UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

In the Matter of **WILLIAM R. BLANTON** Former Director and Interim Chief Executive Officer and Vice Chairman, individually and as an institution-affiliated party UNITED AMERICAS BANK, N.A. Atlanta, Georgia	OCC AA-EC-2015-24

ORDER ASSESSING CIVIL MONEY PENALTY

On June 30, 2015, the Enforcement and Compliance Division ("Enforcement Counsel") for the Office of the Comptroller of the Currency ("OCC") issued a Notice of Charges, as amended on April 4, 2016, ("Amended Notice") against Respondent William R. Blanton ("Respondent"), former director of United Americas Bank, N.A., Atlanta, Georgia ("UAB" or the "Bank"). The Amended Notice alleged that (1) Respondent permitted a series of large overdrafts by a significant customer of the Bank, without adequate controls in place, when capital levels were critically deficient, and (2) Respondent rebooked a series of previously written-down loans in contravention of generally accepted accounting principles and Consolidated Reports of Condition and Income ("Call Report") instructions, causing the Bank to file materially inaccurate Call Reports in violation of 12 U.S.C. § 161. The Amended Notice sought a civil money penalty of $10,000 pursuant to 12 U.S.C. § 1818(i)(2)(A), (B). Respondent timely filed his Answer and Affirmative Defenses to the Amended Notice on April 19, 2016.

On September 19, 2016, Enforcement Counsel filed its Motion for Summary Disposition. Respondent filed a response on October 17, 2016. The response included a statute of limitations argument related to the overdraft charge. The Administrative Law Judge ("ALJ") construed Respondent's statute of limitations argument as a Motion for Partial Summary Disposition on the overdraft charge. On November 1, 2016, the ALJ issued two orders, one finding that Enforcement Counsel was entitled to summary disposition and the other finding that the statute of limitations did not bar the overdraft charge. The ALJ, however, did not decide the appropriateness of a $10,000 civil money penalty in his November 1 orders. On November 7, 2016, Respondent and Enforcement Counsel stipulated that, if the evidence supported the charges, a $10,000 civil money penalty would be appropriate.

On January 19, 2017, the ALJ issued a decision ("Recommended Decision") recommending that the Comptroller issue an order assessing the $10,000 civil money penalty against Respondent. The ALJ issued his Recommended Decision after finding, on Enforcement Counsel's Motion for Summary Disposition and Respondent's Motion for Partial Summary Disposition, that no genuine issue of any material fact existed and that Enforcement Counsel was entitled to judgment as a matter of law. On February 20, 2017, Respondent filed exceptions to the Recommended Decision ("Exceptions"). On March 23, 2017, Enforcement Counsel filed a response to the Exceptions, and on March 30, 2017, Respondent filed his reply.

Having considered the evidence presented to the ALJ, the arguments of Enforcement Counsel and Respondent, the Recommended Decision, Respondent's Exceptions, and the record as a whole,

Pursuant to the authority vested in the Comptroller of the Currency by section 8(i) of the Federal Deposit Insurance Act, 12 U.S.C. § 1818(i):

IT IS HEREBY ORDERED that Respondent, William R. Blanton, be assessed a civil money penalty in the amount of ten-thousand dollars ($10,000).

Remittance of the civil money penalty shall be payable to the Treasury of the United States and delivered to the Office of the Comptroller of the Currency, Washington, D.C.

The provisions of this ORDER will remain in effect and in force except in the event that, and until such time as, any provision of this Order shall have been modified, terminated, suspended, or set aside by the Office of the Comptroller of the Currency or any other governing authority.

IT IS SO ORDERED.

Dated at Washington, D.C., this 10th day of July, 2017.

s/

Keith A. Noreika
Acting Comptroller of the Currency
Office of the Comptroller of the Currency

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

In the Matter of **WILLIAM R. BLANTON** Former Director and Interim Chief Executive Officer and Vice Chairman, individually and as an institution-affiliated party UNITED AMERICAS BANK, N.A. Atlanta, Georgia	OCC AA-EC-2015-24

FINAL DECISION

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I. Introduction

This is a Final Decision in an enforcement action brought by the Enforcement and Compliance Division ("Enforcement Counsel") of the Office of the Comptroller of the Currency ("OCC" or "Agency") against Respondent William R. Blanton ("Respondent"), former director of United Americas Bank, N.A., Atlanta, Georgia ("UAB" or the "Bank"). Pursuant to 12 U.S.C. § 1818(i)(2)(A) and (B), Enforcement Counsel has sought a civil money penalty ("CMP") of $10,000 against Respondent in connection with his role in managing the Bank in 2010.

This enforcement action arises in the wake of the failure of UAB, which was closed and placed in receivership on December 17, 2010.[1] Respondent assumed the duties of UAB's Interim Vice Chairman and Chief Executive Officer ("Interim CEO") from late April 2010 to September 15, 2010.[2] At issue in the present matter are two separate sets of transactions or practices at UAB. The first focuses on Respondent's role in allowing a series of significant overdrafts by a customer of the Bank. Despite the fact that at one point[3] the overdrafts by this single customer represented approximately 65 percent of the Bank's Tier 1 Capital, the Bank lacked adequate controls to address the risks posed by the overdrafts. Moreover, the overdrafts occurred at a time when capital levels at the Bank were deemed critically deficient, and after the Respondent had been warned about the practice by the OCC and other Bank officers. The second focuses upon Respondent's attempt to rebook a series of previously written-down loans. As set forth below, Respondent's actions caused the Bank to file materially inaccurate Consolidated Reports of Condition and Income ("Call Reports").

For the reasons set forth below, the Comptroller[4] adopts the recommendation from the Administrative Law Judge ("ALJ") that the Comptroller assess a $10,000 CMP against Respondent. The Comptroller specifically adopts the ALJ's recommendation that Respondent recklessly engaged in an unsafe or unsound practice when he permitted a series of overdrafts by

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[1] Enforcement Counsel's Summary Disposition Exhibit ("Ex. EC") 11; Ex. EC 75 at 2. As of September 30, 2010, UAB had total assets of $242,339,000 and total deposits of $193,803,000.

[2] Respondent takes issue with Enforcement Counsel's characterization of his position at the Bank. On June 7, 2010, the OCC sent the Bank a letter stating that it approved the Bank's request for a waiver of the prior notice requirement under 12 U.S.C. § 1831i and 12 C.F.R. § 5.51 and the letter tentatively permitted Respondent to serve as the Bank's Interim CEO and Vice Chairman. *See* Respondent's Summary Disposition Exhibit ("Ex. R") 23 at 1-2. Respondent denies that he was appointed to the position of Interim CEO and Vice Chairman, asserting that the approved waiver only applied to the prior notice requirement and that the Bank failed to submit a complete notice required under the applicable regulations. Amended Notice of Charges ("Amended Notice") ¶¶ 7, 9; Answer and Affirmative Defenses to the Amended Notice ("Answer") ¶¶ 7, 9. Respondent admits, however, that from November 28, 2007, to October 7, 2010, he served as a member of the Bank's board of directors. Amended Notice ¶ 2; Answer ¶ 2. Because Respondent was a board member, he was an institution-affiliated party as that term is defined under the Federal Deposit Insurance Act, 12 U.S.C. § 1813(u), and for the purposes of this enforcement action. As such, Respondent owed a fiduciary duty of care and loyalty to the Bank. Amended Notice ¶ 12; Answer ¶ 12.

[3] For example, this bank customer had an overdraft total of almost $450,000 on July 20, 2010, which was nearly 65 percent of the Bank's Tier 1 capital.

[4] On May 5, 2017, Keith A. Noreika became Acting Comptroller of the Currency. Some actions related to this enforcement action were taken prior to Acting Comptroller Noreika's appointment. For the purposes of consistency, this Final Decision will refer to the "Acting Comptroller" and "Comptroller" as "Comptroller."

a significant customer of the Bank without adequate controls. The Comptroller also adopts the ALJ's recommendation that Respondent violated 12 U.S.C. § 161 when he caused the Bank to file materially inaccurate Call Reports. The Comptroller adopts the ALJ's recommendation that Respondent engaged in a pattern of misconduct when participating in or directing the actions that are the bases for the enforcement action. Finally, the Comptroller adopts the ALJ's recommendation that the statute of limitations in 28 U.S.C. § 2462 does not bar the overdrafts charge, but only to the extent discussed below.

II. Procedural History

Enforcement Counsel filed a Notice of Charges against Respondent on June 30, 2015, as amended on April 4, 2016, ("Amended Notice") alleging that Respondent recklessly engaged in unsafe or unsound practices and breached his fiduciary duty by continuing to allow a Bank customer to incur and maintain overdrafts without putting adequate controls in place, when capital levels were deemed critically deficient, and despite prior OCC criticism and warnings from Bank officers.[5] The Amended Notice also alleges that Respondent violated the law and breached his fiduciary duty when he caused the Bank to rebook charged-off loans in contravention of generally accepted accounting principles ("GAAP") and the Call Report instructions, which resulted in the filing of materially inaccurate Call Reports.[6] The Amended Notice alleges that Respondent's practices, breaches, and violations were part of a pattern of misconduct.[7] On the basis of the allegations, Enforcement Counsel sought a CMP in the amount of $10,000 against Respondent pursuant to 12 U.S.C. § 1818(i)(2)(A) and (B). Respondent filed an Answer and Affirmative Defenses to the Amended Notice ("Answer") on April 19, 2016.

On September 19, 2016, Enforcement Counsel filed its Motion for Summary Disposition and related briefing. Respondent filed a response on October 17, 2016. The response included a statute of limitations argument related to the overdrafts. The ALJ construed Respondent's statute of limitations argument as a Motion for Partial Summary Disposition on the overdraft charge. On November 1, 2016, the ALJ issued two orders, one finding that Enforcement Counsel was entitled to summary disposition and the other finding that the statute of limitations did not bar this action. The ALJ, however, did not decide the appropriateness of a $10,000 CMP. On November 7, 2016, Respondent and Enforcement Counsel stipulated that, if the evidence supported the charges, a $10,000 CMP would be appropriate.

On January 19, 2017, the ALJ issued the Recommended Decision. The Recommended Decision contained the following findings of fact and conclusions of law:

1. Respondent "repeatedly and knowingly breached fiduciary duties he owed to the Bank, and engaged in a pattern of misconduct that constituted reckless engagement in banking practices that were both unsafe and unsound" by not mitigating the risk presented by the overdrafts in the Alex Campos accounts.[8]

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[5] Amended Notice ¶¶ 13-36.
[6] Amended Notice ¶¶ 37-76.
[7] Amended Notice ¶¶ 77-79.
[8] Recommended Decision at 30.

2. The statute of limitations did not bar the portion of the action based on the overdrafts.[9]
3. Respondent, by rebooking certain loans, "caused the Bank to file inaccurate Call Reports, in violation of 12 U.S.C. § 161" and "engaged in a pattern of misconduct that constituted reckless engagement in banking practices that were both unsafe and unsound; and he breached fiduciary duties he owed to the Bank."[10]
4. The record supports both a First Tier CMP pursuant to 12 U.S.C. § 1818(i)(2)(A)(i) and a Second Tier CMP pursuant to 12 U.S.C. § 1818(i)(2)(A)(ii).[11]
5. A $10,000 CMP is an appropriate amount for any such assessment.[12]

Given these findings and conclusions, the ALJ recommended that the Comptroller enter an order assessing a $10,000 CMP against Respondent.[13]

Respondent filed exceptions to the Recommended Decision on February 20, 2017 ("Exceptions"). Respondent's Exceptions are voluminous, with 40 specific exceptions to the Recommended Decision. The Exceptions generally assert that the ALJ improperly decided issues on summary disposition as a matter of law that could only be decided by a trier of fact after a hearing. Respondent also requested that the Comptroller hear oral argument on his Exceptions. On March 23, 2017, Enforcement Counsel filed a response to the Exceptions, and on March 30, 2017, Respondent filed his reply. On April 10, 2017, the Comptroller issued a notice, pursuant to 12 U.S.C. § 1818(h)(1) and 12 C.F.R. § 19.40(a), that the case had been submitted for final decision.

This Final Decision addresses each of Respondent's enumerated Exceptions to the ALJ's Recommended Decision. Appendices A and B, attached to this Final Decision, summarize the Comptroller's decision with respect to (1) the ALJ's findings of fact and conclusions of law, which are contained in the Recommended Decision and (2) Respondent's Exceptions to the Recommended Decision.

III. Analysis

The OCC is an independent bureau of the U.S. Department of the Treasury with primary supervisory responsibility over national banks and federal savings associations under the National Bank Act of 1864 and the Home Owners' Loan Act of 1933.[14] Respondent was an "institution-affiliated party" ("IAP") of the Bank, as that term is defined in 12 U.S.C. § 1813(u), because he was a member of the Bank's board of directors.[15] The Bank was an "insured depository institution" within the meaning of 12 U.S.C. § 1813(c)(2) and 12 U.S.C. § 1818(i)(2).[16] The Bank was a national banking association within the meaning of 12 U.S.C. §

[9] *Id.* at 31.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *See* 12 U.S.C. § 1 *et seq.* and 12 U.S.C. § 1461 *et seq.*
[15] Amended Notice ¶ 2; Answer ¶ 2.
[16] Amended Notice ¶ 1; Answer ¶ 1.

1813(q)(1)(A).[17] The OCC is the "appropriate Federal banking agency" as that term is defined in 12 U.S.C. § 1813(q) and is therefore authorized to initiate and maintain this enforcement action against Respondent pursuant to 12 U.S.C. § 1818(i).[18]

The enforcement provisions of the Federal Deposit Insurance Act ("FDI Act") authorize the Comptroller to impose various remedies for misconduct by a national bank or federal savings association or IAP.[19] One such remedy is the assessment of a CMP against an IAP. Specifically, the FDI Act allows the Comptroller to assess three tiers of penalties, increasing in severity with the characteristics of the offense.[20] In this case, Enforcement Counsel seeks a First Tier and Second Tier CMP against Respondent. The Comptroller may assess a First Tier CMP if it finds an IAP violates any law or regulation.[21] The Comptroller may assess a Second Tier CMP if it finds two conditions are met: (1) misconduct, *i.e.,* a violation of law, a reckless unsafe or unsound practice, or a breach of fiduciary duty; and (2) effect, *i.e.*, a pattern of misconduct, conduct that caused or was likely to cause more than minimal loss to the institution, or conduct that resulted in a gain or benefit to the individual.[22]

A. Request for Oral Argument – 12 C.F.R. § 19.40

Respondent requests that the Comptroller hear oral argument on the Exceptions, pursuant to 12 C.F.R. § 19.40(b). In order to grant the request, the request "must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing."[23] Respondent states that the sizeable record means the case is too complex to fully address in writing.

The Comptroller denies Respondent's Request for Oral Argument. The issues raised in the Exceptions are substantially similar to issues raised in briefs on summary disposition. Respondent's written arguments are comprehensive. Given the amount of briefing in this case—Respondent alone filed nearly 100 pages of briefing with his Exceptions—oral argument is unnecessary.[24]

B. Summary Disposition Standard

Enforcement Counsel and Respondent agree that the summary disposition standard under the OCC's Uniform Rules of Practice and Procedure[25] is similar to that of the summary judgment

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[17] Amended Notice ¶ 3; Answer ¶ 3.
[18] Amended Notice ¶ 4; Answer ¶ 4.
[19] *E.g.*, 12 U.S.C. §§ 1818(b) (cease-and-desist proceedings), 1818(e) (removal and prohibition), and 1818(i) (civil money penalties).
[20] 12 U.S.C. § 1818(i)(2).
[21] 12 U.S.C. § 1818(i)(2)(A)(i).
[22] 12 U.S.C. § 1818(i)(2)(B).
[23] 12 C.F.R. § 19.40(b).
[24] *See In re O'Connell*, OCC No. AA-EC-92-22, 1993 OCC Enf. Dec. LEXIS 431, at *2 n.1 (June 4, 1993).
[25] *See* 12 C.F.R. §§ 19.29 and 19.30.

standard under Rule 56 of the Federal Rules of Civil Procedure.[26] As such, it is appropriate for the Comptroller to consider the jurisprudence of federal courts when ruling on a motion for summary disposition.[27] Under that authority, 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.[28]

Respondent argues in his Exceptions that the ALJ's evidentiary recommendations went beyond the scope of summary disposition by improperly (1) weighing evidence in the Recommended Decision, (2) crediting Enforcement Counsel's evidence, (3) disregarding Respondent's evidence, and (4) drawing inferences in favor of Enforcement Counsel and against Respondent.[29] Respondent argues that the ALJ impermissibly decided issues as a matter of law that may only be decided by a trier of fact because genuine issues of material fact exist based on the administrative record.

In reviewing summary judgment jurisprudence in the federal courts, it is reasonably well-settled that although a judge is barred from making credibility determinations, weighing evidence, and drawing inferences from facts at summary judgment,[30] "there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact" to find for the non-movant.[31] In other words, in granting a motion for summary disposition a trier of fact is not obliged to credit the non-moving party's factual assertions when they are not supported on the record. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."[32] A court is not required to move a case past the summary judgment stage when inferences drawn from the evidence and upon which the non-moving party relies are "implausible."[33] Finally, inferences may be drawn from "underlying facts that are not in dispute, such as background or contextual facts," and assuming the existence of such underlying facts, an inference as to another material fact may be in favor of the non-movant only if it is "rational" and "reasonable" and permissible under the governing substantive law.[34]

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[26] *See* Brief in Support of Enforcement Counsel's Motion for Summary Disposition ("Enforcement Counsel's SD Brief") at 11-12; Respondent's Brief in Opposition to the OCC's Motion for Summary Disposition ("Respondent's SD Opp'n Brief") at 24.

[27] *See In re Cirino*, FDIC-99-011e, 2000 FDIC Enf. Dec. LEXIS 17, at *57-58 (May 10, 2000).

[28] 12 C.F.R. § 19.29(a).

[29] *See generally* Exceptions.

[30] *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986).

[31] *Id.* at 254.

[32] *Scott v. Harris*, 550 U.S. 372, 380 (2007).

[33] *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 743 (11th Cir. 1996) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 592-94 (1986)).

[34] *Id.* at 743 (citing *T.W. Elec. Serv. Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987)).

C. Standards for Exceptions – 12 C.F.R. § 19.39

The OCC's regulations, 12 C.F.R. § 19.39, set forth the time frames and standards for exceptions to recommended decisions issued by an ALJ in OCC enforcement proceedings. Specifically, under 12 C.F.R. § 19.39(c)(2), exceptions must:

> set forth page or paragraph references to the specific parts of the administrative law judge's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

In its response to the Exceptions, Enforcement Counsel argued that the Exceptions did not meet the requirements under 12 C.F.R. § 19.39(c)(2) because they did not reference the legal authority relied upon to support the Exceptions, and therefore the Comptroller should reject all of the Exceptions.[35]

The Comptroller declines to reject the Exceptions on this basis. Respondent does cite some legal authority intermittently throughout the Exceptions, and it is apparent what legal authority supports which Exception. Although Respondent's Exceptions are not models of clarity, do not cite specific legal authority with each Exception, and are repetitive, Respondent's Exceptions comply with the spirit of 12 C.F.R. § 19.39. Thus, the Comptroller will address each of Respondent's Exceptions in turn.

D. The Campos Overdrafts

Turning to the merits of the Exceptions, Respondent's first 24 Exceptions are to the portion of the Recommended Decision that relates to the overdrafts in the accounts owned by Mr. Campos. After reviewing the administrative record, the Recommended Decision, and Respondent's Exceptions, the Comptroller finds that Respondent recklessly engaged in unsafe or unsound banking practices, which was a part of a pattern of misconduct. Moreover, the Comptroller finds the statute of limitations does not bar the portion of the action based on a bank customer's overdrafts. The Comptroller does not find, however, that Respondent breached his fiduciary duty. Nevertheless, the Comptroller finds Respondent's actions in allowing the overdrafts warrant assessment of a Second Tier CMP.

1. Facts, Recommended Decision, and Respondent's Exceptions Related to the Campos Overdrafts

The evidence in the administrative record demonstrates that the following facts are undisputed.

The facts that give rise to this portion of the enforcement action, as alleged in Article III of the Amended Notice, consist of a series of overdrafts by a Bank customer named Alex Campos. Mr. Campos maintained over 30 business and personal accounts at the Bank, and he maintained

[35] *See* Enforcement Counsel's Exception Response Brief at 4-6.

overdrafts in multiple accounts concurrently.[36] In 2003, he incurred a multi-million dollar overdraft, which he eventually paid back to the Bank.[37] As a result of this overdraft, the Bank decided it would not honor Mr. Campos' overdrafts unless there was a positive net balance in all of his accounts exceeding the amount of the overdrafts.[38]

Respondent was aware of Mr. Campos' overdrafts, including the 2003 overdraft, before he assumed the duties of Interim CEO, because they were discussed "ad nauseam" in board meetings.[39] Once Respondent assumed the duties of Interim CEO, Mr. Campos continued to incur and maintain overdrafts in his accounts at the Bank.[40] Mr. Campos incurred a number of significant overdrafts during the time that Respondent assumed the duties of Interim CEO.[41] For example, on July 20, 2010, Mr. Campos' combined accounts had an overdraft total of $443,523.23.[42] This amount was nearly 65 percent of the Bank's Tier 1 capital.[43]

In its Amended Notice and Summary Disposition briefing, Enforcement Counsel alleged that the OCC, concerned about the Bank's survival, consistently pointed out problems arising from these overdrafts during the time that Respondent assumed the duties of Interim CEO.[44] Specifically, on May 17, 2010, the OCC held a meeting to discuss exam findings with Respondent.[45] At this meeting, the OCC provided a draft section of a report of examination ("ROE") that noted "the risks involved with allowing a customer to make large and frequent intra fund transfers that result in overdrafts."[46] Again, on August 12, 2010, the OCC provided a draft section of an ROE that stated, "The Bank must cease the practice of allowing intrabank transfers on insufficient funds which result in large overdrafts."[47] On August 31, 2010, the OCC issued an ROE, which describes Mr. Campos' overdrafts as posing "excessive" and "significant" credit risk to the Bank "because it does not have the legal authority to offset against [sic] the accounts against each other."[48] The ROE further stated that allowing these overdrafts without proper controls was an unsafe or unsound practice.[49]

Despite these warnings, Enforcement Counsel alleged that Respondent failed to put in place acceptable controls for these overdrafts.[50] OCC examiners expected him to either get Mr. Campos' accounts out of the Bank, get the right of offset between Mr. Campos' accounts, or stop the overdraft activity.[51] Respondent did none of these, however, and allowed Mr. Campos to

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[36] Exs. EC 79, 91, 92, 93, 94, 95, 96, 97, and 98.
[37] Ex. EC 80; Ex. R 20.
[38] Ex. R 17 ¶ 13.
[39] Exs. EC 3 at 100:11-101:3, 111:17-112:16; 36 at 67:6-16. Ex. R 11 at 314:19-24.
[40] *Supra* note 38; Ex. EC 9 at 19.
[41] Ex. EC 34 ¶ 10-12.
[42] *Id.* at ¶ 12.
[43] *Id.*
[44] Ex. EC 82 at 20:6-21:9.
[45] Exs. EC 86 and 87.
[46] Ex. EC 87 at 5.
[47] Ex. EC 99 at 6.
[48] Ex. EC 5 at 6
[49] *Id.* at 2.
[50] Amended Notice ¶ 16; Enforcement Counsel's SD Brief at 8-11.
[51] Ex. EC 82 at 20:12-23.

continue his overdrafts as before. For example, on May 27, 2010, the Bank's Bank Secrecy Act ("BSA") Officer forwarded an e-mail to Respondent, requesting approval for an intrabank transfer between Mr. Campos' accounts to cover overdrafts.[52] Again, on June 17, 2010, the Bank's BSA Officer sent an e-mail to Respondent noting that the Bank was still allowing intrabank transfers between Mr. Campos' accounts to cover overdrafts.[53] As of July 20, 2010, the Bank's policy for handling Mr. Campos' overdrafts was to "pay everything."[54]

Respondent did make some effort to control the risks of Mr. Campos' overdrafts. Respondent believed that best practices would include additional controls, such as cross-guarantees between accounts and personal guarantees from Mr. Campos.[55] He was not overly concerned about the risk to the Bank, however, and thought "the regulators were making mountains out of molehills."[56] He assigned the Bank's Chief Credit Officer ("CCO") to implement these controls in June 2010.[57] In August 2010, the Bank's CCO met with Mr. Campos and they agreed in principle to an overdraft limit of 10 percent of Mr. Campos' total account balances at the Bank, with the right of offset between accounts, along with personal and corporate guarantees from Mr. Campos and his business partners.[58] This agreement was never formalized and Mr. Campos continued to incur overdrafts in his accounts even after this meeting.[59] On September 21, 2010, the Bank's CCO sent an e-mail to Mr. Campos to get the necessary documents to formalize the agreement.[60] Only on October 8, 2010, after Mr. Blanton resigned as Interim CEO and as a director from the Bank, did the Bank's CCO implement any actual controls by telling Mr. Campos the Bank would no longer honor his overdrafts.[61]

Based on the factual record developed in the parties' summary disposition briefing, the ALJ's Recommended Decision concluded that Respondent recklessly engaged in an unsafe or unsound banking practice.[62] The ALJ found that Respondent knew about Mr. Campos' overdrafts, allowed the overdrafts to continue, and Respondent knew the overdrafts were so large that, if left uncovered, they would have likely caused the Bank to fail.[63] Moreover, the ALJ found that Respondent did not implement effective controls, which could have included, *e.g.*, securing a promissory note, obtaining collateral, obtaining a formal right of offset among Mr. Campos' accounts, or imposing limits on the amount of overdrafts Mr. Campos could make.[64] Based on these facts, the ALJ concluded that Respondent recklessly engaged in unsafe or unsound banking practices, breached his fiduciary duty, and engaged in a pattern of misconduct in allowing Mr. Campos' overdrafts.[65] Therefore, he held that Enforcement Counsel was entitled to judgment as

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[52] Ex. EC 85.
[53] Ex. EC 88.
[54] Ex. EC 89.
[55] Ex. EC 3 at 122:14-123:17, 124:21-125:14.
[56] *Id.* at 125:7-10.
[57] Ex. R 11 at 316:6-25; Ex. R 5 at 189:14-25.
[58] Ex. R 6, 7.
[59] For example, he incurred a $183,298.61 overdraft in his personal account on August 30, 2010. Ex. EC 9 at 19.
[60] Ex. R 7.
[61] Ex. R 18.
[62] Recommended Decision at 14.
[63] *Id.*
[64] *Id.* at 15.
[65] *Id.* at 30.

a matter of law and recommended the Comptroller enter an order assessing a $10,000 CMP against Respondent.[66]

Respondent raises a variety of Exceptions to these conclusions. In general, he raises factual Exceptions, arguing that the ALJ improperly weighed evidence on summary disposition. He also raises Exceptions to the basis of some of the ALJ's legal conclusions. The Comptroller will address each Exception in turn.

2. *Unsafe or Unsound Practices Related to the Campos Overdrafts*

The first set of Respondent's Exceptions contest the conclusion that allowing Mr. Campos' overdrafts was an unsafe or unsound practice. Respondent does not challenge the ALJ's definition of unsafe or unsound practices. Instead, he argues there are material factual disputes that prevent the ALJ from concluding, on summary disposition, that allowing these overdrafts was an unsafe or unsound practice.

The ALJ correctly stated the standard for determining whether a practice is unsafe or unsound:

> An unsafe or unsound practice includes 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.[67]

Turning to the specific Exceptions, Respondent first argues that the ALJ ignored controls the Bank had in place to mitigate the risk with Mr. Campos' overdrafts. In particular, he argues the Bank would not honor overdrafts unless the balance in all Mr. Campos' accounts exceeded the overdrafts.[68] Moreover, Respondent argues that the Bank had the right to transfer funds between Mr. Campos' accounts to cover the overdrafts.[69] He notes that Mr. Campos could not challenge the Bank's ability to transfer funds between his accounts because intentionally overdrawing a checking account is a felony under Georgia law.[70] Respondent points to an affidavit from Bank counsel, which concludes that these controls made the Bank's practice of honoring Mr. Campos' overdrafts safe and sound.[71] As such, Respondent argues that these overdrafts were not an unsecured extension of credit.[72] Because the ALJ did not consider this affidavit in his Recommended Decision, Respondent argues that the Recommended Decision should be reversed.

The Comptroller is not convinced by these Exceptions. While the ALJ did not cite Bank counsel's affidavit in his Recommended Decision, the content of the affidavit is ultimately not

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[66] *Id.* at 30-31.
[67] *In re Adams*, No. OCC AA-EC-11-50, 2011 OCC Enf. Dec. LEXIS 323, at *6 (Sept. 30, 2014). *See also, e.g., Gully v. NCUA*, 341 F.3d 155, 165 (2d Cir. 2003).
[68] Exceptions # 1, 2, 3, 4, 6, 8, 19.
[69] *Id.* # 1, 2, 3, 6, 8.
[70] *Id.* # 2, 3.
[71] Ex. R 17; Exceptions # 1, 2, 3, 4, 7, 19.
[72] Exception # 9.

material to reaching a conclusion whether Respondent's actions were unsafe or unsound. Mr. Campos' overdrafts were unsafe and unsound because they occurred without effective security. The Bank did not have a promissory note with Mr. Campos covering the overdrafts. The Bank did not have collateral covering the overdrafts. The Bank did not have a written agreement with Mr. Campos allowing it to transfer funds between his accounts. The Bank did not have guarantees from Mr. Campos or his companies to cover the overdrafts. As the ALJ stated, the overdrafts occurred despite "no evidence of a promissory note or other terms protecting the [B]ank's interests and with no collateral involved."[73] Given the amounts of Mr. Campos' overdrafts—over 65 percent of the Bank's Tier 1 capital on July 20, 2010—the size of the risk was sufficient to potentially cause the Bank's failure if Mr. Campos did not cover them.

The Bank's "controls" that Respondent points to do not mitigate this risk. Mr. Campos' overdrafts, if not covered, would have caused the Bank a significant loss, even if all of Mr. Campos' accounts still had a positive net balance. Moreover, a careful reading of Bank counsel's affidavit reveals that the Bank *did not* actually have the right to transfer money between accounts.[74] It states, "the Bank routinely and at Mr. Campos' or his staff's request or approval transferred funds between the Campos' companies' accounts" and "there was a history of the Bank transferring funds between the accounts with Mr. Campos' and his staff's *acquiescence* to cover overdrafts."[75] Thus, the Bank could not unilaterally transfer money between Mr. Campos' accounts; it had to get permission from Mr. Campos or his staff first.[76] The fact that Mr. Campos could be criminally liable if he did not cover the overdrafts is also immaterial to the conclusion that allowing the overdrafts was an unsafe or unsound practice. The Bank would still incur any losses due to uncovered overdrafts, irrespective of Mr. Campos' potential criminal liability. In these circumstances, Bank counsel's conclusion that the Bank's controls were safe and sound is unsupported by the record.[77] Respondent's Exception that these overdrafts were not unsecured is similarly incorrect, because the Bank had no collateral securing the overdrafts.[78] The facts to which Respondent points are not evidence that the Bank had any sort of collateral securing the overdrafts.

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[73] Recommended Decision at 11.

[74] *See* Ex. R 17.

[75] *Id.* ¶¶ 9, 15 (emphasis added)

[76] Even if the Bank could, in practice, unilaterally transfer money between Mr. Campos' accounts, the Bank still did not have a written agreement with Mr. Campos allowing it to transfer money between his accounts. This is further evidence that the Bank did not have effective security for the overdrafts incurred by Mr. Campos. *See also* Ex. EC 34 ¶ 21 ("Even if Mr. Campos had collected funds in the aggregate in his related account, without an agreement to offset the account of one of his related entities against the account of another, the Bank would have suffered a loss if Mr. Campos failed to transfer sufficient funds or given the [B]ank authority to transfer funds to cover any of the overdrafts."). To the extent Respondent attempts to argue that Mr. Campos and the Bank had an implied contract allowing the Bank to transfer money between his accounts, he does not attempt to show the elements necessary to find an implied contract under Georgia law, the law of the state where the Bank was located.

[77] The Comptroller also notes that Bank counsel does not cite any authority or offer a definition of what constitutes a safe and sound bank practice in his affidavit. *See* Ex. R 17. The Comptroller does not credit Bank counsel's unsupported conclusions that the Bank's so-called controls made this practice safe and sound. *See Liberty Lobby*, 477 U.S. at 255 (stating "there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact" to find for the non-movant).

[78] *See* Ex. EC 34 ¶ 14 ("An overdraft is an extension of credit, which is typically unsecured, and repayment of an overdraft depends primarily on the customer's capacity to repay.").

Respondent's next arguments are that the ALJ ignored other evidence in his favor. He argues that the ALJ ignored that the OCC knew of Mr. Campos' overdrafts but did not instruct the Bank to stop allowing the overdrafts.[79] Additionally, Respondent argues that the ALJ ignored that Respondent did not personally authorize the overdrafts.[80] Respondent also argues that the ALJ ignored that Respondent could not memorialize the proper controls because the OCC forced Respondent to leave the Bank.[81] Finally, Respondent also argues that the ALJ ignored that the Bank never suffered any loss from Mr. Campos' overdrafts.[82]

The Comptroller is not convinced by Respondent's Exceptions. First, the fact that the OCC may have been aware the Bank was engaged in a particular banking practice does not mean that practice was safe and sound, even if the OCC did not take immediate action. Nor does it enjoin the OCC from taking action in the future.[83] Second, even if Respondent did not personally authorize the overdrafts, he knew of the overdrafts and failed to put in place controls to mitigate the risk of Mr. Campos' overdrafts.[84] Respondent was in a position to place appropriate controls on the Campos accounts or halt the practice altogether, but he instead allowed the overdrafts to continue.[85] The fact that Respondent resigned as Interim CEO in September 2010 does not mitigate his lack of action; the only step he took during his tenure was to make a belated request that the Bank's CCO establish controls on Mr. Campos' overdrafts. When Respondent resigned from the Bank, the only steps any Bank employee had taken to establish these controls was to meet with Mr. Campos and send an e-mail to Mr. Campos outlining what the controls would be. These perfunctory steps do not undermine the conclusion that Respondent's failure to adequately address Mr. Campos' overdrafts was an unsafe or unsound practice. The overdrafts continued, and the Bank did not memorialize a promissory note, security agreement, personal guarantee, or the Bank's right to transfer between Mr. Campos' accounts. The only step the Bank took that mitigated the risk in Mr. Campos' overdrafts occurred after Respondent resigned from the Bank, when his successor told Mr. Campos the Bank would no longer honor his overdrafts.[86]

Moreover, the question whether an institution suffered loss is not a necessary element of the conclusion that a given practice is unsafe or unsound. The definition of an unsafe or unsound banking practice requires either "risk *or* loss *or* damage."[87] Loss is only one of three consequences needed to satisfy this definition. The reason Mr. Campos' overdraft activity was unsafe or unsound was the risk inherent in making large, unsecured extensions of credit to Mr.

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[79] Exceptions # 1, 2, 7.
[80] *Id.* # 6.
[81] *Id.* # 7.
[82] *Id.* # 1, 2, 6, 8, 9, 19.
[83] *See De La Fuente v. FDIC*, 332 F.3d 1208, 1220 (9th Cir. 2003) (holding that a federal banking agency can find people liable for their "role in transactions that had been previously investigated by agency" examiners, even where the examiners "never reported any violations").
[84] There is evidence that Bank employees asked Respondent in May 2010 whether the Bank should allow Mr. Campos to transfer funds between his accounts to cover overdrafts. *See* Ex. EC 85. The overdrafts and internal transfers continued well past May 2010. Even if Respondent never personally authorized any overdrafts, the evidence is clear that he did not stop the overdrafts.
[85] *See* Ex. EC 88.
[86] Respondent also notes that his successor continued to allow Mr. Campos to incur overdrafts. Exception # 7. This observation is not relevant to whether Respondent's actions were unsafe or unsound.
[87] *Adams*, 2011 OCC Enf. Dec. LEXIS 323, at *6 (emphasis added).

Campos.[88] As the ALJ correctly noted, "the failure of Mr. Campos to cover any of the overdrafts identified by the OCC would have 'significantly eroded the Bank's already depleted capital levels and immediately threatened its viability.'"[89] Therefore, the fact that the Bank incurred no *actual loss* as a result of Mr. Campos' overdrafts does not affect the conclusion that Respondent allowing these overdrafts posed an unacceptable *risk* to the institution and, hence, was an unsafe or unsound practice.

Respondent's final Exceptions to this portion of the Recommended Decision are that the ALJ misconstrued the law when concluding that Respondent's actions were unsafe or unsound. First, he argues that an ALJ cannot conclude as of a matter of law that allowing a customer to incur significant overdrafts is an unsafe or unsound practice without an evidentiary hearing.[90] He attempts to distinguish the two cases cited by the ALJ by arguing that they were both decided after evidentiary hearings.[91] He also argues that no legal authority prevents a Bank from honoring a customer's overdrafts; therefore, allowing overdrafts cannot be unsafe or unsound.[92]

Again, the Comptroller does not find these Exceptions to be persuasive. First, it is irrelevant that the two decisions cited by the ALJ were decided after an evidentiary hearing. A hearing is not necessary in the present case to establish the basic operative facts surrounding the Campos relationship; it is undisputed that Mr. Campos' accounts were subject to frequent sizeable overdrafts and that the Bank did not have any formal controls in place to address these occurrences. What *is* relevant is that both cases held, as a matter of law, that continuous overdrafts are considered an unsafe or unsound practice.[93] The summary disposition standard, cited above, allows the ALJ to conclude as a matter of law if there is no genuine issue as to any material fact.[94] ALJs routinely find practices unsafe or unsound on summary disposition.[95] As demonstrated above, Respondent does not point to any material facts that could alter the ALJ's conclusion. Similarly, the ALJ did not hold that a bank cannot honor a customer's overdrafts. Instead, he held that "allowing a customer to incur *significant* overdrafts constitutes an unsafe and unsound banking practice. . . . '[P]ermitting a customer *frequently, much less continuously*, to maintain an overdraft constitutes a willful disregard for the safety and soundness of a bank.'"[96] Case law supports this holding.[97]

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[88] *See also In re* ***, No. OCC AA-EC-87-99, 1987 OCC Enf. Dec. LEXIS 23, at *5 (Jan. 4, 1989) ("Proof of actual loss is not necessary" to establish an unsafe or unsound practice. "The possibility of loss if the action continues is sufficient to establish an unsafe or unsound practice."); *In re* ***, No. OCC AA-EC-87-88, 1988 OCC. Enf. Dec. LEXIS 30, at *27-29 (June 13, 1988) (holding that actual loss is not necessary for a practice to be unsafe or unsound).

[89] Recommended Decision at 12 (quoting Ex. EC 34 ¶ 4).

[90] Exception # 5.

[91] *Id.*

[92] *Id.* # 7, 8, 19.

[93] *In re Welk*, No. FDIC-91-201e, 1992 FDIC Enf. Dec. LEXIS 379, at *27 (June 5, 1992) ("Permitting a customer frequently, much less continuously, to maintain an overdraft constitutes a willful disregard for the safety and soundness of a bank."); *In re* ***, No. OCC AA-EC-87-10, 1987 OCC Enf. Dec. LEXIS 28, at *16 (October 8, 1987) ("*** has participated in and engaged in unsafe and unsound banking practices in permitting overdrafts.").

[94] 12 C.F.R. § 19.29(a); *see Liberty Lobby*, 477 U.S. at 247; *see also* discussion *supra* Section III.B.

[95] *See, e.g., In re Shaffer*, Nos. FDIC-06-201e, FDIC-06-202k, 2009 OFIA LEXIS 5, at *15 (Jan. 14, 2009) (recommended decision), *aff'd* 2009 FDIC Enf. Dec. LEXIS 182, at *9 (April 23, 2009) (final decision and order).

[96] Recommended Decision at 12 (quoting *Welk*, 1992 FDIC Enf. Dec. LEXIS 379, at *27) (emphasis added).

[97] *See, e.g., Welk*, 1992 FDIC Enf. Dec. LEXIS 379, at *27.

After reviewing the Recommended Decision and Respondent's Exceptions, the Comptroller adopts the ALJ's conclusion that Respondent's actions were unsafe and unsound. Respondent failed to control the risk of Mr. Campos' continuous and large overdrafts by not requiring a promissory note, collateral, a written right of offset between his accounts, or a personal guarantee from Mr. Campos. Respondent's lack of action was contrary to generally accepted standards of prudent operation. Therefore, the Comptroller holds that Respondent engaged in unsafe or unsound banking practices by allowing Mr. Campos' overdrafts.

3. Recklessness Related to the Campos Overdrafts

The next set of Respondent's Exceptions address the ALJ's conclusion that Respondent acted recklessly in allowing Mr. Campos' overdrafts. Similar to his prior Exceptions, Respondent does not challenge the ALJ's definition of what constitutes reckless behavior. Instead, he argues there are material factual disputes that prevent the ALJ from concluding, on summary disposition, that allowing these overdrafts was reckless.

The Comptroller notes, however, that the ALJ appears to have relied upon the incorrect standard for recklessness. The ALJ conflated the definition of "reckless disregard for the law," which is one of the factors for determining when restitution is appropriate, 12 U.S.C. § 1818(b)(6)(A)(ii), with the definition of "reckless," the standard called for in assessing a CMP, 12 U.S.C. § 1818(i)(2)(B)(i)(II).[98] Conduct is reckless under the FDI Act for the purposes of assessing a CMP when it is "done in disregard of, and evidencing conscious indifference to, a known or obvious risk of a substantial harm."[99]

The fact that the ALJ's Recommended Decision is based on the "reckless disregard for the law" standard that applies to restitution orders has affected Respondent's Exceptions and, in turn, the Comptroller's consideration of this matter. For example, Respondent argues that he did not act with clear neglect for, and plain indifference to, applicable regulations[100] or agency orders.[101] If this was a restitution matter Respondent might have a point; neither side has identified any regulations that are on point nor did the OCC issue any agency orders directed at Mr. Campos' overdrafts. These considerations, however, are not dispositive under the recklessness standard applicable to a CMP action that is articulated in *Cavallari*.

The Comptroller does conclude that Respondent's conduct meets the standard for reckless behavior under the FDI Act for the purposes of assessing a CMP. That is, the record reflects that

[98] *Compare Simpson v. OTS*, 29 F.3d 1418, 1428 (9th Cir. 1994) ("*reckless disregard for the law* exists when: (1) the party acts with clear neglect for, or plain indifference to, the requirements of the law, applicable regulations or agency orders of which the party was, or with reasonable diligence should have been, aware; and (2) the risk of loss or harm or other damage from the conduct is such that the party knows it, or is so obvious that the party should have been aware of it" (emphasis added)), *with Cavallari v. OCC*, 57 F.3d 137, 142 (2d Cir. 1995) ("an act is *reckless* if done in disregard of, and evidencing conscious indifference to, a known or obvious risk of a substantial harm" (emphasis added)).
[99] *Cavallari*, 57 F.3d at 142.
[100] Exceptions # 10, 12.
[101] *Id.* # 10, 13.

Respondent acted "in disregard of, and evidencing conscious indifference to, a known or obvious risk of a substantial harm."[102]

Turning to the rest of Respondent's Exceptions regarding recklessness, he first argues that the ALJ's factual conclusions were incorrect or inappropriate given the evidence. Respondent argues that there was no obvious risk to the Bank because the Bank had mitigated the risk of Mr. Campos' overdrafts.[103] Similarly, Respondent argues that there was no obvious risk to the Bank because the Bank never lost money on the overdrafts.[104] Respondent again points to the affidavit from Bank counsel that concludes allowing Mr. Campos' overdrafts was safe and sound.[105] Respondent also argues that assigning the Bank's CCO to implement controls was reasonable and demonstrates Respondent was not acting recklessly.[106] His final argument is that, on summary disposition, the ALJ cannot establish recklessness from a lack of action.[107]

The Comptroller is not convinced by these arguments. As discussed above, the argument that the Bank's "controls" adequately mitigated the risk posed to the Bank by Mr. Campos' overdrafts is incorrect. The ALJ properly concluded that the Bank still had no protection from the risks of the overdrafts. Similarly, recklessness does not require that the Bank suffer an actual loss; it requires only a "risk of a substantial harm."[108] Here, the risk was that Mr. Campos would not cover the overdrafts, and the size of the overdrafts would have severely affected the Bank's capital. The Bank was in a critically deficient capital condition at the time, and it is likely that the Bank would have failed had Mr. Campos not covered the overdrafts. Respondent was aware of these risks, and did not act to appropriately address or mitigate the existential risks posed by Mr. Campos' actions.

Respondent's belated delegation to the Bank's CCO to deal with Mr. Campos' overdrafts does not change this conclusion. Respondent did not follow up with the Bank's CCO despite the fact that Mr. Campos continued to incur significant overdrafts. Additionally, the record shows that the only actions the CCO took while Respondent assumed the duties of Interim CEO at the Bank was to meet with Mr. Campos and then send an e-mail outlining controls the Bank intended to implement. The Bank implemented real controls only after Respondent resigned as Interim CEO and as a director of the Bank. Respondent assumed the duties of Interim CEO of the Bank from April 2010 to September 2010, which was plainly enough time to tell Mr. Campos the Bank would no longer honor his overdrafts.[109]

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[102] *Cavallari*, 57 F.3d at 142.
[103] Exceptions # 11, 14, 19.
[104] *Id.*
[105] *Id.* # 18
[106] *Id.* # 15, 16, 20.
[107] *Id.* # 17.
[108] *Cavallari*, 57 F.3d at 142.
[109] Respondent also argues that the "OCC demanded Mr. Blanton's resignation," which prevented him from placing the controls. Exception # 20. The Comptroller notes that Respondent resigned from the Bank because he did not provide the OCC with information he was legally required to submit pursuant to 12 U.S.C. § 1831i and 12 C.F.R. § 5.51. *See* Ex. R 23.

Finally, it is wholly appropriate for an ALJ to conclude on Summary Disposition that a Respondent acted recklessly for the purpose of assessing a CMP where there are no disputed material facts.[110] If the undisputed material facts show that Respondent took no action to mitigate a risk of substantial harm, there is no bar to an ALJ concluding that a Respondent has acted recklessly for purposes of assessing a CMP while granting summary disposition under the OCC's procedural rules.

On that basis, the Comptroller adopts the ALJ's conclusion that Respondent acted recklessly in handling Mr. Campos' overdrafts. The record reflects that Respondent was aware of the risk associated with Mr. Campos' overdrafts, given the OCC's safety and soundness concerns and discussions in board meetings. While Mr. Campos continued to incur large overdrafts that threatened the viability of the Bank if uncovered, Respondent only took perfunctory steps to mitigate the risk. Respondent disregarded and evidenced a conscious indifference to a known risk of a substantial harm to the Bank.[111] Therefore, the Comptroller finds that Respondent was reckless within the meaning of the statute.

4. Breach of Fiduciary Duty Related to the Campos Overdrafts

Respondent also contested the ALJ's finding that he breached his fiduciary duty by allowing Mr. Campos' overdrafts to continue without imposing effective controls.[112] He cites an Eleventh Circuit case, decided under Georgia law, where actual harm is a required element of a breach of fiduciary duty claim.[113]

Because the record supports the "misconduct" prong of a Second Tier CMP under the statute, *i.e.*, the existence of a reckless unsafe or unsound practice, the Comptroller need not reach the issue of whether the record supports a finding that Respondent also breached his fiduciary duty to the Bank. Respondent does not specifically make the argument that state law should establish the standards for breach of fiduciary duty under 12 U.S.C. § 1818(i). Nor, in its response, did Enforcement Counsel adequately support its assertion that federal law, and not state law, is controlling. In summary, Respondent's and Enforcement Counsel's limited briefing render this case an unsuitable vehicle for deciding whether state or federal law provides the standards for breach of fiduciary duty under 12 U.S.C. § 1818(i). Because, as discussed above, Respondent engaged in reckless unsafe or unsound practices, an alternate basis exists for assessing a Second Tier CMP.[114]

5. Pattern of Misconduct Related to the Campos Overdrafts

Respondent also contests the ALJ's finding that a Second Tier CMP is warranted under the

[110] 12 C.F.R. § 19.29(a); *see Liberty Lobby*, 477 U.S. at 247; *see also* discussion *supra* Section III.B.
[111] *Cf. Van Dyke v. Bd. of Governors of Fed. Reserve Sys.*, 876 F.2d 1377, 1380 (8th Cir. 1989) (accepting the agency's conclusion that former officer and director's participation in check-kiting scheme "demonstrated 'a willful disregard for the safety and soundness of the [b]ank'").
[112] Exception # 21.
[113] *Atwater v. NFL Players Ass'n*, 626 F.3d 1170, 1183 (11th Cir. 2010).
[114] *See* 12 U.S.C. § 1818(i)(2)(B).

"effects" prong of the statute, *i.e.*, a pattern of misconduct, conduct that caused or was likely to cause more than minimal loss to the institution, or conduct that resulted in a gain or benefit to the individual.[115] Respondent argues that he was not engaged in a pattern of misconduct because the factual issues preclude granting summary disposition on the overdraft charges.[116] He argues that his other Exceptions demonstrate the ALJ erred in finding any instances of misconduct; therefore, the ALJ could not conclude that there was a pattern of misconduct.

The Comptroller is not convinced by Respondent's arguments, and finds that Respondent engaged in a pattern of misconduct. As discussed thoroughly above, Respondent recklessly engaged in unsafe or unsound banking practices. From April 2010, when Respondent assumed the duties of Interim CEO, until September 2010, when Respondent resigned as the Bank's Interim CEO, Respondent allowed Mr. Campos to incur multiple overdrafts that were so large they threatened the viability of the Bank. These actions constitute a pattern of misconduct.

6. *Statute of Limitations Related to the Campos Overdrafts*

Respondent's final Exceptions are that the ALJ erred in concluding that the statute of limitations did not bar the portion of the action based on Mr. Campos' overdrafts.[117] Citing *Gabelli v. SEC*,[118] Respondent argues that the five-year statute of limitations set forth at 28 U.S.C. § 2462 relating to the enforcement of a civil fine or penalty began to run in April 2010, and Enforcement Counsel brought this action more than five years later, on June 30, 2015.[119] He also argues that *Proffitt v. FDIC*[120] is inapplicable to this action because the statute allowing for CMPs does not have an "effects" prong like the prohibition statute at issue in *Proffitt*.[121] Finally, he argues that the Recommended Decision should not have cited to instances that occurred more than five years before June 30, 2015, when Enforcement Counsel filed the action.[122]

Respondent and Enforcement Counsel agree that the five-year statute of limitations found in 28 U.S.C. § 2462 applies to this action. They agree that "the 'standard rule' is that a claim accrues 'when a plaintiff has a complete and present cause of action.'"[123] As noted earlier, there are two prongs required for a Second Tier CMP: misconduct and effect.[124] As discussed above, the misconduct in this case was Respondent's reckless unsafe or unsound practices from April 2010 until September 2010. The effect in this case was evidenced by Respondent's pattern of misconduct in allowing Mr. Campos to continually overdraw his accounts during that same time period. Respondent's argument is that because a CMP action could be taken as early as April 2010, the whole claim is time barred.

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[115] 12 U.S.C. § 1818(i)(2)(B).
[116] Exception # 40.
[117] *Id.* # 22, 23, 24.
[118] 568 U.S. 442, 133 S. Ct. 1216 (2013).
[119] Exception # 22.
[120] 200 F.3d 855 (D.C. Cir. 2000).
[121] Exception # 23.
[122] *Id.* # 24.
[123] *Gabelli*, 133 S. Ct. at 1220 (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)).
[124] *See* 12 U.S.C. § 1818(i)(2)(B); *see also* discussion *supra* Section III at 3-4.

The Comptroller disagrees. The Amended Notice details a pattern of misconduct that only ended in September 2010, when Respondent resigned as Interim CEO from the Bank. This date is well past June 30, 2010, the earliest date cognizable under the limitations period. Under *Proffitt*, a government agency is not required to take enforcement action at the first moment it could take the action.[125] Moreover, Respondent's argument would have the absurd effect of allowing Respondent to evade liability for reckless unsafe or unsound actions that occurred well inside the five-year statute of limitations. Indeed, taken to its extreme, under Respondent's construction of the statute a malefactor would completely escape liability if they were able to conduct a scheme that continued for more than five years—clearly not the law.

Similarly, Respondent's attempt to distinguish *Proffitt* is unsuccessful. Respondent does not clearly identify the basis for that case. He appears to argue that *Proffitt* does not apply to CMP cases and that *Proffitt* only applies to cases where there is actual loss. The first argument is incorrect; case law has extended *Proffitt*'s reasoning beyond prohibition actions and to CMP actions specifically.[126] Given *Proffitt*'s robust application to a variety of cases, and Respondent's failure to cite any authority that *Proffitt* should be limited to only cases where loss occurred, the Comptroller finds that *Proffitt* applies to this case. Applying that decision, Enforcement Counsel had until September 2015 to bring this portion of the action because Respondent's pattern of misconduct ceased in September 2010.

Finally, the Comptroller need not decide whether events before June 30, 2010, can be referenced in this action. The Comptroller finds that the events after June 30, 2010, constitute a pattern of misconduct—Respondent's reckless engagement in unsafe or unsound practices—that independently supports a $10,000 CMP.[127]

As such, the Comptroller concludes that the statute of limitations in 28 U.S.C. § 2462 does not bar this portion of the action.

E. The AH&H and Brooks Loans

Respondent's Exceptions 25 through 39 address the portions of the Recommended Decision related to Respondent's actions of rebooking three loans and causing the Bank to file materially inaccurate Call Reports. After reviewing the administrative record, the Recommended Decision, and Respondent's Exceptions, the Comptroller finds that Respondent violated the law when he rebooked the loans and caused the Bank to file materially inaccurate Call Reports, and that he engaged in a pattern of misconduct. The Comptroller, however, declines to conclude that Respondent recklessly engaged in unsafe or unsound practices or that he breached his fiduciary

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[125] 200 F.3d at 864.

[126] *See, e.g.*, *Markowski v. SEC*, 2002 U.S. App. LEXIS 12484 (D.C. Cir. 2002) (unpublished) (SEC action barring Markowski from associating with any broker or dealer); *In Re Carlos Loumiet*, No. OCC-AA-EC-06-102, 2008 OFIA LEXIS 2, at *37 (June 17, 2008) (OCC action for civil money penalties); *In re Oren L. Benton*, Nos. FRS-99-030-E-I1, FRS-99-030-CMP-I1, FRS-99-030-E-I-2, FRS-99-030-CMP-I2, 2004 OFIA LEXIS 5, at *63-67 (Feb. 13, 2004) (Federal Reserve action for civil money penalties); *In re United Savings Ass'n of Texas*, No. OTS AP 95-40, 2001 OFIA LEXIS 3, at *18-19 (Sept. 12, 2001) (OTS action for civil money penalties).

[127] *See* 12 U.S.C. § 1818(i)(2)(B) and 12 C.F.R. § 19.240 (2012) (allowing for a $37,500 *per day* Second Tier CMP for violations occurring after December 10, 2008).

duty. Nevertheless, the Comptroller finds Respondent's actions in causing the Bank to file materially inaccurate Call Reports warrant an assessment of a Second Tier CMP.

1. *Facts, Recommended Decision, and Respondent's Exceptions Related to the AH&H and Brooks Loans*

The evidence in the administrative record demonstrates that the following facts are undisputed.

a. AH&H Loans - Background

In February 2007 and January 2008, the Bank issued a $400,000 loan (loan No. XXXX8806) and a $1,839,500 loan (loan No. XXXX8817) to the A.H. & H. Property, LLC ("AH&H").[128] Thereafter, the Bank and AH&H entered into several loan modification agreements from May 2009 to February 2010, which changed the terms of the loans by extending the dates for maturity, requiring interest-only payments, and requiring a principal pay-down of at least $116,500 before the stated maturity date.[129]

Despite the modifications, the Bank did not receive principal payments on the AH&H loans at the maturity date, did not receive interest payments on the loans after March 2010, nor did it receive the $116,500 principal pay-down required under the modification agreements from either the borrowers or the guarantors.[130] The property pledged as collateral on the AH&H loans contained lots, many of which were empty. Some of the lots had houses that were vacant and the borrowers were unable to build newer houses on the lots as originally intended.[131]

The Bank's December 31, 2009, Criticized Asset Reports ("CARs") for the AH&H loans stated that the loans were downgraded to a substandard loan classification "due to the length of time that the loan [sic] has been with the bank without principal reduction."[132] The December 31, 2009, CARs noted that the guarantors of the loans were Ronnie Austin and Brian Henderson and that their recorded net worth and adjusted gross incomes were $4,111,154 and $277,680 and $3,260,350 and $233,885, respectively.[133] The principal balances at the AH&H loans' maturity in April 2010 were $390,323.12 and $1,694,432.18.[134] The updated appraisal for the collateral properties on the AH&H loans determined that the market value of the properties, as of April 16, 2010, was $960,000.[135]

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128 Amended Notice ¶ 43; Answer ¶ 43; *See* Exs. EC 20, 21.
129 *See* Exs. EC 20, 21, 22, 23, 24, 25.
130 Ex. EC 19 at 152:12-16, 153:1-4, 156:1-6; Ex. EC 26; Ex. EC 27; *see* Ex. R 3 at 182:18-183:13; *see also* Ex. EC 27 at 5 (for AH&H loan No. XXXX8806, principal payment of $390,323.12 on April 28, 2010 and curtailment reversal of principal payment on July 9, 2010).
131 Ex. EC 3 at 179:12-21, 180:5-15; 181:8-17; Ex. EC 13 at 51; Ex. EC 32 at 57; Ex. EC 35 at 72.
132 Ex. EC 32 at 57.
133 Ex. EC 32 at 57; *cf.* Ex. R 11 at 207-08 (stating that as of February 2009, the gross incomes of Messrs. Austin and Henderson were $312,000 and $513,000, respectively).
134 Exs. EC 26, 27.
135 Amended Notice ¶ 51; Answer ¶ 51.

b. Brooks Loans - Background

In May 2006, the Bank issued a $2,100,000 loan to Brooks Avenue, LLC ("Brooks"). The purpose of the loan was to rehabilitate an apartment complex in Atlanta, Georgia.[136] From June 2008 to April 2009, the Bank and Brooks entered into three loan modification agreements that did one or more of the following: changed the loan amortization schedule, extended the maturity date of the loan, or changed the interest rate of the loan.[137] In 2009 and 2010, the source of the monthly payments on the Brooks loan was not the actual obligor or the guarantors on the loan but rather an individual who was a relative of the named guarantors who did not appear in the loan documentation.[138] Loan payments on the Brooks loan were sometimes late and past due.[139] Compounding the situation, the collateral properties for the Brooks loan were severely dilapidated, had no occupants, and some apartment units had no roofs.[140]

The Bank's December 31, 2009, CARs for the Brooks loan stated that the loan was being downgraded "due to length of time it has taken to get the renovation project underway and the 25 year amortization on the loan."[141] The CARs stated that the properties were vacant, that the repayment on the loan came from the guarantors, and that the guarantors were attempting to sell the property but delayed renovation to focus on other projects.[142] The CARs also noted that the guarantors of the Brooks loan were Humberto Martinez and Humberto J. Martinez and that their recorded total assets, liabilities, net worth, stated incomes, and adjusted gross incomes were as follows, respectively: (1) Humberto Martinez: $9,935,000 (primarily in real estate), $3,223,000, $6,712,000, $250,000, and $140,000 and (2) Humberto J. Martinez: $8,350,000 (primarily in real estate), $3,230,000, $5,043,000, $300,000, and $72,000.[143]

The updated appraisal for the collateral properties on the Brooks loan determined that the market value of the property, as of March 24, 2010, was $470,000.[144]

c. April 2010 Charge-Offs

In June 2009, the Bank determined that the AH&H loans and the Brooks loan, (collectively, "Loans") were impaired and collateral dependent under Financial Accounting Standards Board Statement No. 114 ("FASB 114").[145] The Bank maintained that the Loans were impaired and collateral dependent on September 30, 2009 and December 31, 2009.[146]

[136] Amended Notice ¶ 39; Answer ¶ 39.
[137] Ex. EC 29; Ex. EC 30; Ex. EC 31, at 1.
[138] Amended Notice ¶ 41; Answer ¶ 41; EC 33 at 125:5-13, 126:12-24; Ex. EC 34 at 10 at ¶ 17, 11-13 at ¶¶ 25-39.
[139] Ex. EC 34 at 11 at ¶ 23.
[140] Ex. EC 3 at 169:21-170:1; Ex. EC 13 at 70.
[141] Ex. EC 32 at 68.
[142] *Id.* at 67.
[143] *Id.*
[144] Amended Notice ¶ 49; Answer ¶ 49.
[145] Amended Notice ¶¶ 42, 47; Answer ¶¶ 42, 47.
[146] Amended Notice ¶¶ 42, 47; Answer ¶¶ 42, 47; Exs. EC 13, 32. A loan is impaired under FASB 114 when based on current information, "it is probable that an institution will be unable to collect all of the amounts due" on the

The June 30, 2009, September 30, 2009, and December 31, 2009, CARs for the Loans were included in board packages and Respondent, as a board member, did not object to the classification of the Loans as impaired and collateral dependent.[147] The OCC concurred with the Bank's determination that the Loans were impaired and collateral dependent, directed the Bank to obtain new appraisals on the relevant collateral properties, and indicated that charge-offs would likely be required after the Bank received new appraisals.[148] The Bank charged off the Loans in April 2010, effective as of December 31, 2009, and refiled its December 2009 and March 2010 Call Reports to reflect the charge-offs.[149] The amount of the charge-offs totaled more than \$2.6 million (\$1,124,755.30 for the AH&H loans and \$1,539,003.00 for the Brooks loan).[150] The charge-offs of the Loans were a material reduction of the Bank's income and capital.[151] On May 18, 2010, the board (including Respondent) approved the charge-offs of the Loans.[152]

d. Rebooking the Charge-Offs and Refiling the Call Reports

On May 23, 2010, Respondent e-mailed an OCC examiner about rebooking the Loans, stating that the Bank reached an agreement with AH&H and received a positive response from a guarantor on the Brooks loan about securing additional collateral for the Loans, which would restore the December 31, 2009, charge-offs.[153] The OCC examiner replied that the Bank could not rebook the charged-off credits and stated that doing so went against Call Report instructions.[154] Respondent replied, acknowledging that his position about rebooking the Loans in the May 23 e-mail was incorrect.[155]

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loan. Ex. EC 40, at A-57. A loan is collateral dependent if repayment of the loan is "expected to be provided solely by the underlying collateral and there are no other available and reliable sources of repayment." *Id.*

[147] Ex. EC 3 at 235:10-236:3; Ex. EC 36 at 39:17-40:2, 42:22-43:20; Ex. EC 37; Ex. EC 38; *Cf.* Ex. EC 39.

[148] Amended Notice ¶ 48; Answer ¶ 48; Ex. EC 2 at 2; EC 41 at 2.

[149] Amended Notice ¶¶ 50, 52; Answer ¶¶ 50, 52; Ex. EC 43; Ex. EC 44; *see also* Amended Notice ¶ 60; Answer ¶ 60.

[150] *See* Amended Notice ¶¶ 50, 52; Answer ¶¶ 50, 52.

[151] Ex. EC 19 at 213:21-214:25.

[152] Amended Notice ¶ 53; Answer ¶ 53; Ex. EC 3 at 205:21-207:1; Ex. EC 36 at 48:6-24.

[153] Ex. EC 45 at 2.

[154] Ex. EC 45 at 1. Specifically, in a May 24, 2010 e-mail to Respondent, OCC examiner Walter Lawrence stated,

> The [B]ank *can not* [*sic*] rebook a charged-off credit. The call report instruction states . . . 'When a bank makes a full or partial direct write-down of a loan or lease that is uncollectible, the bank establishes a new cost basis for the asset. Consequently, once a new cost basis has been established for a loan or lease through a direct write-down, this cost basis may not be "written up" at a later date. Reversing the previous write-down and "re-booking" the charged-off asset after the bank concludes that the prospects for recovering the charge-off have improved, regardless of whether the bank assigns a new account number to the asset or the borrower signs a new note, is not an acceptable accounting practice.'

Call Report forms and instructions are subject to the requirements of the Paperwork Reduction Act, including a Federal Register notice and comment process prior to publication. *See, e.g.*, https://www.federalregister.gov/documents/2016/08/15/2016-19268/proposed-agency-information-collection-activities-comment-request.

[155] Ex. EC 45 at 1.

Despite the May 2010 e-mail exchange between Respondent and the OCC, at a June 15, 2010 board meeting, Respondent informed the board that the Bank would be taking another look at certain year-end charge-offs in an attempt to rebook the charge-offs and recover $3 million.[156] Respondent also stated that the Bank's outside auditor would provide a write-up to support the decision.[157] At Respondent's direction, Charles Knight (the Bank's Chief Financial Officer ("CFO")) and Salvatore Inserra (the Bank's outside auditor) began to investigate whether the Loans were properly charged off.[158] Specifically, Mr. Knight and Mr. Inserra began discussing whether the cash flows of the guarantors should have been considered when the Loans were charged off.[159]

In a July 2, 2010, e-mail exchange, Mr. Knight asked Mr. Inserra about considering the capacity of the guarantors to repay the debt when considering a loan write-down and stated that, in the case of the Brooks loan, the "customer is going to pledge other assets like receivables and collateral."[160] Mr. Inserra responded "Gaap does not require a wd" based on his interpretation of OCC regulations.[161] Mr. Knight forwarded this e-mail to Respondent stating that his interpretation of Mr. Inserra's e-mail is that the Bank did not have to write-down the Loans.[162] On July 7, 2010, the Bank rebooked the charged-off portions of the Loans.[163]

On July 13, 2010, Mr. Knight e-mailed Mr. Inserra a draft document discussing the accounting treatment of the Loans and noted that Respondent sought Mr. Inserra's assistance in drafting the document.[164] Mr. Inserra responded with an updated draft and asked Mr. Knight to fill in details regarding the amount of additional cash flows and the value of additional collateral that the guarantors were willing to pledge.[165] Mr. Knight replied stating that Respondent did not have the requested information readily available and asked if the information was significant[166] and Mr. Inserra responded "Absolutely."[167] Also on July 13, 2010, Mr. Knight e-mailed the OCC—blind

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[156] Ex. EC 48 at 3.
[157] *Id.*
[158] *See* Ex. R 11 at 224:9-25, 229:9-231:8; R 28.
[159] Ex. R 28.
[160] Ex. EC 49.
[161] *Id.*
[162] Ex. R 14.
[163] Amended Notice ¶ 60; Answer ¶ 60.
[164] Ex. EC 53. Specifically, the draft document stated,

> After the OCC exam and the mandated write downs, management has determined that several of the credits are not solely collateral dependent and that 'the capacity of the guarantor to support this debt may receive favorable consideration when determining the loan classification or allowance provision.' From discussions with the guarantors from [AH&H and Brooks] and management's analysis of the guarantor's overall financial condition, the guarantors have committed to pledge additional collateral and pledge additional assets with sufficient cash flow to support and enhance their debt coverage. Thus, as noted above 'the capacity of the guarantor to support this debt may receive favorable consideration when determining loan classification or allowance provisions.' With the additional collateral and cash flows management believes a provision for the noted credits not the write downs is the appropriate course of action as of 12/31/09.

[165] Ex. EC 56 at 1, 6.
[166] Ex. EC 57.
[167] *Id.*

copying Respondent—that the Bank was revising the Loans due to additional collateral and cash flows from the guarantors.[168] In this email exchange, an OCC examiner reiterated the grounds for the initial charge-off decision regarding the Loans and separately informed Mr. Knight that the OCC generally does not allow for the reversal of charge-offs.[169]

On July 15, 2010, Mr. Inserra e-mailed Mr. Knight in response to a question about the charge-offs. His e-mail stated that additional collateral does not represent a recovery and that the Bank must convince the OCC that charging-off the Loans was an error.[170] Further, Mr. Inserra stated that if the OCC does not agree that the charge-offs were erroneous, the charge-offs cannot be recovered until the Bank receives cash.[171] Mr. Inserra has also stated that without the requested documentation supporting the anticipated additional collateral and cash flows from the Loans' guarantors, which Mr. Inserra sought in the July 13 e-mail to Mr. Knight and Mr. Knight subsequently sought from Respondent, the Bank lacked a reasonable basis to argue that the charge-offs were erroneous.[172] Mr. Inserra has also stated that Respondent never provided the requested additional information regarding the additional collateral and the guarantors' cash flows.[173]

In a July 27, 2010, e-mail to Mr. Knight with a copy to Respondent, Mr. Inserra noted his disagreement with the OCC's interpretation of GAAP but also warned that the Bank must be sure about its position regarding the valuation of collateral underlying the Loans.[174] Also in a July 27, 2010, e-mail to Mr. Knight, which was forwarded to Respondent, the OCC warned that it is "imperative that the 12/31/09, 3/31/10 and 6/30/10 Call Reports accurately reflect the [Accounting for Loan and Lease Losses] amounts."[175]

On July 30, 2010, the Bank filed its June 30, 2010, Call Report, which reversed the charged-off portions of the Loans and the reversal had a material effect on the Call Report.[176] Subsequently, on August 5, 2010, one of the AH&H guarantors e-mailed Respondent "we do not have sufficient collateral to cover the AH&H loan deficiency . . . ."[177] Despite this fact, on August 16, 2010, the Bank refiled its December 31, 2009, March 31, 2010, and June 30, 2010, Call Reports, which reversed the charged-off portions of the Loans and the reversal had a material effect on the Call Report.[178]

Two days later, on August 18, 2010, an OCC examiner e-mailed the Bank's CFO and Respondent inquiring about the amended Call Reports. Specifically, the OCC examiner stated that it was not clear what the amendments were, that it was imperative and a legal requirement that the Call Reports were accurate, and that the OCC was unable to determine whether the

[168] Ex. EC 58.
[169] *Id.* at 1-2; Ex. R 31 at 1.
[170] Ex. EC 59 at 1.
[171] *Id.*
[172] Ex. EC 47 at 69:18-72:8, 74:10-75:19, 239:22-240:4.
[173] *Id.*
[174] Ex. R 32 at 1.
[175] *Id.* at 6.
[176] Ex. EC 60 at 125:18-126:6, 129:4-9; Ex. EC 61 at 5, 7.
[177] Ex. EC 62.
[178] Ex. EC 60 at 125:18-126:6, 129:4-9; Ex. EC 63; Ex. EC 64; Ex. EC 65.

December 31, 2009, March 31, 2010, and June 30, 2010 Call Reports were accurate.[179] In a September 13, 2010, letter, the OCC wrote to the Bank's board that it had "significant concerns" about the Bank's failure to provide critical information to the OCC, that the OCC made several requests about information regarding the amended Call Reports, that Respondent said the information would be submitted by August 20, 2010, and that the OCC still had not received the information.[180]

Respondent resigned as Interim CEO on September 15, 2010.[181] On September 27, 2010, the Bank again charged off the Loans effective December 31, 2009.[182] In October and November 2010, the Bank refiled its December 31, 2009, March 31, 2010, and June 30, 2010, Call Reports to reflect the September 27, 2010, charge-offs.[183]

e. Recommended Decision and Exceptions

Based on the factual record developed in the parties' summary disposition briefing, the ALJ's Recommended Decision concluded that Respondent recklessly engaged in unsafe or unsound banking practices, violated the law, breached his fiduciary duty, and engaged in a pattern of misconduct.[184] The ALJ found that Respondent received Agency direction that he could not rebook the Loans, Respondent directed the Loans to be rebooked without seeking further regulatory direction, Respondent failed to disclose to board members that the rebookings were contrary to OCC directions, and Respondent caused the Bank to file the December 31, 2009, March 31, 2010, and June 30, 2010, Call Reports in a way that reflected the rebooking of the charged-off portions of the Loans in contravention of the Agency's interpretation of GAAP and Call Report instructions.[185] Therefore, the ALJ found that Enforcement Counsel was entitled to judgment as a matter of law and recommended the Comptroller enter an order assessing a $10,000 CMP against Respondent.[186]

Respondent raises a variety of Exceptions to the conclusions in the Recommended Decision. In general, he raises factual Exceptions to each of these conclusions, arguing that the ALJ improperly weighed evidence on summary disposition. He also raises Exceptions to the basis of some of the ALJ's legal conclusions. The Comptroller will address each Exception in turn.

2. Violation of Law Related to the AH&H and Brooks Loans[187]

Many of Respondent's Exceptions challenge the ALJ's conclusion that Respondent violated 12

[179] Ex. EC 66 at 1.
[180] Ex. EC 8 at 2.
[181] Ex. EC 9 at 6.
[182] Ex. EC 68.
[183] Exs. EC 70, 71, 72.
[184] Recommended Decision at 14.
[185] *Id.* at 29-30.
[186] *Id.* at 30-31.
[187] In Exception 36, Respondent generally argues that the ALJ erred when he determined that Enforcement Counsel was entitled to judgment as a matter of law. As discussed in this section, the Comptroller has determined that the ALJ properly found that Respondent violated the law when he caused the December 31, 2009, March 31, 2010, and

U.S.C. § 161, which requires national banks to file accurate Call Reports with the OCC in accordance with Call Report instructions.[188] Call reports that are materially inaccurate violate 12 USC § 161.[189] A violation for the purposes of assessing a penalty under 12 U.S.C. § 1818(i) includes "any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding and abetting a violation."[190] As detailed below, Respondent argues that there are material factual disputes that prevent the ALJ from concluding, on summary disposition, that he caused the Bank to file materially inaccurate Call Reports in violation of the law.

a. Exceptions 25, 39

Respondent first argues that the Recommended Decision overstates Respondent's involvement in filing the amended December 31, 2009, March 31, 2010, and June 30, 2010, Call Reports. Respondent argues that he did not prepare the Call Reports or sign the amended Call Reports, that he reasonably relied on the advice of the Bank's CFO and outside auditor in rebooking the Loans and amending the Call Reports, and that it was the Bank's CFO and other members of the board of directors who actually signed the amended Call Reports.[191] The evidence Respondent offers in support of this Exception, however, does not contradict the ALJ's finding that it was Respondent who directed the Call Reports to be amended.[192] The ALJ's findings are supported by the CFO's testimony that he would not have rebooked the Loans absent approval from Respondent.[193] Further, the evidence on the record shows that Respondent caused the Bank to decide to take a second look at the charge-downs, rebook the Loans, and recover millions of dollars.[194] This evidence provides a sufficient basis for finding that Respondent caused the violation[195] of 12 U.S.C. § 161 because Respondent caused the Bank to rebook the Loans and thus caused the Bank to report this change on the Call Reports. Also, "it is presumed that bank reports are made with the assent of all the directors whether or not a particular director attested to a report."[196] For these reasons, the Comptroller is not persuaded that this Exception has merit.

June 30, 2010 Call Reports to be filed inaccurately. Accordingly, the Comptroller also adopts the finding that Enforcement Counsel is entitled to judgment as a matter of law.

[188] 12 U.S.C. § 161(a); *In re Soukup*, No. OCC-EC-AA-88-120, 1991 OCC Enf. Dec. LEXIS 294, at *28 (Nov. 1, 1991) ("An officer and three bank directors must attest that the call report is correct to the 'best of their knowledge and belief.'"); *In re First Nat'l Bank of* ***, No. OCC-AA-EC-87-140, 1989 OCC Enf. Dec. LEXIS 30, at *43 (Dec. 8, 1988) (recommended decision), *aff'd in part*, 1989 OCC Enf. Dec. LEXIS 30 (June 30, 1989) (final decision and order) ("Call Reports must be accurate and they must be prepared in accordance with the Instructions and the Handbook.").

[189] OCC, Supervision Tip 2014-02, at 2 (Nov. 12, 2014) ("Delinquent or materially inaccurate call reports are a violation of 12 USC 161 for national banks . . . .").

[190] 12 U.S.C. § 1813(v).

[191] Exception # 25.

[192] Recommended Decision at 20.

[193] Ex. R 11 at 242:7-243:10.

[194] Exceptions, at 40; Ex. R 11 at 224:9-25, 229:9-231:8; R 28; Ex. EC 45 at 2; EC 48 at 3; *see* Ex. R 39 at 3.

[195] *See* 12 U.S.C. § 1813(v) (a violation for the purposes of assessing a penalty under 12 U.S.C. § 1818(i) includes "any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding and abetting a violation").

[196] *In re Soukup*, 1991 OCC Enf. Dec. LEXIS 294, at *29 n.16 (citing *Jones Nat'l Bank v. Yates*, 240 U.S. 541, 559-60 (1915)).

Respondent also argues that he cannot be liable for filing inaccurate Call Reports because 12 U.S.C. § 161 is not a strict liability statute and he cannot be found to have violated the statute if he had a "reasonable belief" that the amended Call Reports were accurate.[197] Even if the Comptroller were to accept Respondent's argument that such a reasonable belief is a viable defense,[198] based on the administrative record, Respondent's belief that the amended Call Reports were accurate was objectively unreasonable in this instance. The OCC expressly warned Respondent on several occasions—in May 24, 2010, July 13, 2010, and July 27, 2010 e-mails—that it did not agree with the Bank's position on rebooking the Loans *before* the amended and inaccurate Call Reports were filed.[199] Second, the Bank's outside auditor expressed that he took a position that differed from the OCC's interpretation of GAAP, told the Bank that it must convince the OCC that the charge-offs were erroneous, and sought additional information from Respondent about the guarantors' pledge of additional collateral and cash flows before he could finalize an opinion about rebooking the charge-offs.[200] Ultimately, when the OCC's interpretation of how GAAP applies to a specific transaction or event differs from a bank's interpretation, the OCC's interpretation governs.[201] Therefore, Respondent's belief that the December 31, 2009, March 31, 2010, and June 30, 2010, Call Reports were accurately filed was not reasonable.[202] For these reasons, the Comptroller concludes that this Exception is not meritorious.

b. Exceptions 26, 28, 29, 32

Respondent argues next that the ALJ erred in (1) finding that Respondent ignored OCC instructions that the Bank should not rebook the Loans, (2) finding that the OCC can dictate how the Bank can report Loans, even when the OCC's interpretation may conflict with the Bank's interpretation of GAAP, and (3) ignoring evidence that the Bank's outside auditor and CFO believed that it was appropriate for the Bank to reverse the charge-offs.[203] Respondent's arguments here are insufficient. The ALJ correctly cited Call Report instructions in effect at the relevant time period, which state that "the supervisory agency may require the bank to reflect the event(s) or transaction(s) in its Call Report *in accordance with the agency's interpretation.*"[204] Further, pursuant to 12 U.S.C. § 1831n(a)(1)-(2), the OCC may "prescribe an accounting principle which is no less stringent than [GAAP]" in order to "facilitate effective [bank] supervision." Accordingly, the Call Report instructions and the OCC's interpretation of GAAP

[197] Exception # 39.
[198] *See In re Givens*, No. OCC AA-EC-93-91, 1993 OFIA LEXIS 30, at *29 (Oct. 6, 1993) (applying a negligence standard in determining whether a penalty can be assessed in an enforcement action for a violation of 12 U.S.C. § 161).
[199] *See* discussion *supra* Section III.E.1.d.
[200] *Id.*
[201] *See* Ex. EC 54, at 11.
[202] Respondent's citation to *First Nat'l Bank of Gordon v. OCC*, 911 F.2d 57 (8th Cir. 1990) does not alter this conclusion. In that matter, the issue before the court was not whether the bank officers had a reasonable belief about the accuracy of the call reports. *First Nat'l Bank of Gordon,* 911 F.2d at 64 ("The Comptroller does not here contest the bank's assertion that its officials who signed the call reports in question reasonably believed that they were accurate.").
[203] Exceptions # 26, 28, 29, 32.
[204] Recommended Decision at 20 (citing Ex. EC 54 at 11 (Federal Financial Institutions Examination Council ("FFIEC") 031 and 041 General Instructions (12-09)) (emphasis added)).

accounting principles based on its supervisory expertise govern the preparation of Call Reports.

Respondent further argues that the OCC's May 24, 2010 direction via e-mail[205] regarding whether the Loans should be rebooked does not apply here. Respondent argues that the Agency's interpretation of GAAP and Call Report instructions was limited to whether the Bank could rebook the Loans because they were deemed impaired and collateral dependent. Respondent asserts that the Loans were rebooked because the Bank determined, based on the advice of the Bank's outside auditor, that the original basis for charging-off the Loans was erroneous. Respondent asserts that charging-off the Loans was a mistake because the Bank did not properly consider the cash flow of the Loans' guarantors. The Comptroller finds that the evidence clearly supports the ALJ's finding that the OCC's reiteration of Call Report instructions and its interpretation of GAAP govern how the Loans should have been reported in the Call Reports, particularly when the Agency's position was conveyed to Respondent and others working for the Bank. The record shows that the OCC did disagree with the Bank's determination that the Loans were charged off in error. In the July 13, 2010 e-mail about rebooking the Loans—which was eventually e-mailed to Respondent—an OCC examiner reiterated the grounds for the initial charge-off decision regarding the Loans.[206] Further, in the July 27, 2010, e-mail to the Bank's CFO, with a copy to Respondent, the Bank's outside auditor noted his disagreement with the OCC's interpretation of GAAP related to rebooking the Loans but also warned that the Bank must be sure about its position regarding the valuation of collateral underlying the Loans.[207] Finally, the Bank's outside auditor has testified, and Respondent acknowledges this point, that Respondent never sent him the requested additional information supporting the anticipated additional collateral and cash flows from the Loans' guarantors. [208] The outside auditor communicated to the Bank that this information was "[a]bsolutely" important and has stated that without the additional documentation, he believed the Bank lacked a reasonable basis to argue that the charge-offs were erroneous.[209] For these reasons, the Comptroller overrules these Exceptions.

c. Exceptions 27, 31, 34, 35

Respondent argues that the ALJ erred in (1) improperly drawing an inference in favor of Respondent and weighing the credibility of Respondent's evidence supporting his asserted basis for the Bank rebooking the Loans, (2) ignoring evidence that the Loans should have been rebooked, and (3) determining that the Call Reports were materially inaccurate as a matter of law.

Respondent first argues that the ALJ ignored evidence that the reason the charge-offs were rebooked was because Respondent believed that the ability and willingness of guarantors should

[205] Ex. EC 45 at 1.
[206] Ex. EC 58 at 1-2.
[207] Ex. EC 32 at 1.
[208] Ex. EC 47 at 69:18-72:8, 74:10-75:19, 239:22-240:4; *see also* Amended Notice ¶ 73; Answer ¶ 73; Ex. EC 3 at 216:19-217:1; Ex. EC 57; Ex. EC 67.
[209] *Id.*

have been taken into account when the Loans were charged off.[210] Further, Respondent asserts that this belief is supported by testimony from the Bank's CFO, the Bank's outside auditor, and Respondent's reply to the OCC's 15-day letter.[211] Even if the Comptroller accepts Respondent's assertion that the ALJ may have overlooked evidence from the Bank's outside auditor and others regarding whether the Loans were properly charged off, it does not alter the ALJ's core finding that the Call Reports were inaccurately filed. Respondent's assertion does not address evidence that the Bank's outside auditor informed Respondent of the OCC's warnings about rebooking the Loans.[212] Therefore, Respondent was on notice that the OCC's position about rebooking the Loans differed from that of the Bank's interpretation. As noted above and as detailed in the Recommended Decision, the OCC's interpretation of how GAAP applies to a specific transaction or event governs the filing of Call Reports, even when the Bank's interpretation is different.[213] Further, while the Bank's outside auditor initially opined that GAAP did not require a write-down of the Loans,[214] the auditor also communicated reservations about rebooking the Loans prior to the Bank filing the amended Call Reports.[215]

Finally, Respondent argues that the ALJ impermissibly weighed the credibility of the evidence in violation of the standard governing summary disposition.[216] As discussed earlier, the ALJ's finding that Respondent's evidence is insufficient to defeat a motion for summary disposition is consistent with the summary judgment standard, discussed above.[217] For these reasons, the Comptroller overrules these Exceptions.[218]

Respondent next argues that the ALJ overlooked evidence that the guarantors on the Loans were willing and able to pay the Loans and, thus, improperly concluded that the amended Call Reports were materially inaccurate.[219] Specifically, Respondent points to the guarantors' net worth and incomes, that the Loans were being paid at the time of the charge-offs, and that the guarantors made verbal assurances that they would pay the Loans. The evidence to which Respondent points, however, does not displace the concerns that caused the Loans to be charged off in the first place. First, the Bank's December 31, 2009, CARs for the Brooks loan stated that the loan was being downgraded "due to length of time it has taken to get the renovation project underway"[220] and that the guarantors were attempting to sell the collateral property underlying

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[210] Exception # 27.
[211] Exceptions # 27, 31.
[212] *See* discussion *supra* Section III.E.1.d.
[213] Recommended Decision at 20 (citing Ex. EC 54 at 11 (FFIEC 031 and 041 General Instructions (12-09))).
[214] Ex. EC 49.
[215] *See* discussion *supra* Section III.E.1.d.
[216] Exception # 27.
[217] *See* discussion *supra* Section III.B.
[218] The Bank's CFO's guidance and Respondent's reply to the 15-day letter were reiterations of the outside auditor's opinion and Respondent's arguments herein, *see, e.g.*, Ex. R 11 at 238:18-23; Ex. EC 4, at 2-3, and similarly do not negate the ALJ's finding that the Call Reports were inaccurately filed. As such, the Comptroller does not discuss in specific detail Respondent's argument that the ALJ improperly considered such evidence in this Final Decision.
[219] Exceptions # 34, 35. Respondent does not challenge the ALJ's finding that the changes to the amended Call Reports were material. Regardless, the record supports a finding that the amendments to the Call Reports were material. *See* Ex. EC 19 at 213:21-214:25; Ex. EC 60 at 125:18-126:6, 129:4-9; Ex. EC 61 at 5, 7.
[220] Ex. EC 32 at 68.

the Brooks loan but delayed renovation to focus on other projects.[221] Further, the record shows that Loan payments on the Brooks loan were sometimes late and past due.[222] The December 31, 2009, CARs for the AH&H loans stated that the loan was downgraded to a substandard loan classification "due to the length of time that the loan has been with the [B]ank without principal reduction."[223] The Bank did not receive the $116,500 principal pay-downs required under the AH&H loans' modification agreements from either the borrower or the guarantors.[224]

Moreover, the undisputed factual record reveals that the June 30, 2009, September 30, 2009, and December 31, 2009, CARs for the Loans were included in board packages and Respondent did not object to the classification of Loans as impaired and collateral dependent, despite that he now maintains that these classifications were erroneous.[225] Further, the CARs for the Loans did assess the financial performance of the guarantors and their ability to support the Loans[226]—including the guarantors' incomes and net worth—but the Bank still determined that the Loans were impaired and collateral dependent. Finally, before the Call Reports were amended on August 16, 2010, one of the Loans' guarantors e-mailed Respondent and stated that "we do not have sufficient collateral to cover the AH&H loan deficiency." [227] Therefore, the evidence on the record does not support Respondent's Exceptions regarding the guarantors' willingness and ability to pay the Loans. For these reasons, the Comptroller finds that the ALJ properly concluded that the amendments to the Call Reports were materially inaccurate.

d. Exception 30

Respondent argues that the ALJ erred in relying on the August 23, 2010, board meeting minutes. These minutes state that the board was awaiting "appraisals on assets pledged as collateral to shore up exposure" on the AH&H loans.[228] Respondent argues that he testified that the meeting minutes were inaccurate because he informed the board that the loans were rebooked because they had been erroneously charged off, not because additional collateral was pledged.[229] Respondent also argues that the ALJ improperly relied on these minutes because they were not signed and, accordingly, were not final or complete.[230] Respondent's arguments here do not overcome the overwhelming evidence supporting the charges. First, other evidence on the record corroborates and supports the ALJ's finding that Respondent sought additional collateral as a

[221] *Id.* at 67.
[222] Ex. EC 34 at 11 at ¶ 23. Respondent argues that this loan was current at the time of the charge-offs. *See* Exceptions, at 54. Even accepting Respondent's assertion that the Brooks loan was current at the time of the initial charge-off this argument does not contradict evidence on the record that payments on the Brooks loan were *at times* "late and past due" throughout the life of the loan.
[223] Ex. EC 32 at 57.
[224] Ex. EC 19 at 152:12-16, 153:1-4, 156:1-6; Ex. EC 26; Ex. EC 27.
[225] Ex. EC 3 at 235:10-236:3; Ex. EC 36 at 39:17-40:2, 42:22-43:20; Ex. EC 37; Ex. EC 38; Ex. EC 39.
[226] Ex. EC 32 at 57, 67; *see also* Ex. EC 33 at 126:12-24 (OCC examiner highlighting concerns of guarantors' ability to make payment on the Brooks loan because the guarantors relied on unrelated, outside sources of income and the guarantors' brother to make payments on the loan).
[227] Ex. EC 62.
[228] Recommended Decision at 19; *see also* Ex. EC 9 at 3; Ex. EC 50 at 3.
[229] *See* Ex. R 43 at 233:17-234:25.
[230] *See* Ex. R 44 at 211:23-212:25.

basis for rebooking the loans.[231] Respondent's argument that the board meeting minutes are inaccurate is not consistent with the evidence on the record and is not reasonable in light of this other evidence. As such, Respondent's Exception does not invalidate the ALJ's finding here. [232]

Moreover, even accepting Respondent's argument that he communicated to the board that the Loans were rebooked and the Call Reports were refiled because he believed the initial write-downs to be erroneous, there was no reasonable basis for Respondent to reach this conclusion. The record shows that the Bank's outside auditor requested additional information from Respondent before he could submit a memorandum supporting a conclusion that reversing the charge-downs was proper and Respondent never provided that additional information. The record also shows that the Bank's outside auditor warned the Bank's CFO and Respondent that they had to convince the OCC that the charge-downs were taken in error and that the Bank's position was different from the OCC's position on the issue. Further, the record shows that the OCC reiterated its position that the initial charge-downs were proper and warned the Bank that it was imperative that its Call Reports are accurate.[233]

e. Exception 33

Respondent argues that the ALJ erred in ignoring the expert report from Dr. John Campbell, who holds a PhD in accounting and is a professor of accounting,[234] when the ALJ determined that Respondent caused the Bank to file materially inaccurate Call Reports. Dr. Campbell expressed an opinion that any conclusion that a loan is impaired or collateral dependent must be made with due consideration of the strength of the guarantors and that GAAP requires the correction of erroneous charge-downs.[235] Respondent's Exception, however, does not override the ALJ's finding that the OCC's interpretation of how GAAP applies to a specific transaction or event governs the filing of Call Reports, even when the Bank's interpretation is different.[236] The OCC expressly warned Respondent on several occasions that it did not agree with the Bank's position on rebooking the Loans *before* the amended Call Reports were filed.[237]

Further, Dr. Campbell's expert report is not helpful on the issue of whether the Bank's initial decision to charge off the Loans in this instance was erroneous. Dr. Campbell specifically stated that he did not review the Bank's files for the Loans and expressed no opinion with respect to

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[231] *See, e.g.*, Ex. EC 49 (July 2, 2010, e-mail exchange between the Bank's CFO and outside auditor about assessing guarantors' ability to cover debt when considering a loan write-down and stating that in the case of the Brooks loan, Respondent has stated that the "customer is going to pledge other assets like receivables and collateral."); Ex. EC 62 (August 5, 2010, e-mail from one of the AH&H guarantors to Respondent stating that "we do not have sufficient collateral to cover the AH&H loan deficiency.")

[232] *Liberty Lobby*, 477 U.S. at 254 ("there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact" to find for the non-movant).

[233] *See* discussion *supra* Section III.E.1.

[234] *See* Ex. R 40.

[235] Ex. R 39 at 10-11.

[236] Recommended Decision at 20 (citing Ex. EC 54 at 11 (FFIEC 031 and 041 General Instructions (12-09))).

[237] *See* discussion *supra* Section III.E.1.d. Moreover, the Bank included a description of the guarantors' financial capacity and support in the December 31, 2009, CARs when it concluded that the Loans were impaired and collateral dependent. *See* discussion of Exceptions # 27, 31, 34, 35.

their impairment or collateral dependence,[238] which were the grounds for the initial charge-down decision. Therefore, the expert report does not opine on whether the Loans in this case were properly deemed impaired and collateral dependent and whether they were properly charged off.

f. Exception 37

Respondent also argues that Enforcement Counsel should be equitably estopped from bringing a case related to rebooking the Loans (whether under an unsafe or unsound basis or any other basis supporting the enforcement action) because the OCC knew that the Bank would rebook the Loans. Respondent's argument is factually and legally inaccurate.

First, Respondent points to e-mail exchanges between Bank officers and OCC examiners to support his position that the OCC knew that the Bank rebooked the Loans.[239] The e-mails to which Respondent points, however, show that OCC examiners warned that Call Report instructions and accounting principles did not support the Bank's position on rebooking the Loans,[240] that the OCC generally does not allow charge-offs to be rebooked,[241] and that it was "imperative" that the Bank file accurate Call Reports.[242] Also, when the OCC discovered that the Bank refiled the Call Reports, the OCC stated that the amendments to the Call Reports were unclear and repeatedly asked Respondent to provide documentation supporting the amendments.[243]

Second, Respondent's argument that Enforcement Counsel should be equitably estopped from bringing this charge because it should have been aware that the Loans were rebooked and would have been reflected in amended Call Reports is not a colorable defense in this case.[244] For these reasons, the Comptroller declines to adopt this Exception.

3. Unsafe or Unsound Practices Related to the AH&H and Brooks Loans

Respondent argues that the Comptroller should not accept the ALJ's finding that Respondent recklessly engaged in an unsafe or unsound practice when he rebooked the Loans and caused the Bank to file the materially inaccurate Call Reports because the ALJ did not independently analyze the safety and soundness of the decision to reverse the charge-down of the Loans.[245] The Comptroller need not reach this issue because the record provides ample support to conclude that Respondent caused the Bank to violate the law—12 U.S.C. § 161— when he caused the

[238] Ex. R 39 at 3.
[239] Ex. R 31; Ex. R 33.
[240] Ex. R 33 at 2; *see also* Ex. EC 58 at 1-2.
[241] *See* Ex. R 31 at 1.
[242] Ex. R 33 at 2.
[243] Ex. EC 8 at 2; Ex. EC 66.
[244] *See De La Fuente*, 332 F.3d at 1220 ("When a party seeks to invoke equitable estoppel against the government, we ... require a showing that the agency engaged in 'affirmative conduct going beyond mere negligence.'").
[245] Exception # 37.

December 31, 2009, March 31, 2010, and June 30, 2010, Call Reports to be filed inaccurately.[246] This conclusion provides a more than sufficient basis for imposition of a CMP.[247]

4. *Breach of Fiduciary Duty Related to the AH&H and Brooks Loans*

Respondent again argues that he did not breach his fiduciary duty related to rebooking the Loans and again cites to a case where damages are a required element of a breach of fiduciary duty claim.[248] For the reasons set forth in Section III.D.4, the Comptroller does not adopt the ALJ's finding that Respondent breached his fiduciary duty.

5. *Pattern of Misconduct Related to the AH&H and Brooks Loans*

Respondent argues that the ALJ erred in finding that Respondent engaged in a pattern of misconduct, for the purposes of assessing liability under 12 U.S.C. § 1818(i)(2)(B).[249] Respondent first argues that a pattern of misconduct does not consist of a "single event" but requires a showing of a "series of unlawful efforts." The Comptroller declines to adopt this Exception. The Comptroller has determined that Respondent engaged in unsafe or unsound practices regarding the Campos overdraft activities and that Respondent violated the law when he caused the Bank—on July 30, 2010, and August 16, 2010—to file the materially inaccurate December 31, 2009, March 31, 2010, and June 30, 2010 Call Reports. These multiple unlawful efforts, as to Respondent's actions regarding the overdrafts and Respondent's actions regarding the Call Reports, provide sufficient bases to support the conclusion that Respondent's actions constitute a pattern of misconduct.

Respondent also argues that the ALJ improperly found a pattern of misconduct because there are factual issues that preclude granting summary disposition with regard to the charges in Article IV (and Article III) of the Amended Notice. As determined above, the Comptroller adopts the ALJ's conclusions that summary disposition is proper with regard to the charges in the Amended Notice. For these reasons, the basis for Respondent's argument that there was not a pattern of misconduct is rejected and the Comptroller overrules this Exception.

F. Amount of the Penalty

The FDI Act allows the OCC to assess a CMP of $5,000 per day for a First Tier CMP, and $25,000 per day for a Second Tier CMP.[250] In determining the amount of a penalty, the

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[246] The focus of the ALJ's Recommended Decision relating to the Loans is whether Respondent violated the Call Report instructions and OCC warnings when he rebooked the Loans. The Recommended Decision, however, does not analyze whether Respondent recklessly engaged in an unsafe or unsound when he rebooked the Loans. Further, it does not appear that Enforcement Counsel specifically argued that these actions constitute an unsafe or unsound practice in its Brief in Support of the Motion for Summary Disposition. *See generally* Enforcement Counsel's Brief in Support of Motion for Summary Disposition.
[247] *See* discussion *infra* Section III.F.
[248] Exception # 38.
[249] Exception # 40.
[250] 12 U.S.C. § 1818(i)(2)(A), (B).

Comptroller must take into account mitigating factors outlined in the FDI Act.[251] The Comptroller also takes into account the thirteen factors set forth in the FFIEC's Interagency Policy Regarding the Assessment of Civil Money Penalties.[252] Enforcement Counsel seeks to assess Respondent a $10,000 CMP based on the charges outlined in the Amended Notice.

As detailed above, the OCC may assess Respondent a Second Tier CMP both for his actions relating to Mr. Campos' overdrafts and his actions causing the Bank to file materially inaccurate Call Reports. Respondent's misconduct in allowing Mr. Campos' overdrafts lasted from April 2010 until October 2010. Respondent caused the Bank to file inaccurate Call Reports on July 30, 2010, and August 16, 2010, and the Bank refiled these Call Reports to correct them in October and November 2010. Thus, based on the number of days Respondent's misconduct was outstanding, the OCC could assess a CMP far beyond the $10,000 CMP Enforcement Counsel seeks.[253] Moreover, Respondent's misconduct related to the overdrafts and his misconduct related to the materially inaccurate Call Reports each provide an independent basis to impose a CMP far beyond $10,000.

Nonetheless, Enforcement Counsel and Respondent stipulated that a $10,000 CMP is appropriate, if the evidence supported the charges. Given the conclusion that Respondent is liable for a Second Tier CMP and this stipulation, the Comptroller finds that a $10,000 CMP is appropriate.[254] The Comptroller will therefore assess Respondent a $10,000 CMP.

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[251] 12 U.S.C. § 1818(i)(2)(G). These factors are: (1) the size of financial resources and good faith of the person charged; (2) the gravity of the violation; (3) the history of previous violations; and (4) other matters as justice may require. *Id.*

[252] 63 Fed. Reg. 30,226 (June 3, 1998). These factors are: (1) evidence that the violation or practice or breach of fiduciary duty was intentional or was committed with a disregard of the law or with a disregard of the consequences to the institution; (2) the duration and frequency of the violations, practices, or breaches of fiduciary duty; (3) the continuation of the violation, practice, or breach of fiduciary duty after the respondent was notified or, alternatively, its immediate cessation and correction; (4) the failure to cooperate with the agency in effecting early resolution of the problem; (5) evidence of concealment of the violation, practice, or breach of fiduciary duty or, alternatively, voluntary disclosure of the violation, practice or breach of fiduciary duty; (6) any threat of loss, actual loss, or other harm to the institution, including harm to the public confidence in the institution, and the degree of such harm; (7) evidence that a participant or his or her associates received financial gain or other benefit as a result of the violation, practice, or breach of fiduciary duty; (8) evidence of any restitution paid by a participant of losses resulting from the violation, practice, or breach of fiduciary duty; (9) history of prior violation, practice, or breach of fiduciary duty, particularly where they are similar to the actions under consideration; (10) previous criticism of the institution or individual for similar actions; (11) presence or absence of a compliance program and its effectiveness; (12) tendency to engage in violations of law, unsafe or unsound banking practices, or breaches of fiduciary duty; and (13) the existence of agreements, commitments, orders, or conditions imposed in writing intended to prevent the violation, practice, or breach of fiduciary duty.

[253] Respondent assumed the duties of Interim CEO on April 30, 2010, and resigned from the Bank as Interim CEO on September 15, 2010. *See* Amended Notice ¶¶ 7, 10; Answer ¶¶ 7, 10. That means the OCC could assess a $25,000 Second Tier CMP for each of those 139 days, totaling $3,475,000. Assuming the statute of limitations bars any portion of the action before June 30, 2010, that still means the OCC could assess a $25,000 Second Tier CMP for 78 days, totaling $1,950,000.

[254] The evidence on the record supports imposing a Second Tier CMP because the Comptroller has found that Respondent recklessly engaged in unsafe or unsound practices for his actions in allowing Mr. Campos' overdrafts, that Respondent violated the law when he caused the Bank to file materially inaccurate Call Reports, and that Respondent's practices and violations were a part of a pattern of misconduct. *See* 12 U.S.C. § 1818(i)(2)(B). These violations and practices provide sufficient bases for imposing the $10,000 CMP and the penalty is not affected by the Comptroller's decision not to conclude on the breach of fiduciary duty issue (with respect to both charges) and the unsafe or unsound practices issue (with respect to the Call Report charge).

IV. Conclusion

For the foregoing reasons, the ALJ's recommendation that the Comptroller assess a $10,000 CMP against Respondent is well-supported. The Comptroller adopts this recommendation as discussed herein. The Comptroller specifically adopts the ALJ's recommendations that Respondent recklessly engaged in an unsafe or unsound practice when he allowed the overdrafts in Mr. Campos' accounts without adequate controls, that Respondent violated 12 U.S.C. § 161 when he caused the Bank to file materially inaccurate Call Reports, and that Respondent engaged in a pattern of misconduct when participating in or directing these actions. Further, as explained above, the Comptroller accepts the ALJ's recommendation that the statute of limitations in 28 U.S.C. § 2462 does not bar the overdrafts charge but only to the extent discussed herein.

For the reasons stated above, however, the Comptroller declines to adopt the ALJ's recommendations that Respondent recklessly engaged in an unsafe or unsound practice when he caused the Bank to file materially inaccurate Call Reports or that Respondent breached his fiduciary duties when participating in or directing the actions that are the bases for the enforcement action.

Except as discussed above, the Comptroller denies all of Respondent's Exceptions, including any Exceptions not specifically mentioned above.

IT IS SO ORDERED.

Dated at Washington, D.C., this 10 day of July, 2017.

Keith A. Noreika
Acting Comptroller of the Currency
Office of the Comptroller of the Currency

Appendix A: Comptroller's Position on ALJ's Findings of Fact and Conclusions of Law

Citation (ALJ's Recommended Decision)	**Finding of Fact/Conclusion of Law**	**Comptroller Adopts or Rejects**
Finding of Fact # 1, p. 29	United Americas Bank, N.A., Atlanta, Georgia ("Bank"), was an insured depository institution as that term is used in 12 U.S.C. § 1813(c)(2).	Adopt (*See* Final Decision at 1, 3-4)
Finding of Fact # 2, p. 29	Respondent was an institution-affiliated party as that term is used in 12 U.S.C. § 1813(u) in his capacity as a Bank director.	Adopt (*See* Final Decision at 1 n.2, 3-4)
Finding of Fact # 3, p. 29	The Bank was a national banking association as that term is used in 12 U.S.C. § 1813(q)(1)(A).	Adopt (*See* Final Decision at 1, 3-4)
Finding of Fact # 4, p. 29	Respondent owed fiduciary duties to the Bank.	Adopt (*See* Final Decision at 1 n.2)
Finding of Fact # 5, p. 29	Respondent was aware that the Bank was regularly allowing a Bank customer, Alex Campos, to incur and maintain overdrafts in personal and business deposit accounts, without an agreement allowing the Bank to offset his accounts against the others.	Adopt (*See* Final Decision at 6-9)
Finding of Fact # 6, p. 29	Respondent authorized overdrafts in Mr. Campos' accounts in 2010 on July 19, 20, 21, 28, and 29 and August 19, 23, 26, 27, and 30.	Partially Adopt (Respondent allowed the overdrafts by not stopping them but evidence does not show that he personally authorized each one. *See* Final Decision at 7-9, 9-13.)

Citation (ALJ's Recommended Decision)	Finding of Fact/Conclusion of Law	Comptroller Adopts or Rejects
Finding of Fact # 7, p. 29	Respondent resigned as the Bank's Interim CEO effective September 15, 2010, and failed to stop Mr. Campos' overdrafts.	Adopt (*See* Final Decision at 1, 6-9)
Finding of Fact # 8, p. 29	Respondent failed to ensure measures were taken to mitigate the risk Mr. Campos' overdrafts posed to the Bank.	Adopt (*See* Final Decision at 10-11)
Finding of Fact # 9, p. 29	While serving as the Bank's Interim CEO and a member of the Bank's board of directors, Respondent concurred in the board's unanimous determination to charge off two loans made to AH&H and one loan made to Brook Avenue LLC. Thereafter, when Respondent determined the charge-offs were erroneously entered, he sought to confirm with the OCC that the Bank could rebook the loans through entries to the three pertinent quarterly Call Reports, and was told the Bank could not do so.	Adopt (*See* Final Decision at 19-22)
Finding of Fact # 10, p. 30	Notwithstanding the direction provided by the OCC and without seeking further regulatory instruction from the OCC, Respondent directed the Bank's Chief Financial Officer to rebook the loans, and on July 7, 2010, that direction was carried out, at a time when all three loans were past due.	Partially Adopt (Respondent directed the Bank's CFO to rebook the loans but Final Decision does not conclude as to whether the direction was carried out at a time when all three loans were past due, specifically the Brooks loan. *See* Final Decision at 20-21, 26-28, 28 n.222)
Finding of Fact # 11, p. 30	Respondent failed at the next board meeting to disclose to the board members that the rebookings were contrary to the OCC's directions.	Conclusion Not Reached (Respondent did not specifically except to the finding that he failed to

Citation (ALJ's Recommended Decision)	Finding of Fact/Conclusion of Law	Comptroller Adopts or Rejects
		inform the board of OCC's directions, *see* Exceptions # 30, 31. *See* Final Decision at 28-29)
Finding of Fact # 12, p. 30	Following reviews by the Bank's outside auditor, the Bank filed its June 30, 2010, Call Report, which reflected the rebooking of the charged-off portions of the three loans; and shortly thereafter, one of the AH&H guarantors informed Respondent it did not have sufficient collateral to cover the AH&H loan deficiency.	Adopt (*See* Final Decision at 21-23)
Finding of Fact # 13, p. 30	Shortly thereafter, and at Respondent's direction, the Bank refiled its December 31, 2009, March 31, 2010, and June 30, 2010, Call Reports, each of which reflected the rebooking of the charged-off portions of the loans. In this way, Respondent caused the Bank to file inaccurate Call Reports, in violation of 12 U.S.C. § 161.	Adopt (*See* Final Decision at 22-23)
Finding of Fact # 14, p. 30	The Comptroller may, pursuant to 12 U.S.C. 1818(i)(2)(A), impose a First Tier CMP upon Respondent, upon sufficient evidence being shown establishing that Respondent violated 12 U.S.C. § 161.	Adopt (*See* Final Decision at 3-4, 31-32)
Finding of Fact # 15, p. 30	The Comptroller may, pursuant to 12 U.S.C. 1818(i)(2)(B), impose a Second Tier CMP upon Respondent, upon sufficient evidence being shown establishing that Respondent has committed a violation of law; or recklessly engaged in an unsafe or unsound practice; or breached a fiduciary duty; provided the preponderant evidence Enforcement Counsel establishes that the violation of law, the unsafe or unsound practice, or the fiduciary breach is part of a pattern of misconduct.	Adopt (*See* Final Decision at 3-4, 31-32)

Citation (ALJ's Recommended Decision)	Finding of Fact/Conclusion of Law	Comptroller Adopts or Rejects
Finding of Fact # 16, p. 30	The parties stipulate that $10,000 is an appropriate amount for any such assessment, considering both the statutory mitigating factors set forth in 12 U.S.C. § 1818(i)(2)(G) and the factors set forth in the Federal Financial Institutions Examination Council's Interagency Policy Regarding the Assessment of Civil Money Penalties.	Adopt (*See* Final Decision at 2, 31-32)
Conclusion of Law # 1, p. 30	The OCC is the appropriate federal banking agency under 12 U.S.C. § 1813(q) and is authorized to assess this CMP against Respondent pursuant to 12 U.S.C. § 1818(i).	Adopt (*See* Final Decision at 1, 3-4)
Conclusion of Law # 2, p. 30	By failing to ensure measures were taken to mitigate the risk in Mr. Campos' overdrafts, Respondent breached his fiduciary duty to the Bank and engaged in a pattern of misconduct that constituted reckless engagement in unsafe or unsound banking practices.	Partially Adopt (Respondent engaged in a pattern of misconduct that constituted reckless unsafe or unsound banking practices. *See* Final Decision at 9-16. Do not decide whether Respondent breached his fiduciary duty. *See* Final Decision at 15.)
Conclusion of Law # 3, p. 31	Respondent has not met his burden of establishing that the part of this action based on Mr. Campos' overdrafts is barred by the statute of limitations in 28 U.S.C. § 2462.	Adopt (*See* Final Decision at 16-17)
Conclusion of Law # 4, p. 31	By directing the refiling of the Bank's December 31, 2009, March 31, 2010, and June 30, 2010, Call Reports, Respondent caused the Bank to file inaccurate Call Reports, in violation of 12 U.S.C. § 161. Considered both independent of, and in conjunction with, Respondent's failure to mitigate the risks presented by Mr. Campos' overdraft practices, Respondent engaged in a	Partially Adopt (Respondent engaged in a pattern of misconduct when he violated 12 U.S.C. § 161. *See* Final Decision at 23-30. Decline to adopt conclusion that

Citation (ALJ's Recommended Decision)	Finding of Fact/Conclusion of Law	Comptroller Adopts or Rejects
	pattern of misconduct that constituted reckless engagement in banking practices that were both unsafe and unsound; and he breached fiduciary duties he owed to the Bank.	Respondent recklessly engaged in an unsafe or unsound practice. *See* Final Decision at 30-31. Do not decide whether Respondent breached his fiduciary duty. *See* Final Decision at 31.)
Conclusion of Law # 5, p. 31	Because the record establishes that Respondent has violated the law, the record supports a finding that a First Tier penalty is warranted, pursuant to 12 U.S.C. § 1818(i)(2)(A)(i). Further, because Respondent's course of conduct was part of a pattern of misconduct that included multiple and repeated directions to violate the law regarding Call Reports, the record supports a finding that a Second Tier penalty is warranted, pursuant to 12 U.S.C. § 1818(i)(2)(B)(i)(I).	Adopt (*See* Final Decision at 31-32)
Conclusion of Law # 6, p. 31	The record supports by preponderant and substantial evidence the factual premises needed to find Respondent has engaged in the breach of his fiduciary duties owed to the Bank and further that he engaged in unsafe and unsound banking practices. Further, because Respondent's course of conduct was part of a pattern of misconduct, the record supports a finding that a Second Tier penalty is warranted, pursuant to 12 U.S.C. § 1818(i)(2)(B)(i).	Partially Adopt (Respondent engaged in a pattern of misconduct that constituted reckless unsafe or unsound banking practices when he allowed the overdrafts. *See* Final Decision at 9-16. Do not decide whether Respondent breached his fiduciary duty. *See* Final Decision at 15, 31. Decline to adopt conclusion that Respondent recklessly engaged in an unsafe or unsound practice regarding the Call

Citation (ALJ's Recommended Decision)	Finding of Fact/Conclusion of Law	Comptroller Adopts or Rejects
		Reports. *See* Final Decision at 30-31.)
Conclusion of Law # 7, p. 31	$10,000 is an appropriate amount for any such assessment, considering both the statutory mitigating factors set forth in 12 U.S.C. § 1818(i)(2)(G) and the thirteen factors set forth in the Federal Financial Institutions Examination Council's Interagency Policy Regarding the Assessment of Civil Money Penalties.	Adopt (*See* Final Decision at 3-4, 31-32)

Appendix B: Comptroller's Position on Respondent's Exceptions

Citation (Respondent's Exception)	Exception	Comptroller Accepts/Overrules
Exception # 1, p. 7	The Recommended Decision omits material facts demonstrating the Bank's practice of honoring Mr. Campos' overdrafts was not unsafe or unsound.	Overrules (*See* Final Decision at 9-13)
Exception # 2, p. 10	The Recommended Decision incorrectly concludes that permitting Mr. Campos to engage in overdraft was an unsafe and unsound banking practice.	Overrules (*See* Final Decision at 9-13)
Exception # 3, p. 12	The Recommended Decision incorrectly concludes that allowing the overdrafts was unsafe or unsound because there was no written offset agreement.	Overrules (*See* Final Decision at 9-13)
Exception # 4, p. 13	The Recommended Decision incorrectly concludes that allowing the overdrafts was unsafe or unsound because there was no overdraft limit on Mr. Campos' accounts.	Overrules (*See* Final Decision at 9-13)
Exception # 5, p. 14	The Recommended Decision incorrectly concludes that jurisprudence instructs allowing a customer to incur significant overdrafts is unsafe or unsound.	Overrules (*See* Final Decision at 9-13)
Exception # 6, p. 15	The Recommended Decision incorrectly concludes that Respondent allowed the overdrafts with no terms protecting the Bank's interest.	Overrules (*See* Final Decision at 9-13)

Citation (Respondent's Exception)	Exception	Comptroller Accepts/Overrules
Exception # 7, p. 16	The Recommended Decision incorrectly concludes that Respondent failed to minimize the risk in the overdrafts.	Overrules (*See* Final Decision at 9-13)
Exception # 8, p. 19	The Recommended Decision incorrectly concludes the overdrafts were unsafe or unsound because they occurred when the Bank's condition was critically deficient.	Overrules (*See* Final Decision at 9-13)
Exception # 9, p. 20	The Recommended Decision incorrectly concludes the overdrafts were unsafe or unsound because they were unsecured extensions of credit.	Overrules (*See* Final Decision at 9-13)
Exception # 10, p. 21	The Recommended Decision incorrectly concludes Respondent acted recklessly.	Overrules (*See* Final Decision at 13-15)
Exception # 11, p. 21	The Recommended Decision incorrectly concludes Respondent was reckless because the overdrafts, if not covered, could have caused the Bank to fail.	Overrules (*See* Final Decision at 13-15)
Exception # 12, p. 22	The Recommended Decision incorrectly concludes Respondent acted with clear neglect for, and plain indifference to, applicable regulations.	Accept (*See* Final Decision at 13-15)
Exception # 13, p. 23	The Recommended Decision incorrectly concludes Respondent acted with clear neglect for, and plain	Accept (*See* Final Decision at 13-15)

Citation (Respondent's Exception)	Exception	Comptroller Accepts/Overrules
	indifference to, agency orders.	
Exception # 14, p. 25	The Recommended Decision incorrectly concludes the risk of loss from Mr. Campos' overdrafts was so obvious that Respondent knew or should have been aware of it.	Overrules (*See* Final Decision at 13-15)
Exception # 15, p. 26	The Recommended Decision incorrectly concludes Respondent was reckless because he delegated the task of mitigating the risk in the overdrafts.	Overrules (*See* Final Decision at 13-15)
Exception # 16, p. 28	The Recommended Decision incorrectly concludes Respondent was reckless because he failed to provide meaningful oversight after delegating the task of mitigating the risk in the overdrafts.	Overrules (*See* Final Decision at 13-15)
Exception # 17, p. 29	The Recommended Decision incorrectly concludes Respondent was reckless because he offered no explanation for not acting to mitigate the risk in the overdrafts from July to August 2010.	Overrules (*See* Final Decision at 13-15)
Exception # 18, p. 29	The Recommended Decision incorrectly credits Enforcement Counsel's expert testimony while not considering Respondent's expert.	Overrules (*See* Final Decision at 9-15)
Exception # 19, p. 30	The Recommended Decision incorrectly concludes	Overrules (*See* Final Decision at 13-15)

Citation (Respondent's Exception)	Exception	Comptroller Accepts/Overrules
	Respondent was reckless because he stated regulators were making a mountain out of a molehill regarding Mr. Campos' overdrafts.	
Exception # 20, p. 32	The Recommended Decision incorrectly concludes Respondent was reckless because he did not implement timely controls on the overdrafts.	Overrules (*See* Final Decision at 13-15)
Exception # 21, p. 33	The Recommended Decision incorrectly concludes Respondent breached his fiduciary duty.	Accept (*See* Final Decision at 15)
Exception # 22, p. 35	The Recommended Decision incorrectly concludes the statute of limitations on the overdrafts began to run after June 30, 2010.	Overrules (*See* Final Decision at 16-17)
Exception # 23, p. 36	The Recommended Decision incorrectly relies on *Proffitt v. FDIC*, which is distinguishable from this case.	Overrules (*See* Final Decision at 16-17)
Exception # 24, p. 38	The Recommended Decision incorrectly predicates Respondent's liability on events outside the five year statute of limitations.	Overrules (*See* Final Decision at 16-17)
Exception # 25, p. 40	The Recommended Decision erroneously concludes that the materially inaccurate Call Reports were made at Respondent's direction.	Overrules (*See* Final Decision at 24-25)
Exception # 26, p. 42	The Recommended Decision erroneously concludes that	Overrules

Citation (Respondent's Exception)	Exception	Comptroller Accepts/Overrules
	Respondent disregarded instructions from OCC examiners regarding charging-off the Loans.	(*See* Final Decision at 25-26)
Exception # 27, p. 44	The Recommended Decision fails to draw inferences from and improperly judges the credibility of Respondent's deposition testimony.	Overrules (*See* Final Decision at 26-28)
Exception # 28, p. 45	The Recommended Decision erroneously concludes that OCC examiners can prescribe how a bank reports loans on its Call Reports.	Overrules (*See* Final Decision at 25-26)
Exception # 29, p. 47	The Recommended Decision failed to consider evidence from the Bank's outside auditor and the Bank's CFO regarding the decision to reverse the charge-downs of the Loans.	Overrules (*See* Final Decision at 25-26)
Exception # 30, p. 48	The Recommended Decision erroneously relied on an unsigned version of the Bank's August 23, 2010, board meeting minutes.	Overrules (*See* Final Decision at 28-29)
Exception # 31, p. 49	The Recommended Decision erroneously cites to Respondent's reply to the OCC's 15-day letter.	Overrules (*See* Final Decision at 26-28)
Exception # 32, p. 50	The Recommended Decision erroneously and selectively relies on testimony from the Bank's outside auditor, improperly draws inferences in favor of Enforcement Counsel, and ignores	Overrules (*See* Final Decision at 25-26)

Citation (Respondent's Exception)	Exception	Comptroller Accepts/Overrules
	evidence supporting Respondent's position.	
Exception # 33, p. 52	The Recommended Decision ignores testimony from Dr. John Campbell, Respondent's expert witness, regarding GAAP.	Overrules (*See* Final Decision at 29-30)
Exception # 34, p. 54	The Recommended Decision ignores evidence regarding whether the Loans should have been charged off under GAAP.	Overrules (*See* Final Decision at 26-28)
Exception # 35, p. 55	The Recommended Decision erroneously concludes that Respondent caused the Bank to file materially inaccurate Call Reports.	Overrules (*See* Final Decision at 26-28)
Exception # 36, p. 56	The Recommended Decision erroneously concludes that Enforcement Counsel was entitled to judgment as a matter of law on the claim asserted in Article IV of the Amended Notice.	Overrules (*See* Final Decision at 31)
Exception # 37, p. 56	The Recommended Decision erroneously concludes that Respondent's actions with respect to the Loans were an unsafe and unsound banking practice.	Accept (But Reject to the extent Respondent argues within this exception that Enforcement Counsel should be collaterally estopped from bringing this action. *See* Final Decision at 30.)
Exception # 38, p. 57	The Recommended Decision erroneously concludes that Respondent's actions with respect to the Loans were a breach of fiduciary duty.	Accept (*See* Final Decision at 31)

Citation (Respondent's Exception)	Exception	Comptroller Accepts/Overrules
Exception # 39, p. 58	The Recommended Decision erroneously concludes that Respondent's actions with respect to the Loans were a violation of 12 U.S.C. § 161.	Overrules (*See* Final Decision at 24-25)
Exception # 40, p. 61	The Recommended Decision erroneously finds that Enforcement Counsel is entitled to judgment upon the bases presented in Article V of the Amended Notice.	Overrules (*See* Final Decision at 9-17, 23-31)