

UNITED STATES OF AMERICA  
Before The  
OFFICE OF THRIFT SUPERVISION  
DEPARTMENT OF THE TREASURY

In the Matter of )  
DAVID L. PAUL, )  
Former Chairman of the Board, )  
Chief Executive Officer, and )  
Controlling Shareholder of )  
Centrust Bank, a State )  
Savings Bank, Miami, Florida )

Re: Order No. 91-50  
Dated: August 29, 1991

OTS Order No. AP 93-104  
Dated: December 15, 1993

DECISION AND ORDER ON ASSESSMENT  
OF CIVIL MONEY PENALTIES

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DECISION

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

The Respondent in this matter is David L. Paul ("Paul" or "Respondent"), the former Chairman of the Board of Directors, Chief Executive Officer, and controlling shareholder of CenTrust Bank ("CenTrust"). The Office of Thrift Supervision ("OTS") appointed the Resolution Trust Corporation ("RTC") as receiver for CenTrust in March 1990. In a separate administrative proceeding, OTS has sought cease and desist relief, restitution, and an order of prohibition against Paul on account of conduct in which he is alleged to have engaged while CenTrust was in operation.

At the same time as its Notice of Charges in that separate proceeding was filed, the OTS also issued a temporary cease and desist order against Paul. The temporary order was designed to preserve Paul's assets from dissipation pending the outcome of the proceeding on the merits of the OTS's claims. Its objective was to ensure that funds would be available to satisfy any payment of restitution that Paul might ultimately be ordered to make. The temporary order (and subsequent orders issued in this proceeding) also made provision for Paul's reasonable living expenses, for the payment of reasonable attorneys' fees, and for Paul to seek hardship relief from the order's restrictions under certain circumstances.

In this proceeding, a Notice of Assessment of Civil Money Penalties has alleged that Paul violated the asset preservation order and seeks civil money penalties on account of those violations. Paul did not contest the facts material to establishing his liability for such violations. Paul did not appear personally or by counsel at the hearing on the Notice of Assessment, and thus the allegations in the Notice of Assessment may be accepted as true. He was ordered not to transfer assets above the value of \$5,000 without the prior permission of the OTS. He transferred \$50,000 in cash, first, to a trust account maintained by his lawyers and, then, to his private investigator. He was ordered to submit certain financial information to the OTS. To date, the information he has submitted falls woefully short of the requirements imposed by the temporary order. Paul was ordered to post security. He failed to do so. Finally, Paul was ordered to transfer his assets to an Administrator. Again, he wholly failed to comply.

The Acting Director concludes that these violations warrant the imposition of substantial civil money penalties. The statute authorizes the imposition of asset preservation orders to ensure that, in the appropriate case, those found guilty of misconduct will return funds to the institutions they have harmed. Deliberate and substantial violations of an asset preservation order erode the government's ability to seek meaningful restitution awards that would prevent wrongdoers from profiting from their malfeasance and

that would help offset the cost to the taxpayers of the thrift crisis.

To determine the amount of penalties appropriate to this Respondent's violations of the asset preservation order, the Acting Director today applies the analysis prescribed by the decision in In the Matter of Rapp, OTS Order No. AP 92-148 (December 4, 1992) ("Rapp"). As a result, and based on the applicable statutory standards and the record before him, the Acting Director orders Paul to pay civil money penalties in the amount of \$841,748.25.

## II. PROCEDURAL HISTORY<sup>1</sup>

The OTS has filed two administrative proceedings against Respondent. In the first proceeding, initiated by a Notice of Charges, the OTS seeks restitution and an order of prohibition against Respondent based on conduct in which he is alleged to have engaged during his tenure at CenTrust. The administrative proceedings in this first case have been stayed pending completion of criminal proceedings against Paul.<sup>2</sup> This Final Decision and

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1. References to various documents will be as follows: "TR" refers to the transcript of the August 3, 1992 hearing; "OTS Ex. \_\_\_" refers to an OTS Exhibit admitted into evidence at the hearing or attached to the motion for partial summary disposition; "Dep." refers to the deposition of a named individual; and "RD" refers to the Recommended Decision submitted in this case.

2. On February 28, 1992, a Federal grand jury handed down an indictment against Paul based on conduct and transactions that occurred during his tenure at CenTrust. On May 13, 1992, a superseding indictment issued, which included additional counts. At the request of the Assistant United States Attorney, the Administrative Law Judge stayed proceedings in the first

Order completes the second administrative case against Paul, in which the OTS seeks civil money penalties based on his violations of a temporary cease and desist order issued against him at the same time as the Notice of Charges.

A. The Notice of Charges and the Temporary Order

On October 22, 1990, the OTS issued a Notice of Charges and Hearing to Direct Restitution and Other Appropriate Relief ("Notice of Charges") against Paul. OTS Order No. AP 90-1873. The Notice of Charges asserts that Paul violated Federal law and regulations, engaged in unsafe and unsound practices, and breached his fiduciary duty to CenTrust. The Notice seeks a final order to cease and desist requiring Paul to pay restitution in the amount of \$30,879,550 and an order of prohibition against Paul. Paul answered the Notice of Charges on November 12, 1990.

On February 14, 1991, OTS filed an Amended Notice of Charges and Hearing to Direct Restitution and Other Appropriate Relief ("Amended Notice of Charges"). The Amended Notice was supplemented on January 31, 1992. By Order dated April 10, 1992, Administrative Law Judge Walter J. Alprin ("Judge Alprin" or the "ALJ") granted Enforcement's Motion to Amend the original Notice of Charges. On

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(Footnote 2 continued from previous page)  
administrative case by order dated December 1, 1992. The trial of the counts in the superseding indictment began on October 12, 1993, and on November 24, 1993, Respondent was convicted on all but one of 69 counts. Issuance of this decision and order was held in abeyance pending the conclusion of the criminal trial.

May 27, 1992, Paul served his Answer to the Amended Notice of Charges.

On October 22, 1990, OTS also issued a Temporary Order to Cease and Desist ("Temporary Order") under section 8(c) of the Federal Deposit Insurance Act ("FDIA"). 12 U.S.C. § 1818(c). The Temporary Order was designed to preserve Paul's assets pending completion of the principal administrative proceeding. It directed him to post security in the amount of \$30,879,550; to give a sworn statement with quarterly updates identifying his assets, including, but not limited to, accounts or assets outside the United States; and to file copies of certain tax returns with the OTS. In addition, Paul was enjoined from transferring, selling, or encumbering assets over \$5,000 without giving prior notice to OTS. Finally, the Temporary Order permitted Paul to make appropriate application for relief to OTS if compliance with the Temporary Order would cause undue hardship to him or his dependents or would cause him to be unable to hire legal counsel.

B. Litigation Involving the Temporary Order

On November 1, 1990, Paul filed suit in Federal district court to enjoin the OTS from enforcing the Temporary Order<sup>3</sup> under section 8(c)(2) of the FDIA. 12 U.S.C. § 1818(c)(2). Enforcement applied

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3. Paul was represented in this litigation by Mr. Sanford Bohrer of Thomson, Muraro, Bohrer, and Razook. Paul was also represented during this time on criminal matters by Mr. Aubrey Harwell of Neal and Harwell.

to the district court to enforce the Temporary Order under the provisions of section 8(d) of the FDIA. 12 U.S.C. § 1818(d). On December 4, 1990, the United States District Court for the Southern District of Florida granted OTS's petition for an injunction to enforce the Temporary Order in its entirety and denied Paul's application for a preliminary injunction. Paul v. Office of Thrift Supervision, 763 F. Supp. 568 (S.D. Fla. 1990), aff'd per curiam, 948 F.2d 1297 (11th Cir. 1991).

After the district court enforced the Temporary Order, Paul submitted three separate applications for hardship relief with the Director. As a result of the first application, which was made on January 14, 1991, and supplemented on February 25, 1991 and March 1, 1991, the Director issued an order permitting the payment of attorneys' fees to Mr. Abbe Lowell, of Brand and Lowell.<sup>4</sup> OTS Order No. AP 91-169 (March 19, 1991).

On March 26, 1991, Respondent made a second application for hardship relief. He sought permission to sell property in Orono, Maine and a one-half interest in a Bal Harbour apartment to pay his legal expenses.<sup>5</sup> In response, the Director issued an order

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4. On February 20, 1991, Mr. Bohrer sought leave from OTS to withdraw as counsel, citing "irreconcilable differences" as the basis for his request. A motion for leave to withdraw was also filed with the district court. On April 19, 1991, the district court granted Mr. Bohrer's motion to withdraw.

5. According to this application, a \$250,000 advance paid to Mr. Bohrer's firm on or about October 11, 1990, had already been expended.

providing that before OTS would act on any request by Respondent or his attorneys either to pay attorneys' fees in addition to the \$250,000 that previously had been advanced to Mr. Bohrer's firm or to sell any of Respondent's assets, Respondent was required to submit a true sworn statement of financial condition; to file an accounting of the \$250,000 advance; and to provide an accounting of other available sources of funds. In addition, the Order required both parties to file simultaneous submissions within ten business days on whether civil money penalties should be assessed against Paul for his failure to comply with the Temporary Order. OTS Order No. AP 91-196 (April 10, 1991). Paul did not make the required submissions.

On April 19, 1991, on Paul's motion, the district court temporarily stayed enforcement of the Temporary Order to allow Paul the opportunity to obtain new counsel in the administrative proceedings. The district court also directed Respondent to submit the financial statements that the Director had ordered him to produce.<sup>6</sup>

Because Respondent had failed to make any of the submissions required by his previous orders, the Director concluded that OTS did not have adequate factual information to decide Respondent's request to make expenditures for legal fees and expenses. OTS Order No. AP 91-219 (April 22, 1991).

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6. Paul v. OTS, Civil Action No. 90-2496-CIV-DAVIS (S.D. Fla. April 19, 1991).

Respondent then moved the district court to continue its stay of enforcement of the Temporary Order. On April 25, 1991, the district court ordered Respondent to submit the required financial statements and all other documents due to OTS. The district court also requested that OTS meet with Respondent to resolve his continuing request for hardship relief, subject to Respondent's making the required submissions. See District Court Order Extending Stay and Mandating Compliance (April 25, 1991).

On May 2, 1991, Respondent submitted an unsworn statement of his net worth that failed to satisfy the requirements of the Temporary Order. See OTS Order No. AP 91-25 (May 17, 1991). Nonetheless, the Chief Counsel of the OTS held a meeting with the parties on the record on May 23, 1991. Following that meeting, the Director issued Order No. AP 91-26 on June 11, 1991 (the "Hardship Order"). The Hardship Order required, inter alia, that Respondent deliver by June 21, 1991, all of his liquid assets to an Administrator appointed by the OTS. The delivery of these assets was intended to serve two purposes: first, to provide security for any restitution eventually obtained by OTS; and, second, to provide a source of payment of Respondent's reasonable and necessary living expenses and legal fees. Respondent failed to deliver any liquid assets to the Administrator.

The Hardship Order also reiterated the requirement set forth in OTS Order No. 91-196 that Respondent submit a memorandum

addressing whether the Director should assess civil money penalties for his failure to comply with the Temporary Order. Respondent failed to file any memorandum.<sup>7</sup>

C. The Civil Money Penalty Proceedings and Related Litigation

On August 29, 1991, the Director issued a Notice of Assessment of Civil Money Penalty ("Notice of Assessment"). OTS Order No. AP 91-50. The Notice of Assessment alleged five violations by Paul of the Temporary Order and the Hardship Order, and assessed civil money penalties of \$3,172,500 as follows:

Violation A - Transfer of \$50,000 to the law firm of Neal & Harwell on October 26, 1990, contrary to the Temporary Order's prohibition on the dissipation of assets without advance written notice to the OTS, an alleged second-tier violation pursuant to 12 U.S.C. § 1818(i)(2)(B), for which a total civil money penalty of \$25,000 was sought.

Violation B - Transfer of \$200,000 on or about October 26, 1990, through accounts of attorneys and through a business associate, to an account in Israel, without advance notice to the OTS, contrary to the requirements of the Temporary Order, an alleged third-tier violation pursuant to 12 U.S.C. § 1818(i)(2)(C), for which a civil money penalty of \$400,000 was sought.

Violation C - Failure to file the financial statements as required by the Temporary Order from October 29, 1990 to May 1, 1991, and the subsequent failure to file timely updates, an alleged third-tier violation pursuant to 12 U.S.C. § 1818(i)(2)(C), for which a civil money penalty of \$942,000 was sought.

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7. Instead, on July 2, 1991, Respondent filed a motion in district court seeking to clarify that the court's stay order encompassed civil money penalties. The district court issued an order that same day, but it did not include the relief sought by Paul. Of course, under 12 U.S.C. § 1818(i)(1), the district court was powerless to issue the order Paul requested.

Violation D - Failure to post security as required by the Temporary Order, an alleged second-tier violation pursuant to 12 U.S.C. § 1818(i)(2)(B), for which a civil money penalty of \$755,000 was sought.

Violation E - Failure to deliver liquid assets to the Administrator as required by the Hardship Order, an alleged third-tier violation pursuant to 12 U.S.C. § 1818(i)(2)(C), for which a civil money penalty of \$1,050,000 was sought.

On September 18, 1991, Paul filed a timely Answer and request for a hearing pro se.<sup>8</sup>

On September 25, 1991, Respondent commenced a civil action in which he sought to enjoin the Notice of Assessment proceeding and to dismiss the Notice of Assessment. On March 31, 1992, the district court dismissed the action for failure to state a claim upon which relief could be granted. Paul v. OTS, Civil Action No. 91-2082-CIV-DAVIS (S.D. Fla. March 31, 1992).

The civil money penalty case was referred to the Office of Financial Institution Adjudication ("OFIA") and was assigned to Judge Alprin. On May 12, 1992, and pursuant to Rule 32,<sup>9</sup> Judge Alprin issued a pre-trial scheduling order that was revised on June 26, 1992 ("Pre-Trial Order"). The Pre-Trial Order set the case for

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8. Respondent continued to appear pro se until his advisory counsel, Brand & Lowell, entered an appearance in this proceeding on January 8, 1992.

9. All references in this Final Decision and Order to "Rule \_\_\_" are to the OTS's Rules of Practice and Procedure in Adjudicatory Proceedings which are codified at 12 C.F.R. Part 509 (1993), as amended, 58 Fed. Reg. 4308, 4311 (1993).

hearing on August 3, 1992, and required inter alia: submission by July 13, 1992, of a joint statement of agreed upon facts or, if the facts were not stipulated, then of each party's proposed statement of facts; and submission of witness lists and exhibits by July 20, 1992.

On July 1, 1992, Brand and Lowell formally withdrew from the civil money penalty case. On July 10, 1992, Enforcement Counsel wrote to Paul requesting that he inform the OTS of what facts in the Notice of Assessment he was prepared to stipulate to and requesting that he submit any proposed statement of facts.

Paul responded on July 13, 1992, and refused to submit or stipulate to any facts on the grounds that the administrative tribunal lacked jurisdiction over him, that he was preoccupied with his criminal defense, that his constitutional rights were being impaired, and that he was not capable of handling the case pro se. Paul failed to submit any proposed statement of facts to the ALJ on July 13, 1992, or at any time thereafter. Moreover, he failed to submit a witness list or exhibit list to the ALJ as required by the Pre-Trial Order.

On July 22, 1992, Enforcement Counsel filed a motion in limine pursuant to Rule 32(b) to preclude Respondent from calling any witnesses or introducing any documentary evidence at the hearing because of his failure to comply with the terms of the ALJ's Pre-Trial Order.

On July 27, 1992, pursuant to Rules 29 and 30, Enforcement Counsel filed a motion for partial summary disposition on the issue of Paul's liability for the violations alleged in the Notice of Assessment. The motion was accompanied by a statement of material facts as to which Enforcement Counsel contended that there was no genuine issue, as required by Rule 29(b)(2).<sup>10</sup> Judge Alprin considered this motion as a second motion in limine, and by Order served by telephone facsimile on July 28, 1992, permitted Paul to respond to both motions in writing at or before the opening of the August 3, 1992, hearing.

Respondent failed to submit any written opposition to either the motion in limine or the motion for partial summary disposition. Respondent was present in the hearing room on August 3, 1992, however, and asked to be heard prior to appearances being taken. The ALJ permitted Respondent to make a statement on the record. Respondent did so,<sup>11</sup> then indicated on the record that he was going to leave the courtroom. The following colloquy appears in the

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10. This statement was entitled "Office of Thrift Supervision's Statement of Material Facts As To Which There Is No Genuine Issue" ("OTS Statement").

11. Paul argued that the Temporary Order was not legally effective at the time of the alleged transfers of money described in Violations A and B; that he had no money to post security; that he could not supply a certified financial statement because no certified public accountant would prepare such a document and that he had satisfied this requirement at his deposition in January 1991; and that he did not have to turn his liquid assets over to an Administrator because the district court had appointed Magistrate Judge Barry I. Garber on October 10, 1991 to administer his assets.

transcript of the hearing:

THE COURT: Secondly, Mr. Paul, I will ask you to remain for a moment while we take appearances so that in addition to your statement it does appear on the Record that you are here but not making an appearance.

MR. PAUL: I think I said it at the beginning, but I would be glad to do that.

THE COURT: Thirdly, Mr. Paul, I have warned you previously of the provision of the rules that if you do not appear, and you do not have counsel representing you, the matters alleged in the notice are automatically accepted as facts.

MR. PAUL: Well, Your Honor, that presumes that all of these pre-trial motions that I have just made after talking for almost an hour or forty-five minutes you are ignoring. But assuming you do not ignore my motions, maybe in fact that won't occur.

The truth of the matter is, Your Honor, that I can't be represented by counsel because the monies that I would have used are tied up by the OTS, thereby prohibiting me. \$170,000 is tied up.

Secondly, I cannot represent myself Pro Se because of the criminal proceeding. The Public Defender's Office wrote a very good brief on that, I think. So did Mr. Abbe Lowell's office, two of them to your Court I believe, that the Federal Court will make a decision on precisely the same thing this Court has decided; that this case is not parallel and I am not entitled to have this stay.

I am very desirous, Your Honor, to have had the opportunity, frankly, to have tried this case on the merits with an attorney or even if I could have done it Pro Se because I think it's outrageous, but I just can't right now and I am sure you appreciate that.

THE COURT: I appreciate everything you say, Mr. Paul. I just want it on the record that you were advised.

Tr. at 50-52.

Respondent then withdrew from the hearing after specifically refusing to enter a pro se appearance or participate in the hearing.

After Paul withdrew from the hearing, Enforcement Counsel responded to Paul's statement. Judge Alprin orally granted: 1) Enforcement Counsel's motion in limine to preclude Paul from calling any witnesses or introducing any documentary evidence at the hearing; and 2) the motion in limine for partial summary disposition. The effect of the ALJ's grant of partial summary disposition was to establish that Paul had committed the violations alleged in the Notice of Assessment. Thus, the only issue remaining was the appropriate amount of penalties to be imposed for each violation.

Enforcement Counsel sought to put on evidence at the hearing as to appropriate penalty amounts. Enforcement called only one witness: Ms. Kathryn Haney, who was presented as an expert witness on the quantification of civil money penalties. Ms. Haney had completed a Civil Money Penalty Matrix<sup>12</sup> for each violation. She

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12. See OTS Regulatory Bulletin No. 18-3 (June 13, 1990).

testified that the Matrix yielded different amounts for each violation from those in the Notice of Assessment.<sup>13</sup>

At the hearing, Enforcement Counsel also sought to establish that it should recover the expenses it had incurred in investigating and litigating these violations. Enforcement sought total expenses of \$266,758. Ms. Haney apportioned this amount equally among the five violations for a total of \$53,353 per violation. After her testimony, the hearing concluded.

Enforcement Counsel timely filed its post-hearing brief, and proposed findings, conclusions, and order pursuant to Rule 37. On September 4, 1992, Respondent submitted to Judge Alprin a document entitled:

"Motion to Dismiss or in the Alternative to Stay any Forthcoming Judicial Recommendation Arising from the Administrative Hearing Held on August 3, 1992, Concerning the Assessment of Civil Money Penalties and Motion to Include in the Record all Federal District Court Orders Which Have Stayed the Enforcement of OTS' October 22, 1990 Temporary Cease and Desist Order" ("Motion to Dismiss").

13. According to the witness, for Violation A, a third-tier civil money penalty of \$450,000 was appropriate, although the Notice of Assessment sought a second-tier penalty of \$25,000. For Violation B, a third-tier civil money penalty of \$800,000 was appropriate, although the Notice of Assessment sought a third-tier penalty of \$400,000. For Violation C, a third-tier civil money penalty of \$728,000 was appropriate, although the Notice of Assessment sought a third-tier penalty of \$942,000. For Violation D, a third-tier civil money penalty of \$935,000 was appropriate, although the Notice of Assessment sought a second-tier penalty of \$755,000. For Violation E, a third-tier civil money penalty of \$703,000 was appropriate, although the Notice of Assessment sought a third-tier penalty of \$1,050,000.

Enforcement Counsel filed an opposition to the Motion to Dismiss on September 18, 1992. On October 2, 1992, Paul filed a Reply, and on October 9, 1992, Enforcement Counsel filed a Sur-Reply. Respondent did not file a post-hearing brief or proposed findings or conclusions.

On November 18, 1992, Judge Alprin issued his "Recommended Decision Ordering Civil Money Penalties of \$2,211,000 for Violations of [Temporary] Order, Disallowing Penalties in Excess of Demands of Notice of Assessment, and Disallowing Costs" ("Recommended Decision").<sup>14</sup>

On December 18, 1992, Enforcement Counsel filed exceptions to the Recommended Decision pursuant to Rule 39. After the ALJ filed his Recommended Decision with the Director but before the parties'

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14. On December 10, 1992, Paul filed a motion seeking an Order recusing Acting Director Jonathan L. Fiechter and staying all OTS proceedings until a new Director has been appointed and confirmed by the Senate. The Acting Director denied Paul's recusal motion and his request for a stay. OTS Order No. AP 93-25 (April 5, 1993).

In a December 18, 1992, cover letter transmitting his "objections" to the Recommended Decision, Paul asserts that if the December 10, 1992, motions are denied, and if the Acting Director rules against him in this Final Decision and Order, "please also deem this letter to be a request pursuant to § 509.41 'Stays Pending Judicial Review' to stay the effectiveness of all or any part of" this Final Decision and Order pending a final decision on a petition for review of the order. In effect, Paul has asked the Acting Director to stay this Final Decision and Order pending judicial review before the Final Decision and Order has issued. This request is prematurely and inappropriately filed. Subsequent to the issuance of this Final Decision and Order, Paul may seek a stay of this order from the Acting Director pending judicial review if he can satisfy the four-prong test set forth in Cuomo v. U.S. Nuclear Regulatory Commission, 772 F.2d 972 (D.C. Cir. 1985).

exceptions were due, the Director issued a final decision and order in the Rapp case.<sup>15</sup> Rapp established the agency's method for computing civil money penalties. In its exceptions, Enforcement Counsel applied the Rapp analysis "to develop an alternative assessment" of penalties under its application of the Rapp analysis. Enforcement argued that the following penalty amounts were warranted: Violation A - \$570,000; Violation B - \$30,810,000; Violation C - \$66,340,000; Violation D - \$109,537,500; Violation E - \$98,714,850. Thus, in its exceptions, Enforcement Counsel sought total civil money penalties of \$305,972,350.

Also on December 18, 1992, Paul filed "objections" to the Recommended Decision, attached to which were five bound volumes of supplemental material, which Paul identified as Exhibit Nos. 1 through 45. On January 6, 1993, Enforcement Counsel filed a Reply to Paul's objections, which included a motion to strike Exhibits 1-45.

By letter dated April 5, 1993, the parties were notified that the proceeding had been submitted to the Acting Director for final decision pursuant to Rule 40. By subsequent orders, the Acting Director extended the time for decision until after the conclusion of the criminal trial.

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15. The Rapp respondents have appealed this administrative decision to the United States Court of Appeals for the Tenth Circuit. The matter is currently pending there.

### III. THE RECOMMENDED DECISION

In his Recommended Decision, the ALJ adopted the civil money penalty tier levels set out in the Notice of Assessment. He recommended limiting the amounts of penalties imposed for Violations A and D to the amounts specified in the Notice of Assessment. For Violations C and E, the ALJ recommended the same amounts as the expert witness had recommended because these amounts were lower than the amounts alleged in the Notice of Assessment. The ALJ found further that Enforcement Counsel was no longer claiming penalties for Violation B. Rather, he found that Enforcement Counsel was claiming only a proportional share of its litigation costs. The ALJ concluded that there was no statutory or other authority to impose litigation costs in addition to civil money penalties for any of the violations; therefore, he recommended that no penalties be assessed for Violation B.<sup>16</sup> For

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16. In U.S. v. Halper, 490 U.S. 435 (1989), the Supreme Court held that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." Id. at 448-449.

On May 13, 1992, a 100-count superseding indictment was issued against Paul. The conduct underlying counts 92-94 of the indictment largely parallels the conduct underlying Violation B of the civil money penalty case. In view of the double jeopardy concerns presented by Halper, and the possible delays to the resolution of the criminal action that might be occasioned by even an unsuccessful Halper challenge, the United States Attorney, following its entry of its limited appearance, moved Judge Alprin to stay any resolution of Violation B of the civil money penalty action pending conclusion of the criminal matter. Enforcement Counsel opposed the entry of a stay but expressly waived any

the remaining violations, the ALJ recommended civil money penalties totaling \$2,211,000.

#### IV. SUMMARY OF THE FACTS

The Acting Director adopts the facts alleged in the Notice of Assessment and also as found by the ALJ in his Recommended Decision,<sup>17</sup> which may be summarized as follows.

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(Footnote 16 continued from previous page)  
intention of assessing a punishment on Respondent for this conduct, requesting instead, an award of its costs of "prosecuting" this violation. Judge Alprin denied the government's motion for a stay.

Subsequently, in its exceptions to the Recommended Decision, Enforcement Counsel asked the Director to mitigate the penalty for this violation entirely. The United States Attorney in a recent filing with the Director stated that the award of any punishment or penalty for Violation B is contrary to the interests of the United States in prosecuting the criminal action against Respondent. "Position of the Acting United States Attorney For the Southern District of Florida Regarding Recommended Assessment of Civil Money Penalties," dated December 18, 1992. For the reasons advanced by the United States Attorney, the Acting Director declines to rule on any aspect of Violation B.

17. Respondent did not testify in this proceeding other than during his deposition on July 10, 1992, when he refused to answer questions regarding the matters herein, invoking the Fifth Amendment to the United States Constitution. (OTS Ex. 21).

In Baxter v. Palmigiano, 425 U.S. 308 (1976), the Supreme Court of the United States held that an adverse inference may be drawn from the invocation of the Fifth Amendment right in a non-criminal action. The Court explained that although the respondent's silence alone cannot result in an adverse sanction by the tribunal, the Court held the adverse inference, coupled with the other evidence presented at the hearing, formed a sufficient basis for imposing disciplinary action. Id. at 318. In the instant case, the ALJ granted Enforcement Counsel's motion for partial summary disposition on all liability issues without reference to an adverse inference based on Respondent's refusal to testify under the Fifth Amendment. The Acting Director affirms this conclusion below, and, accordingly, it is not necessary to employ the adverse inference here. Nevertheless, the evidence adduced by Enforcement Counsel constitutes sufficient evidence

Respondent was Chief Executive Officer, Chairman of the Board, and controlling shareholder of CenTrust until he was removed on February 2, 1990.<sup>18</sup>

On Monday, October 22, 1990, OTS issued the Notice of Charges and the Temporary Order. The Temporary Order was served on Respondent on or about October 22, 1990; was delivered to Aubrey Harwell (Respondent's then attorney) on October 24, 1990; and was delivered to Respondent's wife on October 25, 1990.<sup>19</sup>

Respondent received actual personal knowledge of the Notice of Charges and the Temporary Order on October 24 and 25, 1990, while in Israel, through a translation of a news account in an Israeli newspaper, and telephone conferences with Mr. Harwell to whom he also telefaxed a copy of the article and the translation.<sup>20</sup>

On Friday, October 26, 1990, Respondent returned to Miami from Israel and directed that \$50,000 be transferred from his personal account to a trust account of the law firm of Neal & Harwell. OTS was not provided advance notice of this transfer.<sup>21</sup>

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(Footnote 17 continued from previous page)  
under Baxter to warrant employment of the adverse inference.

18. ALJ's Finding of Fact Number One.
19. ALJ's Finding of Fact Number Two.
20. ALJ's Finding of Fact Number Two.
21. ALJ's Finding of Fact Number Four.

Respondent failed to submit to the OTS a financial statement on October 29, 1990 as required by subparagraph 19.b of the Temporary Order, failed to submit a quarterly update on January 29, 1991, failed to submit a quarterly update on April 29, 1991, and did not file a financial statement with OTS until May 2, 1991, at which time he submitted an unsworn Statement of Net Worth dated April 20, 1991.<sup>22</sup>

Respondent was required by subparagraph 19.a of the Temporary Order to post security with the OTS by November 1, 1990, but Respondent has never posted any security with the OTS.<sup>23</sup>

Respondent failed to deliver his liquid assets to the Administrator by June 21, 1991, as required by the Hardship Order.<sup>24</sup>

The Acting Director makes the following additional findings of fact based on the record before him:

On Monday, October 29, 1990, Respondent directed that the \$50,000 previously transferred on October 26, 1990 to the Neal & Harwell Trust Account at Dominion Bank be transferred to the

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22. ALJ's Finding of Fact Number Nine.

23. ALJ's Finding of Fact Number Ten. Although the ALJ's finding of fact states that security was required to be posted by November 21, 1990, this appears to be a typographical error.

24. ALJ's Finding of Fact Number Eleven.

account of his private investigator, Larry Plave, at First Union, Miami. (Harwell Dep. 82:14-22, 83:24-25, 84:1-5, Harwell Dep. Exs. 10, 12, 13, 14).

On March 31, 1992, Paul filed with OTS a second unsworn Statement of Net Worth dated March 16, 1992. (OTS Ex. 51). On June 18, 1992, Paul filed an unsworn Statement of Net Worth -- Quarterly Update, dated June 1, 1992. (OTS Ex. 52). After the ALJ had concluded the hearing, Paul submitted an unsworn Statement of Net Worth -- Quarterly Update, dated September 1, 1992.

V. ISSUES

This proceeding presents two principal substantive issues: (1) whether the ALJ properly granted Enforcement Counsel's motion for partial summary disposition on the issue of whether the Respondent violated the terms of the Temporary Order and the Hardship Order so that it is appropriate to impose civil money penalties on him; and (2) if so, what penalty amounts are appropriate.

In addition, several motions pending before the Acting Director are also resolved in this Final Decision and Order: Enforcement Counsel's Motion to Strike Respondent's post-hearing exhibits; a Motion of the United States Attorney to vacate the

Protective Order entered in this case by Judge Alprin; and, Respondent's request for oral argument.<sup>25</sup>

VI. DISCUSSION

A. Respondent's Liability for Violations Alleged in the Notice

1. The ALJ Properly Granted Enforcement's Summary Disposition Motion

As described above, the Notice of Assessment alleged five violations of the Temporary Order and Hardship Order. Enforcement Counsel sought to establish that Paul committed these violations through its motion for partial summary disposition.

Rule 29<sup>26</sup> of the QTS's procedural rules authorizes summary disposition provided that: (1) there is no genuine issue as to any material fact; and (2) the moving party is entitled to a decision in its favor as a matter of law. A party may move for summary disposition in its favor as to all or any part of the proceeding at any time.<sup>27</sup>

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25. Exceptions and objections that are not specifically addressed in this Decision are denied.

26. 12 C.F.R. § 509.29 (1993).

27. Rule 29 is substantially similar to Rule 56(c) of the Federal Rules of Civil Procedure (the "Federal Rules"). Federal Rule 56(c) also explicitly provides that summary judgment may be rendered on the issue of liability alone, even if there is a genuine issue as to the amount of damages.

The OTS Statement filed by Enforcement Counsel in support of its summary disposition motion is based upon the Answer filed by Respondent, investigative deposition transcripts, deposition exhibits, the October 23, 1991 hearing transcript before the district court, Respondent's April 20, 1991, March 16, 1992, and June 1, 1992 financial statements, and Paul's December 7, 1990 affidavit. These documents show that there was no genuine issue as to any fact material to establishing Respondent's liability for violating the Temporary Order and the Hardship Order. As Enforcement Counsel's motion demonstrated, Respondent had admitted all such facts:

1) Violation A: The Notice of Assessment alleged that on October 26, 1990, after service of the Temporary Order, Paul transferred \$50,000 to the law firm of Neal & Harwell. Paul admitted this allegation. "On October 26, 1990, I directed that \$50,000 be transferred to the law firm of Neal & Harwell." (Paul's Answer, p. 24, paras. 14 and 16).

2) Violation C: The Notice of Assessment alleged that Paul failed to submit a financial statement on October 29, 1990. Paul admitted that he did not file a financial statement with the OTS until May 2, 1991. (Answer, p. 36, para. 35).

3) Violation D: The Notice of Assessment alleged that Paul failed to post any security with the OTS. Paul admitted that he has not posted any security with the OTS. (Answer, p. 45, para. D).

4) Violation E: The Notice of Assessment alleged that Paul failed to deliver his liquid assets to the Administrator by June 21, 1991. Paul admitted that he has not delivered any liquid assets to the Administrator. (Answer, p. 41, para. 45; p. 46, para. E).

Moreover, Paul declined to contest the facts-material to establishing his liability. Paul did not "appear" at the hearing within the meaning of OTS Rule 21.<sup>28</sup> Rule 21 provides:

Failure of a respondent to appear in person at the hearing or by duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the administrative law judge shall file with the Director a recommended decision containing the findings and the relief sought in the notice.

At the hearing held on August 3, 1992, Paul made an extensive statement, but then deliberately refused to enter an appearance or remain in the hearing room for the duration of the proceedings. The ALJ warned Paul on the record of the legal consequences under Rule 21 of his failure to enter a formal appearance. Tr. 50: 14-20. Paul acknowledged these consequences, but nonetheless voluntarily departed from the courtroom without entering an appearance pro se or participating in the hearing. Tr. 50-53. The ALJ therefore had authority to deem Paul to have admitted the facts alleged in the Notice of Assessment.<sup>29</sup>

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28. 12 C.F.R. § 509.21 (1993).

29. Even had he appeared at the hearing within the meaning of Rule 21, Paul would have been precluded from introducing evidence because he had failed to comply with the pre-hearing requirements imposed by the ALJ under Rule 32. Paul made no credible showing of good cause for his failure to comply with the ALJ's orders. The argument he offered -- that the tribunal lacked jurisdiction over him -- had already been rejected by the district court. Paul v. Office of Thrift Supervision, 568 F. Supp. at 573.

Paul also sought to rely upon the fact that he was proceeding pro se. His counsel withdrew from the present proceeding shortly

Given Enforcement's demonstration that Paul had violated the Temporary Order and the Hardship Order, however, the ALJ properly found that there was no genuine issue of material fact and that, as a matter of law, these violations warranted the imposition of civil money penalties on Paul. Accordingly, the ALJ's grant of Enforcement's partial summary disposition motion was proper.

2. The ALJ Properly Denied Paul's Motion to Dismiss

On September 4, 1992, Paul filed with the ALJ a Motion to Dismiss the Notice of Assessment Proceeding, or, in the Alternative, to Stay any Forthcoming Judicial Recommendations Arising from the Hearing Held on August 3, 1992 ("Motion to Dismiss"). The ALJ denied the Motion to Dismiss in the Recommended Decision. Paul objects to this ruling. For the reasons discussed below, the Acting Director rejects Paul's objection.

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(Footnote 29 continued from previous page)  
after the ALJ issued his Pre-Trial Order. A similar argument was rejected in Bank One of Cleveland, N.A. v. Abbe, 916 F.2d 1067 (6th Cir. 1990) (district court did not abuse its discretion in sanctioning defendants by entering default judgment against them even though all defendants were proceeding pro se). Moreover, this argument is particularly unpersuasive because Paul has appeared pro se numerous times in the administrative and district court civil proceedings and has made numerous, complex and lengthy pro se filings. The Acting Director concludes that the ALJ properly granted Enforcement's motion. Cf. Federal Rules 16(f) and 37(b) (providing a broad range of sanctions for failure to comply with a pre-trial order, including the striking of pleadings or the entry of default against the disobedient party).

Paul asserted in his Motion to Dismiss that OTS did not have the authority to initiate the Notice of Assessment proceeding because the district court had stayed OTS's ability to take enforcement action against him for violations of the Temporary Order. This argument is predicated upon certain stay orders entered by the district court in the civil action brought by Paul to enjoin the OTS from enforcing the Temporary Order. Paul v. OTS, 90-2496-CIV-DAVIS (S.D. Fla.). Contrary to Respondent's arguments, those orders did not preclude the OTS's assessment of civil money penalties for Respondent's violations of the Temporary Order or the administrative proceeding that was initiated by the Notice of Assessment. Indeed, the district court specifically has acknowledged that it lacks jurisdiction to do what Respondent claims it has done. Paul v. OTS, Civil Action No. 91-2082-CIV-DAVIS (S.D. Fla. March 31, 1992).

Respondent points to several sets of district court orders to support his Motion to Dismiss. First, by cross-motions filed in the District Court for the Southern District of Florida on November 1, 1990, Respondent sought to enjoin and OTS sought to enforce the Temporary Order under 12 U.S.C. § 1818(d).<sup>30</sup> On December 4, 1990,

30. 12 U.S.C. § 1818(d) provides:

In the case of violation or threatened violation of, or failure to obey, a temporary cease-and-desist order issued pursuant to paragraph (1) of subsection (c) of this section, the appropriate Federal banking agency may apply to the United States district court, or the United States court of any territory, within the jurisdiction of

the district court denied Respondent's motion and enforced the Temporary Order in its entirety.<sup>31</sup> The court recognized the continuing effectiveness of the Temporary Order as a necessary predicate under 12 U.S.C. § 1818(d) to his finding that Respondent had violated the Temporary Order. 763 F. Supp. at 570. On December 13, 1990, the district court denied Respondent's motion for a stay, and on December 14, 1990, Enforcement Counsel moved to cite Respondent in civil contempt for failure to comply with the enforcement order of the district court. The district court denied the motion for civil contempt on October 10, 1991.

Second, between December 13, 1990, and at least April 10, 1991, proceedings took place both in the district court and at OTS regarding Respondent's authority, under the terms of the Temporary Order, to pay any legal fees in excess of the sums already paid to the law firm of Thomson, Muraro, Bohrer, and Razook. On April 19, 1991, the district court entered an order approving that firm's motion to withdraw as counsel for Paul based on irreconcilable differences and stating:

all enforcement of the OTS's temporary cease and desist order is STAYED through Thursday, April 25, 1991. This stay does not preclude Paul from complying with this court's previous orders or the OTS's previous orders.

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(Footnote 30 continued from previous page)  
which the home office of the depository institution is located, for an injunction to enforce such order, and, if the court shall determine that there has been such violation or threatened violation or failure to obey, it shall be the duty of the court to issue such injunction.

31. Paul v. Office of Thrift Supervision, 763 F. Supp. 568 (S.D. Fla. 1990), aff'd per curiam, 948 F.2d 1297 (11th Cir. 1991).

During the one week period Paul should attempt to obtain new counsel.

As is clear from this provision, the court entered the stay for the express and limited purpose of permitting Respondent "to obtain new counsel." On April 25, 1991, the court reviewed the record on Respondent's further motion for continuance of the stay, and in part:

ORDERED AND ADJUDGED that:

(1) Paul must submit to the OTS the required financial statements, without the opinion of a certified public accountant, and all other documentary submissions due the OTS. Paul must make these submissions within five business days of this order;

(2) if Paul makes the required submissions, then the OTS must meet with Paul within five business days of his submissions to resolve the problem of funding an attorney for Paul;

(3) this court's stay remains in effect for five business days from the date of this order. If Paul makes the required submissions, then the stay will remain in effect until the OTS and Paul resolve the issue regarding the funding of an attorney for Paul;

(4) this stay does not preclude Paul from complying with this court's previous orders or the OTS' order [sic] previous orders . . . .

Third, in subsequent proceedings, the district court found that the issues of Paul's obligation to submit certain information to the OTS, and of "the funding of an attorney for Paul" had not been resolved. The court issued further orders (on May 10, 1991,

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32. Paul v. OTS, Civil Action No. 90-2496-CIV-DAVIS (S.D. Fla. April 19, 1991).

33. Paul v. OTS, Civil Action No. 90-2496-CIV-DAVIS (S.D. Fla. April 25, 1991).

May 21, 1991, and July 2, 1991) each of which provided, in part, that "the court's order staying the enforcement of the temporary cease and desist order remains in effect."

None of these orders of the district court affects the OTS's assessment of civil money penalties. In the Hardship Order, the Director considered the district court's stay orders, and rejected Respondent's contention that these stay orders enjoined the assessment of civil money penalties on the grounds that (1) the stay contains no language that purports to enjoin such a notice; and (2) the district court is precluded by section 8(i)(1) of the FDIA from entering such an order.<sup>34</sup> Hardship Order at 22-23.

Additionally, the district court has stated that it lacked jurisdiction to stay the Notice of Assessment based on Board of Governors of the Federal Reserve System v. MCorp., 112 S. Ct. 459 (1991) (section 8(i)(1) precluded district court from enjoining administrative enforcement proceeding pursuant either to the automatic stay provision of the Bankruptcy Code or to the bankruptcy court's authority to exercise concurrent jurisdiction in certain circumstances).<sup>35</sup>

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34. Section 8(i)(1) provides, in relevant part: "[E]xcept as otherwise provided in this section [8], no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section [8], or to review, modify, suspend, terminate, or set aside any such notice or order." 12 U.S.C. § 1818(i)(1).

35. On March 31, 1992, the district court dismissed, based on the MCorp decision, Paul's second complaint to enjoin the Notice of Assessment proceeding and to dismiss the Notice of Assessment, for failure to state a claim upon which relief can be granted.

For these reasons, the Acting Director concludes that the ALJ properly denied the Motion to Dismiss, and rejects Paul's objection.

**B. The Appropriate Civil Money Penalty Analysis**

As is demonstrated in the foregoing discussion, Paul's liability for civil money penalties based on the conduct comprising Violations A, C, D, and E<sup>36</sup> was established by the ALJ's grant of Enforcement's motion for partial summary disposition. The appropriate amount of penalties to be assessed remains to be determined.

In reaching his recommendation as to appropriate penalty amounts, the ALJ relied on the testimony of Enforcement's witness but also concluded that he could impose no penalty higher than the amount Enforcement Counsel had sought in the Notice of Assessment. Thus, for Violations C and E, where Enforcement Counsel's witness had testified to penalty amounts lower than those in the Notice, the ALJ relied on the witness's testimony and recommended the amounts as to which she had testified. For Violations A and D,

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(Footnote 35 continued from previous page)  
Respondent appealed, and on June 21, 1993, in an unpublished decision, the Eleventh Circuit Court of Appeals affirmed the district court's dismissal of the second complaint. Paul v. OTS, Appeal No. 92-4398 (June 21, 1993).

36. The disposition of Violation B is discussed above at footnote 16 and its accompanying text.

where the witness had testified to penalty amounts higher than those in the Notice, the ALJ recommended the amounts set forth in the Notice because "[t]he Notice was never amended to increase the assessment[s] . . . ." Recommended Decision at 22.

After the ALJ issued his Recommended Decision, but before the exceptions of the parties were due, the Director issued In the Matter of Rapp, which established the appropriate methodology for computing civil money penalties under the assessment authority granted by FIRREA. The Acting Director does not wholly adopt the ALJ's recommendations with respect to penalty amounts but, instead, applies the Rapp analysis to the facts of this case to determine the penalties appropriate to each violation.<sup>37</sup>

The determination of proper civil money penalty amounts under the Rapp analysis requires several decisions, including legal conclusions. As explained in the Rapp decision, the analysis involves the application of legal standards -- specifically, the statutory standards governing the several penalty tiers; the statutory mitigating factors; and the so-called FFIEC factors endorsed by the Congress when it enacted FIRREA -- to the facts found to determine what amount, along the broad continuum of statutorily permissible money penalties, is warranted by the particular conduct at issue.

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37. For other cases applying the Rapp analysis, see In the Matter of Tonti, OTS Order No. AP 92-154 (December 4, 1992); In the Matter of Seidman, OTS Order No. AP 92-149 (December 4, 1992) (appeal pending).

For this reason, expert testimony is of marginal value. Indeed, the Acting Director discourages this approach. This case, for example, involves the violation of the terms of an OTS order; it does not involve the operations of a savings association as to which the judgments of an examiner are important. The testimony of the examiner put on by Enforcement Counsel at the hearing in this case served only to apprise the ALJ of that witness's judgment as to the proper application of the standards for computing civil money penalties to the conduct at issue. The witness's testimony in this case was not entitled to deference in the way that expert testimony offered by a similar witness with respect to the financial condition of an insured depository institution might be credited. The Acting Director leaves for another day the circumstances in a civil money penalty case in which testimony on the amount of the penalty might be fruitful or even relevant. Suffice it to say, because the facts in this case did not involve the operation of a savings association or the actions of its management with respect to the institution, the testimony of the examiner was inappropriate.<sup>38</sup>

The computation of penalties necessarily requires the discretionary exercise of judgment on the part of the decisionmaker. Each party may properly argue to the ALJ or the Acting Director how this discretion should be exercised, that is,

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38. For the same reason as well, the forms completed by the examiner carry no weight here. The Acting Director doubts that such forms would in any case be very helpful.

how the governing standards should apply to compute a penalty with respect to a particular violation. The nature of the end result -- a legal conclusion, not a finding of fact -- means, however, that neither the ALJ nor the Acting Director is ultimately bound by such argument. Thus, the Acting Director will apply the Rapp analysis de novo to reach a decision as to what penalties to impose against the Respondent here.

Finally, it is unnecessary to reach the issue of whether, as the ALJ apparently concluded, Enforcement Counsel is precluded from seeking penalties at the hearing in excess of those set forth in its Notice of Assessment. The Acting Director concludes that, in this case and as a matter of discretion, it is not appropriate to impose penalty amounts higher than those in the Notice. This is because, if Rule 21 applies to this case,<sup>39</sup> Respondent is deemed to have consented only to the relief sought in the Notice of Assessment.

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39. Rule 21 is sufficient but not necessary to establish the facts supporting the imposition of civil money penalties. The OTS Statement in support of Enforcement's motion for partial summary disposition and the ALJ's grant of that motion demonstrate that Respondent affirmatively admitted the violations at issue. Thus, recourse to Rule 21, while sufficient, may not be necessary. Accordingly, Rule 21 may not operate here, and Respondent may in theory be exposed to greater civil money penalties. In this case, the Acting Director has decided not to do so.

C. Computation of Civil Money Penalties

1. Statutory Predicates for Civil Money Penalties

The FDIA, as amended by FIRREA, employs a three-tiered penalty structure under which the maximum daily penalty increases with the seriousness of the conduct upon which the assessment is based. 12 U.S.C. § 1818(i)(2)(A)-(C).<sup>40</sup>

A first-tier civil money penalty is available, inter alia, for violations of any law or regulation, or of certain temporary or final orders, including temporary cease and desist orders issued under 12 U.S.C. § 1818(c). Intent is not a requisite element and there is no need to show harm to the institution or benefit to the individual. The statute authorizes penalties of up to \$5,000 per day for first-tier violations.

Second-tier penalties of up to \$25,000 per day may be imposed upon a respondent for committing any first-tier violation, for recklessly engaging in any unsafe or unsound practice, or for breaching any fiduciary duty, if one of three additional criteria

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40. Under 12 U.S.C. § 1818(i)(2), the OTS may assess civil money penalties against insured depository institutions and institution-affiliated parties. CentTrust was an insured depository institution under 12 U.S.C. § 1813(c). Paul v. OTS, 763 F. Supp. at 573. Paul, the former Chairman of the Board of Directors, Chief Executive Officer, and controlling stockholder of CentTrust, is an institution-affiliated party under 12 U.S.C. §§ 1813(u) and 1818(i)(3). Id.

is met: the conduct is part of a pattern of misconduct; or causes or is likely to cause more than a minimal loss to the institution; or results in pecuniary gain or other benefit to the institution-affiliated party.

Third-tier penalties may be imposed only when the respondent knowingly commits any first-tier violation, knowingly engages in any unsafe or unsound practice, or knowingly breaches any fiduciary duty; and the respondent knowingly or recklessly causes either a substantial loss to the institution or receives a substantial pecuniary gain or other benefit by reason of the violation, practice or breach. The statute authorizes third-tier penalties of up to \$1,000,000 per day against a person other than an institution and up to the lesser of \$1,000,000 or 1% of its total assets against an institution.

## 2. The Rapp Analysis

Rapp prescribes a five-step analysis to determine the appropriate civil money penalty to be assessed for each instance of wrongful conduct that has occurred. Those steps are as follows:<sup>41</sup> first, determination of the appropriate tier of the violation according to the statutory criteria described above; second, selection of the starting dollar amount for computation of the penalty; third, determination of whether the violation is

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41. For a complete explanation of the Rapp methodology, see Rapp at 35-51.

"continuing;" fourth, application of the FFIEC factors;<sup>42</sup> and, fifth, application of the statutory mitigating factors.<sup>43</sup>

The Acting Director next applies this five-step analysis to each of the four violations committed by the Respondent. Two issues that apply with respect to all four of the violations -- whether penalties should be mitigated upon consideration of Paul's financial resources and whether Enforcement was entitled to recover its litigation costs in this proceeding -- are discussed at the conclusion of the penalty analysis.

Violation A - Transfer of \$50,000

The Rapp approach sets forth several steps for evaluating a penalty, including determination of the appropriate tier level; the selection of a starting amount; and, the application of certain aggravating and mitigating factors.<sup>44</sup> For Violation A, however, the

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42. These factors were developed in 1980 by the Federal Financial Institutions Examination Council ("FFIEC") as guidelines for use by the Federal banking agencies in determining whether it was appropriate to initiate a civil money penalty assessment proceeding. See Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies, 45 Fed. Reg. 59,423 (1980). When it enhanced the agencies' civil money penalty authorities in FIRREA in 1989, Congress urged the agencies to consider these factors in assessing penalties. See H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 469 (1989).

43. These factors appear at section 8(i)(2)(G) of the FDIA. 12 U.S.C. § 1818(i)(2)(G).

44. A thorough discussion and application of the Rapp approach is contained in the text below for Violations C, D, and E.

Notice of Assessment recites and the ALJ recommended a penalty of \$25,000. The Acting Director will approve this amount, although the Rapp analysis would have produced a greater penalty, as discussed below.

If the Rapp analysis were applied to Violation A, the Acting Director would have imposed a penalty of at least \$57,000. This penalty would have resulted by beginning with a daily penalty of \$25,000, see Rapp at 39-43, and assessing it over three days. This would have produced an amount of \$75,000. The evidence as to this violation demonstrates three aggravating factors -- willfulness, concealment, and a gain or benefit to Respondent. The willfulness and concealment factors would have warranted increases of 25% each. The gain or benefit to Respondent would warrant a 10% increase. The total increase would have been 60%, which would have produced \$120,000. As to mitigating factors, there are two shown here -- no actual or threatened harm to the institution, and no prior regulatory violations. See Rapp at 46-47. The Acting Director would have reduced the penalty by 50% for the former, producing a penalty of \$60,000, and 5% for the latter, which would have produced a penalty of \$57,000.

The Acting Director, however, concludes that a civil money penalty be assessed in the amount of \$25,000 for Violation A, which is the amount set forth in the Notice of Assessment and recommended by the ALJ. In determining the appropriate amount of the penalty for Respondent for this Violation, the Acting Director declines as

a matter of discretion to impose a penalty greater than that sought by Enforcement Counsel in the Notice of Assessment.<sup>45</sup>

**Violation C - Failure to File Financial Statements**

**(1) Tier Determination**

Subparagraph 19.b of the Temporary Order required Paul to submit a financial statement to OTS on October 29, 1990. He failed to do so. It was not until May 2, 1991, that Respondent filed his first financial statement with the OTS, or 184 days after the statement was originally due. Respondent did not file another financial statement with the OTS until March 31, 1992, or 244 days after the first quarterly update to the May 2, 1991 statement was due.<sup>46</sup> Respondent did file an update to the March 31, 1992 statement on June 18, 1992. These financial statements omit assets, overstate liabilities, and decrease the value of current assets with unexplained contingent liabilities. These violations of the Temporary Order were knowing; and, by committing them, Paul knowingly or recklessly caused a substantial pecuniary gain or other benefit to himself by making it difficult, if not impossible, for OTS to ascertain and monitor his assets and prevent their

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45. The Acting Director does not conclude, however, that he is, as a matter of law, bound by the dollar amounts, tier levels, or the duration of the violation recited in the Notice of Assessment.

46. The update to the statement filed in May 1991 was due by July 31, 1991.

dissipation. It is a third-tier violation under 12 U.S.C. § 1818(i)(2)(C).

(2) The Starting Amount

Under Rapp, selection of the starting daily dollar amount "would generally be the amount of risk or loss to the institution or personal gain to the Respondent." Rapp at 41. No dollar value can be established firmly for the personal gain to Respondent from failing to file financial statements when due; however, Respondent received substantial benefit from impeding OTS's efforts to monitor his assets to prevent dissipation. He also received the benefit of time -- which gave him the opportunity to conceal and manipulate his assets -- from his delayed filings. In a situation such as this where no fixed amount can be firmly established, it is appropriate to begin with the \$100,000 fixed amount suggested by the Rapp decision.

(3) Violation C was a Continuing Violation

The Rapp decision describes the test to be applied for a continuing violation as follows:

The legal test for a continuing violation is whether (a) the detrimental effect of the violation continued and (b) the effect could have been undone, or cured by the respondent taking or refraining from a particular action. Merely because a violation satisfies this legal test does not mean that the penalty must be assessed on a continuing basis. In deciding whether to assess on a continuing basis, the Director will consider whether the

respondent continued the violation either intentionally or in spite of warnings from regulators or others.

Rapp at 42-43.

This test adopts an "objective" approach to determine whether a violation is continuing in nature. The detrimental effect of Violation C continued until Respondent eventually filed his first financial statement with OTS on May 2, 1991. Respondent could have cured his default at any time before May 2, 1991 by filing the appropriate documents earlier. Thus, Violation C is a continuing one, and should be so assessed.

Having determined that Paul should be assessed for a period of days for a continuing violation, the Director must determine what daily amount is appropriate. As Rapp described, this is a determination in which the exercise of discretion is particularly fact-specific and appropriately has a very broad range.

The harm to the institution, the economic benefit to the respondent, and the respondent's conduct are central considerations in the assessment of civil money penalties. Although the respondent may be assessed for a period of continuing violation, the continuing harm to the institution or economic benefit to the respondent may be of a different order than that caused by the initiation of the violation. Therefore, it may be appropriate to reduce the daily assessment amount as a violation continues.

When the continuing harm is of a lesser magnitude than the initial harm, the daily amount during the period of assessment for a continuing violation may be reduced below the amount selected as the initial tier amount. The Acting Director believes that the effect of Respondent's behavior -- in effect creating the opportunity to evade the requirements of the Temporary Order -- warrants a substantial daily penalty but not one approaching the \$100,000 level. The Acting Director believes that Violation C should be assessed at a daily amount of \$1,000.

If the violation is defined to be continuing, the starting dollar amount is then multiplied by the number of days to be assessed at the full starting amount. Other days may be assessed at lower amounts, and these should total the total number of days for which the respondent is to be assessed.

One hundred eighty-four days elapsed from October 30, 1990, the date on which Respondent's first financial statement was due, until May 2, 1991, when Respondent filed his first such statement. Another 244 days elapsed from the date on which the first quarterly update was due, July 31, 1991, until Respondent actually filed the first update on March 31, 1992. The total number of days of violations is 428 (184 + 244). The starting amount is \$100,000 for the first day and \$1,000 for the remaining 427 days, for a starting amount of \$527,000.

(4) Application of the FFIEC Factors

As Rapp prescribes, the Acting Director will describe and discuss each of these factors in the order in which they are presented by FFIEC and then discuss any remaining statutory factors.

a. Willfulness. FFIEC directs that the agency consider whether there is "[e]vidence that the violation or pattern of violations was intentional or committed with a disregard of the law or the consequences to the institution." Under Rapp, evidence of this factor warrants an increase in the penalty from the starting amount of up to 25%.

Paul's conduct in this case, failing to timely file financial statements and updates, after he had personal knowledge of the provisions of the Temporary Order, demonstrates that this violation was intentional and committed with deliberate disregard for the Temporary Order. This conduct warrants an increase of 25%.

b. Frequency or Recurrence. FFIEC instructs that an agency take into account "[t]he frequency or recurrence of violations and the length of time the violation has been outstanding." This factor may relate directly to culpability or to risk to an institution, and, even when it does not, it is important that violations not be repeated and be terminated at as early a time as

possible. In order to prevent long-term or repetitious violations, under the Rapp analysis, evidence of this factor supports an increase from the starting point of up to 10%.

Because the only violations of the Temporary Order alleged by Enforcement Counsel to date are those involved in the current proceeding, no increase is warranted.

c. Continuation of Violation. "Continuation of violation after the respondent becomes aware of it, or its immediate cessation and correction" is another factor that an agency should consider. Like the "frequency or recurrence" factor discussed above, this factor is intended to deter continuing violations. Its focus, however, is more "subjective" than the objective test employed in the third step of the Rapp analysis, and requires examination of the respondent's conduct once the respondent becomes aware of the violation. Continuation after becoming aware of the fact of violation is a serious indicium of culpability and warrants an increase of up to 15% from the starting amount. On the other hand, immediate correction of a violation indicates good faith and would merit a reduction of up to 15%.

Although Paul consciously determined to continue this violation, the Acting Director has determined not to impose an additional percentage increase because this factor was adequately considered in step three of this analysis.

d. Failure to Cooperate. An agency also should weigh the respondent's "[f]ailure to cooperate with the agency in effecting early resolution of the problem." If OTS attempts to correct or remedy a violation through supervisory means, it is vital that any affected individuals cooperate in this process. Failure to cooperate without a substantial basis, like continuation of a violation, reflects willful or intentional wrongdoing. An increase of up to 15% is called for if evidence of this factor is present.

The Acting Director does not believe this factor is applicable here.

e. Concealment. FFIEC also directs that an agency consider "[e]vidence of concealment of the violation, or its voluntary disclosure." An increase of up to 25% from the starting amount may be warranted. Alternatively, if a respondent voluntarily discloses the violation before its discovery by the agency, then a reduction of up to 25% may be taken.

There was no attempt at concealment: Respondent made clear his intention not to file the required financial statements. No percentage increase is warranted for this factor.

f. Harm to the Institution or Public Confidence. "Any threat of or actual loss or other harm to the institution, including harm to public confidence in the institution, and the degree of any such harm" must be taken into account. As discussed above, the harm to

the institution is important in setting the starting amount for a civil money penalty. If, in addition to a quantifiable loss, the wrongdoing poses other risks to the institution, then an increase is appropriate. For example, a loss that also presents the possibility of a liquidity crisis would merit an increase in the penalty. Such especially serious conduct would warrant an increase in the penalty of up to 25%.

If no harm or risk of harm to the institution occurred, then a reduction of up to 75% may be taken.

Although CentTrust was closed prior to the issuance of the underlying Notice of Charges, the RTC has succeeded to the institution's interest. Respondent's failure to comply with the reporting requirements of the Temporary Order gave him the opportunity to dispose of his assets and to defeat efforts to recover funds on behalf of the RTC. Thus it is not clear that any decrease based on this factor is required. However, because the record does not show that Respondent's failure to file financial statements caused identifiable harm to CentTrust or the RTC, the Acting Director will make a 50% reduction.

g. Gain or Benefit. An agency should consider "[e]vidence that participants or their associates received financial or other gain or benefit or preferential treatment as a result of or from the violation." An identifiable gain may be used in setting the starting amount for a penalty. Other benefits, not quantifiable,

may also be derived from misconduct. If such benefits to a respondent did result, then an increase in the starting amount should be made. The increase should not exceed 10%.

Paul's intentional failure to timely file his required financial statement and quarterly updates produced a benefit to him because he had the opportunity to evade OTS's efforts to monitor his assets to prevent dissipation. This warrants a 5% increase.

h. Restitution. Assessment of a civil money penalty should reflect "[e]vidence of any restitution by the participants in the violation." Because prevention of loss to an institution or to the insurance fund is so central to OTS's regulatory activities, efforts by wrongdoers to make restitution should be encouraged. The starting amount should be reduced by at least the amount of the restitution. In addition, if the restitution is voluntary, then the penalty amount may be reduced up to an additional 25%. This factor does not apply here.

i. Prior Violations. FFIEC also directs that "[h]istory of prior violations, particularly where similarities exist between those and the violations under consideration" be considered in the penalty assessment. In order to deter repeated wrongdoing, an increased penalty may be called for where the respondent has a history of violations before the current one. Alternatively, a first time offender may merit a slightly reduced penalty. This factor is, however, less important than those that concern loss to

the institution or culpability. Accordingly, any adjustment based on this factor should not exceed 10%.

Although Paul is a "first-time" offender with respect to the Temporary Order, his offenses have been willful, and the Acting Director believes a reduction of only 5% is warranted here.

j. Previous Criticism. The agency also should take into account any "[p]revious criticism of the institution for similar violations." Failure to respond to previous criticism is evidence that an institution is not being run with the diligence that is appropriate. In order to deter such laxity, the Acting Director believes that an increase of up to 10% may be appropriate. This factor is inapplicable here.

k. Compliance Program. The agency should consider the "[p]resence or absence of a compliance program and its effectiveness" in determining a civil money penalty amount. The safety and soundness of an institution will be better maintained, and the risk of repeated violations will be diminished, if there are compliance programs in place and if they are effective. Accordingly, if the respondent has voluntarily established an effective compliance program, the starting amount may be reduced by up to 25%.

This factor is inapplicable because the existence of a compliance program is irrelevant to the evaluation of violations of

temporary orders issued against individual respondents.

1. Unsafe or Unsound Practices, or Breaches of Fiduciary Duty. An agency should take into account whether there is a "[t]endency to create unsafe or unsound banking practices or breaches of fiduciary duty."<sup>47</sup> A breach of fiduciary duty is generally an unsafe or unsound practice, and it is apparent that any wrongdoing that threatens the safety and soundness of an institution must be deterred. An increase of up to 25% may be appropriate.

Because these violations have not involved unsafe or unsound practices or breaches of fiduciary duty, no increase is warranted.

a. Preventive Measures. An agency also is expected to consider "[t]he existence of agreements, commitments or orders

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47. The classic formulation of "unsafe or unsound practices" is as follows:

Like many other generic terms widely used in the law, such as "fraud," "negligence," "probable cause," or "good faith," the term "unsafe practices" has a central meaning which can and must be applied to constantly changing factual circumstances. Generally speaking, an "unsafe practice" embraces any action, or lack of action, which is contrary to generally acceptable standards of prudent operation, the possible consequence of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds.

Financial Institutions Supervisory and Insurance Act of 1966: Hearings on S. 3158 and S. 3695 Before the House Committee on Banking and Currency, 89th Cong., 2nd Sess. 49-50 (memorandum submitted by John Horner). This definition was quoted with approval in the Rapp decision.

intended to prevent the subject violation." This factor involves the prevention of wrongdoing and the risks it may pose to an institution. If the violation involves the breach of an existing consensual agreement, commitment, or order, then there likely is an element of willfulness that must be deterred by an increased penalty. Alternatively, a penalty should be reduced if, following identification of the violations, the respondent has initiated efforts to create an appropriate agreement, commitment, or order. The degree to which the starting penalty may be increased or reduced is 10%. Paul obviously made no effort to prevent violations; no reduction is warranted.

(5) Statutory Mitigating Factors

In addition to the FFIEC factors, the agency must take into account the factors set forth in section 8(i)(2)(G) of the FDIA. There is some overlap with the FFIEC factors. The FFIEC factors were intended to amplify the "gravity of the violation" factor set forth in section 8(i)(2)(G) of the FDIA, so no additional consideration of this factor is necessary. The ninth FFIEC factor essentially repeats "the history of previous violations," so no further consideration of this factor is required as well.

This leaves three remaining statutory factors: (i) the size of financial resources of the person charged; (ii) good faith of the person charged; and (iii) such other matters as justice may require. Of these factors, only good faith is susceptible to the same kind of treatment as the FFIEC factors. If good faith exists in a case, it is an important measure of the lack of culpability, and it means that little deterrence is necessary.

a. Good Faith. This mitigating factor is meant to reduce the penalty if there is evidence the respondent acted in good faith. The presence of this factor may decrease the penalty by up to 50%. Paul failed to timely file his financial statements and updates when he knew he was required by the express terms of the Temporary Order to do so. This demonstrates a complete lack of good faith, and no reduction is warranted.

b. Adjustments for Other Factors. The agency is required by the statute to consider whether the penalty needs to be adjusted for "such other factors as justice may require." The agency will consider whether there are other issues or factors not already considered in the process that should be taken into account. Adjustment may also be appropriate if a particular factor has not already been dealt with adequately. If there are such grounds that warrant increasing or decreasing the penalty, considered judgment

should be used in determining how the assessment should be increased or decreased. There are no suggested limits on these adjustments.

Based on the information contained in the pleadings and presented at the hearing, no adjustment, either upward or downward, is warranted here.<sup>48</sup>

### Calculation

The Rapp decision describes the mathematical calculations for assessing penalties as follows:

Once the relevant FFIEC factors, any good faith, and the corresponding percentage adjustments have been identified, the percentage increases should be added together and multiplied by the starting penalty amount. The percentage reductions should then be added, and the reductions taken in the amount of the sum of percentage reductions. The resulting penalty amount may not, of course, exceed the statutory maximum.

Rapp at 50.

This case provides the Acting Director with the opportunity to further elaborate on Rapp in its treatment of mitigating factors. Rapp assigns a maximum percentage reduction for each mitigating factor, and provides that the penalty may be reduced "up to" that percentage amount with the percentages amounts summed to yield an

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48. The financial resources factor is discussed below at pp. 63-68.

overall mitigation percentage. The Acting Director has determined to apply the mitigating factors in a sequential, staged manner. This arrangement modulates the overall effect of the mitigating factors, ensuring that, should several factors be present, the assessment is not inappropriately eliminated.

The Acting Director finds that due to the aggravating factors identified as applicable above, the starting amount, \$527,000, will be increased by 30%, producing an amount of \$685,100.

The Acting Director reduces this amount by 50% in accordance with the staged sequence described above because the conduct at issue did not harm, or threaten to harm, the institution. This produces an amount of \$342,550. The Acting Director reduces this amount by an additional 5% because no prior violations by Paul have been finally adjudicated. This produces an amount of \$325,422.50.

Violation D - Failure to Post Security

(1) Tier determination

Subparagraph 19.a of the Temporary Order ordered Paul to provide security on or before November 1, 1990, in the amount of \$30,879,550. Though the Temporary Order required posting of security through any of four methods, and included a reduction of that amount to the extent that the \$15,000,000 CenTrust senior officer indemnity fund was secured from dissipation, Respondent

failed to post any security. The Director concludes that Paul violated Subparagraph 19.a of the Temporary Order by failing to post any security. This violation resulted in pecuniary gain or other benefit to Paul insofar as he enjoyed unmonitored and unrestricted use of his assets at all times since issuance of the Temporary Order. This is a second-tier violation under 12 U.S.C. § 1818(i)(2)(B).<sup>49</sup>

(2) The Starting Amount

The pecuniary gain resulting from Respondent's retention of all of his assets is not readily measurable because the OTS does not know the full nature or extent of his assets. Because the Acting Director has concluded that this is a second-tier violation, it is appropriate to use the \$12,500 fixed amount suggested by Rapp.

(3) Violation D was a Continuing Violation

The detrimental effect of Violation D has been continuing at all times since November 1, 1990. It has been a continuing obstacle to the protection of the receiver's and OTS's interests, and it could have been corrected at any time. The continuing nature of this violation is not at the level of \$12,500, nor (as a

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49. Respondent's failure to post security was one of the violations cited by the United States District Court for the Southern District of Florida in enforcing the Temporary Order. Paul v. Office of Thrift Supervision, 763 F. Supp. 568, 570 (S.D. Fla. 1990), aff'd per curiam, 948 F.2d 1297 (11th Cir. 1991).

second-tier violation) should it be assessed at the same amount as the third-tier offense in Violation C. The Acting Director believes a significant daily penalty is appropriate and selects \$500. A total of 640 days elapsed from November 1, 1990 through August 2, 1992, the last day before the start of the hearing.<sup>50</sup> Therefore, the first day will be assessed at \$12,500 and the remaining 639 days will be assessed at \$500 for a starting amount of \$332,000.

(4) The FFIEC Factors

a. Willfulness. Paul's failure to post any of the required security, not even a nominal amount, demonstrates willfulness and thus warrants an increase of 25%.

b. Frequency or Recurrence. Because Enforcement has alleged no violations by Paul of the Temporary Order other than those involved in the present proceeding, no increase is warranted.

c. Continuation of Violation. Although Paul consciously determined to continue this violation, the Acting Director has determined not to impose an additional percentage increase because this factor was adequately considered in step three of this

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50. The Acting Director has determined not to impose penalties on Respondent for this violation after August 2, 1992, the day before the commencement of the administrative hearing, because continuation of the assessment during the pendency of this administrative litigation would serve to penalize Respondent for pursuing his administrative remedies.

analysis.

d. Failure to Cooperate. The Acting Director believes that this factor is not applicable here.

e. Concealment. Respondent's failure to post any security has been evident at all times since November 1, 1990. No increase is warranted.

f. Harm to Institution or Public Confidence. The facts underlying this violation present a clearer risk to the institution than those underlying Violation C. That is, the security requirement is designed to protect the interests of CenTrust and the RTC in recovering any losses that may have been sustained through Paul's actions. By failing to post security, Paul weakened the protection to the institution that the Temporary Order sought to provide. Such conduct is not acceptable, and the Acting Director will make no reduction for this factor.

g. Gain or Benefit. Paul's failure to post any security demonstrates an identifiable gain or benefit to Respondent from Violation D because he enjoyed unmonitored and unrestricted use of his assets, contrary to the provisions of the Temporary Order. This warrants a full 10% increase.

h. Restitution. Because restitution is not at issue with respect to the Temporary Order, this factor does not apply.

i. Prior Violations. For the reasons discussed above with respect to Violation C, a decrease of 5% is warranted.

j. Previous Criticism. Because this factor is inapplicable here, no increase is warranted.

k. Compliance Program. For the reasons discussed above with respect to Violation C, this factor is inapplicable here.

l. Unsafe or Unsound Practice/Breach of Fiduciary Duty. Because this violation did not involve these factors, no increase is warranted.

m. Preventive Measures. As there was no existing consensual agreement herein between Paul and the OTS, no increase or decrease is warranted.

(5) Statutory Mitigating Factors.

a. Good Faith. Paul's failure to post any of the required security, not even a nominal amount, demonstrates a complete lack of good faith, and no reduction is warranted.

b. Adjustments for Other Factors. Based on the information contained in the pleadings and presented at the hearing, no adjustment, either upward or downward, is warranted here.

The Acting Director finds that due to the aggravating factors identified above as applicable, the starting amount, \$332,000, will be increased by 35%, producing an amount of \$448,200.

The Acting Director reduces this amount by 5% because no prior violations by Paul have been finally adjudicated. This produces an amount of \$425,790.

**Violation E - Failure to Deliver Liquid Assets**

**(1) Tier Determination**

On June 11, 1991, the Director issued the Hardship Order which established a Special Account under the direction of an Administrator. The Administrator was charged with supervising disbursements from the Special Account to pay Paul's legal fees and reasonable living expenses. Pursuant to the Hardship Order, June 21, 1991, was the last day on which Paul could deliver his liquid assets to the Administrator to be placed in the Special Account. Paul failed to deliver his assets by that date, and failed to do so by the date of the August 3, 1992 hearing. The Director concludes that on June 21, 1991, Paul knowingly violated paragraph III.C.1 of the Hardship Order by failing to deliver assets to the Administrator. By failing to deliver his liquid assets, Paul knowingly caused substantial pecuniary gain or other benefit to himself because he had the unrestricted use of these assets at a

time when he was required to turn them over to the government. The violation is a third-tier violation under 12 U.S.C. § 1818(1)(2)(C).

(2) The Starting Amount

Just prior to the June 11, 1991 issuance of OTS Order AP 91-26, Respondent had disclosed on his financial statement filed May 2, 1991, that he had liquid assets of approximately \$142,000 (OTS Order No. AP 91-26 at 16). Given the size of the liquid assets in question, and given the fact that even if he had turned over the assets, Paul would have been permitted to make some expenditures, the Acting Director will as to this count use the second-tier starting amount of \$12,500 rather than the \$100,000 that otherwise obtains for third-tier offenses.

(3) Violation E was a Continuing Violation

On October 21, 1991, the district court entered an Order stating that "Paul's access to funds for legal representation will facilitate resolution of the numerous legal issues pending. However, access to these funds must be through a mechanism that protects the interests of both Paul and the OTS." The court then appointed U.S. District Court Magistrate Judge Barry Garber to serve as a neutral third party to administer this matter and to review the reasonableness of any of these fees.

The detrimental effect of Violation E is continuing because Respondent has had unmonitored use of at least the \$142,000 in liquid assets at all times since he was required to deposit those liquid assets with the government on June 21, 1991 until October 21, 1991, when Magistrate Judge Garber was appointed. This interval is 122 days. For the first day, the starting amount is \$12,500. The rate for each of the remaining 121 days should be significant, and the Acting Director believes a daily amount of \$500 is appropriate, for a total starting amount of \$73,000.<sup>51</sup>

(4) The FPIEC Factors .

a. Willfulness. Paul's refusal to deliver liquid assets warrants an increase of 25% because Paul clearly intended to violate the unambiguous requirement of the Hardship Order.

b. Frequency or Recurrence. For the reasons as discussed above with respect to Violations C and D, no increase is warranted.

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51. The Acting Director notes that he would begin at the same point if this violation were deemed only a second-tier violation.

c. Continuation of Violation. Although Paul consciously determined to continue this violation, the Acting Director has determined not to impose an additional percentage increase because this factor was adequately considered in step three of this analysis.

d. Failure to Cooperate. The Acting Director believes that this factor is not applicable here.

e. Concealment. Respondent made clear his intention not to deliver his liquid assets. A percentage increase is therefore not warranted for this factor.

f. Harm to Institution or Public Confidence. As with Violation D, Paul's failure to deliver assets deprived CenTrust and the RTC of certain protections they were entitled to have. However, because the amount at issue in this violation is less than the security required in connection with Violation D, and because Paul would have had access to certain of the funds delivered to the Administrator, the Acting Director believes that some reduction is called for, although a smaller reduction than with respect to Violation C. Accordingly, the Acting Director will make a 30% reduction here.

g. Gain or Benefit. Paul's failure to deliver his liquid assets allowed him continued, unmonitored, and unrestricted use of these funds, thereby demonstrating an identifiable gain or benefit to Respondent from Violation E. This warrants a full 10% increase.

h. Restitution. Because restitution is not at issue in this type of proceeding, no adjustment is warranted.

i. Prior Violations. For the reasons discussed above with respect to Violations C and D, a decrease of 5% is warranted.

j. Previous Criticism. Because this factor is inapplicable here, no increase is warranted.

k. Compliance Program. For the reasons discussed above with respect to Violations C and D, this factor is inapplicable here.

l. Unsafe or Unsound Practice/Breach of Fiduciary Duty. Because this violation did not involve these factors, no increase is warranted.

m. Preventive Measures. As there was no existing consensual agreement herein between Paul and the OTS, no increase or decrease is warranted.

(5) Statutory Mitigating Factors

a. Good Faith. Paul's refusal to deliver any of his liquid assets, despite the unambiguous requirement of the Hardship Order, demonstrates a complete lack of good faith, and no reduction is warranted.

b. Adjustments for Other Factors. Based on the information contained in the pleadings and presented at the hearing, no adjustment, either upward or downward, is warranted here.

The Acting Director finds that due to the aggravating factors identified above, the starting amount, \$73,000, will be increased by 35%, producing an amount of \$98,550.

The Acting Director reduces this amount by 30% because the conduct at issue did not harm, or threaten to harm, the institution, producing an amount of \$68,985. This amount is further reduced by 5% because no prior violations against Paul have been finally adjudicated, producing an amount of \$65,535.75.

4. Paul's Financial Resources

Under the statute, five mitigating factors must be taken into account in determining the amount of the civil money penalty. 12 U.S.C. § 1818(i)(2)(G). Four of those factors -- the good faith of

the person charged, the gravity of the violation, the history of prior violations, and such other matters as justice may require -- have been discussed above with respect to each of the four violations at issue. The sole remaining statutory mitigating factor is the size of the financial resources of the Respondent.<sup>52</sup>

In the Recommended Decision, the ALJ noted that the documentation provided by Respondent was insufficiently detailed to provide a definitive listing of his assets and liabilities. However, the ALJ misstated the burden of proof on this mitigating factor. A correct statement of the rule is that once Enforcement Counsel had met its minimal burden of going forward with evidence, as it did herein, the Respondent had the burden of demonstrating that he lacked the resources to pay the assessed penalty.<sup>53</sup>

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52. The burden of proof on the financial capacity issue is governed by 5 U.S.C. § 556(d), which states that "the proponent of a rule or order has the burden of proof." "[B]urden of proof" refers only to the burden of going forward with evidence, not the ultimate burden of persuasion. See Dazzio v. FDIC, 970 F. 2d 71 (5th Cir. 1992); Stanley v. Board of Governors of the Federal Reserve System, 940 F.2d 267 (7th Cir. 1991); Bullion v. Federal Deposit Ins. Corp., 881 F.2d 1368 (5th Cir. 1989). Therefore, the initial burden is upon Enforcement Counsel to produce some evidence on that point. Once that minimal burden has been met, the respondent has the burden of demonstrating that he or she lacks the financial resources to pay the assessed penalty.

53. Paul's assertion in his "Objections" that the record of his financial resources has been "suppressed" is completely without merit. At the hearing, no less than six of Paul's statements of net worth were included in the OTS exhibits and introduced into the record by Enforcement Counsel.

These documents are as follows:

- OTS Ex. 47: Statement of Net Worth (December 19, 1986)
- OTS Ex. 48: Statement of Net Worth (August 3, 1988)
- OTS Ex. 49: Statement of Net Worth (April 30, 1989)

The ALJ correctly found that:

The documentation provided by Respondent was still insufficiently detailed to provide a definitive listing of assets and liabilities, and considering that Respondent had shown a proclivity to conceal assets, the expert witness could not reach a conclusion based upon questionable evidence. In addition, Respondent did not make appropriate prehearing production of any exhibits to contradict his prior showing of financial inability [sic] or lack thereof, and was not and did not present any witnesses to lay a foundation for mitigation on this factor. (Footnotes omitted.)

Recommended Decision at 23-24.

As the ALJ noted, one of the violations in this proceeding, Violation C, arose from Respondent's refusal to submit financial statements required by the Temporary Order. Id. at 23. In addition, those financial statements that Respondent eventually submitted are of questionable reliability. The two major liabilities on Respondent's financial statements -- the purported IRS liability and the purported Arison liability -- are questionable. The Director previously noted that Respondent had failed to document his alleged \$4 million IRS liability, and because of inadequate documentation, the Director was "unable to conclude that any current [\$3 million] liability to Arison exists." OTS Order No. AP 91-26 at 11-12. The Acting Director concludes.

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(Footnote 53 continued from previous page)

OTS Ex. 50: Statement of Net Worth (April 20, 1991)

OTS Ex. 51: Statement of Net Worth (March 16, 1992)

OTS Ex. 52: Statement of Net Worth (Quarterly Update)(June 1, 1992)

In addition, the Acting Director has considered Paul's Statement of Net Worth - Quarterly Update, dated September 1, 1992, filed after the hearing in this proceeding was concluded.

that the documentation submitted by Paul omits assets, overstates liabilities, and decreases the value of current assets with unexplained contingent liabilities.

The Director in Rapp stated:

Respondents cannot be allowed to undermine the integrity of the process of imposing CMPs by providing inaccurate or misleading information at the hearing or by defying an agency or court order requiring the provision of true financial information. If a respondent takes either of these courses of action, the ALJ or the Director may draw an adverse inference from the failure to produce evidence on this critical issue. Dazzio v. FDIC, 970 F.2d 71, 78 (5th Cir. 1992).

Rapp at 51, note 55.

The conclusion reached by the ALJ and the Acting Director -- that Paul submitted insufficient reliable information concerning his financial resources -- is corroborated by the independent findings of Magistrate Judge Garber in a Report and Recommendation in United States v. Paul, Case No. 92-134-CR, (August 13, 1992) ("Report"). The United States requested and obtained a hearing on whether Respondent was entitled to continued representation by a Federal Public Defender. Finding that "unrebutted estimates for Paul's criminal defense range from \$1.5 to 3.5 million" (Report at 5 n.5), Magistrate Judge Garber recommended that the court continue its appointment of the Federal Public Defender.

Nevertheless, the Magistrate concluded after holding three hearings that "[d]uring the course of these hearings, the

government convincingly demonstrated that Paul owns or controls considerable assets." (Report at 3). The Magistrate found that these assets included a residence in Miami Beach, Florida worth over two million dollars; a residence in Bal Harbour, Florida worth \$150,000; an apartment building in Orono, Maine (which OTS permitted Paul to sell in OTS Order No. AP 91-26); cash holdings in corporate accounts of an undetermined balance; an art collection worth anywhere from \$150,000 to \$950,000; various personal items worth over \$300,000 at the time of purchase; an interest in a retirement plan and a trust account held by his civil attorneys worth about \$200,000; an interest in two corporations worth approximately \$200,000; a remaining interest in his mother's probate estate and several other accounts of an undetermined value. (Report at 3-4).

These findings fully corroborate the Acting Director's determination that no mitigation as a result of the size of Paul's financial resources is warranted.<sup>54</sup> This conclusion as to Paul's true financial condition reveals that the amount of the penalties calculated above are well within Paul's financial means. The financial statements submitted by Respondent disclose, on their

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54. In Rapp, the Director ruled that financial capacity was an ultimate limiting factor on the amount of the civil money penalty:

There is no limit on the degree to which a limited capacity to pay may mitigate a penalty. If the penalty exceeds the respondent's ability, it should be reduced to a level that can be paid. (Footnote omitted).

Id. at 50.

face, assets in excess of \$4 million (without regard to liabilities) that are far less than the penalties calculated in the preceding section under the Rapp formulation.

5. Enforcement's Request for Litigation Costs

As discussed previously, Enforcement Counsel put on evidence that its expenses in litigating this proceeding against Respondent were \$266,758, and apportioned this amount equally among the five charged violations for a total of \$53,353 per violation.

The ALJ declined to assess these expenses in addition to the civil money penalties sought in the Notice of Assessment.<sup>55</sup> The Acting Director agrees with this determination. There is no statutory authority under 12 U.S.C. § 1818 or 12 U.S.C. § 1464 for imposing these expenses in addition to the assessed civil money penalties. Enforcement Counsel's reliance on two cases, United States v. Furlett, 781 F. Supp. 536 (N.D. Ill. 1991), aff'd, 974 F.2d 839 (7th Cir. 1992) and United States v. WRW Corp., 731 F. Supp. 237 (E.D. Ky. 1989) is misplaced. These cases do not authorize the collection of litigation expenses; rather, they discuss whether Halper concerns are raised by the sanction under

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55. The ALJ correctly noted that the Notice of Assessment did not indicate that Enforcement would attempt to seek recovery of its expenses.

consideration.<sup>56</sup>

In some cases, of course, the expenses of the Enforcement staff may bear on the amount of a civil money penalty. For example, when a respondent has concealed evidence and Enforcement has devoted significant resources to uncovering it (see Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies, 45 Fed. Reg. 59,423 (1980)), such expenses may be taken into account when considering whether to increase the penalty based on the concealment factor.<sup>57</sup> Such expenses do not, however, create another element of a civil money penalty case.

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56. In United States v. Halper, 490 U.S. 435 (1989), the Supreme Court held that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." Id. at 448-449. Both cases cited by Enforcement Counsel attempt to discern whether the penalties under consideration in those cases are more properly characterized as remedial or punitive. Under Halper, the civil assessment must be rationally related to the goal of making the United States whole. Id. at 451. While it is difficult to ascertain the United States' losses due to statutory violations, its losses include the ancillary costs of detection, investigation, and prosecution that routinely occur as a result of enforcement actions. Id. at 445. If the civil penalty sought is roughly equal to established governmental losses, the penalty is more properly characterized as remedial, and Double Jeopardy issues do not arise. Id.

57. Such expenses also may appropriately be taken into account when a consent civil money penalty case is negotiated.

6. Summary of Amounts per Violation and Total Amounts

a. For Violation A, the Notice of Assessment sought a second-tier civil money penalty of \$25,000. At the hearing, Enforcement sought to prove a third-tier penalty of \$450,000. The ALJ recommended a second-tier penalty of \$25,000. The Acting Director imposes a final second-tier civil money penalty of \$25,000.

b. For Violation C, the Notice of Assessment sought a third-tier civil money penalty of \$942,000. At the hearing, Enforcement sought to prove a third-tier penalty of \$728,000. The ALJ recommended a third-tier penalty of \$728,000. The Acting Director imposes a final third-tier civil money penalty of \$325,422.50.

c. For Violation D, the Notice of Assessment sought a second-tier civil money penalty of \$755,000. At the hearing, Enforcement sought to prove a third-tier penalty of \$935,000. The ALJ recommended a second-tier penalty of \$755,000. The Acting Director imposes a final second-tier civil money penalty of \$425,790.

d. For Violation E, the Notice of Assessment sought a third-tier civil money penalty of \$1,050,000. At the hearing,

Enforcement sought to prove a third-tier penalty of \$703,000. The ALJ recommended a third-tier penalty of \$703,000. The Acting Director imposes a final third-tier civil money penalty of \$65,535.75.

Therefore, the Acting Director imposes civil money penalties totaling \$841,748.25 for these four violations.

D. Disposition of Pending Motions

1. Enforcement Counsel's Motion to Strike

In the Reply to Paul's "Objections" filed on January 6, 1993, Enforcement Counsel submitted a motion to exclude from the record Exhibits 1-45 that Paul had attached to his "Objections." Paul did not seek leave to include Exhibits 1-45 in the record.

In support of its motion, Enforcement Counsel stated that Paul had failed to submit a list of witnesses or exhibits prior to the August 3, 1992 hearing, and the ALJ granted Enforcement's motion under Rule 32(b) to preclude Paul from calling any witness or introducing exhibits at the hearing (Tr. at 73). Enforcement pointed out that Paul failed to advance any reason why he should be permitted to introduce Exhibits 1-45 into the record, most of which were in existence before the August 3, 1992 hearing and could have been submitted prior to or at the hearing.

The Acting Director concludes that because most of these documents already appear elsewhere in the administrative record of this proceeding, no harm is done to Enforcement by allowing them into the record and considered on their merits.<sup>58</sup> Accordingly, Enforcement Counsel's Motion to Strike is denied.

2. Motion of United States to Vacate Protective Order

On April 20, 1992, Respondent filed a Motion to Quash Deposition Subpoenas of Respondent's former attorneys in both the administrative and criminal proceedings.<sup>59</sup> On June 23, 1992, Judge Alprin entered an order in which he denied Paul's Motion to Quash and entered a protective order concerning the use of these depositions ("Protective Order"). Judge Alprin ruled that a finding of attorney-client privilege concerning communications made by Paul with his former counsel could not be made at that time, and that Enforcement Counsel had demonstrated a legitimate basis for

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58. These five bound volumes contain numerous motions, orders, letters, transcripts, and varied other filings (all of which are extensively supplemented), from both the administrative and civil proceedings, compiled in no particular order, and without a complete index.

59. The Motion to Quash sought to quash the deposition subpoenas of Paul's former criminal counsel, Aubrey Harwell and Delta Anne Davis, and former counsel, Sanford Bohrer and Steve Davis, and their legal administrator Peggy Aldrich.

requesting the depositions.<sup>60</sup>

The Protective Order essentially prohibited Enforcement Counsel from communicating to the Assistant United States Attorneys involved in the criminal prosecution of Paul in Miami any information arising from the OTS' depositions of Paul's former attorneys.

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60. The Order contains a section entitled "Closed Deposition" which in its entirety reads as follows:

Respondent requests that any non-OTS government attorneys, investigators, or personnel be prevented from attending the deposition of Paul's former counsel and that OTS be prevented from transmitting the deposition to any other government entity. OTS responds by advising the court that it is Respondent who initially requested a public hearing and that circumstances do not now justify granting a closed deposition. The undersigned [Judge Alprin] disagrees with the OTS.

Due to the pending criminal case against Paul and the more limited nature of the criminal discovery rules, certain restrictions shall be imposed regarding these depositions to ensure Respondent's due process rights. Only OTS counsel and those employees necessary in aiding the deposition process may attend. OTS counsel shall receive two copies of the deposition transcript, one for the New Jersey office and one for the Washington office. A custodian of the transcripts shall be appointed in each office and will maintain the confidentiality of the depositions by requiring OTS employees to sign the documents out each time they wish to read them. Copies of these depositions shall not be made and transmitted out of the OTS offices. The individuals at the depositions, the deposition transcript custodians, and each individual obtaining possession shall sign a form stating that he/she understands that they may not discuss or otherwise make known the contents of the deposition with or to any individual not having executed the same form, and in no event are they to discuss or make known the contents to employees of the United States Department of Justice.

After the issuance of the Protective Order, on August 3, 1992, Enforcement Counsel moved ore tenus to vacate the Protective Order. Judge Alprin declined to do so.

On August 14, 1992, the United States Attorney's Office for the Southern District of Florida entered a limited appearance under 5 U.S.C. § 551(3) in the Notice of Assessment proceeding on two discrete issues: 1) the amount, if any, of civil money penalties to be assessed for Violation "B" due to Halper concerns, and 2) review of the necessity of the Protective Order.

On September 17, 1992, the Acting United States Attorney filed a Motion to Vacate the Protective Order ("Motion to Vacate") in the "interest of justice." On September 18, 1992, the Office of the Federal Public Defender (on behalf of Respondent) filed an opposition to the Motion to Vacate. On October 2, 1992, Enforcement Counsel filed a memorandum in support of the Motion to Vacate. On October 13, 1992, in a one paragraph order, Judge Alprin denied the Motion to Vacate.

On December 18, 1992, in a filing with the Acting Director, the United States Attorney requested that the Protective Order be vacated for the following reasons:

[F]irst, the order serves no Fifth Amendment or other due process interest of Respondent Paul; second, the order is contrary to the public policy that civil discovery and adjudicative proceedings of governmental bodies be open to the public; third, no abuse of the OTS administrative proceedings by the United States Attorney was ever threatened requiring such extraordinary relief,

and certainly no such abuse can be demonstrated to have occurred; fourth, the order is contrary to the interests of justice as it threatens to deprive the United States Department of Justice and the District Court in Miami of probative evidence relating to pending criminal charges; and, fifth, the order likely will create practical difficulties for the United States at trial of the criminal action.

These reasons are substantially identical to the reasons offered in the Motion to Vacate.

The Acting Director has determined that due to the timing of this Final Decision and Order, this Motion to Vacate may be moot, and declines to issue a ruling on the Motion at the present time. However, if any interested person or party desires a decision on this Motion, an application or request for a ruling must be made by written motion directed to the attention of the Acting Director within ten business days after issuance of this Final Decision and Order. Within ten business days after service of any written motion, any interested person or party may file a written response to the motion. The Acting Director will not rule on any written motion before this response time has elapsed. Thereafter, a decision will be issued in accordance with the OTS's Rules of Practice and Procedure.

### 3. Request for Oral Argument

In Respondent's December 18, 1992 cover letter transmitting his objections, he requests oral argument before the Director pursuant to 12 C.F.R. § 509.40(b) (1993). Under Rule 40(b), the Director has the discretion to order and hear oral argument.

However, a party seeking oral argument has the burden of showing good cause for such argument and establishing that arguments cannot be adequately presented in writing. Upon consideration of Respondent's request for oral argument, the Acting Director finds that: (1) the factual and legal arguments are fully set forth in the parties' written submissions; (2) the Acting Director will not be aided in deciding this matter by oral argument; and (3) Respondent will not be prejudiced by the lack of oral argument. Therefore, the Acting Director declines to exercise his discretion under Rule 40(b) and denies Respondent's request for oral argument.

#### VII. CONCLUSION

For all the reasons set forth herein, the Acting Director imposes civil money penalties against Paul of \$841,748.25.

ORDER

Based upon the entire record of the proceeding, the Recommended Decision of the Administrative Law Judge (the "ALJ"), the submissions of the parties, the reasons set forth in the accompanying Final Decision, and after consideration of factors in aggravation and in mitigation of the conduct of Respondent David L. Paul ("Respondent" or "Paul"), the Acting Director of the OTS, pursuant to his authority under 12 U.S.C. § 1818, makes the following findings, conclusions, and Order:

1. On August 29, 1991, the Director of the OTS issued a Notice of Assessment of Civil Money Penalties ("Notice of Assessment") against Respondent. OTS Order No. AP 91-50. The Notice of Assessment alleged five violations by Paul of two orders previously issued by the OTS: a temporary cease-and-desist order issued on October 22, 1990, OTS Order No. 90-1873 ("Temporary Order")<sup>61</sup> and a hardship order modifying the Temporary Order issued on June 11, 1991, OTS Order No. AP 91-26 ("Hardship Order").

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61. On November 1, 1990, Paul sued in the United States District Court for the Southern District of Florida to enjoin the OTS from enforcing the Temporary Order. OTS Enforcement Counsel then applied to the district court to enforce the Temporary Order under the provisions of section 8(d) of the Federal Deposit Insurance Act ("FDIA"). 12 U.S.C. § 1818(d). On December 4, 1990, the district court granted OTS's petition for an injunction to enforce the Temporary Order in its entirety. Paul v. Office of Thrift Supervision, 763 F. Supp. 568 (S.D. Fla. 1990), aff'd per curiam, 948 F.2d 1297 (11th Cir. 1991).

2. A hearing in this matter was scheduled to commence on August 3, 1992. In violation of Rule 32 of the OTS's Rules of Practice and Procedure in Adjudicatory Proceedings ("Rules"),<sup>62</sup> Paul failed to make the required prehearing submissions. As a consequence of this failure, Enforcement Counsel filed two motions: a motion pursuant to Rule 32(b) to preclude Respondent from calling any witnesses or introducing any documentary evidence at the hearing; and, a motion pursuant to Rules 29 and 30 for partial summary disposition on the issue of Paul's liability for the violations alleged in the Notice of Assessment. Paul failed to submit any written opposition to either of these motions.

3. The OTS Statement filed by Enforcement Counsel in support of its summary disposition motion is based upon the Answer filed by Respondent, investigative deposition transcripts, deposition exhibits, the October 23, 1991 hearing transcript before the district court, Respondent's April 20, 1991, March 16, 1992, and June 1, 1992 financial statements, and Paul's December 7, 1990 affidavit. These documents show that there is no genuine issue as to any fact material to establishing Respondent's liability for violating the Temporary Order and the Hardship Order and that Enforcement Counsel is entitled to a decision in its favor as a matter of law. As Enforcement Counsel's motion demonstrated, and as the ALJ found, Respondent has admitted to all such facts.

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62. These Rules are codified at 12 C.F.R. Part 509 (1993), as amended, 58 Fed. Reg. 4308, 4311 (1993).

Therefore, the ALJ properly limited the remainder of the hearing to the sole issue of the appropriate amount of civil money penalties to be assessed.

4. Paul declined to contest the facts material to establishing his liability. Paul did not "appear" at the hearing within the meaning of Rule 21.<sup>63</sup> At the hearing held on August 3, 1992, Paul made an extensive statement, but then refused to enter an appearance or remain in the hearing room for the duration of the proceedings. The ALJ warned Paul on the record of the legal consequences under Rule 21 of his failure to enter a formal appearance. Paul acknowledged these consequences, but nonetheless voluntarily departed from the courtroom without entering an appearance pro se or participating in the hearing. The ALJ therefore had authority, under Rule 21, to deem Paul to have admitted the facts alleged in the Notice of Assessment.

Rule 21 is sufficient but not necessary to establish the facts supporting the imposition of civil money penalties. The OTS Statement in support of Enforcement Counsel's motion for partial summary disposition and the ALJ's grant of that motion demonstrate that Respondent affirmatively admitted the violations at issue.

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63. Under a literal interpretation of Rule 21, Paul failed to appear at the hearing, and by failing to appear, has waived his right to a hearing, and is deemed to have admitted the facts as alleged in the Notice of Assessment, and to have consented to the relief sought in the Notice of Assessment.

5. Paul, from on or about September 28, 1983, until on or about February 2, 1990, when the OTS appointed a conservator for CenTrust, was Chairman of the Board, Chief Executive Office, and controlling shareholder of CenTrust. During this period, he was an officer, director, or person participating in the conduct of the affairs of CenTrust.

6. Respondent is an institution-affiliated party of CenTrust as defined in 12 U.S.C. § 1813(u).

7. As an officer, director, or person participating in the conduct of the affairs of CenTrust, and as an institution-affiliated party of CenTrust, Respondent is subject to the authority of the OTS to maintain cease and desist and removal and prohibition proceedings. The jurisdiction and authority of OTS to proceed against Respondent were not affected by his separation from CenTrust on or about February 2, 1990. 12 U.S.C. § 1818(i)(3).

8. The Temporary Cease and Desist Order became effective upon service on or about October 22, 1990, and shall remain in effect pending the completion of the administrative proceedings pursuant to which the Temporary Order was issued and until such time as the OTS shall dismiss the charges specified in the underlying Notice of

Charges, or, if the OTS issues a cease-and-desist order against Paul, until the effective date of any such order. 12 U.S.C. § 1818(c)(1). The Temporary Order has been in effect at all times since its issuance on October 22, 1990, and remains in full force and effect.

9. This administrative proceeding was properly initiated by the Director of the OTS by issuance of a Notice of Assessment of Civil Money Penalties dated August 29, 1991, pursuant to 12 U.S.C. § 1818(i)(2).

10. The Acting Director adopts the findings of fact alleged in the Notice of Assessment and also as found by the ALJ in the Recommended Decision. The Acting Director makes the following additional findings of fact based on the record before him:

a) On Monday, October 29, 1990, Respondent directed that the \$50,000 previously transferred on October 26, 1990 to the Neal & Harwell Trust Account at Dominion Bank be transferred to the account of his private investigator, Larry Plave, at First Union, Miami. (Harwell Dep. 82:14-22, 83:24-25, 84:1-5, Harwell Dep. Exs. 10, 12, 13, 14).

b) On March 31, 1992, Paul filed with the OTS a second unsworn Statement of Net Worth dated March 16, 1992. (OTS Ex. 51).

On June 18, 1992, Paul filed an unsworn Statement of Net Worth -- Quarterly Update, dated June 1, 1992. (OTS Ex. 52). After the ALJ had concluded the hearing, Paul submitted an unsworn Statement of Net Worth -- Quarterly Update, dated September 1, 1992.

11. Respondent is subject to the assessment of civil money penalties for violation of the Temporary Order issued by OTS under 12 U.S.C. § 1818(c).

12. Respondent violated the Temporary Order issued pursuant to 12 U.S.C. § 1818(c) by transferring \$50,000 to the law firm of Neal and Harwell on October 26, 1990, for deposit in that firm's trust account, and on October 29, 1990, directing the transfer of the same \$50,000 in payment of an outstanding debt of Respondent. These actions resulted in pecuniary gain or other benefit to Respondent. Respondent is hereby ORDERED, pursuant to 12 U.S.C. § 1818(i)(2)(B), to pay a second-tier civil money penalty of \$25,000.

13. Respondent knowingly violated the Temporary Order issued pursuant to 12 U.S.C. § 1818(c) by failing to file a financial statement, as ordered, on October 29, 1990. Respondent further knowingly violated the Temporary Order by failing to file the update to the financial statement, as required by the Temporary Order, until March 31, 1991. By reason of these actions, Respondent knowingly caused a substantial pecuniary gain or other

benefit to himself. Respondent is hereby ORDERED, pursuant to 12 U.S.C. § 1818(i)(2)(C), to pay a third-tier civil money penalty of \$325,422.50.

14. Respondent violated the Temporary Order issued pursuant to 12 U.S.C. § 1818(c) by failing to post security as required on November 1, 1990. This failure resulted in pecuniary gain or other benefit to Respondent. Respondent is hereby ORDERED, pursuant to 12 U.S.C. § 1818(i)(2)(B), to pay a second-tier civil money penalty of \$425,790.

15. Respondent knowingly violated the Temporary Order issued pursuant to 12 U.S.C. § 1818(c) and the Hardship Order (which modified the Temporary Order) by failing to deliver his liquid assets to the Administrator, as ordered, and thus knowingly caused substantial pecuniary gain or other benefit to himself. Respondent is hereby ORDERED, pursuant to 12 U.S.C. § 1818(i)(2)(C), to pay a third-tier civil money penalty of \$65,535.75.

16. Respondent shall make full payment of the penalties assessed herein within sixty days after the date of service of this Order. Remittance of these penalties shall be payable to the Treasurer of the United States and delivered to:

Controller's Division  
Office of Thrift Supervision  
U.S. Treasury Department  
1700 G Street, N.W.  
Washington, D.C. 20552

17. On January 6, 1993, Enforcement Counsel submitted a motion to exclude or strike from the record Exhibits 1-45 that Paul had attached to his "Objections" to the Recommended Decision. The Acting Director concludes that because most of these documents already appear elsewhere in the administrative record of this proceeding, no harm is done to Enforcement Counsel by allowing them into the record and considered on their merits. The Motion to Strike is hereby DENIED.

18. On September 17, 1992, the Acting United States Attorney for the Southern District of Florida filed with the ALJ a Motion to Vacate the Protective Order ("Motion to Vacate") entered by the ALJ on June 23, 1992. On September 18, 1992, the Office of the Federal Public Defender (on behalf of Respondent) filed an opposition to the Motion to Vacate. On October 2, 1992, Enforcement Counsel filed a memorandum in support of the Motion to Vacate. On October 13, 1992, the ALJ denied the Motion to Vacate.

19. On December 18, 1992, in a filing with the Acting Director, the Acting United States Attorney requested that the Protective Order be vacated. The Acting Director declines to rule upon this Motion to Vacate because the motion may be moot. If any interested person or party desires a decision on this Motion to Vacate, an application or request for a ruling shall be made by written motion directed to the attention of the Acting Director

within ten business days after issuance of this Final Decision and Order. Within ten business days after service of any written motion, any interested person or party may file a written response to the motion. The Acting Director will not rule on any motion before this response time has elapsed. Thereafter, a ruling will be issued in accordance with the OTS's Rules.

20. All filings made under the foregoing provision of this Final Decision and Order shall be addressed to:

Acting Director  
Office of Thrift Supervision  
1700 G Street, N.W.  
Washington, D.C. 20554

ATTN.: Melba McCannon  
Acting Secretary for  
Adjudicatory Proceedings

21. Respondent filed, pursuant to Rule 40(b), a request for oral argument before the Director. Upon consideration of Respondent's request for oral argument, the Acting Director finds that: (1) the factual and legal arguments are fully set forth in the parties' written submissions; (2) the Acting Director will not be aided in deciding this matter by oral argument; and (3) Respondent will not be prejudiced by the lack of oral argument. Therefore, the Acting Director declines to exercise his discretion under Rule 40(b) and Respondent's request for oral argument is hereby DENIED.

22. This ORDER shall be and is effective immediately upon service and shall remain effective and enforceable except to such extent as it is stayed, modified, terminated, or set aside by action of the Director or a reviewing court, in accordance with any applicable statute or regulation.

23. Respondent is hereby notified that he has the right to appeal this Final Decision and Order to the U.S. Court of Appeals within 30 days after the date of service of such Final Decision and Order. 12 U.S.C. § 1818(h).

Date: Dec 14, 1993

OFFICE OF THRIFT SUPERVISION

By:

/S/

Jonathan L. Flechter  
Acting Director