonstrate that Farmers was not a Central competitor, they had the opportunity to do so by identifying in the record evidence (through testimony, affidavit, or documentary production) that went beyond their own unsupported and self-serving declaration. In the absence of such support, Respondents' averment is entitled to no weight.

As self-serving and unsupported assertions, none of these claims constitute a basis upon which summary disposition favoring Enforcement Counsel would be denied.

d. Factual Claims that were not Disputed

Fourth, Respondents' Statement of Disputed Material Facts also included factual averments that were not disputed – such as the averment that prior to June 5, 2015, neither Respondents were executive officers at Farmers, or that “Central is a state chartered, non-member bank.”³⁵² Because challenges to a motion for summary disposition require the opponent to identify material facts that *are* in dispute, statements like these factual averments offer no basis to deny summary disposition.

Further regarding this point, Respondents repeatedly, and inexplicably, cited Statements appearing in Enforcement Counsel's Statements of Undisputed Facts in their Statements of Disputed Material Facts. Undisputed claims that *supported* judgment in Enforcement Counsel's favor did not belong in Respondents' Statement of Disputed Material and will not constitute a basis for denying their Motion.³⁵³

Other averments in Respondents' Statement of Disputed Material Facts that included averments that were not disputed likewise provided no barrier to summary disposition.³⁵⁴

³⁵² Statement of Disputed Material Facts in Opposition to Enforcement Counsel's Motion for Summary Disposition at ¶¶3-4.

³⁵³ See *Id.* at ¶¶3-5, 35, 50, 54-55.

³⁵⁴ These included the claim that the “majority of the forms Central alleges are confidential were not created by Central's employees” and “originated with other banks” and thereafter “Central modified them from time to time”, *id.* at ¶10; That Central “rarely spent time or resources updating forms” *id.* at ¶11; that Central's president, Christopher Von Holton, “has been involved in banking since in or around 2009”; *id.* at ¶12; that mortgage documents routinely recorded by Central “do contain information such as the banks rate of interest and balance”, *id.* at ¶14; that in spite of Central's stated policy with respect to copyrighted information, Central “routinely obtained forms from other financial institutions and used those forms in its business”; *id.* at ¶15; in late 2013, while employed at Central, Respondents “began drafting a business plan to acquire an interest in a bank. Respondents finalized the plan at the request of representatives of the Wyoming Division of Banking.” *id.* at ¶22. See Enforcement Counsel's and Respondents' Joint Stipulations at ¶8: “In late 2013, while employed at Central, Respondents began working on a plan to acquire an interest in a bank, with Farmers being one of three potential opportunities”; that the Wyoming Division of Banking “requested that the plan include projections”, Statement of Disputed Material Facts in Opposition to Enforcement Counsel's Motion for Summary Disposition at ¶23; that in late 2013, Respondents had identified Farmers State Bank as one of three potential investment options and that it “was not until sometime in May 2014, after further discussions with the Wyoming Division of Banking, as well as conversations with representatives from Farmers State Bank that Respondents chose to focus their efforts on Farmers State Bank”, *id.* at ¶24; that in early 2014, Respondents provided a copy of the business plan to the Wyoming Division of Banking.

Where Respondents advanced non-disputed averments found in Enforcement Counsel's statement of undisputed facts, those non-disputed averments will not be regarded as disputed material facts that would serve as a basis for denying summary disposition in Enforcement Counsel's favor.

e. Presentation of Factual Claims that were not Material to Issues in Dispute

Fifth, Respondents' Statement included averments of facts not material to issues in dispute. Only disputes over facts that might affect the outcome of this enforcement action will properly preclude the entry of summary disposition. "Factual disputes that are irrelevant or unnecessary will not be counted."³⁵⁵

For example, Respondents included in their Statements of Disputed Material Facts the following averments: "There is no evidence in the record that Central copyrighted any of its forms" and "There is no evidence in the record that Central had any ownership interest in any forms it purchased or acquired from others."³⁵⁶ Again, there is nothing in Respondents' Statement establishing that these are either disputed or material, and the claims do not controvert any claim presented in Enforcement Counsel's Statement of Undisputed Facts.

In their Memorandum, Respondents assert the following:

In addition, there is no evidence to show Central took any steps to maintain the secrecy of its purported trade secrets. [EC's Motion, generally.] There is no evidence that Central labeled the information as confidential, sought to

Respondents also provided a copy of the business plan to the Federal Reserve, including a copy to James Clark and James Echtermeyer in conjunction with Respondents' applications to become shareholders and employees of Farmers State Bank, *id.* at ¶29; that Grady Kessler, James Clark, and James Echtermeyer routinely contacted Respondents while Respondents were employed at Central in conjunction with the application Respondents filed with the Federal Reserve, *id.* at ¶30; that at no time during the relevant time period did anyone from the Wyoming Division of Banking or the Federal Reserve advise Respondents that developing a business plan to acquire an ownership interest in another bank constituted a breach of Respondents' fiduciary duties to Central or a violation of § 1818(e), *id.* at ¶31; that Respondents were still employed by Central when Kiolbasa sent Smith a list of Kiolbasa's loans at Central on July 1, 2014, *id.* at ¶35; that Respondents exchanged this information to satisfy questions raised by individuals at the Wyoming Division of Banking, *id.* at ¶36; that Respondents exchanged this information to satisfy questions raised by individuals at the Wyoming Division of Banking, *id.* at ¶37; that all payoff information provided by Smith or other employees of Central to Kiolbasa regarding loans which were transferred from Central to Farmers State Bank was provided after Kiolbasa had terminated his employment at Central and had begun working at Farmers State Bank, *id.* at ¶37; that during the Central Litigation, Carl Huhnke, Central's former president, testified that Smith's final performance evaluation, completed approximately one month before his employment with Central was terminated, was excellent and that Smith had steered Central through difficult issues sorting out its operations, *id.* at ¶46; that Kiolbasa's supervisor testified that he had done exactly what he needed to do prior to his resignation and continued to do so during the interim period between his announcement and eventual departure Central, and his final review was glowing, stating Kiolbasa's biggest issue was that he worried too much about his branch, *id.* at ¶47; that Respondents were free to do what they pleased with their vacation and other free time, *id.* at ¶48; all of the e-mails referenced in Paragraph 90 of Enforcement Counsel's Undisputed Statement of Facts were from Smith's personal Yahoo account, *id.* at ¶50; and that Respondents intended to terminate their employment with Central and begin working at Farmers State Bank on September 22, 2014, but Smith's employment was delayed at the request of the Federal Reserve, which was still reviewing his application, *id.* at ¶53.

³⁵⁵ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

³⁵⁶ Statement of Disputed Material Facts in Opposition to Enforcement Counsel's Motion for Summary Disposition at ¶¶8-9.

copyright the information, had an ownership interest in the information, or otherwise sought to protect the information in any manner. [Respondents' Exhibit 10 Respondents' Exhibit 10 (IAP00003192-3199, 3206-3213, 3220-3227, 3228-3235, 3236-3243, 3244-3251, 3252-3255, 3256-3259, 3260-3263, 3264-3267, 3268-3280, 3281-3284, 3298-3305, 3306-3309, 3310-3317, 3340-3343, 3344-3352; Respondents' Exhibit 12, at 35:1-23.] These facts demonstrate, at a minimum, genuine disputes of material fact as to whether Respondents engaged in unsafe and unsound banking practices and breached their fiduciary duties by misappropriating Central's confidential and proprietary information. For these reasons, the Court should deny Enforcement Counsel's Motion.³⁵⁷

The averment here, however – that Central failed to take steps to copyright documents containing trade secrets – does not materially relate to the charges presented in the Notice of Intent. Respondents offer no authority for the proposition implicit in this averment – that an employee may disregard the proprietary nature of uncopyrighted documents accessible to the employee and thereafter appropriate those documents without regard to fiduciary duties the employee owes to his or her employer. The converse of the averment makes no appearance in the factual claims presented by Enforcement Counsel, and as such this claim is not a “disputed” one – but is instead a claim that is not material to the issues presented in this enforcement action.

In sum, as reflected above, Respondents offered 59 averments said to reflect disputed material facts, all in opposition to Enforcement Counsel's Motion. To the extent the averments are not supported by reference to the record, or do not identify a disputed claim, or assert facts not material to the issues and claims present in this enforcement action, they too will not preclude a determination on the merits. To the extent the averments are not supported by documentary evidence, any weight given to the averment will be determined by the record as a whole.

B. Analysis of Averments Related to Material Disputed Facts

Twenty-five of the factual claims in Respondents' Statement of Disputed Material Facts actually present disputed facts that Respondents aver are supported by references to the record.³⁵⁸ These are addressed here:

Paragraph 6

In Paragraph 6, Respondents do not identify a controverted fact, but instead aver that “Central's management did not consider its customers' loan amounts, rates of interest or loan balances to be confidential information because Central published this information regularly by recording mortgages containing such information in the public records.”³⁵⁹ In support,

³⁵⁷ Respondents' Memorandum of Points and Authorities in Support of Its [*sic*] Motion for Summary Disposition at 31.

³⁵⁸ See Respondents' Statement of Disputed Material Facts in Opposition to Enforcement Counsel's Motion for Summary Disposition at ¶¶6-7, 13, 16-21, 25-28, 32-34, 38, 41-44, 49, 51-52, 59.

³⁵⁹ *Id.* at ¶6, citing Respondents' Exhibit 10 (IAP00003192-3199, 3206-3213, 3220-3227, 3228-3235, 3236-3243,

3244-3251, 3252-3255, 3256-3259, 3260-3263, 3264-3267, 3268-3280, 3281-3284, 3298-3305, 3306-3309, 3310-3317, 3340-3343, 3344-3352.)

Respondents noted testimony from Christopher Von Holtum (Respondents' Exhibit 12, at 35:1-23), along with copies of mortgage documents that are publicly filed through the county clerk's office.³⁶⁰ The factual premise appears to be that inasmuch as some of the information Central maintained in its proprietary control was shared publicly through the public title recording process used regarding real property, Central cannot and did not consider such information confidential.

That factual premise is not supported by Respondents' references to the record. The documents in the county recorder's office do indeed reflect, presumably, information gathered by Central in the course of its mortgage loan business. That such information is released through the public recording process does not, however, suggest that while the information is in Central's possession it was considered non-confidential.

Further, the testimony Respondents cite – that of Central's President, Christopher Von Holtum³⁶¹ – does not support the above factual premise and does not present a controverted fact regarding how Central maintained its customer information internally. Mr. Von Holtum was asked “you'd be able to see from looking at [a mortgage that's recorded in the county] who the lender was,” and he responded in the affirmative.³⁶² The relied-upon evidence states the obvious – that mortgages when filed with the county clerk's office are public records and identify Central as the mortgage lender. The references relied upon by Respondents in Paragraph 6 do not create a controverted fact concerning the material fact in issue here, which is: whether Central regarded as proprietary information their possession of customer mortgage information while that information was in the bank.

Paragraph 7

Respondents in Paragraph 7 aver that “Central did not take any steps to label its information confidential or to otherwise protect its information it claimed was confidential. Central refused to take these steps despite recommendations from its consultants to do so” and cited in support the same references to the record as those cited in Paragraph 6.³⁶³ Again, Respondents do not state how this factual premise controverted any fact in issue presented either in the Notice of Intent or Enforcement Counsel's Statement of Uncontroverted Facts.

Further, neither the documents on file at the county clerk's office nor the text of Mr. Von Holtum's cited testimony address in any way the existence of “recommendations from [Central's] consultants” to “label its information confidential”; and indeed, the record strongly suggests that the cited portions of the record have nothing to do with such a recommendation.

Nothing in the cited documents refers to a recommendation regarding Central's need to label its information as confidential. Even had such evidence been presented, its relevance here

³⁶⁰ *Id.*

³⁶¹ Resp. Ex. 12 (Deposition of Christopher Von Holtum dated 4/11/19) at 10.

³⁶² *Id.* at 35.

³⁶³ Respondents' Statement of Disputed Material Facts in Opposition to Enforcement Counsel's Motion for Summary Disposition at ¶7.

would be tangential at best, in that Respondents' conduct repeatedly involved misappropriating and distributing documents shown to have contained clearly proprietary information – with or without being marked as confidential.

Respondents offered no legal support for the premise that a bank must label a document as confidential in order for the document to fall within the scope of the bank's confidentiality policies. The unauthorized transfer of the documents identified by Mr. Gray, coupled with his opinion that such documents were proprietary to Central, established the noncompliant nature of Respondents' actions. Moreover, testimony cited by Respondents included that of Mr. Von Holtum, through which he made clear the undisputed assertion that Central regarded its customer information to be confidential and proprietary:

One of the difficult parts about pursuing new customers for a new bank are knowing what rate to quote to that customer. And with the information as important as what their current loan rate is, you would have a grave advantage in negotiating and moving that business to the new bank.³⁶⁴

When asked "if another bank called you and asked you for customers' rates, Central Bank & Trust's customers' rates, would you provide that bank that information" Mr. Von Holtum responded "No," nor has he ever given an employee permission to share confidential customer information with a competing bank.³⁶⁵

Nothing in Paragraph 7 establishes a controverted material fact that would preclude summary disposition in Enforcement Counsel's favor.

Paragraph 13

In Paragraph 13, Respondents aver that "[m]any of the forms Central claims are confidential are used throughout the banking industry and are merely a restatement of information required by banking regulations." In support, Respondents again cite to testimony from Mr. Von Holtum, although this time from the trial proceedings on March 14, 2018.³⁶⁶

Respondents do not show how the averment in Paragraph 13 is either controverted or material. Further, the testimony cited in support of Paragraph 13 does not support the factual averment. Mr. Von Holtum described Central's forms within the cited pages – EC SD Ex. 343-39 – forms that were "created by our employees" and also forms that were "purchased . . . from different companies that offer that service." *Id.* at 346. He said that Central paid for the latter – and modified them "on an annual basis," adding that these help the bank be successful in its business.

³⁶⁴ EC SD Ex. 9 (Trial Testimony of Christopher Holtum) at 343.

³⁶⁵ *Id.*

³⁶⁶ EC SD Ex. Exhibit 9, at 343-349 (FRB-FARMERS000385-391).

This testimony did not indicate, or imply or infer, that many of the blank forms Central regarded as confidential were instead either used throughout the banking industry or merely restatements of information required by banking regulations. Even were that the case, however, the factual claims here would not create a material question of fact – given that the uncontroverted evidence established Respondents’ misappropriation of both proprietary forms and customer information regardless of the form used.

Paragraphs 16 and 17

In Paragraph 16, Respondents aver that Carl Huhnke, as president of Central, “was responsible for all operations of the bank,” and in Paragraph 17 Respondents aver that Smith, who was the Chief Financial Officer, was “not responsible for all bank records.” Both averments are supported by citation to Respondents’ Exhibit 5 at Paragraph 3.

Paragraph 3 of Respondents’ Exhibit 5 is Mr. Smith’s affidavit in support of Respondents’ opposition to Enforcement Counsel’s summary disposition motion. At Paragraph 3, Mr. Smith averred that as CFO at Central, he “was not responsible for all operations of the bank and/or for all bank records.”³⁶⁷ This self-serving declaration is silent with respect to the responsibilities he had at the bank – and does not controvert evidence establishing the operations and records he was responsible for. Further, Paragraph 3 does not state what Respondent asserts here: it makes no mention of the role of Mr. Huhnke at Central.

Paragraph 18

In Paragraph 18, Respondents aver that “Smith never conducted annual reviews of Central’s policies” and cited in support Respondent Smith’s Affidavit at ¶ 4. Smith through the affidavit – again without citation to the record or any supporting evidence – avers that he never conducted annual reviews of Central’s policies – a fact not alleged in the Notice of Intent. Respondents then state that they “intend to present evidence that, to the contrary, they were conducted at the holding company level by Tom McCarvel.” Again, this averment does not relate to a material fact in issue, and is supported by no reference to the record.

Paragraph 19

In Paragraph 19, Respondents aver that “Central’s Employee Handbook did not prohibit outside activities or employment of its employees. Central’s Employee Handbook merely stated ‘expectations’ and ‘discouraged’ full-time employees from accepting outside employment.” In support, Respondents cited Central’s Employment Handbook (EC SD Exhibit 75), at p. 17.³⁶⁸

The factual claim here does not constitute a material fact in dispute – the handbook speaks for itself, and while Respondents may argue the impact of what is stated in the handbook, what appears in the handbook is not controverted. Equally significant is that the Notice of Intent did not allege that Central’s policies prohibited outside activities of its employees, such that the averments in Paragraph 19 are not clearly material.

³⁶⁷ Resp. SD Ex. 5 at ¶3.

³⁶⁸ Respondents’ Statement of Disputed Material Facts in Opposition to Enforcement Counsel’s Motion for Summary Disposition at ¶19, citing FRBFARMERS005574.

Outside employment is, however, addressed in Enforcement Counsel’s Statement of Undisputed Facts. Specifically, Enforcement Counsel aver that while Respondents were employed at Central, “the Central Handbook set forth a policy on outside employment and activities, and it restricted employees from engaging in outside activities, particularly those that constituted actual or apparent conflicts of interest.”³⁶⁹

Enforcement Counsel included in their averment, however, the policy provision holding that “if you feel that such outside employment is justified in your case, you must obtain the prior written consent of your supervisor.”³⁷⁰ Inasmuch as Respondents offered no evidence indicating they requested supervisory consent, nothing in Paragraph 19 would prevent summary disposition.

Paragraph 20

In the Notice of Intent (at Paragraphs 14 and 15), the Federal Reserve Board alleged that both Smith and Kiolbasa “acknowledged in writing receiving the Handbook and agreeing to comply with the policies set forth in the Handbook.”

In Paragraph 20 of Respondents Statement of Disputed Material Facts, Respondents aver that they “did not ‘agree’ to abide by the policies of the Central Employee Handbook. The Central Employee Handbook clearly states that it is not an ‘agreement’ between the parties”.³⁷¹

The reference to the record cited by Respondents is found in Central’s Handbook (EC SD Exhibit 75), which again, is not controverted. Whether the terms do or do not bind Respondents is a matter of construction of the handbook – and such construction is not a factual one but a legal one.

Respondents offered no citation to the record (or legal authority, for that matter) controverting the opinion of Mr. Gray on this point, where he opined that both Respondents acknowledged that it was their responsibility to “read and abide by the policies described in the Employee Handbook” and in so doing had agreed to “comply with [] Central’s policies.”³⁷² Where the sole citation in support of Respondents’ claim of *controverted* fact is not controverted – that is, where the authority supporting this claim is the handbook itself – there is no basis shown that would preclude summary disposition based on this averment.

Paragraph 21

In Paragraph 21, Respondents aver: “[t]here is no evidence in the record that Respondents received compensation for services from any other party for any activities they engaged in while Central employed Respondents.”

Respondents offer no citation to support this averment. This is understandable, in that the averment alleges the absence of a fact in evidence. The Notice of Intent, however, does not allege Respondents received compensation from non-Central sources while employed at Central. The Notice includes the allegation that while still employed at Central, Smith “took several

³⁶⁹ Enforcement Counsel’s Statement of Facts at ¶24.

³⁷⁰ *Id.*

³⁷¹ Citing EC SD Ex. 75 at 2 (FRB-FARMERS005559).

³⁷² See EC SD Ex. 3 (Gray Report-Kiolbasa at 12, and Ex. 4 (Gray Report-Smith at 20).

actions on behalf of and/or as an agent of Farmers,”³⁷³ but makes no claim that has been directly addressed in Paragraph 21. Accordingly, Paragraph 21 does not controvert a material fact in issue.

Without referring to the Notice of Intent or any specific allegation therein, Respondents in Paragraph 21 indirectly raise the question of whether they benefited from Farmers while still working at Central. While averring there was no evidence of compensation from Farmers while they were working for Central, Respondents made no mention of the factual claims presented in Enforcement Counsel’s Statement of Undisputed Facts related to such compensation. There is in the record evidence that had been presented to Respondents through Enforcement Counsel’s Statement of Uncontroverted Facts which directly addressed the factual claim indirectly raised in Paragraph 21 – and Respondents neither recognize the evidence nor introduce evidence controverting the evidence.

As Enforcement Counsel aver in their Statement of Uncontroverted Facts, the FDIC’s expert witness, Mr. Schwartz, found that in 2015 and 2016, Respondents’ ownership interests in Commercial increased in value as follows: (1) Kiolbasa’s interest increased by \$356,767 in 2015 and by \$548,455 in 2016; and (2) Smith’s interest increased in value by \$142,707 in 2015 and by \$219,382 in 2016.³⁷⁴ These gains were based on the Business Plan that Respondents had put into use while Respondents were employed at Central – at a time when Respondents were engaged in efforts to acquire an ownership interest in Commercial. During their employment at Central, Respondents received from Central salary and benefits as follows: 1) Smith received \$205,570; and 2) Kiolbasa received \$93,040.³⁷⁵

Inasmuch as Respondents made no attempt to controvert findings in Mr. Schwartz’ report, there is no factual support for Respondents’ indirect assertions in Paragraph 21.

Paragraph 25

In Paragraph 25, Respondents aver that there “is no evidence in the record that Central was looking to bring new investors into Central during the relevant time period.”

Nothing in the record establishes that Central’s lack of efforts to bring in new investors is a relevant matter in this enforcement action. Respondents cite to no allegation in the Notice of Intent calling into question whether or not Central was “looking to bring new investors into Central”. Accordingly, the averments in Paragraph 25 do not constitute controverted material facts such as would prevent summary disposition.

Paragraph 26

In Paragraph 26, Respondents aver that “[t]here is no evidence in the record that Respondents solicited Central’s customers to move their business from Central to Farmers State Bank while still employed by Central.”

³⁷³ Notice of Intent at ¶7; see also ¶¶12 and 19 (regarding Smith’s providing Kiolbasa at Farmers with proprietary information)

³⁷⁴ Statement of Undisputed Facts at ¶162, citing EC Exhibit 5 (Schwartz Report, Table 3.1, at 10).

³⁷⁵ Statement of Undisputed Facts at ¶164 (citing EC Exhibit 5 (Schwartz Report, Table 4, at 12).

Respondents offer this with no citation to the record, which again is not surprising because the claim is that the record contains no such evidence. The record, however, does contain uncontroverted evidence presented in Mr. Gray's reports establishing that by soliciting Central customers to become *investors* in Farmers while still employed at Central, Respondents acted to solicit Central's customers to move their business from Central to Farmers.³⁷⁶

Respondents elected not to address Mr. Gray's findings in their Statement of Disputed Facts, despite the factual claims presented in Enforcement Counsel's Statement of Undisputed Facts at ¶146, averring that Respondents contravened Central's policies by "the improper solicitation of Central customers".³⁷⁷ Upon this undisputed evidence, there is no basis to find Paragraph 26 constitutes a basis to preclude summary disposition.

Paragraph 27

In Paragraph 27, Respondents aver that "Central did not present any testimony in the Central Litigation to substantiate Central's claim that Respondents solicited Central's customers to move their business to Farmers State Bank while still employed by Central."

Regardless of whether or not testimony was presented in the Central litigation on the point raised here, the record in this enforcement action includes Mr. Gray's uncontroverted and unrebutted determination, described above, that by soliciting Central customers to become Farmers investors, Respondents acted to solicit Central's customers to move their business from Central to Farmers.³⁷⁸ The presence or absence of such testimony in the Central litigation is not a material issue of fact that would have an impact on summary disposition.

Paragraph 28

In Paragraph 28, Respondents aver that "[s]even customers who moved their business from Central to Farmers State Bank testified that Respondents did not solicit their business while Respondents were still employed by Central."³⁷⁹

Standing alone, the factual premise here – addressing a universe of seven Central customers – is insufficiently complete to controvert allegations in the Notice of Charges. The

³⁷⁶ Gray Report-Smith at 26, citing EC Ex. 11 (Smith's Trial Testimony) at 903-04 (FRB-FARMERS-000690 at 984) (Smith testified that in early 2014, while both were still Central employees, Respondents went on two or three business calls together to discuss investments in Farmers with Central customers, where Respondents would tell these customers that they were going to fix Farmers' profitability by increasing its loan portfolio, among other things.); EC SD Ex. 25 (FRB-FARMERS-004241-54 at 4245) ("There are three key managers that are critical to the accomplishment of the purchase and expansion: Frank Smith, Mark Kiolbasa, and Michelle Thomas.")

³⁷⁷ Citing EC Exhibit 3 (Gray Report-Kiolbasa at 3); EC Exhibit 4 (Gray Report-Smith at 3).

³⁷⁸ Gray Report-Smith at 26, citing EC Ex. 11 (Smith's Trial Testimony) at 903-04 (FRB-FARMERS-000690 at 984) (Smith testified that in early 2014, while both were still Central employees, Respondents went on two or three business calls together to discuss investments in Farmers with Central customers, where Respondents would tell these customers that they were going to fix Farmers' profitability by increasing its loan portfolio, among other things.); EC SD Ex. 25 (FRB-FARMERS-004241-54 at 4245) ("There are three key managers that are critical to the accomplishment of the purchase and expansion: Frank Smith, Mark Kiolbasa, and Michelle Thomas.")

³⁷⁹ Respondents' Statement of Disputed Material Facts at ¶28, citing Respondents' Exhibit 3, at 2010:6-24, 2035:15-2037:14 (FRB-FARMERS002248, 2273-2275); Respondents' Exhibit 4, at 2201:13-2202:6, 2215:25-2216:10, 2236:7-10, 2264:23-2265:8, 2336:3-10 (FRB-FARMERS002489-2490, 2503-2504, 2524, 2552-2553, 2624).

premise offers information about a finite number of customers, but is silent with respect to any other customer who may have moved their business because of solicitations by Respondents.

The Notice of Intent does not include a headcount of Central customers – be it seven or any other number – who moved their business to Farmers. Instead, the Notice alleges that Respondents met with the Farmers board on June 1, 2014 and advised the board that “they had obtained commitments from certain Central customers to move their loans to Farmers, upon execution of the contemplated transaction for Smith and Kiolbasa to acquire an ownership in Commercial.”³⁸⁰ The factual premise that seven of these customers moved their business but were not solicited to do so by Respondents does not controvert the factual claims found in the Notice of Intent.

Further, Respondents do not by their citations to the record support this claim. Respondents point to testimony adduced during the Central litigation. The record cited by Respondents reflects that one of the seven Central customers, [J] [K], testified that one of his investments got its first loan from Central and that Kiolbasa has been his banker for over 15 years. The witness testified that “I’ve essentially followed Mark Kiolbasa as my banker from Wells Fargo to Central Bank & Trust to Farmers State Bank because of the relationship we’ve developed and my trust in him.”³⁸¹ He described Kiolbasa as “the kind of banker who would come to your office. Let’s say he had a better deal on a refi of a building or something that could lower the interest rate or change some sort of payoff or he and my wife had talked about something that maybe would be beneficial to us, I would never have to leave my office to sign the documents and give him the tax returns and the financials and whatever else he needed.”³⁸² Although he vaguely recalled at some time considering investing in a bank, he never did so – and following Kiolbasa’s advice he continues to have a trust account at Central; but once he learned that Kiolbasa was moving from Central to Farmers, [J] [K] said “I knew at some point he was moving from Central Bank & Trust to Farmers State Bank. I just wanted to make sure my loans went with him because he was my guy.”³⁸³

Another witness in the Central Litigation, [H] [L], also had been banking at Central and that, before leaving Central, Kiolbasa informed [H] [L] he was leaving to go to Farmers.³⁸⁴ During examination by Central’s lawyers in the trial, she identified loan documentation she had at Central that she never authorized Kiolbasa to present to Farmers; and said she would have been surprised to learn he gave the loan information to Farmers in order to convince others to let him buy a bank.³⁸⁵

Another witness cited by Respondents in support of this factual averment, [W][G], testified that while working with Kiolbasa he obtained two loans; that he trusted Kiolbasa, and when he learned that Kiolbasa was leaving Central, he told Kiolbasa “if you leave, I’m following

³⁸⁰ Notice of Intent at ¶6.

³⁸¹ *Id.* at ¶28 citing Resp. SD Ex. 3 at 2002-03.

³⁸² Resp. SD Ex. 3 at 2004.

³⁸³ *Id.* at 2008.

³⁸⁴ *Id.* at 2040.

³⁸⁵ *Id.* at 2042.

you.”³⁸⁶ He added that it wasn’t long after Kiolbasa left Central that he moved his loans to Farmers, adding that while Kiolbasa never solicited him to move his loans over to Farmers, Kiolbasa did talk with [W][G] about investing in a bank (but [W][G] never invested).³⁸⁷

Another witness, [M][N], testified he moved loans from Wells Fargo to Central to get “better rates,”³⁸⁸ and said that before moving to Farmers Kiolbasa never asked [M][N] to move loans from Central to Farmers³⁸⁹, and that the customer did so anyway, in order to get “better terms”³⁹⁰; and, like the other customers, recalled briefly discussing with Kiolbasa the idea of investing in a bank, but [M][N] dismissed the idea.³⁹¹

Another witness, [S][F], testified that although she had been banking at Central and working with Kiolbasa there, she moved her loans to Farmers after one of the tellers at Farmers told her that Kiolbasa had joined Farmers.³⁹²

Another witness, [M][R], testified that he knew Kiolbasa from when Kiolbasa worked at Wells Fargo, and when Kiolbasa moved to Central [M][R] brought a loan from Wells Fargo to Central.³⁹³ Shortly before Kiolbasa left Central for Farmers, [M][R] learned of the move and while Kiolbasa never asked him to move his loan to Farmers he nonetheless did so after Kiolbasa left Central.³⁹⁴

Another witness, [D][T], testified that she had loans at Central and that Kiolbasa was the banker she knew there.³⁹⁵ She said that after Kiolbasa left Central, she learned that he went to Farmers, and because he was “my good friend,” she moved her loans to Farmers, but he never asked that she do so.³⁹⁶

It is not clear what the above testimony relates to in this enforcement action. The Notice of Intent does not allege Respondents solicited any of Central’s customers to *move* from Central to Farmers. By offering the averments in Paragraph 28, Respondents do not controvert a material fact in issue. Most particularly, the above testimony supports, and does not controvert, Mr. Gray’s opinion that by soliciting investment in Farmers, Kiolbasa had the effect of motivating Central’s customers to move their loans to Farmers.

Paragraph 32

³⁸⁶ *Id.* at 2194.

³⁸⁷ *Id.* at ¶28 citing Resp. SD Ex. 4 at 2199-2200, 2202.

³⁸⁸ Resp. SD Ex. 3 at 2002-03 at 2212.

³⁸⁹ *Id.* at 2216.

³⁹⁰ *Id.* at 2217.

³⁹¹ *Id.* at 2220.

³⁹² *Id.* at 2236.

³⁹³ *Id.* at 2261.

³⁹⁴ *Id.* at 2264-65.

³⁹⁵ *Id.* at 2230-32.

³⁹⁶ *Id.* at 2334-36.

In Paragraph 32, Respondents acknowledged that Kiolbasa's March 25, 2014 draft letter to John Gross stated "these are current customers that have been approached and have agreed to move their business upon the transition".³⁹⁷ The averment goes on to allege that the record reflects that by March 25, 2014, "Kiolbasa had not yet approached any of these customers to move their business to Farmers State Bank."³⁹⁸

This averment identifies no controverted material fact, as the Notice does not allege Kiolbasa approached any Central customers prior to March 25, 2014 asking that they move their loans while Kiolbasa was still employed at Central.

Paragraph 33

In Paragraph 33, Respondents aver that "[a]t the June 1, 2014 meeting with Farmers State Bank, the list of individuals presented as potential investors did include some of Central's customers. However, less than half of the individuals were Central's customers and all of them were potential as opposed to committed investors. None were identified as Central's customers."³⁹⁹

The averment creates no controversy regarding any claim in the Notice, inasmuch as the Notice does not allege that the persons who were identified in the June 1, 2014 Investor List presented by Respondents to the Farmers board were either Central customers or committed investors.⁴⁰⁰

Paragraph 34

In Paragraph 34, Respondents allege that "[a]t the June 1, 2014 meeting with Farmers State Bank, Respondents did not represent that they had solicited Central's customers or that Central's customers had agreed to move their loans from Central to Farmers State Bank."

The citations offered in support of this factual premise are not to testimony by either Respondent, but instead refer to testimony by Central customers who followed Kiolbasa to Farmers – thus, they offered no evidence regarding what Respondents did or did not say during the June 1 meeting. The premise thus is not supported by the references to the record that Respondents rely upon for the factual claims in Paragraph 34.

³⁹⁷ See EC SD Exhibit 23 (FRB-FARMERS-004222-35) (3/25/14 email from Smith at Central to Smith at fsmith@wyoming.com with Farmers State Bank proposal).

³⁹⁸ Respondents' Statement of Disputed Material Facts at ¶32, citing Respondents' Exhibit 3 (Trial testimony of [H][L] at 2041-5-13 (FRB-FARMERS002279) ; Respondents' Exhibit 4, at 2202:2-6 (Trial testimony of [W][G]), 2216:7-10 (Trial testimony of [M][N]), 2236:7-10 (Trial testimony of [S][F]), 2264:23-2265:8 (Trial testimony of [M][R]) (FRBFARMERS002490, 2504, 2524, 2552-2553).

³⁹⁹ Respondents' Statement of Disputed Material Facts at ¶33, citing EC SD Exhibit 12 (Trial testimony of Mr. Gross) at 1506-1508 (FRBFARMERS001663-1665); Respondents' Exhibit 3 (Trial testimony of [H][L]) at 2041-5-13 (FRB-FARMERS002279); Respondents' Exhibit 4 (Trial testimony of [W][G]) at 2202:2-6, (Trial testimony of [M][N]) at 2216:7-10, (Trial testimony of [S][F]) at 2236:7-10, (Trial testimony of [M][R] at 2264:23-2265:8) (FRBFARMERS002490, 2504, 2524, 2552-2553).

⁴⁰⁰ See Notice of Intent at ¶6: "At the meeting [of June 1, 2014], Smith and Kiolbasa advised the Farmers board members that they had obtained commitments from certain Central customers to move their loans to Farmers, upon execution of the contemplated transaction for Smith and Kiolbasa to acquire an ownership interest in Commercial."

Paragraph 38

In Paragraph 38, Respondents aver that “Central had no policy – written or otherwise – that required written payoff requests in conjunction with the payoff of loans.”⁴⁰¹

Inasmuch as there is no claim in the Notice of Intent alleging a policy that required written requests for loan payoff information, the factual premise presented in Paragraph 38 has not been shown to be material to a determination of the issues of this enforcement action.

Paragraph 40

In Paragraph 40, Respondents state that they “were not concerned about Central discovering that they were considering investing in Farmers State Bank.” Rather, Respondents “were concerned that if Central knew they were considering other employment to any extent, Central would fire them.”⁴⁰²

While the Respondents’ statements are material, in that the statements in Respondents’ affidavits provide both admissions against their interests and substantial evidence of scienter – specifically that they were aware their actions were contrary to Central’s employment policies and could result in the termination of their employment – the averments in Paragraph 40 *support* the charges presented in the Notice of Intent, and do not controvert any material fact in issue.

Paragraph 41

In Paragraph 41, Respondents aver that “Smith did not handle all of Farmers State Bank’s requests for payoff information for those customers who transferred their business to Farmers State Bank,” and that “other employees at Central handled some of the payoff requests submitted by Farmers State Bank relating to loans customers had applied for at Farmers State Bank.”⁴⁰³

Nothing in the charging document alleged Smith handled all of Farmers’ requests for payoff information, and as such, the fact that other Central employees may have handled payoff requests related to the issues presented here is not a material fact in issue.

Paragraph 42

In Paragraph 42, Respondents aver that “[t]here is no evidence in the record that Smith was prohibited from providing services to others while working at Central.”⁴⁰⁴ Respondents

⁴⁰¹ Respondents’ Statement of Disputed Material Facts at ¶34, citing Respondents’ Exhibit 2 (Trial testimony of Carl Huhnke) at 1714:15-1715:11 (FRBFARMERS001911-1912); and Respondents’ Exhibit 12 (4/11/14 deposition testimony of Christopher Von Holtum) at 32:2-33:7.]

⁴⁰² Respondents’ Statement of Disputed Material Facts at ¶40, citing Respondents’ Exhibit 5 (Smith Affidavit) at ¶14 Smith: “I was not concerned about Central Bank & Trust discovering that I was considering investing in Farmers State Bank. Rather, I was concerned that if Central Bank & Trust knew I was considering other employment to any extent, Central Bank & Trust were terminate my employment; Respondents’ Exhibit 8, at ¶ 12 (Kiolbasa’s Affidavit stating the same).

⁴⁰³ Respondents’ Statement of Disputed Material Facts at ¶41, citing EC SD Exhibit 11 (Trial testimony of Respondent Smith) at 1088:18-1091:3 (FRB-FARMERS001207-1210).

⁴⁰⁴ Respondents’ Statement of Disputed Material Facts at ¶42 citing Respondents’ Exhibit 5 (Affidavit of Smith) at ¶ 16; Respondents’ Exhibit 8 (Affidavit of Kiolbasa) at ¶ 3.]

support this averment by referring to their own affidavits (Resp. SD Exs. 5 (Smith) and 8 (Kiolbasa) – which consists of the unsupported, bald claim that they “had no written employment agreement” with Central.

Presumably because it was offered as a statement that evidence is lacking, Respondents did not support this averment with a citation to the record, other than their own claim that there was no employment agreement between them and Central. Respondents thus did not recognize that such evidence, notably with respect to Smith’s practice of providing services to Farmers while still a Central employee, is in the record, presented in Mr. Gray’s expert report. Specifically, Mr. Gray’s report provides the following uncontroverted documentary evidence:

Referring to EC SD Ex. 26 (4/8/14 email from Kiolbasa to Thomas Long regarding “our business plan,” re-sent from Scott Lamons to Wyneema Engstrom, et al. on June 1, 2014), Mr. Gray offered his assessment and opinion of the impact of Smith’s service to Farmers Bank while still a Central employee:

Further, by Smith providing assistance to Farmers, a competing bank, while still employed by Central, as evidenced above, Smith was disloyal to Central by acting in conflict with Central’s interests, and was performing outside activities without the required prior approval of Central. Even if Smith was not compensated by Farmers or anyone else for providing such assistance, and did so outside of his normal work schedule, the Business Plan and other evidence shows that Smith performed these services with an expectation of financial gain once moving to Farmers. [Citing, *e.g.*, excerpt from the Business Plan, EC SD Ex. 26 at 5 (FRB-FARMERS-004241–54 at 4245) (“Our proposition [as documented in the Business Plan] is to purchase [Farmers] and to open an LPO (loan production office) in Cheyenne, Wyoming. We will grow the bank’s loan portfolio by \$12,000,000 in quality, performing loans within the first three years, at which time a full service branch would be opened in Cheyenne.”).⁴⁰⁵

Enforcement Counsel noted these observations, embodying them in their Statement of Uncontroverted Fact at ¶155, which averred that “Smith breached is duty of loyalty to Central . . . by providing services to a competitor.”⁴⁰⁶ Respondents, presented with this assertion of undisputed facts, responded in neither their Statement of Disputed Facts or in their Memorandum in Opposition. Upon this record, there is no basis to regard the averments in Paragraph 42 as a basis for denying summary disposition.

Paragraph 43

In Paragraph 43, Respondents aver that “[t]here is no evidence in the record that Respondents were bound by an employment agreement, a non-competition agreement, or a non-solicitation agreement.”⁴⁰⁷ Again, the sole support for this premise – and like the prior paragraph

⁴⁰⁵ Gray Report-Smith at 19.

⁴⁰⁶ Enforcement Counsel’s Statement of Undisputed Material Facts at ¶155, citing EC SD Ex. 4 (Gray Report-Smith at 4).

⁴⁰⁷ Respondents’ Statement of Disputed Material Facts at ¶43, citing Resp. SD Ex. 5 (Smith Affidavit) at ¶ 16; and Resp. SD Ex. 8 (Kiolbasa Affidavit) at ¶ 3.)

this one offers a legal premise rather than a factual one – is the self-serving statement of each Respondent. The record, however, does establish – without contradiction – the binding effect of Central’s employment handbook on both Respondents. As Mr. Gray opined:

Based on my review of Central’s policies, and communications and documents involving Smith, as described above, it is my opinion that Smith violated Central policy. Specifically, Smith violated the honesty, integrity, and loyalty requirements in the Central Handbook, as well as the provision restricting outside activities. Smith’s active pursuit of the Business Plan, which involved acquiring an ownership interest in Farmers, including the execution of a confidentiality agreement and meetings with Farmers directors, constituted outside activities prohibited by Central policy, and were disloyal to his employer, Central.⁴⁰⁸

Enforcement Counsel raised this assertion in their Statement of Uncontroverted Facts (at Paragraph 138, *inter alia*) but again, Respondents failed to refer to this assertion in either their Statement of Disputed Facts or their Memorandum in Opposition. Upon this record, there is no basis to regard the averments in Paragraph 42 as a basis for denying summary disposition.

Paragraph 44

In Paragraph 44, Respondents aver that there “is no evidence in the record that Smith or Kiolbasa received any compensation from any party for anything either of them did other than as an employee of Central.”⁴⁰⁹

I find nothing in the Notice of Intent alleging either Respondent received compensation from a source other than Central, for work performed (presumably for the benefit of Farmers). Paragraph 7 of the Notice alleges Smith “took several actions on behalf of and/or as an agent of Farmers,” but there is no claim in the Notice relating to the averment in Paragraph 44. Paragraph 23 of the Notice alleges Respondents “received a financial benefit from their misappropriation and use of Central’s confidential and proprietary information in the form of compensation from Farmers and in the form of increased value of the stock they own in Commercial.” The averment in Paragraph 44 does not address the allegation in the Notice inasmuch as it speaks only to Respondents’ service as Central employees; it makes no reference to compensation by Farmers, which is not a party to this enforcement action.

Again, the factual premise here is supported solely by Respondents’ individual affidavits, which make no reference to the record. The record, however, includes evidence that relates directly to the allegations in Paragraph 23 of the Notice of Intent. In his reports, Mr. Gray opined as follows:

Further, by Smith providing assistance to Farmers, a competing bank, while still employed by Central, as evidenced above, Smith was disloyal to Central by acting in conflict with Central’s interests, and was performing outside activities without the required prior approval of Central. Even if Smith was not compensated by Farmers or anyone else for providing such

⁴⁰⁸ Gray Report-Smith at 20.

⁴⁰⁹ Respondents’ Statement of Disputed Material Facts at ¶44.

assistance, and did so outside of his normal work schedule, the Business Plan and other evidence shows that Smith performed these services with an expectation of financial gain once moving to Farmers.⁴¹⁰

Inasmuch as the averments in Paragraph 44 controvert no material facts in issue and fail to recognize or contradict evidence in the record that Respondents anticipated receiving a financial benefit from their actions, nothing in this Paragraph would prevent granting summary disposition.

Paragraph 49

In Paragraph 49, Respondents aver that representatives of the Federal Reserve “had multiple discussions with Frank Smith and Mark Kiolbasa while each of the Respondents were employed at Central” and “solicited information with respect to Central from Smith. Kiolbasa did not have access to such information.”⁴¹¹ The averment is silent with respect to the nature of these discussions, such that the materiality of the averment is not established.

Respondents support the averment by citing first to Kiolbasa’s testimony during the Central trial, where he is questioned about a document identified as Exhibit 321 in the Central litigation, referred to as an “ALCO Lookback.”⁴¹² In this testimony, Kiolbasa stated that he obtained this document from Smith, and after printing it off, gave it to the Federal Reserve Board’s lead auditor (and no one else, including no one at Farmers). He testified that the same was true with respect to a document introduced at the Central trial as Exhibits 317 and 320. There is in the Notice of Intent no mention of these exhibits, and as such the materiality of the averment is not established. Further, if these exhibits are part of the current record, Respondents had the obligation to identify them as such, but the Paragraph is silent regarding what these documents are.

Respondents also support this Paragraph’s factual premises by citing to trial testimony from Mr. Smith, in which he states, without reference to any authority, that he did not believe he was harming Central in providing Farmers’ staff with assistance.⁴¹³ This citation to the record neither relates to nor supports the factual premise in Paragraph 49.

Paragraph 51

In Paragraph 51, Respondents aver that “Smith was not required to advise Central where Kiolbasa was employed following his resignation from Central.”⁴¹⁴

⁴¹⁰ Gray Report-Smith at 19, citing EC SD Ex. 26 (email chain ending on 6/1/14 from Scott Lamons to Wyneema Engstrom et al. transmitting Respondents’ Business Plan to Farmers) (FRB-FARMERS-004241-54 at 4245) (“Our proposition [as documented in the Business Plan] is to purchase [Farmers] and to open an LPO (loan production office) in Cheyenne, Wyoming. We will grow the bank’s loan portfolio by \$12,000,000 in quality, performing loans within the first three years, at which time a full service branch would be opened in Cheyenne.”).

⁴¹¹ Respondents’ Statement of Disputed Material Facts at ¶49.

⁴¹² *Id.* citing EC SD Ex. 10 (Trial testimony of Kiolbasa) at 710:7-712:13, 745:2-15 (FRB-FARMERS000791-793, 826).

⁴¹³ Respondents’ Statement of Disputed Material Facts at ¶49, citing EC SD Ex. 11 (Trial testimony of Smith) at 1088:6-17 (FRB-FARMERS001207).

⁴¹⁴ Respondents’ Statement of Disputed Material Facts at ¶51.

The averment is not supported by any reference to the record, and posits a claim not related to or in conflict with any of the factual allegations in the Notice of Intent. Given that its materiality has not been shown and given the lack of support for the claim in the record presented, nothing in this Paragraph would prevent summary disposition.

Paragraph 52

In Paragraph 52, Respondents aver that “Smith was not responsible for assessing acquisitions and was not involved in due diligence for such transactions. Throughout his seven years of employment at Central, Smith was only at one board meeting where such transactions were discussed.”⁴¹⁵

Smith’s presence at Central’s board meetings is not, however, alleged in the Notice of Intent, nor is there any claim that he was responsible for assessing acquisitions or performing due diligence reviews for acquisition transactions. As such, the materiality of the averment is not shown.

Further, the averments are supported by Smith’s unsupported and self-serving statement that “he was only at one meeting where [acquisitions] were discussed,”⁴¹⁶ and testimony to the effect that while Smith was not on Central’s Board of Directors, he was present at board meetings performing in the role of keeper of the minutes, having asked “to attend the board replacing the lady that took the board minutes.”

Inasmuch as the factual premises in this Paragraph are not shown to be material and do not controvert any material fact, nothing in the Paragraph constitutes a basis to preclude granting summary disposition.

Paragraph 59

In Paragraph 59, Respondents aver that there “is no evidence in the record that Respondents transmitted any of Farmers State Bank’s confidential information without proper authorization.”⁴¹⁷

There is no allegation in the Notice of Intent that Respondents improperly transmitted confidential documents maintained by Farmers. Accordingly, as the factual premises in this Paragraph are not shown to be material and do not controvert any material fact, nothing in the Paragraph constitutes a basis to preclude granting summary disposition.

C. Analysis of Respondents’ Arguments

Respondents posited that summary judgment would not be available because there were genuine issues of material fact in dispute.⁴¹⁸ Specifically, Respondents assert the evidence submitted through the summary disposition process presented disputes regarding whether

⁴¹⁵ *Id.* at ¶52, citing EC SD Exhibit 8 (Trial testimony of Mr. Von Holtum) at 228:15-24 (FRB-FARMERS000228); Respondents’ Exhibit 5, at ¶7.]

⁴¹⁶ Resp. SD Ex. 5, at ¶7.

⁴¹⁷ Respondents’ Statement of Disputed Material Facts at ¶59, citing

⁴¹⁸ Respondents’ Memorandum of Points and Authorities in Support of its Motion for Summary Disposition [*sic*] at Section II D.

Respondents misappropriated Central’s confidential and proprietary information;⁴¹⁹ whether their plans to compete were lawful;⁴²⁰ whether Respondents solicited Central’s customers to move their business to Farmers;⁴²¹ whether assistance Smith provided was lawful;⁴²² and whether violations of Central’s Handbook constitute unsafe and unsound practices or violations of fiduciary duties.⁴²³

Most of Respondents’ contentions were without merit and were rejected in the summary disposition Order. The premise that documents appropriated from Central were not copyrighted – and thus could be freely delivered by Respondents to Farmers – is a legal one, one rejected by the FDIC’s expert and not controverted by Respondents (other than by their own conclusory and self-serving opinions). Respondents did not controvert that they appropriated the documents identified during the Central trial – they instead contended that doing so was not misappropriation because of the way the documents were maintained in Central. This contention did not present controverted facts, but rather it presented a controverted interpretation of whether such conduct was wrongful.

The premise that Respondents’ actions, starting in 2013 and continuing throughout their tenure at Central, were lawful is, again, not a factual one but a legal one. The facts being applied to reach the legal conclusions, presented through Enforcement Counsel’s Statement of Undisputed Material Facts and not contradicted by Respondents, included most notably those relied upon by Mr. Gray. These facts were not called into controversy by Respondents’ Statement of Disputed Material Facts.

Similarly, the facts relied upon by Mr. Gray in reaching his determination that Respondents’ conduct caused Central’s customers to migrate to Farmers are not in dispute, and were in fact presented by Respondents themselves, in their assertion that the migration was due to loyalty to Mr. Kiolbasa. Respondents have not called into question whether Central customers moved their business from Central to Farmers. What they controverted was whether the unsolicited movement constitutes evidence of misconduct. While Respondents may challenge the conclusions reached by Mr. Gray on this point, the evidence Mr. Gray relied upon in reaching his conclusions was not disputed.

Respondents’ assertion that the assistance Mr. Smith provided to Farmers was legal is not an assertion calling into question facts, but instead makes a legal argument based on uncontroverted facts – thus permitting summary disposition that determines the merits of those arguments. To the same effect, the premise that conduct attributed to Respondents constituted unsafe or unsound practices invokes a legal, not a factual, claim.

Once Enforcement Counsel identified the factual bases in support of their motion, including those bases relied upon by the FDIC’s two expert witnesses, and presented those facts as uncontroverted, Respondents had an affirmative duty to bring forward evidence that contradicted or called into question those claimed uncontroverted facts. Respondents’

⁴¹⁹ *Id.* at II D 1 a.

⁴²⁰ *Id.* at II D 1 b.

⁴²¹ *Id.* at II D 1 c.

⁴²² *Id.* at II D 1 d.

⁴²³ *Id.* at II D 1 e.

Memorandum and their accompanying Statement of Disputed Facts did not identify controverted facts material to these issues. Accordingly, there was no legal basis preventing summary disposition other than with respect to two points: first, whether some of the blame for loss sustained by Central should be borne not by Respondents but by members of Farmers' Board of Directors; and second, whether delivery of some of the documents transmitted to Farmers was prompted by requests for those documents by Federal Reserve employee James Echtermeyer. Because determining the merits of these claims required evidence, a hearing was held to permit the parties to address these averments.

Respondents further averred that issues of material fact remain regarding the adverse effect their conduct had on Central and Farmers. Specifically, they posited that disputes about material facts concerning whether their actions caused harm – either monetary losses or reputational harm (or both) – preclude summary disposition.⁴²⁴ Further, Respondents argue they did not receive any benefit from their alleged misconduct.⁴²⁵

Support for these averments, however, has not been tendered. Respondents urged a rejection of Mr. Gray's determination that soliciting Central's customers to invest in Farmers equates to soliciting those customers to move their business.⁴²⁶ The argument is not, however, based on a claim that the evidence relied upon by Mr. Gray is controverted. Instead, it is based on a premise calling into question the reasoning relied upon by Mr. Gray when using the undisputed evidence. Finding that reasoning to be both solidly supported by uncontroverted evidence and well-reasoned, I rejected Respondents' argument as being without merit.

D. Findings and Conclusions Based on Enforcement Counsel's Motion for Summary Disposition

Under the Federal Deposit Insurance Act, Enforcement Counsel bear the burden of establishing three things in order to support the charges against each Respondent: there must be misconduct, a consequent effect from the misconduct, and culpability on each Respondent's part.

More formally, the FDI Act provides as follows:

Whenever the appropriate Federal banking agency determines that

(A) any institution-affiliated party has, directly or indirectly-- (i) violated (I) any law or regulation; * * * (ii) engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution; or (iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty;

(B) by reason of the violation, practice, or breach described in any clause of subparagraph (A)--

(i) such insured depository institution or business institution has suffered or will probably suffer financial loss or other damage;

⁴²⁴ *Id.* at II D 2 a.

⁴²⁵ *Id.* at II D 2 b.

⁴²⁶ *Id.* at 47.

(ii) the interests of the insured depository institution's depositors have been or could be prejudiced; or

(iii) such party has received financial gain or other benefit by reason of such violation, practice, or breach; and

(C) such violation, practice, or breach—

(i) involves personal dishonesty on the part of such party; or

(ii) demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution or business institution,

the appropriate Federal banking agency for the depository institution may serve upon such party a written notice of the agency's intention to remove such party from office or to prohibit any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution.⁴²⁷

Under 12 C.F.R. § 263.29(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.

Upon the evidence presented above, Enforcement Counsel established all three factors needed to support a prohibition order: misconduct, effects, and culpability.⁴²⁸

1. Conclusions Regarding Misconduct

a. Respondents Engaged in Unsafe and Unsound Banking Practices

Misconduct under section 8(e) includes violations of governing laws and regulations along with participation in activity deemed to be an unsafe and unsound banking practice or in breach of a party's fiduciary duty.⁴²⁹ The undisputed evidence establishes that Respondents engaged in conduct that was contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds.

b. Respondents Breached Fiduciary Duties Owed to Central and Farmers

Officers and directors of financial institutions are deemed to be fiduciaries of the institution and, as such, owe the institution duties of care and loyalty.⁴³⁰ The duty of care

⁴²⁷ 12 U.S.C. § 1818(e)(1).

⁴²⁸ *Id.*; see *Matter of Candelaria*, FDIC-95-62e, 1997 WL 211341, at *3 (Mar. 11, 1997), *aff'd sub nom. Candelaria v. FDIC*, No. 97-9515, 1998 WL 43167 (10th Cir. Feb. 3, 1998); *Matter of Leuthe*, FDIC-95-15e, 1998 WL 438323, at * 11 (June 26, 1998), *aff'd sub nom. Leuthe v. FDIC*, 194 F.3d 174 (D.C. Cir. 1999) (per curiam).

⁴²⁹ 12 U.S.C. § 1818(e)(1)(A).

⁴³⁰ *In re Constance C. Cirino*, 2000 WL 1131919 at *4 (FDIC May 10, 2000) (citing *In the Matter of Ramon M. Candelaria*, FDIC Enf. Dec. and Orders at A-2847 (1997)).

requires directors and officers to act as prudent and diligent business persons in conducting the affairs of the bank. The duty of loyalty generally prohibits them from putting their personal or business interests above the interests of the bank, and requires that they administer the affairs of the bank with candor, personal honesty, and integrity.⁴³¹ The duty of loyalty also requires that they put the interests of the bank before their own, and not use their positions at the bank for their own personal gain.⁴³²

Further, “[t]he duty of candor requires ‘corporate fiduciaries to “disclose all material information relevant to corporate decisions from which they may derive a personal benefit.”’⁴³³ Officers must also refrain from self-dealing at the expense of the bank.⁴³⁴

The undisputed evidence cited above establishes that Respondents breached the fiduciary duties of care, loyalty, and candor owed to Central.

Upon these findings, there is preponderant and uncontroverted evidence establishing Respondents engaged in misconduct, both individually and jointly, as alleged in the Notice of Intent and as that term is used in the FDI Act.

2. Findings and Conclusions Regarding Effect

I agree with Respondents’ assertion that the uncontroverted evidence of reputational harm to Farmers was through summary disposition insufficient to meet a preponderance standard, as is the record’s evidence of monetary loss to Farmers.⁴³⁵ The record from the Central litigation was not clear with respect to either form of harm to Farmers, as the issue of harm to Farmers was not among those presented during the Central litigation. Harm to Central, however, has been shown by preponderant and uncontroverted evidence and thus was beyond the scope of the hearing held on December 3, 2019.

Prior to the hearing conducted in Wyoming in 2019, notwithstanding the analyses of Mr. Gray and Mr. Schwartz, the record was insufficient to permit a proper allocation of harm that should be attributed to Respondents, rather than the other named defendants in the Central litigation, including Farmers and its Board of Directors. As a result, summary disposition was not granted with respect to the extent and nature of the effects of Respondents’ misconduct versus harm caused by the misconduct of Farmers and members of its Board of Directors.

During the hearing, the parties presented evidence regarding the allocation of harmful effects occasioned by Respondents’ misconduct versus harm brought about by Farmers and its Board of Directors. Respondents had asserted that monetary losses Enforcement Counsel attributed to Respondents’ conduct actually were incurred not due to Respondents’ misconduct alone, but were incurred because “Central also sued Farmers, its Board of Directors, and another

⁴³¹ *Id.* at *50.

⁴³² *Seidman v. Office of Thrift Supervision*, 37 F.3d 911, 933-34 (3d Cir. 1994).

⁴³³ *Seidman*, 37 F.3d at 935 n.34.

⁴³⁴ *Indep. Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164, 1168 (D.C. Cir. 1979).

⁴³⁵ Respondents’ Memorandum of Points and Authorities in Support of its Motion for Summary Disposition [*sic*] at 46-48 and citations to the record therein.

employee in the same action. Thus, Farmers incurred these fees defending itself, its board, and its employees – including Respondents.”⁴³⁶

As framed by Respondents, there were “genuine disputes of material fact regarding whether Respondents caused Farmers to suffer monetary and/or reputational harm.”⁴³⁷ The hearing therefore provided the parties with the opportunity to develop a record permitting a determination of whether harms – economic and otherwise – sustained by Central or Farmers should be allocated entirely to Respondents or whether Farmers board members other than Respondents should be identified as the source of some or all such harms.

Evidence presented by the parties in Wyoming, however, offered no basis upon which to find the source of harms sustained by Central or Farmers could be attributed to anyone other than Respondents.

Farmers Board Chair Wynema Engstrom was called by Respondents and gave testimony about her understanding and actions related to the Central litigation, as did Board member Scott Lamons.⁴³⁸ Enforcement Counsel called Board member John Gross, who also served as Chairman of Commercial’s Board, which was the Bank’s holding company.⁴³⁹

Respondents cite to testimony from the civil litigation for the proposition that Mr. Gross, “Farmers’ president at the time, authorized Smith to speak with the Federal Reserve on Farmers’ behalf understanding that Smith was still Central’s Chief Financial Officer”,⁴⁴⁰ and noted Gross’s attendance at a meeting at Farmers so that Smith “could meet Farmers’ staff.”⁴⁴¹ They also cite to evidence that Smith and Kiolbasa “first met with Farmers’ board members, John Gross, William Gross, Wynema Engstrom, and Scott Lamons in June 2014 and presented the Business Plan” and that the Board reviewed the plan and a potential investor list that Respondents put together for the June 2014 meeting.”⁴⁴²

I found no evidence suggesting the harms sustained by either Central or Farmers were brought about due to conduct that could be attributed to any member of Farmers’ Board as constituted in 2014. That evidence includes the fact that through the civil litigation, Farmers was found to be *not* liable to Central for any stated cause of action, nor were any Farmers’ Board members;⁴⁴³ and what I found to be credible testimony by Mr. Gross, Ms. Engstrom, and Mr.

⁴³⁶ *Id.* at 48.

⁴³⁷ *Id.*

⁴³⁸ Tr. Dec. 3, 2019 at 210-36.

⁴³⁹ *Id.* at 110-36.

⁴⁴⁰ Respondents’ Proposed Findings of Fact and Conclusions of Law at 3, citing Joint Ex. 12 (Jury Trial Proceedings conducted on March 19, 2018 at 1498:10-19, 1499:1-25 (FRB-FARMERS001655-1656).]

⁴⁴¹ Respondents’ Proposed Findings of Fact and Conclusions of Law at 3, citing Joint Ex. 12 (Jury Trial Proceedings conducted on March 19, 2018 (Jt. Exh. 11, at 1087:18-1088:5 (FRB-FARMERS001206-1207); and Tr. Dec 3, 2019 Hearing, at 71:14-19, 72:3-12, 20-24, 73:6-15, 127:25-128:6.

⁴⁴² Respondents’ Proposed Findings of Fact and Conclusions of Law at 3, citing joint Ex. 12 (Jury Trial Proceedings conducted on March 19, 2018 (Jt. Exh. 11, at 1087:18-1088:5 (FRB-FARMERS001206-1207); and Tr. Dec 3, 2019 Hearing, at 71:14-19, 72:3-12, 20-24, 73:6-15, 127:25-128:6 and Jt. Exh. 25 (FRB-FARMERS004239-4240); Tr. Dec. 3, 2019 Hearing at 215:12-216:13, 230:17-231:1.]

⁴⁴³ Tr. Dec. 3, 2019 at 115 (Gross).

Lamons, establishing that no member of Farmers' board sought to have Respondents approach Central's customers to ask that they move their Central loans to Farmers.⁴⁴⁴ Similarly, I found no evidence suggesting any Farmers Board member or employee other than Respondents sought to receive confidential or proprietary information belonging to Central.⁴⁴⁵

On the record as a whole, there is no evidence that any member of the Farmers Board as constituted in 2014-15 precipitated or caused the harm or risk of loss occasioned by Respondents' misconduct. Preponderant evidence established that the misconduct and the effects of that misconduct described above may properly be attributed only to Respondents, and no one else.

3. Findings and Conclusions Regarding Culpability

Charges in the Notice of Intent include allegations of both personal dishonesty and either a willful or continuing disregard for the safety and soundness of either Central or Farmers. In answering these charges, Respondents aver, *inter alia*, that their delivery of Central's documents was, in part, "specifically requested by representatives of the Federal Reserve in conjunction with Smith's application to purchase the stock in and to become president and chief executive officer of Farmers."⁴⁴⁶ As preponderant and uncontroverted evidence on this point was not present in the record when Enforcement Counsel presented its summary disposition motion, a determination of Respondents' culpability had to consider testimony adduced during the December 3, 2019 hearing. The question presented was whether Respondents' acquisition of Central's documents was in response to requests by the Reserve Board's examiners, as alleged by Respondents.

The scope of the question presented at the hearing was limited to a discrete set of documents identified by Respondents as having been produced at the request of employees of the Federal Reserve System. According to Mr. Smith, the Federal Reserve employee James Echtermeyer requested that he produce documents contained in Joint Exhibits 64, 65 and 66, broadly referred to as Central's "ALCO and liquidity reports."⁴⁴⁷ Mr. Smith testified that Mr. Echtermeyer's first request occurred on February 12, 2015, and the second request was made on February 24, 2015.⁴⁴⁸

According to Mr. Smith, he initiated a call to Mr. Echtermeyer on February 12, 2015, intending "to confirm with him information provided to me by Mark Kiolbasa that James

⁴⁴⁴ *Id.* at 126 (Gross); 216 (Engstrom); and 227-28 (Lamons).

⁴⁴⁵ *Id.* at 127-28 (Gross); 217 (Engstrom); and 232 (Lamons); see also Tr. Dec. 3, 2019 at 89 (Smith).

⁴⁴⁶ Answer of Kiolbasa at ¶12; Answer of Smith at ¶12. See also Respondents' Opposition to Enforcement Counsel's Motion for Summary Disposition at 44: "Smith's communications with the Federal Reserve were done in conjunction with his application to acquire an ownership interest in and management position at Farmers. The Federal Reserve requested Kiolbasa to provide certain information to demonstrate Smith's expertise, including, among other things, an ALCO look back report Smith drafted. [Respondents' Exhibit 5, at ¶ 6.] Smith also provided Kiolbasa with copies of GAP Reports, Public Funds Reports, and Liquidity Reports to provide to the Federal Reserve to demonstrate Smith's knowledge of regulatory and monitoring reporting. [Id.]"

⁴⁴⁷ Tr. Dec. 3, 2019 at 74 (Smith).

⁴⁴⁸ *Id.* at 74-75 (Smith).

Echtermeyer wanted me to email certain Central Bank and Trust asset, liability, and liquidity forms to Mr. Kiolbasa.”⁴⁴⁹

Asked whether Mr. Kiolbasa explained to him what was the nature of the request from Mr. Echtermeyer, Mr. Smith responded: “I don’t remember all the specific details, but he indicated . . . to me that Mr. Echtermeyer wanted me to email him documents that I used at Central Bank and Trust for liquidity and asset liability.”⁴⁵⁰ Acting in response to Mr. Kiolbasa’s message, Mr. Smith said he called Mr. Echtermeyer in order to confirm the request, and according to Mr. Smith, Mr. Echtermeyer’s response was “he wouldn’t have time to look at them, but to go ahead and email them to Mr. Kiolbasa, and that he would receive them during the upcoming examination.”⁴⁵¹

Asked to report on the purpose Mr. Echtermeyer gave for making this request, Mr. Smith testified:

He said to me that -- that I had never worked for a Federal Reserve Bank, and they didn't have any knowledge of -- or any information about my knowledge in terms of asset liability or liquidity and that Farmers State Bank needed -- needed help in that area, and that I was to send these to him, and that it would be followed up with a phone call, and that it would help to determine whether or not I had the knowledge to go forward in the position that I was looking to obtain at Farmers State Bank, or that I was proposing to Farmers State Bank.⁴⁵²

At this point, and without making a determination regarding the truthfulness of this response, I find that *any* delivery of documents belonging to Central without consent from Central plainly violated Central’s confidentiality policies as described by Mr. Gray. Whether requested by Mr. Echtermeyer or anyone else, the transfer of confidential documents would be proper only upon Mr. Smith securing Central’s consent – and there is no evidence that he did so, nor that he tried to do so.

Given that the five Central documents in Exhibits 64, 65, and 66 are but one subset of a larger set of documents – proprietary or confidential or both – that were shown to have been given to Farmers through the joint efforts of Mr. Kiolbasa and Mr. Smith, the preliminary question is whether the claimed defense makes a material difference. In seeking exclusion of the five exhibits identified in this defense, Respondents fail to address the other documents. In this way, it may for two reasons prove to be immaterial whether Respondents acted in response to requests by Mr. Echtermeyer. The first reason, as mentioned above, is the outcome – proof of misconduct – would be established because releasing proprietary or confidential Bank documents required Central’s consent, which was not given. The second reason is that proof of misconduct regarding the transfer of these documents is possible without reference to the five documents, given the preponderant evidence showing unauthorized transmission of the other

⁴⁴⁹ *Id.* at 75-76 (Smith).

⁴⁵⁰ *Id.* at 76 (Smith).

⁴⁵¹ *Id.* at 77 (Smith).

⁴⁵² *Id.* at 78 (Smith).

documents, those that were not within the group identified by Respondents in this part of their defense.

On the question of whether this was credible testimony, i.e., whether Mr. Echtermeyer actually made the requests averred by Respondents, additional evidence suggests Mr. Smith's testimony, set forth above, is neither reliable nor credible.

The reasons Mr. Smith attributes to Mr. Echtermeyer for seeking Central's records were that examiners for the Federal Reserve (which supervised Farmers) did not have sufficient information about Mr. Smith's knowledge of asset liability or liquidity to support Mr. Smith's application regarding change of control over Farmers.⁴⁵³ According to Mr. Smith, the call that he scheduled for February 24, 2015 would be attended by Mr. Echtermeyer, Steven Park (a Reserve employee who Mr. Smith said was "kind of a supervisor of the asset liability area, lack of liquidity area") and Lindsey Fester, "who was actually going to be the examiner doing most of the work".⁴⁵⁴

Mr. Smith described the February 24, 2015 conference call in these terms:

I left the bank to go home on my lunch break and called them from my home, on my home phone. And then we spent well over an hour, probably an hour and 20 minutes, going through the reports, then asking me questions -- basically getting my knowledge of, did I have the -- the acceptable knowledge to -- to run the asset liability and the liquidity for Farmers State Bank if I was approved by the -- the application group. So it was very detailed, very technical, Why do you do things, What is this about, the economic value of equity gap, liquidity. It was a number of different questions that -- basically, assessing my general knowledge.⁴⁵⁵

Continuing, Mr. Smith testified that during the conference call, Mr. Echtermeyer requested additional documents. When asked "what was the nature of these documents", Mr. Smith testified:

During the course of the conversation, questions were asked about what you do after reports are presented. So, for example, questions were asked about review of assumptions and how was that performed. There were also questions asked about, look back to make sure that what was done in the reports were accurate and that it reflected a fair position of the bank after they were done.⁴⁵⁶

After stating that Mr. Echtermeyer asked, during this conference call, that he wanted Mr. Smith to forward the documents not to himself but to Mr. Kiolbasa, Mr. Smith gave this explanation: He said he understood that Mr. Echtermeyer was present in the Farmers office when the conference call took place, and that Mr. Echtermeyer "said something of the fact that he couldn't print them or it was a printer issue -- I don't -- it was something regarding printing them

⁴⁵³ *Id.*

⁴⁵⁴ *Id.* at 79 (Smith).

⁴⁵⁵ *Id.* at 80 (Smith).

⁴⁵⁶ *Id.* at 81 (Smith).

off and having them, and he asked me to send them to Mark, for Mark to print off, for Mr. Kiolbasa to print off, and provide them to him.”⁴⁵⁷

One document is entitled “Central Bank & Trust Liquidity – Three Month Cash Flow Analysis – Worse Case, dated June 30, 2014.”⁴⁵⁸ The one-page document reflects the Bank’s investments, loans, deposits, repurchase agreements, net cash, among other information.

Asked whether banks disclose the type of information found in this Liquidity Report, after acknowledging that this is not public information, Mr. Smith nevertheless opined that “banks would disclose those to other banks or share this with other banks.”⁴⁵⁹ He testified that when working in Oregon, the Oregon Bankers Association had “various different committees, and part of that was investment officers’ and CFO’s policies and forms, and monitoring documents such as these were regularly shared with those entities to help [the] bankers out.”⁴⁶⁰ Given the nature of the information on this document, I can give no weight to Mr. Smith’s opinion that banks – specifically that Central – would disclose this information to other banks, finding Mr. Gray’s contrary opinion on this point persuasive.⁴⁶¹

The next document is entitled “Central Bank & Trust Public Funds & Repurchase Agreements – No TAGP,”⁴⁶² July 31, 2014.”⁴⁶³ This document listed various public entities, reflecting total deposits, FDIC insurance coverage, pledges, and amounts under pledges. Asked whether this would be the type of information that banks share with each other on a regular basis, Mr. Smith deflected, responding “I do know that they would share similar documents of this with other banks.”⁴⁶⁴ When the question was clarified, so that it was clear the question was not about similar documents but was whether banks would provide the information about public entities that have accounts – including the amount of the account per depositor – Mr. Smith deflected again, responding “Well, I do know that public entities have to disclose balances on certain fines,” at which point the question was repeated, and Mr. Smith responded “I have seen other banks share information similar to this at some of those committee meetings that I have participated in,” but acknowledged that Central never disclosed this information to the public, or to third parties.⁴⁶⁵

From this exchange, I found reason to question whether Mr. Smith could be relied upon to answer questions fully and without deflection or evasion.

⁴⁵⁷ *Id.* at 81-82 (Smith).

⁴⁵⁸ *Id.* at 83-84(Smith); Joint Ex. 64 (FRB-Farmers-004443).

⁴⁵⁹ Tr. Dec. 3, 2019 at 84 (Smith).

⁴⁶⁰ *Id.*

⁴⁶¹ Gray Report- Smith at 8, citing EC SD Ex. 64 (“Central Bank & Trust Liquidity Report – Three Month Cash Flow Analysis – Worse Case” dated June 30, 2014; Public Funds & Repurchase Agreements Report dated July 31, 2014, etc.); Trial testimony (Kiolbasa) at 598.

⁴⁶² Possibly: Transaction Account Guarantee Program.

⁴⁶³ Tr. Dec. 3, 2019 at 84-85(Smith); Joint Ex. 64 (FRB-Farmers-004448).

⁴⁶⁴ Tr. Dec. 3, 2019 at 85(Smith).

⁴⁶⁵ *Id.*

Mr. Smith identified each of the documents he sent to Mr. Kiolbasa in response to Mr. Echtermeyer's purported request.⁴⁶⁶ He testified that each document was "part of the application[]" and that "information would be passed on to the applications department as part of the application for me coming on-board, both as an executive officer as well as buying an interest in the Bank."⁴⁶⁷ He then contradicted himself, testifying that he did not believe that the documents were going to be passed on to the applications department, but only that Mr. Echtermeyer was "going to speak with the applications department about my knowledge" related to the application.⁴⁶⁸

Asked whether he had any emails or other writings from Mr. Echtermeyer (or anyone else at the Federal Reserve) requesting that he provide the Central liquidity documents to Mr. Kiolbasa, Mr. Smith responded "Not that I have any longer."⁴⁶⁹ Asked if he had any recollection of ever receiving anything in writing concerning the request for these documents, Mr. Smith testified:

I don't remember if there was anything in writing that I was instructed to use the Federal Reserve's secure system, and so those documents, or those emails, would have all went away. But I don't recall specifically anything in that regard, but I'm not a hundred percent confident of that.⁴⁷⁰

When asked whether he requested authorization from Central to send these documents to Mr. Kiolbasa, Mr. Smith again deflected, responding "I didn't think I needed it."⁴⁷¹ Asked to answer the question, Mr. Smith then responded "No sir, I did not."⁴⁷²

At this point the record reflects that Mr. Smith knowingly violated the Bank's policies regarding confidentiality and candor, having deliberately delivered confidential Bank information to an employee of another bank, without first seeking Bank approval. Accepting, for the moment, Mr. Smith's claim that he had been directed by Mr. Echtermeyer to deliver the identified documents to Mr. Kiolbasa, nothing in the exchange between Mr. Echtermeyer and Mr. Smith, as described by Mr. Smith, excused him from his obligation to seek permission from the Bank before transmitting the documents. No different outcome is warranted by the assertion that Mr. Kiolbasa would be receiving the documents on behalf of Mr. Echtermeyer – Mr. Smith knew that the transmission would go first to Mr. Kiolbasa, who was at that point employed by Farmers.

There is, moreover, cause to doubt Mr. Smith's version of how these identified documents came to be delivered to Mr. Kiolbasa.

First, given that Mr. Smith acknowledged, however grudgingly, that Central would have regarded the documents in the February 13, 2015 transmission as confidential Bank records, it

⁴⁶⁶ *Id.* at 86 (Smith); Joint Ex. 64.

⁴⁶⁷ Tr. Dec. 3, 2019 at 87 (Smith).

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.* at 88 (Smith).

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² *Id.*

follows that had he been acting in good faith, he would have ensured the transmission was properly identified as confidential; but he failed to do so. (The folio of documents in Joint Exhibit 64 have been given a “Confidential” label, but that label, shown in a footer next to Bates-stamp numbers, was affixed as part of the documents’ preparation for this administrative action – it was not present on the original transmission.)

Next, logic would lead to the understanding that were this transmission intended for Mr. Echtermeyer, Mr. Smith would have indicated that fact on the cover page of the transmission; but he did not do so. Indeed, there is nothing in the transmission expressing the expectation that the documents were to be used by anyone other than Mr. Kiolbasa.

Next, had Mr. Smith been acting in accordance with his normal banking practice, the transmission from Central to Farmers would have, most likely, been sent from Mr. Smith’s email address at the Bank, to Mr. Kiolbasa’s email address at Farmers. Instead, Mr. Smith sent the message from his personal Yahoo email account.⁴⁷³ Further, Mr. Smith testified that at one point during the time he was applying for permission from the Federal Reserve he actually had Mr. Echtermeyer’s email address. This can be deduced from his answer when asked whether there were any emails from Mr. Echtermeyer or anyone else at the Federal Reserve to support his claim that he was responding to a request for these documents: Mr. Smith testified “I don’t remember if there was anything in writing that I was instructed to use the Federal Reserve’s secure [email] system, and so those documents, or those emails, would have all went away. But I don’t recall specifically anything in that regard, but I’m not a hundred percent confident of that.”⁴⁷⁴ The deduction is warranted, based on the premise that if Mr. Smith lacked the means to email material to Mr. Echtermeyer, he would have said so in his answer to this question.

Apart from evidence drawn directly from the contents of Joint Exhibit 64, other circumstantial evidence casts doubt on Mr. Smith’s testimony regarding requests from Mr. Echtermeyer.

First, there is the matter of the role played by Federal Reserve employees related to Mr. Smith’s application for regulatory permission to become an officer at Farmers. Respondents took the deposition of James Clark, and by agreement of the parties, the deposition has been admitted as evidence.⁴⁷⁵ Mr. Clark retired from the Federal Reserve Bank of Kansas City after almost 30 years of service.⁴⁷⁶ He served in the Reserve Bank’s applications department, in its consumer affairs as an examiner for consumer compliance laws, and has conducted holding company inspections.⁴⁷⁷

Mr. Clark described the process by which Mr. Smith was required to secure the Reserve Bank’s approval of his proposal to acquire a controlling interest in Farmers Bank. Applicants such as Mr. Smith “who were looking to acquire control” in a bank needed to submit a “change of control” form (Form 2081) used for that purpose, and submit it along with an “interagency

⁴⁷³ Joint Ex. 64 at 1; FRB-FARMERS-04442. See Tr. Dec. 3, 2019 at 149, identifying Mr. Smith’s email address appearing on Joint Ex. 74 as fesmith68@yahoo.com. FRB-FARMERS-007029.

⁴⁷⁴ Tr. Dec. 3, 2019 at 88.

⁴⁷⁵ Tr. Dec. 3, 2019 at 238, admitting Deposition of James Clark dated November 18, 2019.

⁴⁷⁶ Tr. Nov. 18, 2019 at 7 (Clark).

⁴⁷⁷ *Id.*

biographical financial report”, accompanied by proof that the applicant had complied with a publication requirement through newspaper publication of the application.⁴⁷⁸

Mr. Clark testified that Mr. Smith contacted him and “wanted to know about the regulatory process and wanted to know what was required of those individuals who might be interested in acquiring control of a banking organization.”⁴⁷⁹ Regarding the function of the “change of control” application, Mr. Clark explained that if an applicant was coming in to be the CEO of a troubled bank, the applications office “would look to their experience [as o]ne of the factors we would consider.”⁴⁸⁰ Elaborating on this point, Mr. Clark stated the Federal Reserve’s applications office “would look to that experience level of that individual as to whether or not they have had the kind of experience that may be needed or required to work in a troubled institution.”⁴⁸¹

Mr. Clark explained that when the application was filed, if he was assigned to evaluate the application then he would have reviewed the application.⁴⁸² However, while recalling that he had conversations with Mr. Smith about the application, he had no specific recollection of the Form 2081 filed with respect to Mr. Smith’s application regarding Farmers State Bank and did not know if he was the one who reviewed the application.⁴⁸³ He added that if he was not the employee who reviewed Mr. Smith’s application, the other employee might have been Grady Kessler.⁴⁸⁴

Mr. Clark testified that while working in the applications department he both assigned and took for himself some of the applications, such that either he would be the primary contact (of cases he assigned to himself), or would serve in an oversight capacity only – he would “look at it, a quick review for completeness as far as I can tell,” but would not evaluate the quality of the answers.⁴⁸⁵

Presented with a copy of the Form 2081b, entitled “Interagency Notice of Change in Director or Senior Executive Officer” bearing Mr. Smith’s February 28, 2015 application,⁴⁸⁶ Mr. Clark testified that he did not recall having the occasion to review this application, and that he would have reviewed the exhibits accompanying the application only if he was assigned to do so.⁴⁸⁷

Mr. Clark explained that during his discussions with Mr. Smith, he understood that Mr. Kiolbasa was trying to become an employee at Farmers in a position “that did not require

⁴⁷⁸ *Id.* at 9, 17 (Clark).

⁴⁷⁹ *Id.* at 12 (Clark).

⁴⁸⁰ *Id.* at 16 (Clark).

⁴⁸¹ *Id.* at 16-17 (Clark).

⁴⁸² *Id.* at 17 (Clark).

⁴⁸³ *Id.* at 17-19 (Clark).

⁴⁸⁴ *Id.* at 23 (Clark).

⁴⁸⁵ *Id.* at 24 (Clark).

⁴⁸⁶ *Id.* at 25-26 (Clark); Resp. Ex. 25 FSB007469-93.

⁴⁸⁷ *Id.* at 27 (Clark).

approval” under the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) because it would not be considered a senior executive position. According to Mr. Clark, Mr. Smith “was very clear that [Mr. Kiolbasa’s] role was limited in such a way that he was not construed or considered by management or us to be a senior executive officer as that term is defined in the regulation,” such that “no notice is required” for Mr. Kiolbasa to become an employee at Farmers.⁴⁸⁸

According to Mr. Clark, both Mr. Smith and Mr. Kiolbasa had filed to become senior executive officers at Farmers or its holding company, but that “in lieu of that . . . Mr. Smith initiated a dialog about ‘what if Mr. Kiolbasa were to go and become an employee of Farmers but not a senior executive level,’” – would that require Federal Reserve approval?⁴⁸⁹ Mr. Clark said he told Mr. Smith approval would not be needed provided they were “clear in what capacity that is, such that it doesn’t raise to the level that it trips a filing requirement or prior approval under FIRREA and Reg Y.”⁴⁹⁰

When asked whether he could recall requesting information from Mr. Smith related to his application, Mr. Clark testified that he did not recall making such a request.⁴⁹¹ He testified that if he had wanted an applicant to supply information that is outside the information requested in such an application, his request would be in writing and it would be directed to the applicant himself or herself, or the applicant’s attorney or consultant.⁴⁹²

Mr. Clark testified that in evaluating an applicant’s experience, the following would be taken into account:

We would look to see where . . . they have been employed, in what capacity they’ve been employed, how they conducted their – based on what, like for example, examination reports or inspection reports, a holding company or other banks that they may have worked in. We would . . . research those, kind of look to see what kind of assessment evaluation of that individual may be present in those reports to help give us an ideal how they performed in the past.⁴⁹³

When asked whether he would ever ask an applicant to provide documents from the bank at which they currently work, Mr. Clark responded “no”, without equivocation or hesitation.⁴⁹⁴ Further, Mr. Clark did not recall ever asking Mr. Echtermeyer to obtain Central documents, and did not recall any circumstances in which non-member bank documents would be useful in his change-in-bank-control review process.⁴⁹⁵

⁴⁸⁸ *Id.* at 20 (Clark).

⁴⁸⁹ *Id.* at 22 (Clark).

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.* at 14 (Clark).

⁴⁹² *Id.* at 31 (Clark).

⁴⁹³ *Id.* at 31-32 (Clark).

⁴⁹⁴ *Id.* at 32 (Clark).

⁴⁹⁵ *Id.* at 33-34 (Clark).

Specifically regarding the documents Mr. Smith stated he had been asked to produce, Mr. Clark testified that while he was generally familiar with ALCO reports, such reports are not typically included in the change-of-control process.⁴⁹⁶ Mr. Clark further could recall no instance where he asked Mr. Echtermeyer to obtain information work product from Mr. Smith, nor where he participated in a telephone conference with Mr. Smith and Federal Reserve examiners.⁴⁹⁷

Testimony from Mr. Clark credibly established that it would be unusual for Federal Reserve application reviewers to make the kind of requests for Central's documents that Mr. Smith has said was the case. Further, the same body of evidence tended to show that the records identified by Mr. Smith would not be useful to the Reserve reviewers, given the nature of the questions presented in the Form 2081b.

Testimony from Mr. Echtermeyer similarly supplied evidence that called into question the truth of Mr. Smith's factual claims regarding why he emailed the documents in Joint Exhibit 64 to Mr. Kiolbasa.

Mr. Echtermeyer testified that during the relevant period, he served as a Central Point of Contact, or CPC, for portfolio banks, monitoring the portfolios of institutions between examinations, answering regulatory questions, and writing memorandums for upcoming examinations to "focus the examiners at the risks of the bank."⁴⁹⁸

Mr. Echtermeyer testified that as CPC he would be assigned to a range of 10 to 15 banks, and would be expected to answer regulatory questions and "even help them with some research," but that he had no responsibility regarding Mr. Smith's application regarding change-of-control at Farmers.⁴⁹⁹ He recalled, nevertheless, discussing the application with Farmers' president, John Gross, in the middle of 2014, and read the business plan Mr. Smith had prepared.⁵⁰⁰ As Farmers' CPC for the Federal Reserve, Mr. Echtermeyer "was talking to John [Gross] about typical things, local economic conditions, financial condition of the bank, different things going on, and during that [Mr. Gross] passed that information on, that they were working with" an investor group "out of Lander that included two bankers that worked for Central Bank and Trust" and that "plans were for them to put together an investor group, inject some capital in the bank, and eventually develop and if approved that they would ultimately become senior executive officers."⁵⁰¹

Asked why he would have read the Respondents' business plan if he would only be observing the 2015 Farmers examination, Mr. Echtermeyer testified: "I think the analyst processing the application thought that I would find that of interest in just helping track what the bank's . . . plan was with the change of control going forward."⁵⁰² He added that while he had

⁴⁹⁶ *Id.* at 35 (Clark).

⁴⁹⁷ *Id.* at 34-35 (Clark).

⁴⁹⁸ *Id.* at 180-81 (Echtermeyer). Mr. Echtermeyer has roughly 26 years of experience in banking supervision, has served as a field examiner on examinations at Farmers in the early 1990s, has been a commissioned examiner since 1996. *Id.* at 182.

⁴⁹⁹ *Id.* at 183, 204 (Echtermeyer).

⁵⁰⁰ *Id.* at 183, 206 (Echtermeyer).

⁵⁰¹ *Id.* at 183-84 (Echtermeyer).

⁵⁰² *Id.* at 206-07 (Echtermeyer).

not reviewed the plan “for the content that applications is looking for,” he nonetheless opined that the plan was a good one, and “[i]f the plan was executed the way it was laid out, it would be good for the bank.”⁵⁰³

In addition to discussing this with Mr. Gross, Mr. Echtermeyer said that Mr. Smith called him to introduce himself, provide contact information, “and explain in general terms what their plans were to invest in the bank and improve the financial conditions of the bank.”⁵⁰⁴

Mr. Echtermeyer testified that while he served as the Federal Reserve’s CPC for Farmers, he had no role in the applications process – that the application Mr. Smith would be submitting to the Federal Reserve would be processed by Jim Clark, who reported to Brady Kessler.⁵⁰⁵ According to Mr. Echtermeyer, CPCs (and possibly Reserve employees who had served as examiners for Farmers) might be asked “if they had any concerns or objections to the filing.”⁵⁰⁶ He added that at the end of the application process, when the application was nearly final, applications staff asked him (as Farmers’ CPC) “if we have any concerns or objections to anything . . . and . . . I do not recall having any objections or concerns.”⁵⁰⁷ He added, however, that at no time did anyone from the Federal Reserve ask him to get information relating to Mr. Smith’s application, that at no time did Mr. Echtermeyer request information from the applications staff about the application, and that he was aware of no circumstances where the applications staff would have asked him to get information from an applicant like Mr. Smith.⁵⁰⁸

Directly refuting Mr. Smith’s testimony, Mr. Echtermeyer testified that at no time did he have a telephone conversation with Mr. Smith in which he asked Mr. Smith to have Mr. Kiolbasa send certain Central documents to him, and never asked either Respondent to provide Central’s asset liability committee reports or its liquidity reports.⁵⁰⁹ Nor, according to Mr. Echtermeyer, would there ever be a reason for him to request gap reports, ALCO reports, or liquidity reports relating to Central: documents from Central “would have nothing to do with” Farmers – “It would provide us no insight into the risk management practices that the bank needs to provide.”⁵¹⁰

Mr. Echtermeyer identified Joint Exhibit 64, which contains the documents Mr. Smith averred he sent to Mr. Kiolbasa at Mr. Echtermeyer’s request.⁵¹¹ Mr. Echtermeyer opined that these documents are typical of what he sees from other banks, but inasmuch as the email transmission was dated February 13, 2015, when Mr. Smith was working at Central, it would not

⁵⁰³ *Id.* at 208 (Echtermeyer).

⁵⁰⁴ *Id.* at 184 (Echtermeyer).

⁵⁰⁵ *Id.* at 186 (Echtermeyer).

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.* at 209 (Echtermeyer).

⁵⁰⁸ *Id.* at 186-87 (Echtermeyer).

⁵⁰⁹ *Id.* at 188. (Echtermeyer).

⁵¹⁰ *Id.* at 189 (Echtermeyer).

⁵¹¹ *Id.* at 190 (Echtermeyer).

be typical for a banker to transmit such documents by their personal email address, as was the case here.⁵¹²

Mr. Echtermeyer opined that these documents, along with the other documents in Joint Exhibit 64 (including Central's three-month cash flow analysis – worse case, and Central's public funds and repurchase reports) are regarded as proprietary property of Central and as both internal and confidential bank records – which banks that he supervises would not publicly disclose.⁵¹³ He testified that while some of the information in the reports is publicly available, it is not available in this format, adding that “there's certainly assumptions that they made in here that are not publicly available.”⁵¹⁴ He testified that he never requested the Respondents to provide these documents, and could think of no circumstance where a Federal Reserve CPC for Farmers would find this information, from another bank, to be relevant.⁵¹⁵

Responding to Mr. Smith's testimony that during the relevant time period Mr. Echtermeyer was physically present at Farmers (and thus explaining why Mr. Smith sent the five documents identified in Joint Exhibits 64, 65, and 66⁵¹⁶ to Mr. Kiolbasa at Farmers), Mr. Echtermeyer refuted Mr. Smith's testimony, stating that he was not working on-site at Farmers, and his only role during the February exam (which began on February 9, 2015) was as an observer, observing from his office.⁵¹⁷

Elaborating on this answer, Mr. Echtermeyer testified:

Given the financial information of the bank and pending the change in control that was in process, our process at Kansas City Federal Reserve Bank is to ensure some independence. So in those situations, the CPCs usually step out of it. The examiner in charge, or EIC, writes the scope memorandum, leads the whole exam, and arrives at the conclusions. So that helps us to ensure that the field examiner is making an independent assessment of the bank.⁵¹⁸

Asked “Why is that independence from the CPC and the actual examiners important? Mr. Echtermeyer responded:

I think the CPCs can -- they can get kind of close to the bankers. You know, they're working all along to help the bank move along, and so there's some -

⁵¹² *Id.* See also, to the same effect, testimony that Joint Exhibit 65, Mr. Smith's February 24, 2015 email to Mr. Kiolbasa, containing Central's Assumption Review, likewise contained internal and confidential Central documents, would not normally be sent via a banker's personal email account, are not documents he would have requested as Farmers' CPC, and had not been requested by Mr. Echtermeyer. *Id.* at 194-95 (Echtermeyer); and Joint Exhibit 66, Mr. Smith's February 24, 2015 Yahoo account email to Mr. Kiolbasa's Hotmail account attaching Central's June 30, 2012 ALCO Model Look Back interoffice memorandum. *Id.* at 197-98.

⁵¹³ *Id.* at 191-94 (Echtermeyer).

⁵¹⁴ *Id.* at 194 (Echtermeyer).

⁵¹⁵ *Id.* at 192-93 (Echtermeyer).

⁵¹⁶ *Id.* at 97 (Smith).

⁵¹⁷ *Id.* at 198-99 (Echtermeyer).

⁵¹⁸ *Id.* at 199 (Echtermeyer).

- there could be some intent for the CFO to look past some things. So having the field examiners that are independent making those assessments is what you want to have.⁵¹⁹

Mr. Echtermeyer testified that he did not ask Mr. Kiolbasa to obtain information from Mr. Smith while Mr. Smith was still employed at Central – adding that doing so would be “highly unusual” – and did not recall participating in any conference phone call with the examiners or with either Mr. Kiolbasa or Mr. Smith.⁵²⁰

Having examined each of the documents in Joint Exhibits 64, 65, and 66, Mr. Echtermeyer testified he did not pass these documents along to the applications staff at the Federal Reserve, adding that when he first read Mr. Smith’s testimony from the Central litigation in which Mr. Smith averred that Mr. Echtermeyer was the person who “called and asked that they scan Central documents to an examiner at Farmers[,] my initial reaction was that was not true” and today it remains his reaction to Mr. Smith’s averment.⁵²¹

E. Weighing Evidence Regarding Respondents’ Claim that Mr. Smith Produced Documents to Mr. Kiolbasa at Mr. Echtermeyer’s Request

When evaluating the weight that conflicting testimony should be given, experience teaches that no one formula fits all needs – but that in broad terms, once the record presents such a conflict, the core tests include corroboration, inherent believability, internal consistency and reliability of other parts of the evidence, clouded or clear recollection, and (in very limited circumstances) witness demeanor.

Here, I reiterate that apart from the question regarding whether Mr. Echtermeyer did or did not request confidential documents from Central, Mr. Smith engaged in unsafe and unsound conduct and breached fiduciary duties owed to Central by transmitting the contents of Joint Exhibits 64, 65 and 66 to Mr. Kiolbasa without first seeking and securing Central’s permission to do so.

On the question of whether Mr. Echtermeyer made the requests averred by Mr. Smith, I find insufficient evidence to support Mr. Smith’s factual claim. Documentary evidence that could have corroborated the claim is wholly lacking here, given the absence of any reference in any of these exhibits to the proposition that the transmissions were intended to be delivered to Mr. Echtermeyer.

Testimonial evidence that could have supported the claim is of questionable character here: Mr. Kiolbasa testified that he sought Central documents from Mr. Smith – including his September 15, 2014 email (to and from personal email accounts) to Mr. Smith seeking Central’s appraisal checklist form, so that Mr. Kiolbasa could provide the form to Michelle Thomas. From this testimony there is a want of evidence that would suggest either Respondent felt any qualms about such a document diversion – certainly no one made any effort to secure Central’s permission to take these documents.⁵²²

⁵¹⁹ *Id.*

⁵²⁰ *Id.* at 200 (Echtermeyer).

⁵²¹ *Id.* at 202 (Echtermeyer).

⁵²² *Id.* at 142-43(Kiolbasa); Jt. Ex. 41.

To the same effect, the record reflects Mr. Kiolbasa sought from Mr. Smith the loan balances and rates for a named Central customer,⁵²³ that Mr. Kiolbasa received from Mr. Smith Central's Dormant Account Procedures,⁵²⁴ and that Respondents exchanged email messages identifying Central customers, providing rate and payoff details of the customers' loans, and speculating how many of the loans identified "will move without us offering something more", all without feeling the need to secure Central's consent.⁵²⁵

Testimonial evidence from Mr. Clark and Mr. Echtermeyer persuasively establishes that there would be no reason for either Federal Reserve employee to seek the documents sent to Mr. Kiolbasa in Joint Exhibits 64, 65, and 66. Given the sensitive nature of the contents of those documents, and given that neither Mr. Clark nor Mr. Echtermeyer supervised Central, I am persuaded that the record lacks reliable and substantial evidence that would support Respondents' claim in this regard.

Already established in the record, and beyond the scope of the presented question, was that Respondents had engaged in misconduct, the misconduct had an actionable adverse effect on Central and Farmers, and Respondents were culpable in respects other than those directly associated with the documents identified by Respondents found in Joint Exhibits 64, 65, and 66. Testimony taken during the December 3, 2019 hearing established Respondents' culpability through both willful and continuing disregard for the safety and soundness of both Central and Farmers, and their personal dishonesty.

Conclusions of Law

Upon the foregoing findings, the following Conclusions of Law are entered:

Conclusion of Law # 5: An "unsafe or unsound" practice is an imprudent act that places an abnormal risk of financial loss or damage on a banking institution. Generally speaking, an "unsafe or unsound practice" is any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds.

Conclusion of Law # 6: As a result of the Respondents' foregoing acts, omissions and practices, the Respondents both have engaged and participated in unsafe and unsound banking practices in connection with Central and Farmers.

Conclusion of Law # 7: As a result of the Respondents' foregoing acts, omissions and practices, the Respondents both have breached fiduciary duties of care, loyalty, and candor each owed to the Central and Farmers.

Conclusion of Law # 8: The acts, omissions and practices of the Respondents establish both Respondents' personal dishonesty and demonstrate Respondents' willful and continuing disregard for the safety and soundness of both Central and Farmers.

⁵²³ Tr. Dec. 3, 2019 at 144 (Kiolbasa); Jt. Ex. 51.

⁵²⁴ Tr. Dec. 3, 2019 at 145 (Kiolbasa); Jt. Ex. 61.

⁵²⁵ Tr. Dec. 3, 2019 at 147-48 (Kiolbasa); Jt. Ex. 45. See also Tr. Dec. 3, 2019 at 148 (Kiolbasa); Jt. Ex. 53 (11/10/14 email from Kiolbasa to Smith seeking loan payoffs and per diems).

Recommended Orders of Prohibition

Pursuant to the provisions of Sections 8(e) of the Federal Deposit Insurance Act, upon the foregoing Findings of Fact and Conclusions of Law, I recommend the Board of Directors of the Federal Reserve System issue Orders prohibiting Frank Smith and Mark Kiolbasa from further participation in any manner in the conduct of the affairs of any financial institution or organization enumerated in section 8(e)(7)(A) of the Act, 12 U.S.C. § 1818(e)(7)(A); from soliciting, procuring, transferring, attempting to transfer, voting, or attempting to vote any proxy, consent or authorization with respect to any voting rights in any financial institution enumerated in section 8(e)(7)(A) of the Act, 12 U.S.C. § 1818(e)(7)(A); from violating any voting agreement previously approved by the appropriate Federal banking agency; and from voting for a director, or serving or acting as an institution-affiliated party.

SO ORDERED.

Date: April 13, 2020

Christopher B. McNeil, JD, Ph.D
Administrative Law Judge
Office of Financial Institution Adjudication

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