UNITED STATES OF AMERICA
before the
OFFICE OF THRIFT SUPERVISION
DEPARTMENT OF THE TREASURY

IN THE MATTER OF: Robert D. Rapaport, Majority Shareholder of Great Life Savings Association Sunrise, Florida	Enforcement Review Committee Resolution No: 90-49 Dated: July 2, 1990 OTS Order No. AP 93-95 Dated: November 18, 1993

DECISION AND ORDER

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DECISION

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

This case arises from a Net Worth Maintenance Agreement between Robert D. Rapaport ("Respondent") and the former Federal Savings and Loan Insurance Corporation ("FSLIC"), operating under the direction of the former Federal Home Loan Bank Board ("FHLBB").

Respondent, the owner of approximately 70 percent of the stock of Great Life Savings and Loan, Sunrise, Florida (the "Association" or "Great Life"), executed a Net Worth Maintenance Agreement (the "Net Worth Maintenance Agreement" or the "Agreement") on March 19, 1985. The Net Worth Maintenance Agreement required him to maintain the net worth of the Association for a period of five years in compliance with 12 C.F.R. § 563.13 or any successor regulation. When the Association's capital fell below the required levels in 1989, the Office of Thrift Supervision ("OTS") demanded that Respondent honor the agreement. Respondent refused to do so.

Based on the record, the Acting Director finds that Respondent's execution of the Net Worth Maintenance Agreement rendered Respondent personally liable for a portion of the Association's net worth, if its net worth fell below required levels during the five year term of the Agreement; that Respondent violated the Net Worth Maintenance Agreement by failing to infuse capital into the Association when his obligation to do so under the Agreement was triggered; and that Respondent's failure to infuse capital as required under the

Agreement unjustly enriched him. Accordingly, the Acting Director affirms the conclusions of the Administrative Law Judge with respect to Respondent's liability.

The Acting Director affirms in part and reverses in part the conclusions of the Administrative Law Judge with respect to the amount of Respondent's liability. The Administrative Law Judge concluded that Respondent was liable in the amount of $1,946,000. The Acting Director concludes that Respondent is entitled to his pro rata share of two offsets totalling $585,587 in connection with a classified loan to Pembroke Development Corporation. While the evidence demonstrates that the loan was properly classified as of the conclusion of the 1989 examination of Great Life based on the information available at that time, the weight of the evidence also demonstrates that under 12 U.S.C. § 1818(b)(6), Respondent is entitled to an offset in the amount of 69.9 per cent of $585,587 -- or $409,325 -- in connection with this loan on the record of this proceeding. Accordingly, the Acting Director orders Respondent to pay $1,536,675 to the Association in receivership.

II. <u>BACKGROUND</u>

A. <u>Description of the Charges and Summary of Administrative Proceedings</u>

In 1990, the OTS placed Great Life into receivership on June 1, 1990. On July 2, 1990, the OTS issued a Notice of Charges and Hearing ("Notice") under section 5(d)(1)(A) of the Home Owners' Loan Act ("HOLA"), 12 U.S.C. § 1461 et seq., and section 8(b) of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1811 et seq. The Notice charges that Respondent, in order to obtain federal deposit insurance for the Association, executed a Net Worth Maintenance Agreement with the FSLIC. According to the Notice, Respondent agreed to infuse capital into the Association should the institution's net worth fall below the levels required by 12 C.F.R. § 563.13 or any successor regulation for a five year period ending March 19, 1990. The Notice further alleges that in November, 1989, the OTS notified Respondent that the Association had failed to meet its regulatory capital requirements as of September 30, 1989 but that Respondent did not infuse capital as required under the Net Worth Maintenance Agreement; and that in January, 1990, Respondent was again notified of the deficiency but failed to cure it. The Notice concludes that Respondent violated the Net Worth Maintenance Agreement by "failing to cause the net worth of Great Life to be maintained at a level required by such Agreement, and/or 12 C.F.R. § 563.13 or successor regulation," and by failing to infuse capital as required under the Agreement. The Notice also concludes that Respondent was unjustly enriched by such violation.

Respondent thereafter brought suit in federal district court for the southern district of Florida to preliminarily enjoin the enforcement proceeding. He sought and obtained a stay of this proceeding from Administrative Law Judge Frederick M. Dolan (the "ALJ") pending resolution of the federal court action. After the district court denied his request for an injunction,[1] Respondent unsuccessfully moved to dismiss the proceeding herein. Respondent later answered the charges, asserting some 15 affirmative defenses. OTS Enforcement's ("Enforcement") motion to strike these defenses was denied.

On June 8-12, 1992, a hearing was held in Fort Lauderdale, Florida before the ALJ during which the parties presented the testimony of witnesses and introduced documentary evidence. The parties filed post-hearing proposed findings of fact, conclusions of law, memoranda of law, briefs and reply briefs. The ALJ requested and obtained an extension of time in which to issue his Recommended Decision. OTS Order No. AP 93-8 (Jan. 29, 1993).

Respondent again moved to dismiss the action based on the District of Columbia Circuit's decision in Wachtel v. OTS, 982 F.2d 581 (D.C. Cir. 1993). The ALJ referred Respondent's motion to dismiss to the Acting Director of the OTS, who denied it on April 12, 1993.

The ALJ issued a Recommended Decision and Order ("Recommended Decision") on April 13, 1993. Respondent filed exceptions to the Recommended Decision, and Enforcement opposed Respondent's objections. On July 15, 1993, the parties were notified that the ALJ's Recommended Decision had been submitted to the Acting Director for his final decision. 12 C.F.R. §

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[1] Respondent subsequently refiled a Second Amended Complaint. On August 27, 1993, the district court dismissed all but one of the counts (under the Freedom of Information Act). See Second Amended Complaint (May 3, 1991) and Order, Case No. 90-6442-CIV-Moore (August 27, 1993).

509.32(b) (1990). By Order dated October 1, 1993 (OTS Order No. AP 93-79), the Acting Director extended the time for rendering his final decision until November 19, 1993.[2]

B. Summary of the ALJ's Recommended Decision

The ALJ determined: that Respondent was liable for violation of the Net Worth Maintenance Agreement, concluding that Respondent, a majority shareholder of the Association, had entered into a Net Worth Maintenance Agreement in March, 1985 whereby he agreed to be personally responsible for his pro-rata share of any net worth deficiency incurred by the Association during a five-year period; that the 1989 examination of the Association revealed that the Association had a capital deficiency; that the OTS notified Respondent of the deficiency and requested a capital infusion in November, 1989 pursuant to the Net Worth Maintenance Agreement; that Respondent failed to infuse capital as required by the Net Worth Maintenance Agreement; and that Respondent was unjustly enriched by the continued receipt of the benefits of federal insurance after he failed to make the required capital contribution and by the retention of funds or property he was otherwise obligated to infuse into the Association.

The ALJ also rejected Respondent's numerous defenses. In response to Respondent's claim that two loans were improperly

[2] Respondent subsequently moved to dismiss this proceeding on the ground that the Acting Director's extension of the time for decision deprives him of jurisdiction to decide the case. The Acting Director is issuing simultaneously a separate decision and order disposing of this motion.

classified by the OTS during the 1989 examination -- and that his liability under the Net Worth Maintenance Agreement should be reduced accordingly -- the ALJ concluded that the loans had been properly classified under generally accepted accounting principles ("GAAP") and thus Respondent was not entitled to any offset. The ALJ based his determination on, among other things, evidence of the examiners' conclusions that the classifications were properly taken, rejecting Respondent's arguments that such evidence was either inadmissible or should be given little weight.[3]

The ALJ also dismissed Respondent's various claims based on state contract law that the Net Worth Maintenance Agreement was unenforceable by the OTS. Because the Net Worth Maintenance Agreement was a written agreement with a federal agency, the ALJ concluded that federal banking law, rather than Florida contract law, should govern its interpretation. In particular, the ALJ found the Fifth Circuit's decision in Akin v. OTS, 950 F.2d 1180 (5th Cir. 1992) -- upholding the OTS's enforcement of a similar net worth maintenance agreement -- to be controlling precedent.

With respect to Respondent's claim that he could not be liable under the Agreement because he had lost "actual control"

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[3] In that regard, Enforcement argued in its post-hearing submissions that only the Association -- not Respondent -- had standing to challenge the loan classifications because the challenge amounted to a collateral attack on the OTS's appointment of a receiver for the Association in June, 1990. The ALJ rejected Enforcement's position, determining that it had not shown that Respondent would have been able to challenge the appointment decision and that Enforcement had failed to object to Respondent's challenge at the hearing.

of Great Life as a result of regulatory action, the ALJ concluded that Respondent's liability rested solely on his status as a majority shareholder, not with reference to whether he had "actual control" of the Association. The ALJ concluded that the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") did not render the Net Worth Maintenance Agreement unenforceable and that Respondent's claim that the FHLBB/OTS caused the Association financial damage was unsupported.

The ALJ also rejected the argument that the FHLBB lacked authority to require Respondent to execute a Net Worth Maintenance Agreement. The ALJ determined further that the post-FIRREA revision of the OTS policy requiring execution of such agreements for de novo thrifts applied prospectively and did not invalidate a previously executed agreement. The ALJ concluded that 12 C.F.R. § 567.2 was the successor regulation to 12 C.F.R. § 563.13. Finally, the ALJ rejected Respondent's claim that he was entitled to a jury trial.

In light of the foregoing, the ALJ determined that Great Life's capital deficiency was $2,784,000 as of December 31, 1989 and accordingly recommended that Respondent be ordered to make a capital infusion to Great Life in the amount of $1,946,000, representing 69.9% of that deficiency.

C. Exceptions to the Recommended Decision

Respondent has entered exceptions to most of the ALJ's Recommended Decision, reasserting the arguments he raised before the ALJ. Respondent raises five principal arguments, summarized as follows: 1) the OTS is not statutorily authorized to enforce an agreement to which the FSLIC was a party; 2) the OTS has not satisfied the statutory requirements for a cease and desist order; 3) the Net Worth Maintenance Agreement is not an enforceable contract; 4) the OTS administrative proceedings are unconstitutional because Respondent was deprived of a jury trial; and 5) the FSLIC was not authorized to enter into a Net Worth Maintenance Agreement in 1985. Enforcement filed no exceptions, but replied in opposition to Respondent's exceptions.

III. FINDINGS OF FACT

In April 1984, Respondent, who sat on the board of at least one other thrift, and other investors applied to the Federal Home Loan Bank of Atlanta ("FHLB-Atlanta") for FSLIC insurance of the accounts of the Association, a de novo thrift chartered under Florida law. Originally, Respondent intended to acquire approximately 74 per cent of the Association's stock; the attorney representing the applicant, Marvin Rosen, intended to acquire 25 per cent; and the remainder would be held by individual members of the Board.[4] While the Association's application for federal deposit insurance was pending, the FHLBB adopted a policy of requiring majority shareholders of de novo state-chartered thrifts to execute net worth maintenance agreements. See 49 Fed. Reg. 41237 (October 22, 1984). On

[4] There is no indication in the record that the percentage of Great Life stock owned by Respondent changed during the period March 19, 1985- March 19, 1990.

August 15, 1984, counsel for the applicant notified the FHLBB that the Association agreed to abide by the proposals if codified.[5] The record does not demonstrate that until the initiation of this proceeding Respondent ever challenged the FHLBB's requirement that he execute a net worth maintenance agreement.

On March 7, 1985, the FHLBB issued a resolution approving the Association's application for FSLIC deposit insurance, conditioned on, among other things, Respondent's execution and submission of a net worth maintenance agreement.[6] Apparently

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[5] Respondent contends that this letter (OTS Exhibit 4) was inadmissible as hearsay. The ALJ had admitted it into evidence. The Director affirms the ALJ's ruling. First, under the standards relevant to this proceeding -- which require that evidence be relevant, material, and nonrepetitive -- the Acting Director concludes it was admissible. See 12 C.F.R. § 509.24(a) (1990). Moreover, the document would likely have been admissible even under the Federal Rules of Evidence. See United States v. Norris, 205 F.2d 828, 829 (2d Cir. 1953)(loan application completed by applicant and maintained by bank admissible as record kept by bank in ordinary course of business); United States v. Ward, 575 F. Supp. 159, 162 (E.D.N.C. 1983)(food stamp application signed by defendant admissible, under business record exception, citing Federal Rule of Evidence 803(6)).

The ALJ inferred from OTS Exhibit 4 that Respondent had actual knowledge of this letter. Respondent never effectively rebutted this inference, and the Acting Director finds that Respondent had such knowledge.

[6] At the time that the FHLBB passed this resolution, the applicant represented that Mr. Rosen intended to purchase 25 per cent of the Association's stock. Accordingly, the resolution required that Mr. Rosen execute a net worth maintenance agreement as well. The FHLBB was later informed by counsel for the applicant that Mr. Rosen would purchase only 24.6 per cent of the stock and thus did not intend to, and was not required to, execute a net worth maintenance agreement.

Respondent has claimed as a defense that Mr. Rosen breached his professional responsibilities to the Respondent. That is not with the assistance of counsel, Respondent negotiated the terms of the Net Worth Maintenance Agreement and on March 19, 1985, Respondent executed the Net Worth Maintenance Agreement for a five-year term. On May 21, the FHLBB informed FHLB-Atlanta that the Association's application for insurance of accounts had been approved.[7]

The Net Worth Maintenance Agreement provides in substance that, in light of: (1) Respondent's proposal to control 25 per cent or more of the Association's stock, (2) the Association's application for insurance and (3) the FSLIC statement of policy requiring such individuals, groups, or entities to execute net worth maintenance agreements, Respondent "undertakes and agrees pursuant to the requirements of 12 C.F.R. § 571.6(4), or any successor regulation thereto, to maintain the Association's net worth in compliance with the Net Worth Requirement applicable to the Association, computed in accordance with 12 C.F.R. 563.13 or any successor regulation then in effect," by infusing capital into the Association in an amount proportionate to the amount of his stock ownership if the Association's net worth fell below required levels. The Net Worth Maintenance Agreement further

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a valid defense here; to the extent Respondent has a claim against Mr. Rosen he may pursue it in the appropriate forum.

[7] Accordingly, the deposits of Great Life were insured by the FSLIC from approximately May 21, 1985, until approximately August 9, 1989 and by the Savings Association Insurance Fund ("SAIF") of the Federal Deposit Insurance Corporation ("FDIC") from approximately August 9, 1989, through June 1, 1990.

provides that "it shall be deemed a contract made under and governed by the laws of Florida," and that it is a "written agreement" entered into with the FSLIC.[8]

Section VI of the Agreement, entitled "Rights and Remedies of FSLIC not Exclusive," provided that "[a]ny and all rights available to the FSLIC under the terms of this Agreement shall be in addition to, and not in lieu of, any other rights or remedies available to the FSLIC in law or equity." The Agreement further provides that:

> "[s]pecifically, the FSLIC is not limited in the event of default to proceeding initially or solely against the shares. The acquiror is personally liable for any Net Worth Deficiency and the FSLIC may elect to proceed against any of the Acquiror's assets if the Acquiror does not satisfy the entire amount of the Net Worth Deficiency within 60 days of the giving of a notice of Default by the FSLIC.

The Net Worth Maintenance Agreement also provided that it would terminate five years from March 19, 1985. In addition, the Agreement states that:

All references to regulations of the [FHLBB] or the

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[8] Specifically, the Net Worth Maintenance Agreement provides:

> This Agreement has been duly authorized, executed, and delivered, and constitutes, in accordance with its terms, a valid and binding obligation of the Acquiror, the Association and the FSLIC. It is understood and agreed that this Agreement is a "written Agreement entered into with the Corporation [FSLIC]" as that phrase is used in Section 407(e) of the National Housing Act, 12 U.S.C. § 1730(e)(1982).

Section 407(e) of the NHA, like current section 8 of the FDIA, authorized the FSLIC to impose a cease and desist order for a violation of a written agreement. 12 U.S.C. § 1730(e).

> FSLIC used in this Agreement shall include any successor regulation thereto, it being expressly understood that subsequent amendments to such regulations may be made and that such amendments may increase or decrease the Acquiror's obligations under this Agreement.

Soon after its inception, the Association experienced supervisory difficulties. The FHLBB's 1986 examination of Great Life revealed a net worth deficiency in the Association's first year of operation. Moreover, the Association had an extremely high concentration (59 percent) of commercial real estate loans and was operating beyond the scope of its business plan. In lieu of enforcement action, the FHLBB and the Association entered into a Supervisory Agreement on April 17, 1986, which, inter alia, imposed operating restrictions with respect to certain real estate loans, provided for a reduction of total liabilities, and required compliance with the loans-to-one-borrower regulation and development of underwriting standards and loan documentation procedures. As it developed, the Association never recovered from these early problems, and these restrictions remained in effect for the life of the Association.

On October 12, 1989, the OTS-Atlanta commenced a regular examination of the Association. The examination revealed that the Association had roughly $8.4 million in classified assets, which was more than four times the Association's regulatory capital. Concluding that the Association was capital deficient, the OTS found Respondent in default under the Agreement and demanded in writing on November 14, 1989, that Respondent infuse his pro rata share of the Association's capital deficiency --

then calculated at $106,248 (representing 69.9% of a $152,000 capital deficiency as of September 30, 1989) -- under the Net Worth Maintenance Agreement. Respondent acknowledged receipt of the notice but did not infuse any capital into the Association as a result. By year-end, the Association had a risk-based capital deficiency of approximately $2.8 million (including allowable general reserves).[9]

As a result of the Association's capital deficiency, the OTS obtained the board of directors' consent to merge the Association if the OTS should find a suitable merger partner. On January 16, 1990, the OTS-Atlanta again informed Respondent that the Association was capital deficient; that Respondent was in default under the terms of the Net Worth Maintenance Agreement; and that as a result the OTS could proceed against his personal assets in order to cure the deficiency. Under protest, the Association reclassified certain assets in late March 1990, at the insistence of the OTS.

Again in April, 1990, the OTS informed Respondent that the Association had failed to meet its risk-based capital requirements by $3.236 million (excluding general reserves) as of year-end 1989. It is uncontested that Respondent made no payment under the Net Worth Maintenance Agreement in response to any of the OTS's demands. In June, 1990, the Association was placed

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[9] Excluding general reserves, the deficiency was approximately $3.2 million.

into receivership.[10]

IV. ISSUES

This proceeding presents the following issues for the Acting Director's decision. First, the Acting Director must determine whether the FSLIC and the OTS were authorized, respectively, to require the execution of, and seek compliance with, the Net Worth Maintenance Agreement. If so, it must then be determined whether Respondent violated the Agreement.

If he has, the Acting Director must consider whether Respondent's purported lack of "actual control" affects his obligation to honor the Net Worth Maintenance Agreement; whether Florida state contract law or federal common law controls the interpretation of the Agreement, and whether Respondent's common law contract defenses properly apply in this proceeding; whether Respondent is excused from performance under the Net Worth Maintenance Agreement by the OTS's post-FIRREA repeal of the net worth maintenance agreement requirement for _de novo_ thrifts; and whether Respondent is entitled to "offset" his liability in connection with two loans he argues were classified improperly.

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[10] The Director also adopts additional facts as set forth in the discussion concerning Respondent's entitlement to offset the amount of his liability, _infra_ at section V. F. 1. c. i. and ii.

V. DISCUSSION

A. Authority to Impose and Enforce the Net Worth Maintenance Agreement

1. Authority of the FSLIC to Require Execution of the Net Worth Maintenance Agreement as a Condition to the Grant of Insurance

Respondent complains that the FSLIC had no authority to require that he execute a net worth maintenance agreement in 1985. The Director rejects this contention. The FHLBB -- as the operating head of FSLIC -- was statutorily authorized at the time the Net Worth Maintenance Agreement was executed in 1985 to impose appropriate conditions on applicants seeking federal deposit insurance coverage (including state-chartered thrifts), This authority extended to requiring execution of a net worth maintenance agreement.

a. The FHLBB had jurisdiction over all federally insured associations.

Under the National Housing Act ("NHA"), 12 U.S.C. § 1724 <u>et seq</u>. (1982), the FHLBB -- sitting as the operating head of the FSLIC -- acted as both regulator and insurer of all federally insured thrifts, including those chartered under state law.[11] 12 U.S.C. §§ 1725(a), 1730.

If a state-chartered institution sought to obtain federal deposit insurance, it voluntarily subjected itself to the regulatory and enforcement jurisdiction of the FHLBB:

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[11] Under the HOLA, the FHLBB exercised direct regulatory and enforcement authority over federally-chartered thrifts, 12 U.S.C. § 1461 <u>et seq</u>. (1982), which was largely duplicative of its authority under the NHA.

> FSLIC insurance, in the case of state-chartered associations, is voluntary and becomes effective only if such institutions apply for it and are accepted. As a condition for eligibility under the program, state-chartered thrifts agree to inspection and regulation by the Board. The Board, moreover, possesses the ultimate authority of terminating an association's insurance if it finds that institution engaging in unsafe or unsound practices.

Lincoln Savings and Loan Ass'n v. Federal Home Loan Bank Board, 670 F. Supp. 449, 453-54 (D.D.C. 1987). Accordingly, the deposits of eligible savings and loan associations organized and operated under state laws, such as the Association, were insured by the FSLIC and were subject to its regulation under sections 402 and 403 of the NHA, 12 U.S.C. §§ 1725(a) and 1726(b) (1982). The FHLBB, as operating head of the FSLIC, was authorized to bring cease and desist proceedings and exercise the full range of enforcement authority under section 407 of the NHA, 12 U.S.C. § 1730, with respect to federally-insured, state-chartered institutions such as the Association. See, e.g., Saratoga Savings and Loan Ass'n v. Federal Home Loan Bank Board, 879 F.2d 689, 692 (9th Cir. 1989); Otero Savings and Loan Ass'n v. FHLBB, 665 F.2d 279, 288 (10th Cir. 1981); Lincoln Savings and Loan Ass'n, 670 F. Supp. at 450-52.

b. The imposition of a net worth maintenance condition on a grant of insurance was a proper exercise of the FSLIC's authority.

The FSLIC (under the direction of the FHLBB) was "vested with great discretion in regulating the institutions under its jurisdiction." FSLIC v. Smith, 721 F. Supp. 1039, 1046 (E.D. Ark. 1989) (citing former 12 U.S.C. §§ 1464(a) and 1726(b)).

Part of that discretionary authority included the ability to require the execution of capital maintenance agreements for federally insured, de novo state-chartered thrifts as a means to protect the FSLIC from loss.

The NHA required the FSLIC, under the direction of the FHLBB, to review applications for insurance submitted by state-chartered institutions. 12 U.S.C. §§ 1725, 1726. In so doing, the FSLIC was statutorily required to consider the applicant's financial condition, including the existence of any capital impairment and the adequacy of the applicant's reserves. See 12 U.S.C. § 1726(b) and (c). Based on these statutory provisions, the FSLIC was specifically empowered to impose conditions on the grant of insurance. See 12 C.F.R. § 562.7 (1984).[12]

Section 407(e) of the NHA makes clear that Congress intended the FSLIC to be able to impose conditions on the grant of insurance and enter into written agreements thereto. The FSLIC was authorized to pursue enforcement action in the event of a violation of "any condition imposed in writing by the FSLIC in connection with the granting of any application . . . or any written agreement entered into with the [FSLIC]. . . ." 12

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[12] The FSLIC's authority to do so also comports with the well-settled principle that an agency's statutory authority to approve or deny applications inherently includes the power to condition approval. See, e.g., Southern Pac. Co. v. Olympian Dredging Co., 260 U.S. 205, 208 (1922)("[t]he power to approve implies the power to disapprove and the power to disapprove necessarily includes the lesser power to condition an approval"); Kaneb Servs., Inc. v. Federal Sav. & Loan Ins. Corp., 650 F.2d 78, 82 (5th Cir. 1981).

U.S.C. § 1730(e)(1). This language would be meaningless if the FSLIC was not empowered to enter into a written agreement in the first instance. See Kaneb, 650 F.2d at 82. Moreover, Congress amended section 407 several times between 1970 and 1989. If it had disagreed with the FHLBB's or the FSLIC's interpretation of section 407, it could have revised the section accordingly. See Zenith Radio Corp. v. U.S., 437 U.S. 443, 457 (1978). Accordingly, courts have specifically upheld the FHLBB's authority to impose a capital maintenance requirement, through FSLIC's regulatory authority, under the federal banking laws.[13]

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[13] As both the insurer and regulator, the FHLBB's primary concern in the consideration of applications for insurance of *de novo* thrifts was to reduce the risk of loss to newly-chartered institutions, and ultimately, to the insurance fund. 48 Fed. Reg. 54320 (Dec. 2, 1983). To that achieve that purpose, the FHLBB in August 1984 proposed to issue a policy statement requiring controlling persons to execute a net worth maintenance agreement. 49 Fed. Reg. 33141 (August 21, 1984). Under the proposed net worth maintenance agreements, controlling persons who held in excess of 80 percent of the institution's total stock would be responsible for 100 percent of a net worth deficiency; controlling persons holding less than 80 percent would be responsible for a payment proportionate to the amount of stock held. Id. On October 15, 1984, the FHLBB adopted the policy statement as a final rule, including the requirement that controlling person(s) execute a net worth maintenance agreement for a period of at least five years. 49 Fed. Reg. 41238 (October 22, 1984), codified at 12 C.F.R. 571.6 (1985). Under the policy statement, a "controlling shareholder" was defined as:

> [A]ny individual who will control, or any group of individuals acting in concert to control, or controlling persons for a company which does not have substantial independent economic substance that will control, directly or indirectly, 25 percent or more of the stock of a *de novo* institution.

12 C.F.R. § 571.6(d)(iv)(b) (1985). The policy statement was thus in effect at the time Great Life's application for deposit insurance was approved.

See In re Firstcorp., 973 F.2d 243, 250 n.6 (4th Cir. 1992)("[a] capital maintenance obligation imposed as a condition of FHLBB's approval of an acquisition, however, is clearly enforceable by OTS under settled law"); see also Akin v. OTS, 950 F.2d 1180 (5th Cir. 1992).[14] Thus, the FSLIC, under FHLBB's direction, was permitted to require as a precondition to the grant of federal insurance to the Association that a controlling person, such as Respondent, execute such a "written agreement" as a reasonable means to protect the insurance fund from loss.

2. Authority of the OTS to Enforce the Net Worth Maintenance Agreement in its Capacity as Primary Federal Regulator

One of the central reforms in FIRREA was to divide the dual regulatory and insurance functions held by FSLIC and its operating head, the FHLBB, among separate regulatory and insurance agencies. The regulatory and enforcement powers of FSLIC fell to the OTS. The OTS was thus statutorily authorized to take enforcement action against Respondent, in its capacity as

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In August, 1988, when the FHLBB revised its policies regarding net worth maintenance agreements so that they would be capped, or limited, at a predetermined amount. 53 Fed. Reg. 31761, 31762 (August 19, 1988). This policy change, as well as others that were undertaken after 1988, applied prospectively only and did not alter Respondent's obligation to honor the net worth maintenance agreement imposed on him in accordance with the 1984 policy. For later revisions to the net worth maintenance policies of the FHLBB and the OTS, see Thrift Bulletin No. 5 (October 19, 1988); 54 Fed. Reg. 49,418 (November 30, 1989); and Thrift Bulletin No. 5a (April 12, 1990).

[14] Cf. Board of Governors of the Federal Reserve System v. Lincolnwood Corp., 439 U.S. 234 (1978) (Federal Reserve Board may use approval process to require infusion of additional capital into subsidiary).

"the appropriate federal banking agency,"[15] based upon a violation of "a written agreement entered into with the agency." See 12 U.S.C. § 1818(b). The Net Worth Maintenance Agreement in this case was created by the FHLBB and founded on FSLIC's regulatory and enforcement authority. FIRREA, however, abolished the FSLIC and transferred its regulatory and enforcement authority over state-chartered, federally-insured thrifts to the OTS. The FSLIC net worth regulations that were cited in the Net Worth Maintenance Agreement were transferred to the OTS.[16] The OTS thus is the appropriate entity to enforce a "written agreement with the agency" in its role as primary federal regulator of the Association and affiliated persons such as the Respondent.

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[15] Section 3(q)(4) of the FDIA, 12 U.S.C. § 1813(q)(4), provides that the "appropriate federal banking agency" is the Director of the OTS in the case of any savings association or any savings and loan holding company.

[16] The capital regulations were promulgated pursuant to FIRREA § 301, which amended the HOLA to add section 5(t), 12 U.S.C. § 1464(t), and required the OTS to promulgate regulations by November 7, 1989, prescribing uniformly applicable capital standards for all savings associations. These regulations were published at 12 C.F.R. Part 567 and became effective on December 7, 1989. The preamble to these regulations, published in the Federal Register on November 8, 1989, states that:

> The [OTS] has reorganized and relocated its capital regulations, which appeared at §§ 561.13, <u>563.13</u>, 563.14, 563.14-1, and 563.47 at the time of the 12/88 proposal, into a new part 567. It believes this new structure will make it easier for those applying or subject to these capital regulations to determine and understand their content.

54 <u>Fed</u>. <u>Reg</u>. 46845, 46847 (November 8, 1989)(emphasis added). Thus, the new capital regulations were intended to, and did, replace the former net worth requirements.

Respondent complains that because the Agreement was required by the FSLIC, the OTS cannot now enforce it because OTS is not a successor to the FSLIC; rather, he claims, the FSLIC's insurance functions were transferred to the FDIC. Respondent is correct only in that FIRREA repealed the National Housing Act (thereby eliminating the FSLIC) and transferred the insurance fund and its administration to the FDIC. Respondent's argument ignores, however, the fact that the FSLIC also performed regulatory and enforcement functions over federally-insured institutions. See 12 U.S.C. §§ 1725(a), 1730 (1982).

FIRREA divided the FSLIC's responsibilities. In place of the FSLIC insurance fund, it created the SAIF, a new thrift insurance fund under the administration of the FDIC. 12 U.S.C. § 1821(a)(6). The FSLIC's regulatory functions -- the examination, supervision, and regulation of all federally-insured savings associations -- were transferred to the OTS. 12 U.S.C. § 1463(a)(1); § 1464(d)(2)(A). FSLIC's enforcement authority to institute cease and desist proceedings against state-chartered thrifts under the NHA was transferred to the OTS. Id.; see also Akin, 950 F.2d at 1182 n.2 ("[t]he FIRREA dissolved the FSLIC and created the OTS to act as the principal regulator of savings and loan associations"); In re Keating, OTS Decision and Order No. AP 91-20 at 9 (May 11, 1991); 54 Fed. Reg. 46845, 46846 (November 8, 1989) (FIRREA "established the [OTS] as the primary federal banking regulator for all savings associations and savings and loan holding companies.")[17]

Respondent contends that the repeal in FIRREA of the NHA extinguished FSLIC's regulatory and enforcement authority and prevented it from being passed on to the OTS. Respondent relies on the provision in FIRREA that powers not expressly transferred to another entity would remain with the OTS, unless otherwise repealed by FIRREA. FIRREA § 301, HOLA § 3(e), 12 U.S.C. § 1462a(e)(1). Section 1462a(e) does not apply here, however, because the regulatory and enforcement authority over state-chartered, federally-insured thrifts was in fact expressly transferred to the OTS under 12 U.S.C. § 1463(a)(1).

There can be no serious dispute that this agreement survived FIRREA. Congress did not contemplate that agreements that had been entered into with the FSLIC would simply disappear after August 9, 1989. FSLIC's authority to enforce written agreements under section 407 of the NHA was expressly preserved by the savings provision of FIRREA, § 401(f). That section provides that the abolition of the FSLIC by FIRREA § 401(a):

> . . . shall not affect the validity of any right, duty,

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[17] Although this issue was not raised by the parties, the Director notes that there is an apparent error in the heading to the Title 12, USC and USCA versions of § 1463(a), which are entitled "Federal savings associations." As the actual language of this provision makes clear, this section applies to both federal and state-chartered institutions. This section also separately defines "savings association" and "federal savings association." § 1462(4) and (5).

This interpretation comports with the legislative history as evidenced by the conference report on FIRREA. See Conf. Rept. to accompany H.R. 1278 ("The Director [of OTS] is responsible for the examination and supervision of all savings and loans. . . ").

or obligation of the United States, the Federal Savings and Loan Insurance Corporation, or any other person, which --

> (A) arises under or pursuant to any section of title IV of the National Housing Act [12 U.S.C. § 1724 et seq.], and
>
> (B) existed on the day before the date of the enactment of this Act [Aug. 9, 1989].

FIRREA § 401(f). See also 54 Fed. Reg. 34637 (August 21, 1989)(OTS adopts and ratifies, among other things, all pre-FIRREA regulations, orders, resolutions, enforcement proceedings, agreements and other determinations of the FHLBB and FSLIC not transferred elsewhere); 1 U.S.C. § 109 (general savings statute). Accordingly, the Net Worth Maintenance Agreement was not rendered unenforceable by the passage of FIRREA.

Respondent contends in addition that the agency is estopped from finding that the OTS inherited FSLIC's regulatory and enforcement function because in the related district court litigation, the OTS argued that it was not a successor to a party to the contract since FSLIC's insurance function was transferred to the FDIC by FIRREA.[18] Respondent's argument is of no weight,

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[18] The OTS argued in the district court that:

> The Amended Complaint is rife with the incorrect assumption that Defendant Ryan, as OTS Director, is the successor in interest to the FSLIC as a party to the Net Worth Maintenance Agreement. . . The Director's authority to enforce the agreement, however, derives not from any status as a successor in interest to FSLIC as a contracting party, but rather from his statutorily-granted power under FIRREA to enforce conditions imposed in connection with Great Life's application for federal deposit insurance and to enforce FSLIC's written agreements with controlling shareholders like Rapaport. . . .

considering the context of the related litigation. The purpose of Respondent's suit was to interrupt the instant administrative proceeding. In an attempt to evade the express jurisdictional bar on such suits, see 12 U.S.C. § 1818(i)(1), Respondent characterized his claims as sounding in contract. The district court rejected this approach and dismissed Respondent's contract claims under section 1818(i)(1). It was thus unnecessary for the court to consider the OTS's subsidiary argument that, assuming Respondent's claims were in contract, then under section 215 of FIRREA, 12 U.S.C. § 1821a(a), they were a liability of the FSLIC Resolution Fund. This position is wholly consistent with the Acting Director's conclusion that the OTS has succeeded to the FSLIC's regulatory and enforcement authority.[19]

> The OTS' authority to enforce FSLIC's Net Worth Maintenance Agreement with plaintiff thus is statutory, not contractual. . . .

OTS's Memorandum of Law in Support of Motion to Dismiss and Motion for Summary Judgment, dated September 27, 1990, at pp. 31-33 (emphasis added)(citations omitted).

[19] The Acting Director also rejects Respondent's claims that enforcement of the Net Worth Maintenance Agreement is arbitrary and capricious because such agreements allegedly have not been enforced against others. The net worth maintenance cases cited herein for their precedential value demonstrate that enforcement action was taken against individuals or entities that committed to maintain an institution's net worth and subsequently failed to honor that commitment. See, e.g., Wachtel, 982 F.2d 581; Akin, 950 F.2d 1180; Firstcorp, 973 F.2d 243; see also In re Christo, OTS Order No. AP 93-69 (August 27, 1993). Accordingly, the OTS has in fact sought enforcement of commitments to infuse capital where, in its prosecutorial discretion, it has concluded the facts warrant such action.

B. <u>Standards for Issuing a Cease and Desist Order</u>

Section 8(b)(1) of the FDIA provides that if, in the opinion of the "appropriate federal banking agency," an insured depository institution or an institution-affiliated party has violated any written agreement entered into with the agency, or any condition imposed in writing in connection with the consideration of any application, the agency may issue and serve a notice of charges in respect thereof. 12 U.S.C. § 1818(b)(1). If, upon hearing, the agency finds that any violation specified in the notice of charges has been established, the agency may order the institution or party to cease and desist from the violation. Accordingly, the Director is authorized to issue a cease-and-desist order upon finding that Respondent entered into a Net Worth Maintenance Agreement and violated the terms of such agreement. In addition, upon a finding that an institution-affiliated party acted in reckless disregard of the law or was unjustly enriched by his misconduct, the OTS may also order the respondent to take affirmative action to correct the condition resulting from any such violation. 12 U.S.C. § 1818(b)(1) and (6); <u>see also</u> <u>Wachtel v. OTS</u>, 982 F.2d 581 (D.C. Cir. 1993); <u>Akin v. OTS</u>, 950 F.2d 1180 (5th Cir. 1992).

C. Respondent's Violation of the Net Worth Maintenance Agreement

The facts of this case amply demonstrate that the agency imposed, and Respondent expressly assumed, a commitment to maintain the net worth of the Association for a period of five years. Here, Respondent entered into an express "written agreement" under § 1730(e) which is enforceable by means of a cease and desist order.[20] The Association fell below its net worth requirement as of September 30, 1989, thus triggering Respondent's default under section II of the Agreement. Pursuant to section V(A)1 of the Agreement -- which required Enforcement to notify Respondent in the event of a default -- Enforcement first informed Respondent of a default on November 14, 1989. By letter of that date, Enforcement informed Respondent that he was then responsible to make a capital infusion in the amount of 69.9 percent of a capital deficiency of $152,000. The letter also stated that Respondent was "also responsible for providing the institution with additional capital if the regulatory capital deficiency reoccurs." By letter dated November 30, 1989, Respondent acknowledged receipt of the November 14 notice but failed to indicate whether he would infuse capital as requested.

OTS notified the Respondent again in January that the Association was capital deficient and that he was obligated under the Agreement to infuse capital. OTS again notified Respondent

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[20] Cf. Wachtel, 982 F.2d at 584 n.2 ("OTS. . . has not pointed to any representation by the petitioners that affirmed an obligation enforceable through a cease and desist order as opposed to a less formal obligation.")

in April of 1990 of its calculations of the amount of the deficiency.[21] Respondent did not make the requisite capital infusion. After Respondent failed to honor his commitment, the institution was placed in receivership.

Under the applicable precedent, it is clear that a violation of a written agreement occurs when a party refuses to make payment pursuant to the terms of that agreement. See Akin, 950 F.2d 1180. Cf. In re Firstcorp, OTS Decision and Order No. AP 92-125 at pp. 15-16 (November 20, 1992)(violation of condition imposed in writing occurs when party refuses to honor commitment). The Acting Director concludes that Respondent, having failed to make the requisite capital infusion as he committed to do under the Net Worth Maintenance Agreement, is in continuing violation of a written agreement and that a cease and

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[21] The agency is not required to provide the Respondent with multiple, updated notices of the deficiency calculation. Rather, under the Agreement, the OTS is responsible for notifying Respondent in the event of a default. See Section V(A); see also In re Akin, OTS Decision and Order No. AP 90-4009 (December 24, 1990), aff'd sub nom. Akin v. OTS, 950 F.2d 1180 (5th Cir. 1992).

Nor is the OTS's April, 1990 letter (OTS Exhibit 21) inadmissible as part of an admission made during settlement negotiations. First, the letter meets the regulatory standards of admissibility under 12 C.F.R. § 509.24(a). Moreover, it is likely admissible even under the Federal Rules of Evidence because it was not a statement made by Respondent. Excluding the evidence on such grounds does not further the purpose of the rule, which is to foster settlement of actions where possible. See note to F.R.E. 408. Indeed, the cases cited by Respondent in support of exclusion reflect attempts by a declarant to exclude admissions made in furtherance of settlement, which were then used against the declarant at trial. Here, no statement has been made by the Respondent under the guise of settlement which the OTS is seeking to use against the Respondent as an admission at trial.

desist order may properly issue under section 8(b) of the FDIA.[22]

1. Respondent's Control Defenses

Respondent argued before the ALJ and repeats in his exceptions that the Net Worth Maintenance Agreement cannot now be enforced against him because, at least as of October, 1988, he could no longer be deemed to have "actual control" of the institution in light of the following intervening events.

First, the FHLBB imposed a Supervisory Agreement on Great Life in 1986 -- during the first full year of its operation. The Supervisory Agreement was imposed by the FSLIC in lieu of enforcement action and made the Association subject to, inter alia, operating restrictions with respect to commercial real estate loans, a reduction of total liabilities, a requirement of compliance with the loans-to-one-borrower regulation, and the development of underwriting standards and loan documentation procedures. In addition, the FHLBB designated the Association as a "troubled institution" in January 1989 and imposed additional restrictions on the institution.

Second, in October 1988, Respondent -- in apparent resolution of another, independent FHLBB enforcement proceeding against Respondent regarding his involvement with another thrift

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[22] The fact that the Association is in receivership is not a defense to Respondent's compliance with the Agreement, because the injury that the Net Worth Maintenance Agreement was intended to prevent has in fact already been sustained by the insurance fund and, ultimately, the taxpayer. See Akin, 950 F.2d at 1185; In re Firstcorp, 973 F.2d at 249.

-- entered into an undertaking with the FSLIC. The undertaking, to which Respondent consented, removed Respondent from the board of directors of that thrift and prohibited him from voting for a director in any thrift in which he owned stock without first obtaining clearance from the FHLBB.

Finally, in September 1988, the state of Florida notified Respondent and the institution that Respondent was specifically prohibited from obtaining access to confidential Association files. Under section 665.042 of the Florida Savings and Loan Associations Code, dissemination of such materials to individuals other than Association directors, officers and employees, with limited exceptions, is punishable as a felony. See Fla. Stat. Ann. § 665.042 (West 1984).

The Director rejects Respondent's novel proposition that the imposition of appropriate supervisory sanctions by authorities of competent jurisdiction extinguished his obligation to comply with the Net Worth Maintenance Agreement. First, the statutory and regulatory definitions of "control" at the time Respondent executed the Net Worth Maintenance Agreement extended to those who had the ability to vote 25 per cent or more of the thrift's stock. See 12 U.S.C. § 1730(q)(9)(1984); 49 Fed. Reg. 41238 (October 22, 1984), codified at 12 C.F.R. 571.6 (1985); accord FHLBB, Annotated Manual of Statutes and Regulations at ¶¶ 1048, 1436 (5th ed. Jan. 1985). See also In re Firstcorp, 973 F.2d at 250. From the institution's inception, it is undisputed that Respondent owned 69.9 per cent of the Association's outstanding voting shares and he did not offer evidence that he was prevented from voting those shares or that he disposed of shares so that his ownership fell below 25 per cent. Accordingly, as he was aware when he executed the Net Worth Maintenance Agreement in 1985, Respondent was deemed to "control" the Association by virtue of his stock ownership as a matter of law.[23]

Thus, arguments based on Respondent's purported lack of "actual control" are irrelevant. Even if they were not, however, Respondent has not shown that the Supervisory Agreement -- which was imposed by the FHLBB to correct the Association's failure to comply with thrift laws, as an alternative to enforcement action -- actually interfered with any "control" he exercised. In Firstcorp, the Fourth Circuit rejected the argument that because a thrift was operating under supervisory restrictions, the holding company had necessarily lost "control" of the institution. 973 F.2d at 250-251. Similarly, the Respondent here did not lose "control" of the Association because the FHLBB took supervisory action in an attempt to ensure that the institution was being operated in a safe and sound manner.

Nor has Respondent demonstrated that the 1988 enforcement

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[23] The Acting Director notes that the record suggests that Respondent did in fact exercise a great deal of influence over the institution. A September 23, 1988 letter from the FHLBB-Atlanta to the Association's Board of Directors (Respondent's Exhibit 315) states that "[t]he level of influence exerted by majority shareholder Robert Rapaport over the management and the board of directors of Great Life is such that Mr. Rapaport was acting as a de facto director in violation of the Management Interlocks Act." It is the fact of the amount of his stock ownership, however, that is material for purposes of the Agreement.

undertaking ever actually interfered with his voting rights in the Association. Respondent was not deprived of his right to vote; he was merely required to obtain the FHLBB's approval before voting for any member of the board of directors of an insured institution in which he owned stock. This requirement did not substantially change the restriction that Great Life was operating under because -- even independent of the undertaking -- the OTS had the supervisory authority to approve candidates for the Association's board of directors for a period of three years after the first fiscal year of the Association's operation. See 12 C.F.R. § 571.6(d). At the time the enforcement action was taken against Respondent in October, 1988, he did not have an unfettered right to select the composition of the board of directors.[24] Respondent's rights thus were not, even in theory, materially changed by the "voting restriction." Finally, Respondent makes no attempt to demonstrate that he ever tried to vote -- and that such attempt was actually restricted by the FHLBB or the OTS -- after the consent was executed in 1988. Nor did he present any evidence demonstrating that he was prevented from receiving proxy solicitations or other shareholder materials.

Respondent's violation of the Florida state statute is not

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[24] Even today, the OTS must pass on the qualification of directors of certain thrifts, including de novos. See 12 U.S.C. § 1831i; see also 58 Fed. Reg. 45421 (August 30, 1993), to be codified at 12 C.F.R. § 574.9. As these provisions make clear, because of the significant federal interest, and the existence of federal deposit insurance, no owner of thrift stock has an unrestrained right to elect directors.

probative of any issue in this case. The fact that the state of Florida determined that Respondent had improperly been given access to confidential, internal Association documents (in violation of Florida law), and ordered the institution to restrict Respondent's access thereto, demonstrates little more than the state's legitimate concern to enforce its banking laws. Its mandate to the Association and Respondent to obey the law are not relevant to the issue of control in this case, which is established by proof of 25 per cent ownership of an institution's outstanding stock.

2. <u>Respondent's State Law Contract Defenses</u>

Respondent has argued that because the Net Worth Maintenance Agreement states on its face that it is a contract under the laws of the state of Florida, he is entitled to assert state common law defenses against the OTS, such as failure of consideration, failure to mitigate damages, unclean hands and failure to act in good faith. He also argues that the Net Worth Maintenance Agreement, as a contract, must be supported by consideration and that there was no consideration for the Agreement.

First, Respondent wholly ignores the "written agreement" language in the Agreement, despite the fact that the OTS is seeking to enforce the Agreement in its capacity as primary federal regulator. As <u>Akin</u> makes clear, the obligations of a respondent in such a case are governed by the federal enforcement statutes as construed by the federal courts. <u>See</u> <u>Akin</u>, 950 F.2d at 1183-84. State contract law is wholly irrelevant for this purpose. See Groos Nat'l Bank v. Comptroller of the Currency, 573 F.2d 889, 896 (5th Cir. 1978). Even the Agreement itself makes clear that "[a]ny and all rights or remedies available to the FSLIC under the terms of this Agreement shall be in addition to, and not in lieu of, any other rights or remedies available to the FSLIC in law or equity." See Section VI. Thus, the Agreement expressly contemplates that the FSLIC may take action against the Respondent independent of its status as a party to the Agreement. Accordingly, an action by the OTS seeking enforcement of the Agreement in the exercise of the OTS's regulatory authority is properly governed by federal law.

Nor can the obligor on a net worth maintenance agreement bypass the banking enforcement statutes by asserting, under the language of the net worth maintenance agreement, that the document may be construed only as a contract. This interpretation, which gives no meaning to the "written agreement" language of the Net Worth Maintenance Agreement, is incorrect as it wholly ignores the regulatory authority of the federal banking agencies. Moreover, Respondent's interpretation is even inconsistent with general principles of contract construction, which disfavor interpretations that deprive a particular provision of any meaning.

Respondent has offered no reasonable reconciliation of these two clauses. In contrast, the Acting Director's conclusion does not render meaningless the "contract" language in the Net Worth Maintenance Agreement. There may be circumstances where state contract law may properly speak to the rights of the parties or their successors because federal law does not. For example, the Agreement provides that in the event of an uncured default, the acquiror must convey his shares of Association stock to the FSLIC. Particularly in the case of a third party purchaser, there may be an issue of ownership rights governed by state law. This is not the posture of the case before the Acting Director, however.[25] The Director declines to interpret the Agreement against the weight of authority concerning the ability of a federal regulatory agency to take enforcement action under federal law and finds that state contract law does not govern the resolution of this case.

Notably, even if Respondent were permitted to raise his state contract law defenses -- failure of consideration, failure to mitigate damages, unclean hands and failure to act in good faith -- he has not sustained his burden of proof on any of them. With respect to his failure of consideration defense, Akin and Groos make clear that consideration is not necessary to sustain a written agreement with the federal government; if it were, however, there is sufficient consideration in the fact that Respondent obtained insurance from the FSLIC, and the FHLBB obtained a personal financial commitment from Respondent.

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[25] Nor is the issue of whether the FDIC or the Resolution Trust Corporation ("RTC") may enforce the Agreement. The Acting Director notes, however, that concurrent jurisdiction among several of the banking agencies for related purposes is part of the overall scheme of the banking laws. See, e.g., In re Keating, OTS Decision and Order No. AP 91-20 (May 11, 1991).

As to the remaining defenses, the ALJ correctly concluded that equitable defenses against the federal government, acting in its sovereign capacity, are strictly limited.[26] See SEC v. Electronics Warehouse, Inc., 689 F. Supp. 53, 73 (D. Conn. 1988) citing Schweiker v. Hansen, 450 U.S. 785, 788 (1981) and Heckler v. Community Health Services, 467 U.S. 51, 60 (1984). Among other things, Respondent must show that "the agency's misconduct [was] egregious and the resulting prejudice to the defendant [rose] to a constitutional level." Id. The record is devoid of any such evidence.[27] The Acting Director rejects Respondent's reliance on state law cases between private parties as inapposite.

3. Respondent's Regulatory Defenses

Respondent claims that the OTS has not made a case for a cease and desist order because, inter alia, the Net Worth Maintenance Agreement lapsed by regulatory amendment as of November 30, 1989. See 54 Fed. Reg. 49411, 49418, 49674-75 (November 30, 1989)(amending 12 C.F.R. § 571.6). This amendment

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[26] For example, Respondent has not demonstrated entitlement to the affirmative defense of failure to mitigate damages. See, e.g., FSLIC v. Burdette, 718 F. Supp. 649, 663-64 (E.D. Tenn. 1989). Nor does the OTS owe Respondent a duty of good faith. See FSLIC v. Locke, 718 F. Supp. 573, 582 (W.D. Tex. 1989). Similarly, Respondent's defense of unclean hands must fail. FDIC v. Baker, 739 F. Supp. 1401, 1404-1407, 1409 (C.D. Cal. 1990).

[27] Respondent's arguments in this regard also assume that the regulators are responsible, at least in part, for the Association's losses. This assumption has been rejected by the Supreme Court. See United States v. Gaubert, 499 U.S. 315 (1991).

stated that controlling shareholders of state-chartered thrifts would no longer be required to execute net worth maintenance agreements as part of the application for insurance. Enforcement responded that this amendment was to be applied prospectively, not retroactively, to de novo institutions. The ALJ did not consider whether the regulation lapsed by amendment prior to enforcement because the issue had not been before him.

The Acting Director concludes that Respondent's pre-existing net worth maintenance obligation is unaffected by this amendment. Respondent undertook, pursuant to 12 C.F.R. § 571.6(d)(iv) and any successor regulation to maintain the Association's net worth for a period of five years. The revision to section 571.6(4) that Respondent cites was explicitly declared by the agency to have only prospective application: "Section 571.6 is being revised to apply only to applications for de novo federal charters and no longer to apply to applications for FSLIC insurance of accounts for de novo state-chartered institutions." 54 Fed. Reg. at 49418 (emphasis added). Thus, as the amendment changed only the application process for future agreements, not existing net worth maintenance agreements, it is clear that the revision was intended to have only prospective effect. See Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990)(where intent as to retroactive or prospective application is clear, it governs). Accordingly, this regulatory amendment does not relieve Respondent from his obligation under the Net

Worth Maintenance Agreement.[28]

D. Right to a Jury Trial

The Acting Director rejects as meritless Respondent's argument that he was denied the right to a jury trial under the Seventh Amendment. See, e.g., Akin, 950 F.2d at 1186. The Acting Director's determination also comports with Supreme Court jurisprudence, which instructs that the right to a jury trial under the Seventh Amendment attaches only to those civil actions recognized under eighteenth-century common law and not to claims based on "public rights." See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 & n.4 (1989); Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 454-55 (1977). The instant proceeding is founded on a section of the Federal Deposit Insurance Act -- for violation of a written agreement with the

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[28] The Acting Director also rejects Respondent's claim that the successor capital regulations to 12 C.F.R. § 563.13 were issued without notice and comment. On December 15, 1988, the FHLBB issued a risk-based capital proposal which it promulgated for a 90-day public comment period. See 54 Fed. Reg. 46845, 46846 (November 8, 1989). The FHLBB held public hearings on the proposal on February 9 and 10, 1989. Id. Because FIRREA became effective August 9, 1989, the OTS reopened the comment period on the proposal from September 12 to 22, 1989, in order to allow for additional public comment based on the capital changes mandated by FIRREA. Id.

The regulatory savings provision of FIRREA, section 401(h), provides that orders, resolutions, determinations and regulations of the FHLBB in effect on August 9, 1989 were to remain in effect until modified, terminated, set aside or superseded in accordance with applicable law by the appropriate successor agency. As the OTS noted when it adopted the new capital regulation as an interim final rule in November, 1989, the FHLBB's "notice of proposed rulemaking on regulatory capital is such a resolution and the [OTS] has succeeded to that notice." Id. Accordingly, the public was given notice and an opportunity to comment on the proposed regulatory revisions.

agency -- not on any cause of action which is grounded in eighteenth-century common law. Under the weight of authority, Respondent is not entitled to a jury trial.

E. Unjust Enrichment

The Acting Director finds that Respondent has been unjustly enriched by his violation of the Net Worth Maintenance Agreement. See In re Akin, OTS Decision and Order No. AP 90-4009 (December 24, 1990), affirmed sub nom. Akin v. OTS, 950 F.2d 1180 (5th Cir. 1992) and In re Akin, (on remand), OTS Decision and Order No. AP 92-138 (November 25, 1992).

In Akin, the respondent entered into a net worth maintenance agreement with the FSLIC, in lieu of enforcement action, which required him to maintain the net worth of TexasBanc Savings FSB ("TexasBanc") at the level required by section 563.13(b) or any successor regulation thereto and to infuse additional capital if the net worth of TexasBanc fell below its minimum net worth requirement. Akin, however, failed to infuse capital in the amount of the deficiency. The OTS concluded the appropriate remedy for Akin's violation of the net worth maintenance agreement was a cease and desist order requiring Akin to infuse capital into TexasBanc. The OTS also concluded that Akin had been unjustly enriched by retention of funds due to TexasBanc when a default was triggered under the agreement. The Fifth Circuit upheld the OTS's enforcement of the net worth maintenance agreement.

Like Akin, Respondent voluntarily entered into the Agreement to obtain a benefit from the federal government. In Akin, the purpose was to avoid enforcement consequences; here, Respondent did so as a majority shareholder so that the Association could commence operations enjoying the benefits of federal insurance. Like Akin, Respondent refused to honor his commitment when the institution's capital fell. Like Akin, Respondent's failure to infuse capital contributed to the demise of the Association. Finally, like Akin, Respondent has been unjustly enriched by his failure to comply with the Agreement, by retaining funds or property that belong to the Association, while the Association received the benefits of deposit insurance.[29]

Respondent's attempts to distinguish Akin are not persuasive.[30] Accordingly, the Acting Director concludes that the appropriate remedy for Respondent's violation of the written agreement is enforcement of the Agreement and imposition of the requirement that Respondent infuse capital into the Association in receivership.

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[29] The ALJ concluded that Respondent was unjustly enriched by receiving the benefits of federal insurance without honoring the net worth maintenance agreement (Recommended Decision at p. 2). Specifically, the ALJ found that Respondent had been unjustly enriched "since, as in Akin, he has unlawfully retained funds owed to Great Life in receivership." (Recommended Decision at pp. 50-51). See also ALJ's Conclusion of Law No. 11.

[30] For example, it is not significant that Respondent, unlike Akin, was not an officer or director; rather, what is significant is that he is an institution-affiliated party who owned more than 25 per cent of the Association's stock.

E. The Appropriate Remedy

1. The Amount of Respondent's Liability

The proper amount of Respondent's liability under the Agreement, however, is also a matter of dispute. The ALJ adopted Enforcement's argument that the loan classifications were proper under generally accepted accounting principles.

Respondent asserts that he is entitled to an "offset" in the approximate amount of $1.5 million, on the theory the OTS applied improper accounting standards in its evaluation of certain loans during the 1989 examination of Great Life. In challenging the OTS's classifications of two disputed loans (Pembroke and Louisville), Respondent also challenges the deference the ALJ accorded the examiners' testimony, and the admissibility of certain evidence reflecting those conclusions.

Because it appears that the OTS examiners applied the proper criteria under the facts of this case, the Acting Director finds that the ALJ properly accorded deference to the OTS examiners' determinations, as reflected in documentary evidence and oral testimony at hearing, in concluding that the subject loan classifications were properly taken at the time of the examination. The Acting Director departs from the ALJ's Recommended Decision, however, insofar as the ALJ failed to consider evidence adduced (in connection with certain offsets sought in connection with the loan to Pembroke Development Corporation) in calculating the amount of liability under 12 U.S.C. § 1818(b)(6) -- an issue which goes beyond the propriety of the loan classifications. Based on the evidence in this record, the Acting Director concludes that Respondent is entitled to his pro-rata share of two offsets in connection with the Pembroke loan in the amounts of $485,587 [31] and $100,000, respectively -- equalling $339,425 and $69,900. The Acting Director affirms the decision of the ALJ that Respondent is not entitled to an offset in connection with the Louisville loan.

a. The Examiners' "Expert" Status

Respondent has claimed that the Examiner-in-Charge ("EIC") of the 1989 examination does not qualify as an expert because he had been employed as a bank examiner for only two years and had served as EIC for only two examinations. Respondent also asserts that the EIC was biased and thus his conclusions must be dismissed.

It is well settled that bank examiners are "experts" on the subject of loan classifications, and their predictive judgments should generally be given deference in subsequent administrative proceedings. See Sunshine State Bank v. Federal Deposit Ins. Corp., 783 F.2d 1580, 1582-83 (11th Cir. 1986). Cf. Franklin Savings Ass'n v. OTS, 934 F.2d 1127, 1146 (10th Cir. 1991), cert. denied, __ U.S. __, 112 S. Ct. 1475 (1992) (predictive judgments are particularly within expertise of agency).

The presumption of deference is rebuttable, however. To determine if the examiners' predictive conclusions regarding loan

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[31] This number is derived by subtracting the OTS's original fair value estimation of $2,464,413 from the OTS's revised fair value estimation of $2,950,000. See c. i., below.

classifications should be accorded deference, the ALJ should analyze: (1) whether the facts the examiners relied on were erroneous and (2) whether the conclusions the examiners arrived at were reasonable in light of the evidence. See, e.g., Sunshine ~~State Bank, 783 F.2d at 1582;~~ In the Matter of Anderson County Bank, Clinton, Tennessee, Dkt. No. FDIC 89-235a (Prentice Hall FDIC Enforcement Decisions and Orders dated May 21, 1991).

As discussed in greater detail with respect to the specific classifications below, the Acting Director concludes that the ALJ properly evaluated this record under the Sunshine test and appropriately accorded deference to the conclusions of the examiners.

Respondent urges, in lieu of the test expressly stated in Sunshine, that because the EIC supervising the Association's 1989 examination did not have as much experience as the Sunshine State Bank examiners, he is not entitled to deference. Such an interpretation distorts the import of Sunshine. The EIC received specific training, has thoroughly reviewed and is knowledgeable concerning the relevant loan files at issue and, in his occupation as a thrift examiner, deals with examination issues on a daily basis.[32] Under the Sunshine standard, seniority alone is not dispositive: rather, the analysis hinges on whether there

[32] Respondent implies that because the EIC is not a lawyer or CPA, he cannot be a qualified examiner. A bank examiner's expertise, however, need not extend to areas such as litigation, bankruptcy or appraisals. In the Matter of Anderson County Bank, Clinton, Tennessee, Dkt. No. FDIC 89-235a (Prentice Hall FDIC Enforcement Decisions and Orders dated May 21, 1991).

is error in the examination at the time it was conducted. Once it is established that the examiner is in fact a professional regulatory examiner, who has been specially trained for that employment, and who possesses expertise on the loan classifications based on the examiner's familiarity with the loans at issue, the issue of extent of experience must be subordinate to an evaluation of whether demonstrable error was committed in the examination process. Accordingly, the examiner's conclusions may be properly questioned not by reference to seniority alone but by either demonstrating that the information upon which the examiner relied was erroneous; or that his conclusions did not flow from the facts.

Thus, to the extent that Respondent attacks the examiners' conclusions herein, the Director finds that Respondent must attack them directly under the Sunshine test, not collaterally.[33]

b. Admissibility of the 1989 Report of Examination and related documents

The 1989 Report of Examination, the examiners' workpapers and the District Appraiser's reviews reflect the facts relied on, and the conclusions drawn, by the examiners regarding the loan classifications that Respondent has sought to put at issue. Respondent contends that the report is inadmissible because it is

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[33] Independent of the Sunshine analysis, Respondent also claimed that the OTS's accounting expert does not qualify as an expert because he had not yet received the results of his CPA exam. The Director rejects this argument. The OTS's accountant, through the course of his employment with the OTS, had substantial accounting expertise in the area of loan classifications.

neither reliable nor fair, as it is allegedly based on hearsay. He also claims that he was denied the opportunity to cross-examine, impeach and rebut the information contained in the examination report, the underlying examiners' notes and the OTS District Appraiser's reviews.

The ALJ correctly rejected these arguments. While, as discussed in further detail below, Respondent has demonstrated that he is entitled to two additional offsets on the Pembroke loan based on the evidence in the record, he has not shown that the papers relating to the 1989 examination are inadmissible. First, the Federal Rules of Evidence do not apply in this proceeding. See, e.g., Richardson v. Perales, 402 U.S. 389, 400 (1971) (hearsay may be admissible in administrative proceedings); Hoska v. United States Dep't of the Army, 677 F.2d 131, 138 (D.C. Cir. 1982)(hearsay, if relevant and material, is admissible in administrative proceedings); Director, OTS v. Lopez, 960 F.2d 958, 964 n.11 (1992)(it is well-settled that Federal Rules of Evidence do not apply in administrative proceedings). Accordingly, the Acting Director need not reach the issue of what materials would be admissible under the Federal Rules of Evidence. Under the procedural rules applicable to this action, only "[i]rrelevant, immaterial or unduly repetitious evidence shall be excluded." 12 C.F.R. § 509.24(a) (1990); see also 5 U.S.C. § 556(d) (1988).[34]

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[34] Under the revised procedural rules, evidence need only be "relevant, material, reliable, and not unduly repetitive." 12 C.F.R. § 509.36(a)(3)(1993).

Second, the Report of Examination, the examiners' workpapers and the District Appraiser's reviews do not fail under any of these standards. They reflect the agency's findings concerning the specific loan classifications at issue. Accordingly, their admission was not error. The ALJ correctly concluded that these materials were fair and reliable. As the ALJ found:

> A report of examination, such as OTS EX 33, is the fundamental tool through which federal regulatory agencies assess the safety and soundness of federally insured depository institutions. These agencies make supervisory decisions in reliance upon these examination reports which contain information gathered in accordance with established regulatory and supervisory practices.

Recommended Decision at 39. The workpapers and District Appraiser's reviews underlying the examination report are also fair and reliable. The Acting Director affirms the ALJ's conclusion that such documents are admissible in this proceeding.

Even if admissible, however, the question remains concerning the appropriate weight to be accorded these materials. Because these materials reflect the facts and conclusions summarized by the examiners, it appears appropriate to apply the Sunshine standard to determine the deference to be accorded the examiners' opinions. As discussed more specifically below, the Director finds generally that such documents reflect conclusions that are due deference under Sunshine.

Moreover, as noted by the ALJ, Respondent has had ample opportunity throughout the hearing process to challenge the accuracy of these documents. He has not, however, demonstrated that such documents are irrelevant, immaterial, repetitive unreliable or not credible. Accordingly, the ALJ properly admitted these documents into evidence.

c. Entitlement to Offsets

~~The Acting~~ Director makes the following additional findings and conclusions with respect to Respondent's claim that he is entitled to offset the amount of his liability under the Net Worth Maintenance Agreement. As noted above, the ALJ did not permit any offset for either of the two disputed loans. The Acting Director rejects that conclusion and, as discussed below, will permit a $409,325 offset in connection with the Pembroke loan.

i. Pembroke Loan

(a). Loan Terms

In January, 1986, the Association granted a loan to Pembroke Development Corporation ("PDC") for the acquisition, development and construction of a 86,000 square foot self-storage facility in Delray Beach, Florida. As of September 30, 1989, the Association had a recorded investment of $3,305,607 in the loan. The loan was originally supported by an appraisal apparently prepared in October, 1985, which valued the property at $3,530,000.

The loan was secured by a guarantee of collection[35] executed by Albert Miller ("Miller"), the owner of PDC. Miller's

[35] The guarantee of collection provided that the Association would have to first seek repayment from the PDC, then commence foreclosure proceedings on the collateral before seeking repayment from Miller.

personal financial statement reflected approximately $12.2 million in net worth; approximately $8.4 million of this amount constituted the value of his personal residences and his interest in PDC.

(b). History

As the 1989 Report of Examination notes, this loan had a troubled history since at least 1987. During the period May 1987-May 1988, one half of the payments were at least 30 days delinquent. Among other things, the leasing of the facilities was slower, and the rent obtained lower, than anticipated, which resulted in the property's failure to produce sufficient income to service the debt. The loan was subject to special mention in the May 9, 1988, Report of Examination, due to low borrower equity and an occupancy rate of approximately 35 percent. Based on the borrower's difficulties in repayment, the debt was restructured in the spring of 1989. As part of the restructuring Miller agreed to waive a potential lender liability claim against the institution. Nonetheless, the borrower failed to make any payments at least as of August 28, 1989. The Association commenced foreclosure proceedings on October 3, 1989. The OTS's 1989 examination began shortly thereafter.

In connection with the examination, on November 6, 1989, the OTS-Atlanta District Appraiser reviewed the Association's October, 1985 appraisal of the property and found it deficient in a number of respects. First, the appraisal -- which had been prepared before the property had been developed -- did not take into consideration current property values or actual income production. The District Appraiser criticized the appraisal because, among other things, it failed to include significant property estimates and a rationale supporting certain of the appraiser's conclusions. The District Appraiser also concluded that the appraisal in the Association's files was "an inappropriate tool for underwriting a loan because of the hypothetical value estimate that was reported in it."

To better ascertain fair value, the District Appraiser calculated a stabilized operating statement based on income for the property and expenses which were based on similar facilities. The District Appraiser concluded that the fair value of the property was $2,464,413, and recommended rejecting the earlier appraisal as deficient.

As a result of the examination, the OTS required that $841,194 be classified as a loss, which the institution did under protest on March 23, 1990. The Association apparently acquired the property on March 5, 1990, as a result of foreclosure and hired a property manager.

On April 3, 1990, a second appraisal was performed on the property, which concluded that the fair value of the property was approximately $3.15 million. Information supplied by the new property manager showed that since March 1990, the amount of rent received increased significantly, suggesting that "the borrower may have skimmed cash from the receipts." In an appraisal review dated May 21, 1990 (OTS Exhibit 37) the District Appraiser recommended that this information be brought to management's attention so the institution might pursue legal proceedings against the borrower if appropriate.[36] The Appraiser concluded, in light of the increased income stream, that the April 3, 1990 appraisal was reasonable and ~~that the~~ estimated fair value was $2.95 million.

(c). Respondent's Exceptions

Respondent contends that the OTS's loss calculation of $841,194 -- based on a fair value of the loan at $2,464,413 -- is arbitrary and capricious since the District Appraiser's May 21, 1990 appraisal review concludes that, in light of the information discovered after the Association took possession of the property, a fair value of $2,950,000 was reasonable. Respondent also asserts that the OTS's original fair value calculation contained numerous significant omissions and miscalculations. Respondent argues further that the OTS loss classification misjudged the value of the litigation against Miller, the guarantor, as reflected by the fact that the Association ultimately recovered $100,000 from Miller (despite the OTS's assumption that the guaranty was of little value); and erred in concluding that the guarantor's financial statements were unreliable.

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[36] The record does not reflect, however, that the Association took action against the borrower in this regard. Rather, the record reflects only that the Association obtained a $100,000 settlement from Miller on his personal guaranty after the 1989 examination concluded. Nor does the record demonstrate that the Association made further inquiry to determine whether grounds existed for an independent action against the borrower.

(d). Analysis

Under generally accepted accounting principles ("GAAP"), property in foreclosure must be accounted for according to its fair value. See Statement of Financial Accounting Standards ("SFAS") No. 15: Accounting by Debtors and Creditors for Troubled Debt Restructurings (1977). In light of the pending foreclosure proceeding -- which the Association had instituted even before the 1989 examination was commenced -- the examiners determined that the Pembroke loan should be accounted for in accordance with SFAS 15. The proper application of SFAS 15 was confirmed by the OTS's accounting expert at the hearing.

Under SFAS 15, when an asset is in foreclosure its fair value must be calculated, based on the information available at the date of foreclosure, and compared with the recorded investment receivable. Accordingly, the ALJ properly found that the Association was required to recognize the $891,194 difference between the Association's recorded investment and the fair value as a loss.

Respondent contends, however, that he is entitled to offset against this amount by any subsequent alleged recovery by the institution, because Florida state law, rather than GAAP, dictates the recovery under the Net Worth Maintenance Agreement.

For regulatory and financial reporting purposes, information obtained subsequent to the close of the examination is not relevant for assessing the propriety of loan classifications. See In re Anonymous, Docket No. 84-100b (Prentice Hall FDIC

Enforcement Decisions and Orders dated September 16, 1985).[37] Nor are the loan classifications directed against Great Life directly at issue here. Rather, these issues are relevant herein only to the extent they concern the appropriate measure of Respondent's liability under the Net Worth Maintenance Agreement.

Respondent argues that the April, 1990, appraisal and OTS's evaluation thereof demonstrate that the November 6, 1989, appraisal review was inaccurate because it was based on information which was subsequently rendered suspect. He argues that the fair value of the property must be increased to the amount of the later appraisal.

Among other things, section 8(b)(6) of the FDIA permits the OTS to issue a cease and desist order requiring an institution-affiliated party such as Respondent to correct or remedy his violation of a written agreement, including a requirement that he "make restitution or provide reimbursement, indemnification, or guarantee against loss" if he has been unjustly enriched by his violation or acted in reckless disregard of the law. 12 U.S.C. § 1818(b)(6). See Wachtel v. OTS, 982 F.2d 581 (D.C. Cir. 1993). The remedy assessed by the Director must bear a reasonable

[37] Indeed, even if the loan classifications were properly reviewable in this proceeding, the record reflects that the loss classifications were properly made under GAAP. The record does not reflect that the District Appraiser could reasonably have been expected to obtain information concerning the revised income stream earlier. Indeed, he relied on information supplied by the Association, and the institution apparently was not even aware of the alleged "skimming."

relation to Respondent's violation of the Agreement. Akin, OTS Decision and Order No. AP 90-4009 at p. 50. Here, the OTS's remedy must bear a reasonable relation to Respondent's refusal to infuse capital into the Association as required by the Agreement.

The Acting Director concludes that the payment of funds due under the Agreement is the appropriate remedy. The Acting Director affirms the conclusions of the ALJ that the Association had a capital deficiency of $2,784,000 as of December 31, 1989. Independent of any offsets, Respondent would be liable for 69.9 per cent of this deficiency -- as the ALJ calculated, an amount of $1,946,000.

Under the unique facts of this case, however, the Acting Director is persuaded that Respondent is entitled to two offsets. The loss caused to the Association in connection with the Pembroke loan is properly calculated based on a fair value of $2,950,000. The May 21, 1990 appraisal review prepared by the OTS District Appraiser (OTS Exhibit 37) acknowledges the fact that it was subsequently discovered, after the close of the examination and before the appointment of the receiver, that the fair value calculation should be increased. Thus, the Acting Director concludes that Respondent is entitled to an offset in the amount of $339,425 -- representing 69.9 per cent of $485,587 -- reflecting the OTS's subsequent judgment on the fair value of the Pembroke property.

The Acting Director also concludes that Respondent is entitled to an additional offset in the amount of $69,900 --

representing 69.9 per cent of $100,000 -- reflecting the recovery received under the guarantee of collection against Miller. Enforcement has not successfully rebutted Respondent's claim that the Association received this recovery prior to the appointment of the receiver. Accordingly, the Director finds that Respondent is entitled to a total offset in the amount of $409,325.

ii. The Louisville Loan

(a). Loan Terms

On July 30, 1985, the Association entered into a participation loan, structured by GermaniaBank, FSB of Alton, Illinois, in connection with the development of a hotel in Clarksville, Indiana. The Association's interest was approximately $1.5 million, representing approximately a 12 per cent share in the $11 million loan. The loan was secured by the hotel property which had originally been appraised at approximately $10.3 million. The remaining interests were held by GermaniaBank (which, as lead lender, held a 60.15% interest) and Concord Liberty Savings and Loan Association of Monroeville, Pennsylvania.

(b). History

The loan had been in default since April, 1986. Another appraisal was performed by an appraiser for the institution in June 1989, at which time the property was revalued at approximately $4.8 million. The property was foreclosed on by, and came under the possession of, GermaniaBank in October, 1989.

The Association commenced litigation against GermaniaBank as the lead lender alleging, among other things, fraud and breach of fiduciary duty, and sought recovery of $2,500,000. GermaniaBank brought a counterclaim against the Association. The Association's counsel opined in July 1989 that "[a]lthough it is ~~difficult to predict the outcome of pending litigation, it~~ appears that Great Life Savings has a reasonable likelihood of success. . . ."[38]

As a result of the 1989 examination, the OTS concluded that the fair value of the Association's interest in the loan to be only $423,617, based on its review of the June 1989 appraisal which valued the hotel at approximately $4.8 million. The OTS District Appraiser determined that the appropriate fair value of the hotel was $3,367,388, after subtracting $750,000 for the cost of asbestos removal and the costs of holding and selling the hotel over a two year period. Accordingly, the Association's interest was devalued to $423,617, and the OTS required the Association to classify the difference -- $ 963,605 -- as a loss. The Association did so under protest on March 23, 1990.

(c). Respondent's Exceptions

Respondent contends that the OTS should have accepted, at least, the $4.8 million appraisal instead of the fair value of $3,367,388. If so, the loss to the Association would have been a lesser amount, and Respondent would be entitled to an offset. Respondent challenges the OTS's valuation as arbitrary and

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[38] Both suits were ultimately dismissed, however, after the RTC was later appointed receiver for both institutions. The Association never received any recovery from GermaniaBank.

capricious, alleging it was based on a desk review and hearsay. Respondent also challenges the examiners' accounting treatment of the Association's lawsuit against the lead lender, GermaniaBank.

(d). **Analysis**

After careful consideration of Respondent's arguments, the Acting Director affirms the findings and conclusions of the ALJ with regard to the Louisville loan. As discussed above, the Acting Director accords substantial deference to the reasonable conclusions reached by the examiners. Sunshine, 783 F.2d 1580 (11th Cir. 1986). First, since the property was an asset in foreclosure, the examiners properly relied on SFAS 15 and the District Appraiser's review and calculation -- the only fair value calculation in the record -- which was also supported by the testimony of the OTS's appraisal expert. Second, Respondent has not shown that it was error for the examiners not to have given more weight to an opinion prepared by Price Waterhouse, the Association's outside auditors, upon which they theorize that under GAAP, the Association was entitled to defer any possible loss on the loan until the litigation with GermaniaBank was concluded. It was reasonable for the examiners to conclude that the opinion was not persuasive, because it indicated the difficulties on settling on a reserve amount in light of the litigation, and even notes that a conservative approach would be to calculate a reserve based on the lowest appraised value minus disposal costs. Moreover, given the fact that any recovery awarded could not have been realized for some period of time (a trial date was not scheduled until 1990 at the earliest), it was reasonable for the examiners to determine that the possible recovery was too attenuated in time to be accounted for presently as a gain contingency under GAAP.

The examiners' conclusion that the Association failed to support a fair value estimation of its interest in excess of $423,617 was thus reasonable in light of the record evidence and should be accorded deference. The Acting Director affirms the ALJ's determination that Respondent is not entitled to an offset in connection with the Louisville loan.

VI. CONCLUSION

Based on the record, the Acting Director finds that Respondent's execution of the Net Worth Maintenance Agreement rendered Respondent personally liable for a portion of the Association's net worth, if its net worth fell below required levels during the five year term of the Agreement; that Respondent violated the Net Worth Maintenance Agreement by failing to infuse capital into the Association when his obligation to do so under the Agreement was triggered; and that Respondent's failure to infuse capital as required under the Agreement unjustly enriched him. Accordingly, the Acting Director affirms the conclusions of the Administrative Law Judge below with respect to Respondent's liability.

The Acting Director reverses the conclusions of the Administrative Law Judge with respect to the amount of Respondent's liability in connection with offsets claimed in regard to the Pembroke loan, totalling $409,325. Accordingly, the Acting Director orders Respondent to pay $1,536,675 to the Association in receivership.

All other exceptions lodged by Respondent and not otherwise addressed are denied.

O R D E R

Upon consideration of the entire record in this matter, including the Recommended Decision filed by the Administrative Law Judge, the submissions of the parties, and for the reasons set forth in the accompanying Decision, the Director of the OTS, pursuant to his authority under 12 U.S.C. § 1818(b), finds that:

Respondent Robert D. Rapaport ("Rapaport") has violated the Net Worth Maintenance Agreement he executed in connection with the FHLBB's grant of federal deposit insurance to Great Life Savings and Loan Association ("Great Life"); and Rapaport was unjustly enriched by his violation of the Net Worth Maintenance Agreement.

IT IS HEREBY ORDERED THAT:

1. Rapaport shall cease and desist from violating the Net Worth Maintenance Agreement;

2. On the effective date of this Order, Rapaport shall contribute capital, in the amount of $1,536,675, representing his liability under the Net Worth Maintenance Agreement, into Great Life, in a form acceptable to the Resolution Trust Corporation ("RTC") as receiver;

3. The form of any capital that Rapaport contributes to

Great Life under this Order must first be approved by the RTC. If, for any reason, the RTC does not approve the form of capital contribution by Rapaport, such disapproval shall not relieve Rapaport of his obligation to infuse capital into Great Life pursuant to this Order; and

4. The provisions of this Order are effective upon the expiration of thirty (30) days after service of this Decision and Order on Rapaport, and shall remain effective and enforceable, except to the extent that, and until such time as, any provisions of this Order shall have been stayed, modified, terminated, or set aside by the Director or a reviewing court. Rapaport is hereby notified that he has the right to appeal this Decision and Order to the appropriate United States Court of Appeals within 30 days after service of such Decision and Order. 12 U.S.C. § 1818(h).

OFFICE OF THRIFT SUPERVISION

Date: Nov 15, 1993

/S/

Jonathan L. Fiechter
Acting Director

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November, 1993, copies of the foregoing (1) Decision and Order and (2) Order were served as indicated below on the following:

By Hand Delivery

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