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UNITED STATES OF AMERICA

OFFICE OF THRIFT SUPERVISION

In the Matter of Jess A. Rodriques and Donna R. Rodriques	A Removal and Prohibition Proceeding No. 88-1564 OTS No. 89-447

DECISION AND ORDER

December 5, 1989

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I. INTRODUCTION

This removal and prohibition action was initiated by the then Office of Enforcement of the Federal Home Loan Bank Board ("Bank Board")[1] on behalf of the FSLIC against Jess A. Rodrigues, the Chairman of the Board of Directors of Saratoga Savings and Loan Association ("Saratoga") and Donna A. Rodrigues, a Senior Vice President of Saratoga, for alleged violations of regulations, alleged unsafe and unsound practices, alleged violations of the conflict of interest regulations, and alleged breaches of fiduciary duty.

Saratoga is a California savings association with its principal place of business in San Jose, California. California Housing Securities, Inc. ("CHS"), a California corporation and savings and loan holding company, is the parent of Saratoga. Since about late 1970, Jess A. Rodrigues has owned, and continues to own, all of the outstanding stock issued by CHS. Since September 24, 1984, CHS has owned, and continues to own, all of the outstanding stock of Saratoga. Saratoga's accounts were

[1] On August 9, 1989 the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (Pub. L. 101-73, 103 Stat. 183 (1989)) ("FIRREA") was enacted. FIRREA abolished the Bank Board and its insurance arm, the Federal Savings and Loan Insurance Corporation ("FSLIC"). As the successor agency to the Bank Board, the Director of the Office of Thrift Supervision ("OTS") is the appropriate person to determine the disposition of this matter. Section 401(h) of FIRREA provides for the continuation of the Bank Board's order in this matter, and provides that it shall be enforceable by the Director of the OTS. Accordingly, this matter may be adjudicated by the Director.

insured by the FSLIC pursuant to Section 403(b) of the National Housing Act, 12 U.S.C. 1726(b) ("NHA"), but after enactment of FIRREA on August 9, 1989, the accounts became insured by the Savings Association Insurance Fund ("SAIF"). Saratoga commenced operations on or about April 18, 1983, and it remains in operation through the date hereof.

This action arose as a result of four unsecured loans made by Saratoga (and refinancing of such loans) to three partnerships: a $400,000 loan to the RH&C Venture regarding the Cinnabar property (the "RH&C Venture"), a $456,000 loan to the Tate and Lazares Venture, and two loans in the amount of $800,000 each to the Continental Can Property Joint Venture (the "Continental Can Venture") (collectively referred to as the "Subject Loans"). Mr. and Mrs. Rodriguez were involved with each of the above three entities at the time the loans in question were made.

The NHA and applicable regulations of the Bank Board, in effect at the time of the above transactions, authorized FSLIC to proceed against a director or officer of a FSLIC-insured institution who was in breach of his or her fiduciary duty, engaged in unsafe or unsound practices, or violated Bank Board regulations and whose conduct (1) caused the institution to suffer substantial financial loss and (2) demonstrated a willful or continuing disregard for the safety and soundness of the institution. These rules were designed to control risk to the FSLIC insurance fund and thereby protect the fund for the benefit and protection of all depositors.

On December 30, 1988 a Notice of Intention to Remove and Prohibit (the "Notice") was issued against Mr. & Mrs. Rodrigues. They were charged with acting singly and in concert (1) to cause Saratoga to violate the FSLIC's regulation prohibiting loans-to-affiliated-persons, 12 C.F.R. § 563.43(b); or (2) to engage in acts, omissions or practices which constitute breaches of their fiduciary duties as directors or officers of Saratoga. The Notice charged that by such violations, practices or breaches of fiduciary duty, (1) they received financial gain, or (2) Saratoga suffered substantial financial damage, and that such violations, practices or breaches of fiduciary duty, (1) involved personal dishonesty on their part, or (2) demonstrated a willful or continuing disregard for the safety or soundness of Saratoga.

The Administrative Law Judge ("ALJ") before whom this matter was adjudicated issued a Recommended Decision with detailed Findings of Fact and Conclusions of Law (a copy is attached as Exhibit 1). The ALJ concluded that the Bank Board's findings in the Notice were fully supported by the record. (Recommended Decision at 42.) In this regard, the ALJ found that the business associations involved in the Subject Loans each constituted an "affiliated person" of Saratoga. (Recommended Decision at 39.)

He determined that Saratoga violated § 563.43(b) by making the Subject Loans. (Recommended Decision at 40.) In the ALJ's opinion, Jess A. Rodrigues participated in the making of the Subject Loans, and Donna Rodrigues engaged in actions with her husband whereby she participated in, and aided and abetted, the regulatory violations. (Recommended Decision at 41.) He also determined that Mr. and Mrs. Rodrigues engaged or participated in one or more unsafe or unsound practices in connection with the Subject Loans. (Recommended Decision at 40.) The Decision states that during the period in question, Mr. and Mrs. Rodrigues owed a fiduciary duty of loyalty to Saratoga and its depositors, and engaged in acts, omissions, or practices which constituted breaches of their fiduciary duties owed to Saratoga and its depositors. (Recommended Decision at 40.) The Decision also states that Saratoga suffered substantial financial damage by reason of the regulatory violations mentioned above, by reason of the unsafe or unsound practices and breaches of fiduciary duty of the Rodrigues', and that the Rodrigues had received financial gain by reason of such violations. (Recommended Decision at 41.) The ALJ further stated that the actions of Mr. and Mrs. Rodrigues perpetuated a fraudulent scheme of using nominee loans that redounded to their own personal benefit. (Recommended Decision at 42.) He determined that their actions demonstrated a willful and continuing disregard for the safety and soundness of Saratoga. (Recommended Decision at 42.)

Section 903(a) of FIRREA now consolidates the removal and prohibition authority of the various banking agencies. This was accomplished by amending § 8(e)(1) of the Federal Deposit Insurance Act (the "FDIA"), 12 U.S.C. 1818(e)(1) to include the removal and prohibition authority for all of the banking agencies. The revised provision, which applies to this matter, essentially sets forth the same criteria for removal and prohibition as was set forth in § 407(g) of the NHA.

The Director has examined the record of the proceedings in this case and concludes that the Rodrigues' caused Saratoga to violate regulations, engaged in unsafe or unsound practices, breached their fiduciary duties to Saratoga, received financial gain as a result of such breaches, and engaged in person dishonesty and a disregard for safety and soundness principles. Based on his findings that the Rodrigues' caused Saratoga to violate the then existing Bank Board regulations and to commit unsafe and unsound practices and breached their fiduciary duties, the Director issues an order prohibiting Jesse A. Rodrigues and Donna Rodrigues from participating in the conduct of the affairs of Saratoga or any other entity as set forth in Section 8(e)(7)(A) of the Federal Deposit Insurance Act, as amended by Title IX of the FIRREA, codified at 12 U.S.C. § 1818(e)(7)(A).

II. Statutory Framework

The provisions of the FDIA that provide for removing a director or officer and/or prohibiting him or her from further participation in the affairs of a savings association and barring his or her participation in any such association is Section 1818(e).[2] Removal and prohibition proceedings are designed to control and limit the risk undertaken by federally insured savings associations, including state-chartered associations such as Saratoga, to limit the exposure of the federal insurance funds (the Savings Association Insurance Fund and the Bank Insurance Fund), and thereby to protect the funds for the benefit and protection of all depositors, by mandating prudent business practices. Saratoga sought and received FSLIC, and subsequently SAIF insurance of its deposits, and with that insurance comes the burden of regulation.

Under Section 1818(e) of the FDIA, OTS may serve upon an "institution affiliated party" a notice of its intention to remove or prohibit whenever in OTS's opinion:

> 1) the individual has committed a breach of his fiduciary duty to the institution, <u>or</u> has engaged or participated in an unsafe or unsound practice with respect to the association, <u>or</u> has committed a violation of

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[2] Prior to FIRREA the provision applicable to savings and loans was contained in Section 407(g), 12 U.S.C. § 1730(g).

> **any** law, rule, or regulation, or a final **cease**-and-desist order; <u>and</u>
>
> 2) as a result of the breach of fiduciary duty, unsafe or unsound practice, or violation, the association has suffered or will probably suffer substantial financial loss or other damage <u>or</u> the individual has received financial gain; <u>and</u>
>
> 3) the breach of fiduciary duty, unsafe or unsound practice, or violation evidences personal dishonesty on the part of the individual <u>or</u> willful or continuing disregard for the safety or soundness of the association.[3]

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[3] Section 8(e) of the FDIA, 12 U.S.C. 1818(e) provides in pertinent part:

> **(e) Removal and prohibition authority.**
> (1) AUTHORITY TO ISSUE ORDER. Whenever the appropriate Federal banking agency determines that --
> (A) any institution-affiliated party has, directly or indirectly --
> (i) violated --
> (I) any law or regulation;
> (II) any cease-and-desist order which has become final;
> (III) any condition imposed in writing by the appropriate Federal banking agency in connection with the grant of any application or other request by such depository institution; or
> (IV) any written agreement between such depository institution and such agency;
> (ii) engaged or participated in any unsafe or **unsound** practice in connection with any **insured** depository institution or business **institution**; or
> (iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty;
> (B) by reason of the violation, practice, or breach described in any clause of subparagraph (A) --
> (i) such insured depository institution or business institution has suffered or will probably suffer financial loss or other damage;

The term "institution-affiliated party" means any director, officer, employee or controlling stockholder (other than a bank holding company) of, or agent for, an insured depository

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> (ii) the interests of the insured depository institution's depositors have been or could be prejudiced; or
> (iii) such party has received financial gain or other benefit by reason of such violation, practice, or breach; and
> (C) such violation, practice, or breach --
> (i) involves personal dishonesty on the part of such party; or
> (ii) demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution or business institution,
> the agency may serve upon such party a written notice of the agency's intention to remove such party from office or to prohibit any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution.

Section 8(e)(3) provides:

> (A) Suspension or prohibition authorized. If the appropriate Federal banking agency serves written notice under paragraph (1) or (2) to any institution-affiliated party of such agency's intention to issue an order under such paragraph, the appropriate Federal banking agency may suspend such party from office or prohibit such party from further participation in any manner in the conduct of the affairs of the depository institution, if the agency --
> (i) determines that such action is necessary for the protection of the depository institution or the interests of the depository institution's depositors; and
> (ii) serves such party with written notice of the suspension order.

institution.[4] The term "depository institution" includes any savings association.

Jess A. Rodrigues since 1982 has owned and controlled Saratoga, directly or indirectly. From 1982 through September 1984, Mr. Rodrigues owned all of the outstanding stock issued by Saratoga. On or about September 24, 1984, he transferred all of his Saratoga stock to CHS. Since about late 1970, Mr. Rodrigues has owned, and continues to own, all of the outstanding stock issued by CHS. Since on or about September 24, 1984, CHS has owned, and continues to own, all of the outstanding stock of Saratoga.

Mr. Rodrigues has served as a director of Saratoga at all times since it commenced operations in April 1983, and has served as its chairman of the board at all times since April 1986. During the period from April 1983 through July 23, 1987, Mr. Rodrigues also served as an officer of Saratoga with the title sometimes being president and other times being chief executive officer. During the time that he served as an executive officer of Saratoga, Jess A. Rodrigues also served as a member of Saratoga's loan committee.

[4] Section 3(u) of the FDIA, 12 U.S.C. 1813(u).

Donna R. Rodrigues currently serves as a senior vice president of Saratoga. Mrs. Rodrigues also served as a director of Saratoga during the periods of September 27, 1982, through March 25, 1985, and June 10, 1986, through June 28, 1988. During these times, Mrs. Rodrigues was, and currently is, the wife of Jess A. Rodrigues.

III. Statement of Facts

The OTS and the Director have reviewed the evidence of record in this proceeding and the Administrative Law Judge's Findings of Fact Nos. 1 through 85 contained in his Recommended Decision at pages 2 through 38. We adopt these Findings of Fact as our own.

Jess A. Rodrigues and Donna R. Rodrigues filed exceptions to these findings; however, we conclude that the exceptions seek the inclusion of irrelevant and repetitive information that would not add significantly to the Findings.

While some of the Findings of Fact appear to state legal conclusions, on the whole we find the ALJ's factual findings are supported by the record and we adopt them substantially in their entirety. Those Findings are not repeated here, but are duplicated as Exhibit 1. Moreover, where the Recommended Decision did not provide citations to the record, we have provided them.[5]

The critical facts may be summarized as follows: Jess A. Rodrigues has owned and controlled Saratoga, directly or indirectly since 1982. He played a central role in the organization of Saratoga, and since Saratoga commenced operations in April 1983, Mr. Rodrigues has served as a director, and served as Saratoga's chairman of the board since April 1986.

Donna R. Rodrigues currently serves as a senior vice president of Saratoga. She served as a director of Saratoga during the periods of September 27, 1982, through March 25, 1985, and June 10, 1986, through June 28, 1988. During these times Mrs. Rodrigues was, and currently is, the wife of Jess A. Rodrigues.

During the years 1983 and 1984 Saratoga entered into three transactions by making four separate loans. The three transactions at issue here are: 1) the RH&C Venture Regarding the Cinnabar Property (Saratoga Loan No. 80-00312); 2) the Tate and Lazares Venture Regarding the Marina Property (Saratoga Loan

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[5] Throughout this opinion, we make references to the Administrative Record which includes a transcript ("Tr."), FSLIC Exhibits ("GX"), and Respondent's Exhibits ("RX").

No. 80-00473); and 3) the Joint Venture Regarding the Continental Can Property (Saratoga Loan Nos. 80-00559 and 80-00560).

A. The RH&C Venture Regarding the Cinnabar Property

The Cinnabar Property venture with RH&C (the "RH&C Venture") involved Saratoga's unsecured loan in the amount of $400,000 made to Richard A. Cristina and Murray B. Hall ("Cristina and Hall") to help finance the acquisition of real property (the "Cinnabar Property") by a business venture in which Mr. and Mrs. Rodrigues were co-venturers. (GX 3, p. 55.)

Cristina and Hall are the sole general partners of a California general partnership named Cristina & Hall, which is in the real estate development business. (Cristina p. 548; Hall, p. 614.) In connection with their activities involving the investment in and development of real estate, they often enter into partnerships or joint ventures with third parties. (Cristina, p. 560; Hall, pp. 615-16.) Cristina is the son of Vernon Cristina, a former director of Saratoga and friend of Jess A. Rodrigues. Cristina was personally acquainted with Jess A. Rodrigues, and had worked for Mr. Rodrigues' corporation and parent of Saratoga, CHS during the late 1970s. (Cristina, p. 549; J. Rodrigues, p. 1050.) Hall has been personally acquainted with Jess A. Rodrigues for about ten years. (Hall, p. 616; J. Rodrigues, p. 1054.)

On February 9, 1984, Cristina & Hall entered into an agreement to purchase the Cinnabar Property from Bay-Valley Ventures for $4,300,000. (GX 39; Cristina, pp. 552-53; Hall, pp. 620-21.) A down payment of $50,000 was made. (GX 47, pp. 8, 9.) On or before February 16, 1984,[6] Messrs. Cristina and Hall had spoken with Jess A. Rodrigues about having him and his wife Donna participate as investors in the Cinnabar property. At about that time Messrs. Cristina, Hall and Rodrigues entered into an oral agreement concerning the Cinnabar Property which provided that Mr. and Mrs. Rodrigues (together), Cristina, and Hall were to acquire the Property, each to have a one-third ownership interest, each to contribute one-third of the funds needed for the acquisition, and each to share one-third in the profits or losses related to their ownership in the Cinnabar Property. (Cristina, pp. 554-55; Hall, p. 617; Answer Par. 7.) The joint venture was to be called the "RH&C Venture." (Hall, p. 619; see GX 48.)

In addition to entering into the joint venture agreement, Jess A. Rodrigues and Donna Rodrigues participated in various activities in support of the RH&C venture, including execution of a lease agreement dated March 1, 1984, regarding a lease of part

[6] The ALJ Decision notes that the date of February 16, 1984 is supported by a letter of that date indicating that Rodrigues, Hall, and Cristina were removing contingencies to the purchase of the property. (GX 40.)

of the Cinnabar Warehouse to C.C.B.S. Warehousing Services, Inc. (GX 41; Answer Par. 13.)

In mid-February 1984, the RH&C Venturers obtained approval for a $3 million purchase money mortgage loan from San Francisco Federal Savings and Loan Association ("San Francisco Federal"). (GX 51; Hall, p. 656.) In order to acquire the Cinnabar Property however, RH&C would still require another $1.3 million. (See GX 47, p. 38; Cristina, p. 553.) The additional funds were obtained as follows: 1) $1 million from three line-of-credit loans from Crocker National Bank that were secured by a) a second deed of trust against the Cinnabar property in favor of CHS and assigned to Crocker, and b) a take-out commitment from CHS, prepared and signed by Mr. Rodrigues;[7] 2) funds from Saratoga loan no. 80-00312 (the "Saratoga Loan"); and 3) $150,000 contributed by Mr. and Mrs. Rodrigues. (GX 48; GX 49; GX 52; Cristina, pp. 561-62; 749-51; Hall, p. 659.)

Jess A. Rodrigues participated in the making of Saratoga loan no. 80-00312, and he was instrumental in causing that loan to be made. Lawrence J. Winslow ("Winslow") who at the time was

[7] The ALJ Decision notes that during the course of the FSLIC's investigation, it issued a subpoena duces tecum to CHS for documents regarding this $1 million obligation of CHS. (GX 78.) CHS, however, acting though its counsel, responded to the FSLIC that it had no documents regarding this $1 million obligation, and it implied that there was no such obligation. (GX 79; see J. Rodrigues, p. 1172.)

serving as the executive vice president and a director of Saratoga testified that, in or about March 1984, Jess A. Rodrigues told him that Saratoga would be making this $400,000 unsecured loan, and that based on this information he gathered the documentation to support the loan. (Winslow, pp. 104-6.)[8] Cristina also testified that, in March 1984, he had met with Jess A. Rodrigues in his office at Saratoga, and that they discussed the making of the $400,000 loan. Cristina testified further that after this discussion with Jess A. Rodrigues, Mr. Rodrigues met with Winslow to assist Winslow with preparing the documentation in connection with the loan. (Cristina, pp. 714-15.)[9]

Winslow further testified that prior to the funding of the Saratoga Loan, neither Jess A. Rodrigues nor Donna Rodrigues disclosed to Winslow or to Saratoga's board of directors that they were participants with Cristina and Hall in the RH&C Venture. (Winslow, pp. 111, 113, 128.) There is no testimony or other evidence that conflicts with Mr. Winslow's testimony on this point. Jess A. Rodrigues did not give testimony that directly conflicted with Winslow's testimony on this point, but rather seems to imply that, immediately after the loan was

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[8] Mr. Winslow served as the Executive vice president and a director of Saratoga during the period from April 18, 1983, through January 1985, and served as president of Saratoga from January 1985 through February 22, 1985.

[9] Mr. Rodrigues denies that, prior to the making of this loan, he spoke with Winslow about making the loan. (J. Rodrigues, p. 1069.)

funded, Winslow should have been able to figure out that Rodrigues was involved in a venture with Cristina and Hall. (J. Rodrigues, p. 1072.)

The $400,000 loan was funded on March 26, 1984 by the issuance of two checks payable to the order of Messrs. Cristina and Hall: One for $300,000 (check no. 2396) and one for $100,000 (check no. 2397). (GX 2; DX 1.) On March 26, 1984 a checking account was opened for RH&C at Saratoga by Jess A. Rodrigues, Cristina, and Hall with a deposit of $450,000. $300,000 of the initial deposit was made by depositing check no. 2396, with the remaining $150,000 drawn against a checking account of Mr. and Mrs. Rodrigues' at Saratoga, bearing the name "J. A. Rodrigues & Venturer."[10] (GX 48; GX 49; Hall, pp. 633-47.)

The acquisition of the Cinnabar Property by the RH&C Venture was consummated on March 28, 1984. (GX 47, p. 38.) The closing documents show that the RH&C Venturers, (which included Mr. and Mrs. Rodrigues), took title to the Cinnabar Property on March 28, 1984, as shown by the deed recorded with the county land records. (GX 53.) After application of the San Francisco Federal loan proceeds, and the $1,000,000 loan made to the Venture by CHS (the proceeds of which were funded by the Crocker Loan), application

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[10] The issuance of this $150,000 check caused the J. A. Rodrigues & Venturers account to be overdrawn. (GX 76; GX 77; J. Rodrigues, pp. 1164-67.)

of tax prorations, a commission due Cristina & Hall, and credit for the $50,000 escrow deposit, the amount of cash due at the closing was $231,083.07. (GX 47, p. 38.) This amount was derived, in whole or in part, from the proceeds of the Saratoga Loan. This is because 1) the escrow documents show that the $231,083.07 amount was deposited into the escrow by a check drawn against the RH&C checking account at Saratoga (GX 47, p. 10), and 2) $300,000 of the $450,000 that had been deposited into the RH&C checking account was derived from the proceeds of the Saratoga Loan.

In 1984, RH&C leased the space in the Cinnabar Property warehouses, and Mr. and Mrs. Rodrigues executed various of the lease agreements on behalf of the lessor. (GX 41.) The Cinnabar Property remained fully leased during 1984 and 1985. (Hall, p.664.) RH&C commenced the disbursement of profits to each of the RH&C venturers on February 1, 1985, by issuing a check in the amount of $1,000 to Jess A. Rodrigues. (GX 55, p. 1.) Thereafter, RH&C made disbursements of profits virtually on a monthly basis, derived principally from the positive cash flow from the rental of the Cinnabar Property. (Cristina, p. 718.) Through July 1, 1987, RH&C made disbursements to Mr. and Mrs. Rodrigues in an aggregate amount of $216,000, including a disbursement of $170,000 on January 16, 1987, and a disbursement of $25,000 on April 1987. (GX 55; Cristina, p. 720; Hall, pp. 667-71.)

The Saratoga Loan became due and payable on March 26, 1985, but the loan was not paid off on or before that date. Instead, Saratoga refinanced the loan by making its loan no. 80-00518 in the principal amount of $400,000 (the "Refinance Loan"), which was to be due and payable on April 8, 1986. (GX 56; see GX 2 pp. 347-48; Cristina, pp. 752; Hall, pp. 674-75.) Again, Mr. and Mrs. Rodrigues concealed from Saratoga's loan committee and board of directors that they were involved with Cristina and Hall in the RH&C Venture. This conclusion is supported by a document in Saratoga's file for the Refinance Loan, entitled "Commercial and Misc. Underwriting Sheet," which shows that on March 26, 1985, the following three members of Saratoga's loan committee approved this refinancing: Jess A. Rodrigues, Gary Rodrigues, and David Huibregtse. (GX 2, pp. 324, 326; Huibregtse, p. 795-96.) Mr. Huibregtse currently serves as a vice president of Saratoga, and since 1986 has been the head of Saratoga's major loan department, which processes the paperwork for portfolio loans.[11] The document also states that the Refinance Loan was underwritten by Huibregtse. The testimony of Huibregtse also shows that Jess A. Rodrigues had not disclosed to him that Mr. and Mrs. Rodrigues were involved in the RH&C Venture. (Huibregtse, pp. 797-99.)

[11] Portfolio loans are conforming loans made by Saratoga which were generally retained in Saratoga's loan portfolio and were not marketed to secondary market agencies (the Government National Mortgage Association, Federal National Mortgage Association, and Federal Home Loan Mortgage Corporation).

The Refinance Loan was not paid off on or before the due date of April 8, 1986, but rather was extended by Saratoga until August 1, 1986, as memorialized by an executed extension agreement dated March 31, 1986. (GX 2, p. 344; Cristina, p. 733.) The extension was approved on March 25, 1986 by Mr. Huibregtse and Mr. McDonald, both members of the loan committee. (FX 2, P. 345.) McDonald's testimony suggests that, in March 1986, he was not aware that Mr. and Mrs. Rodrigues were involved in the RH&C Venture. (McDonald, pp. 905-8.) The Refinance Loan was paid off on or about September 5, 1986, with a cashier's check issued by Wells Fargo Bank. (GX 2, pp. 331-34.)

A consolidated loan in the amount of $5 million was made by General Electric Credit Corporation ("GECC") on January 14, 1987. (GX 58; Hall, p. 680.) The promissory note for this consolidation loan was signed by each of the RH&C venturers, including Mr. and Mrs. Rodrigues. (GX 57.) The loan proceeds were used, _inter alia_, to pay off the 1) $3 million loan from San Francisco Federal and 2) three Crocker line-of-credit loans aggregating $1 million (prior to such pay-off Crocker merged into Wells Fargo Bank). (_See_, escrow files of Valley Title Company, escrow no. 197673, GX 58.) Out of the GECC loan proceeds, $878,819.23 was disbursed to RH&C. (GX 58, p. 38; GX 59, pp. 3-4.) RH&C used a portion of these funds for disbursement to the venturers, and $170,000 of these funds were disbursed to Jess

Rodrigues by a check dated January 16, 1987, which was issued against the Cristina & Hall Clearing Account. (GX 55, p. 13; Cristina, pp. 720-30; see Answer para. 15.)

On September 23, 1987, Mr. and Mrs. Rodrigues sold their one-third interest in the Cinnabar Property to Mr. and Mrs. Gene Carter, co-trustees for $440,000 plus the assumption by the Carters of Mr. and Mrs. Rodrigues' obligations to GECC with respect to the consolidation loan. (GX 61, pp. 108, 33-53; Cristina, p. 735; Hall, pp. 690-91; see Answer para. 16(a).) The net amount of the sales proceeds disbursed to Mr. and Mrs. Rodrigues was $381,583.08. (GX 62, p. 1; GX 61, pp. 103, 108; GX 70.) As a result, Mr. and Mrs. Rodrigues received personal financial gain in the net amount of $447,583.08 by virtue of their participation in the RH&C Venture as follows:

RH&C profit distributions	$216,000.00
PLUS: Net proceeds of sale to Carters	381,583.08
LESS: Contribution to RH&C . . .	150,000.00
Total	$447,583.08

B. The Tate and Lazares Ventures

Mr. Rodrigues and Ronald M. Tate ("Tate") have been personally acquainted since about 1962. During the period 1980 through 1985, Mr. Rodrigues and Tate were friends and business associates, and from 1984 through 1986, Mr. and Mrs. Rodrigues lived across the street from Tate. (Tate, pp. 368-69, 372.) Prior to the spring of 1984, Mr. and Mrs. Rodrigues had been involved in various real estate investments with Tate and David L. Lazares ("Lazares"). Their first investment together was in the Los Gatos Golf and Country Club property in 1979 or 1980. (Lazares, pp. 190-95; Tate, 377; J. Rodrigues, p. 1039.)

Lazares testified that Mr. Rodrigues had once remarked to him and Tate that his sole ownership of a savings and loan was "like his own private cookie jar, he could borrow money, make deals, make transactions, and he could do whatever he wanted because he was the single shareholder of all the stock." (Lazares, p. 196; see, Tate, p. 375.)

Tate and Lazares are in the real estate development business. During the period including 1983 through 1985, they operated through two businesses owned by them: Regency Monarch Development Company ("Regency Monarch") and Regency Monarch Realty Management. (Tate, p. 367; Lazares, pp. 184-85.) By early 1985 Saratoga had made many loans to Tate and Lazares. (Winslow, p. 145.) Whenever Tate and Lazares were interested in obtaining a loan from Saratoga, they would discuss the proposal with Jess A. Rodrigues personally. (Lazares, p. 198; see, Winslow, p. 117.)[12]

In late March 1984, Regency Monarch entered into an agreement to purchase approximately 3.9 acres of real property in Marina, California (the "Marina Property"), for a price of $500,000, to close in or about November 1984. (GX 13-A; GX 13-B; Tate, pp. 380-81; Lazares, pp. 210-13; Answer para. 19.) Shortly after the purchase contract was entered into, Tate contacted Mr. Rodrigues to ask him whether he would be interested in participating in the purchase transaction. Several discussions followed, and an oral agreement was reached. (Tate, pp. 381-85.) Two written agreements were drawn up, but were never executed by the parties. The oral agreement provided for Mr. and Mrs. Rodrigues (together), Tate and Lazares to own or share one-third of the Marina Property, the costs associated therewith, and the profits or losses (the "Marina Venture"). (Lazares, pp. 217-18; Tate, pp. 391, 428; Answer para. 20.)

On November 5, 1984, the Marina Venture consummated its acquisition of the Marina Property, with record title being

[12] Tate testified that in or about 1984, Mr. Rodrigues told him that Tate had a line of credit with Saratoga for about $1.5 million, and Mr. Rodrigues' testimony corroborates this. (Tate, pp. 453; Rodrigues, p. 1119.) However, Winslow testified that he was not aware that Saratoga had in fact granted such a line of credit, and that at that time Saratoga did not have the facilities to make line-of-credit loans. (Winslow, pp. 118-19; see also, Huibregtse, p. 831.)

recorded in the names of Tate and Lazares, since the Mr. and Mrs. Rodrigues had asked not to take record title to the Marina Property. (GX 17 -- especially see, pp. 96; Tate, p. 403; see also, GX 23.) In fact, it was not until March 1985 so that a construction loan from Home Federal Savings and Loan of San Diego could be funded, that a deed was recorded in the county land records showing their interest in the Marina Property. (See Answer para. 28.) The down payment was funded with the proceeds of an unsecured loan made by Saratoga (Saratoga Loan No. 80-00473) in the amount of $456,000 (the "Saratoga Marina Loan"). Tate was the sole obligor on the promissory note, but he testified "Well, yes, I signed the note, but the venture was responsible for the repayment." (Tate, pp. 397-98, see, GX 17; GX 4; Lazares, pp. 230-31.) This is also supported by the fact that on Mr. and Mrs. Rodrigues' signed personal financial statement dated as of December 31, 1984, a loan payable was reflected in the amount of $152,000 (one-third of the Saratoga Marina Loan) under the heading "private loan, Marina land." (GX 72; J. Rodrigues, p. 1099.)[13]

The record indicates that Jess A. Rodrigues participated in the making of, and caused Saratoga to make the Saratoga Marina

[13] Although Mr. and Mrs. Rodrigues signed this personal financial statement and it was received by Home Federal on February 11, 1985, Mr. Rodrigues testified that he did not know of the existence of the $456,000 loan until March 15, 1985. (J. Rodrigues, p. 1179.) The ALJ stated that Mr. Rodrigues' testimony on this point is not credible.

Loan. Tate testified that "Jess" loaned him the money "in lieu of putting up the money himself, as I recall." (Tate, pp. 397-98; see also, p. 392.) Tate further testified that he never met with Larry Winslow concerning the Saratoga Marina Loan, but rather "my business was with Mr. Rodrigues." (Tate, p. 401.) In this regard, Mr. Winslow testified that while he prepared documentation for the Saratoga Marina Loan, he was informed about the loan by Mr. Rodrigues. (Winslow, p. 125; see also pp. 122-23.)

Mr. Rodrigues testified that he was on vacation in China during late October and early November 1984. (J. Rodrigues, p. 1100-09.) However, this does not conflict with the testimony of Tate and Winslow, because Mr. Winslow's testimony suggests that Mr. Rodrigues participated in the loan decision well before the Saratoga Marina Loan was funded and documented. In fact, Mr. Rodrigues testified that he had met with Tate on September 27, 1984, and at that time they talked about financing for the purchase of the Marina Property. (J. Rodrigues, p. 1104; Answer para. 22(b).) Mr. and Mrs. Rodrigues did not at any time prior to the making of the Saratoga Marina Loan inform Mr. Winslow or Saratoga's board of directors that they were involved in a venture with Tate and Lazares with respect to the Marina Property. (Winslow, pp. 126, 129, 149.)

In order to obtain funds for the development of the Marina Property by the building of an apartment complex, the Marina Joint Venture participants applied to Home Federal Savings and Loan Association of San Diego ("Home Federal") for a secured loan, the proceeds of which would be used to 1) pay off the Saratoga Marina Loan, and 2) finance the construction of the apartment complex (the "Home Federal Loan"). (Lazares, pp. 232-35; Tate, pp. 405-7.)

The Saratoga Marina Loan became due and payable on January 1, 1985. (GX 6, p. 125.) Since the Home Federal Loan would not be ready for funding by that date, Tate brought this to the attention of Mr. Rodrigues, who arranged to have Saratoga extend the due date of the Saratoga Marina Loan until March 1, 1985. (Tate, pp. 403-4.) Winslow prepared the documentation regarding the extension, and Tate and Winslow (on behalf of Saratoga) executed an agreement moving the extension to March 1, 1985. (GX 4, P. 94.) The Saratoga Marina Loan was paid off in late March 1985 with funds from the Home Federal Loan in the amount of $3,319,000. (GX 5, pp. 298-99; GX 16 pp. 64-65; Lazares, p. 231.) Tate, Lazares, and Mr. and Mrs. Rodrigues executed the promissory note for the Home Federal Loan. (GX 24 (promissory note).)

Documents in Home Federal's file for this loan show that no later than January 22, 1985, Home Federal was informed that Mr.

and Mrs. Rodrigues would be borrowers on the Home Federal Loan. (GX 16, pp. 2-3; see also p. 93, an internal memorandum of Home Federal suggesting that Mr. and Mrs. Rodrigues were intended as named obligors as early as November 1984.) Both Mr. and Mrs. Rodrigues signed various documents in connection with obtaining the Home Federal Loan. (GX 16, passim.) In addition, the borrowers were required to contribute $574,148.06 of their own funds to a collateral pledge account, and in early April 1985, Mr. and Mrs. Rodrigues contributed $200,000 of their funds to that account. (GX 18, p. 11; Lazares, pp. 240-41; Tate, pp. 405, 408-19.)

An 84 unit apartment complex was built on the Marina Property, and the units in the complex were quickly rented out. (Lazares, p. 242; Answer para. 29.) In March 1986 a permanent loan was obtained from Home Federal in the amount of $3,890,000. (GX 25; Lazares, p. 242; Tate, pp. 419-21.) Profits were disbursed to the venturers beginning on March 26, 1986, with a total of $157,663.33 disbursed to Mr. and Mrs. Rodrigues through June 10, 1986. (GX 19; Lazares, pp. 243-47; Tate, p. 424.)

On December 31, 1986, the Marina Property was sold to William Brooks and Verling Brooks for a price of $5,235,000. Out of the net sales proceeds a check in the amount of $322,037.87 was issued to Mr. and Mrs. Rodrigues. (GX 22 (see, pp. 4, 38, 39); Lazares, pp. 253-56; Tate, pp. 428-32; see, Answer para.

30.) **As a result** of their participation in the Marina Venture, Mr. and **Mrs.** Rodrigues received personal financial gain of at least $276,253.29, determined as follows:

Sales proceeds	. . . .	$322,037.87
PLUS:	Profit distributions .	157,663.33
LESS:	Contributions	203,447.91
	Net personal benefit .	$276,253.29

C. <u>The Joint Venture Regarding the Continental Can Property</u>

On or about June 26, 1985, Lazares was informed by a real estate agent that a Ron Sakauye held an option to purchase from the Continental Can Company by July 1, 1985, a parcel of real property with improvements in San Jose, California (the "Continental Can Property") for a price of $1,500,000. Mr. Sakauye was willing to sell the option for $50,000. (Lazares, p. 263; Tate, p. 442-44.) On the following day, Tate and Lazares met with Mr. Rodrigues. At that meeting, Tate and Lazares asked whether Rodrigues could arrange for Saratoga to lend them $1.6 million on or before July 1, 1985, so that Tate and Lazares could purchase the Continental Can Property. (Lazares p. 265.) That day, Tate and Mr. Rodrigues visited the Continental Can Property. (Tate, pp. 447-48.) Mr. Rodriguez then informed Tate that he would cause Saratoga to provide the $1.6 million in financing.

He also told Mr. Tate that "since we're doing this with Saratoga Savings, I would like to get some sort of an additional kicker for Saratoga Savings." (Tate, pp. 450-51; <u>see</u> Lazares, pp. 266-70.) When asked by Tate what he meant, Mr. Rodrigues got very specific, and said "I think it would be fair, in addition to us getting our interest rate on it, that we should get an additional $200,000." This would be secured by a note and deed of trust, interest free, to be paid at the time of the refinancing or sale of the property. (Tate, pp. 450-51; <u>see</u> Lazares, pp. 266-70.)

On June 28, 1985, Saratoga, with Mr. Rodrigues' participation, made and funded two unsecured $800,000 loans: one to Tate (Saratoga Loan No. 80-00559) and the other to Lazares (Saratoga Loan No. 80-00560) (collectively the "Continental Can Loans"). (GX 7; GX 8; GX 66; Huibregtse, pp. 826, 828, 833-34, 836.) The loan files for each of these loans contain a document entitled "Commercial and Misc. Underwriting Sheet," signed by Mr. Rodrigues, Warren G. McDonald and Mr. Huibregtse on June 28, 1985, which document indicates that the purpose of the loan was to purchase the Continental Can Property. (GX 7, pp. 191, 192; GX 8, p. 481.) (Mr. McDonald currently serves as the president and as a director of Saratoga. He was hired by Mr. Rodrigues as an executive vice president in February 1985 to replace Lawrence Winslow. Since March 1985 Mr. McDonald has been a director of Saratoga and a member of Saratoga's loan committee.) No mention is made of the $200,000 equity kicker, and no disclosure of its existence was made by Mr. Rodrigues to Mr. McDonald or Mr. Huibregtse. (McDonald, p. 928; Huibregtse, pp. 829, 834, 846.)

Mr. Rodrigues denies the existence of the equity kicker. (J. Rodrigues, p. 1122.) The ALJ determined that Mr. Rodrigues' denial that he had not negotiated the equity kicker is not credible. He concluded that Mr. Rodrigues failed to disclose the existence of the equity kicker because he decided that he would attempt to take a personal equity interest in the Continental Can Property in lieu of having Saratoga receive the $200,000 equity kicker. (ALJ Des. 28.)

On July 2, 1985 Tate and Lazares consummated their purchase of the Continental Can Property by using the $1.6 million loaned to them through the Saratoga Continental Can Loans. Within a day or two thereafter, Mr. Rodrigues arranged with Tate and Lazares for himself and his wife to obtain a one-third non-record ownership interest in the Continental Can Property in lieu of the Saratoga Equity Kicker. (Tate, pp. 459-61.) This was accomplished by Tate, Lazares, and Mr. and Mrs. Rodrigues (together) entering into an oral agreement (the "Continental Oral Agreement"), which provided for each party to share one-third of the ownership interest in the Continental Can Property, costs and expenses of acquiring and operating the property, and profits or losses. (Tate, p. 466; Lazares, pp. 269-73.) Mr. and Mrs.

Rodrigues reported their ownership in the Continental Can Property on their 1985 Federal Income Tax Return. (GX 73.)

Until about May 1987, Mr. and Mrs. Rodrigues concealed from Saratoga's management and board of directors that they had acquired an interest in the Continental Can Property in 1985. (See Huibregtse, p. 834; McDonald, p. 891.) When Federal and Sate savings and loan examiners commented on this matter to the management of Saratoga in May 1987, Mr. Rodrigues told McDonald that he had acquired an interest in the Continental Can Property in December 1985, not July 1985. (McDonald, pp. 919-21; GX 68; see GX 45 (letter from examiners).) This same false information was relayed to the board of directors of Saratoga. (See GX 69, p. 18.)

In October 1985 the Continental Can Loans were extended by Saratoga from October 1, 1985, to January 1, 1986, (GX 7, p. 183; GX 8, p. 495.), in order to allow Tate and Lazares more time to obtain financing from Home Federal. (Tate, pp. 494.) In December 1985 the Continental Oral Agreement was reduced to writing and executed by the parties as a "Preliminary Partnership Agreement, dated December 24, 1985. (GX 26.) Mr. Rodrigues asserts that he and Donna Rodrigues did not become partners in the Continental Can Joint Venture until December 1985. (J. Rodrigues, pp. 1121-22, 1184.) The ALJ concluded that Mr. Rodrigues' testimony on this point is not credible (ALJ Decision p.31.) because 1) it is contrary to the credible testimony of Tate and Lazares; and 2) it is inconsistent with information set forth in the Rodrigues' 1985 personal Federal Income Tax Returns. (GX 73 @ Statement 5, pp. 10-11.)[14]

Home Federal made a loan to Tate and Lazares in December 1985, in the amount of $3,564,000, secured by the Continental Can Property. (GX 30, pp. 58-59.) Mr. and Mrs. Rodrigues were not obligors on this loan. In this regard, Tate testified that Mr. Rodrigues had told him he did not want to go of record, but just wanted to get payment for his one-third interest at the end. (Tate, p. 469; see Lazares p. 287.) With the proceeds of the Home Federal loan, the Saratoga Continental Can Loans were paid off on December 27, 1985. (Lazares, p. 292; Tate, pp. 475-76.) Also on that date, the excess funds from the Home Federal loan

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[14] Mr. Rodrigues refused to produce this document to the FSLIC. First he refused to produce it (and other tax returns) in compliance with the FSLIC's investigative subpoena duces tecum dated May 12, 1988. The FSLIC obtained a Federal court order directing Rodrigues to comply with the subpoena, but he has not done so in light of a stay of that order issued in connection with his appeal of the lower order. FSLIC v. Jess A. Rodrigues, No. C-88-20472-WAI (N.D.Calif., subpoena enforcement order issued Nov. 28, 1988), appeal docketed, No. 89-15084, (9th Cir., Jan. 23, 1989)(concerning Fifth Amendment assertion). Mr. Rodrigues, again invoking his Fifth Amendment privilege, refused to produce this document, during the course of this proceeding, in response to the Government's First Request for Production of Documents. See, the Respondents' Response thereto dated April 7, 1989.

were disbursed to the joint venturers, with Mr. and Mrs. Rodrigues getting $143,000. (GX 31, pp. 5-6; Lazares, p. 291.)[15]

On April 15, 1986, the Continental Can Property was sold to Mr. and Mrs. Stan Davis, Trustees, for $3,300,000. (GX 33 (escrow file); see Answer para. 45(a).) Mr. and Mrs. Rodrigues received personal financial gain of approximately $224,559 from the sale of the Continental Can Property, determined as follows. The Continental Can Joint Venture Partners took part of the sales consideration in the form of a secured promissory note in the amount of $200,000, payable to the order of Tate, Lazares, and Jess A. Rodrigues and Donna R. Rodrigues. After payment of the Home Federal loan, Mr. and Mrs. Rodrigues received two checks in the amounts of $155,816.79 (GX 34, p. 44.), and $1,742.10 (GX 34, p. 45.) respectively. In addition, another $62,000 was disbursed to Mr. and Mrs. Rodrigues by the Continental Can Joint Venture. (GX 35, pp. 1-2.) Finally, Mr. and Mrs. Davis paid off their $200,000 promissory note (plus interest), and Lazares applied one-third of this amount (approximately $67,000) for the benefit of Mr. and Mrs. Rodrigues. (Tate, pp. 479-82; Lazares, pp. 296-302, 310.) Mr. and Mrs Rodriguez received approximately $343,559

[15] In early January the partners had to reimburse a portion of this distribution since it was more than should have been distributed. Thus Mr. and Mrs. Rodrigues reimbursed the joint venture $24,000 by issuing a check out of their JARDONA Investments checking account at Saratoga. (GX 32; Fleischman, pp. 959-60.)

of personal financial gain from their participation in the Continental Can Joint Venture as follows:

Net sales proceeds	$224,559
PLUS: December 1985 distribution	143,000
LESS: January reimbursement .	24,000
Net personal benefit . . .	$343,559

IV. Background of the Proceedings

On December 30, 1988, FSLIC issued its Notice of Intention to Prohibit and a Notice of Hearing (the "Notice"). The Notice charged that a) Mr. and Mrs. Rodrigues, directly or indirectly, singly and in concert: 1) caused Saratoga to violate the FSLIC's regulation prohibiting loans-to-affiliated-persons, codified at 12 C.F.R. § 563.43(b); or 2) engaged or participated in unsafe or unsound practices in connection with Saratoga; or 3) engaged in acts, omissions or practices which constitute breaches of their fiduciary duties as directors or officers of Saratoga; b) by reason of such violations, practices or breaches of fiduciary duties: 1) Mr. and Mrs. Rodrigues received financial gain; or 2) Saratoga suffered substantial financial damage; and c) such violations, practices or breaches of fiduciary duty, 1) involved personal dishonesty on the part of the Rodrigues', or 2) demonstrated a willful or continuing disregard for the safety or soundness of Saratoga. Between April 18 and April 26, 1989 the ALJ conducted a hearing on the charges against Mr. and Mrs.

Rodrigues, pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. 554-557, and the Bank Board regulations governing enforcement proceedings, 12 C.F.R. 509.1-509.22. After the evidentiary hearing ended, Enforcement and Counsel for Mr. and Mrs. Rodrigues filed their proposed findings of fact and conclusions of law, and the parties filed briefs and reply briefs. On July 17, 1989 the ALJ issued his Recommended Decision with Findings of Fact, Conclusions of Law, Discussion, and a Recommended Order ("Recommended Decision"). The Recommended Decision establishes the necessary elements for issuance of an order of prohibition under Section 1818(e) of the FDIA[16] and supports the ALJ's recommendation that the OTS issue an Order of Prohibition prohibiting Jess A. Rodrigues and Donna Rodrigues pursuant to § 1818(e) of the FDIA from participation in the affairs of Saratoga pursuant to § 1818(e)(3)(A) from voting, acting, or serving as directors, officers, or employees of Saratoga, or any other "FSLIC Insured Institution."[17]

On August 18, 1989, Enforcement filed with the Secretariat a document entitled "Notice of Substitution of Part, Motion for

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16 As noted under the Statutory Framework portion of this Final Decision and Order, the ALJ evaluated this matter under § 407(g) of the NHA, which was abolished by the FIRREA. However, the essential provisions of § 407(g) are now found in § 1818 of the FDIA.

17 The terminology corresponding to "FSLIC Insured Institution" as a result of FIRREA is any entity as set forth in Section 8(e)(7)(A), as amended by Title IX of the FIRREA, codified at 12 U.S.C. § 1818(e)(7)(A).

Expedited Issuance of Final Order; and Revised Proposed Form of Order" ("Notice of Substitution"). The Notice of Substitution explains certain changes in the Federal law regarding the instant enforcement proceeding due to the operation of the FIRREA. In summary, the Director of the OTS is substituted for the FSLIC as the appropriate party to determine whether a removal-and-prohibition order should be issued, and the Director of OTS has the power to issue such an order pursuant to Section 8(e) of the FDIA, 12 U.S.C. § 1818(e), as amended by FIRREA.

Subsequently, Mr. and Mrs. Rodrigues filed Exceptions to the Recommended Decision on August 21, 1989. Enforcement filed a Response to Respondents' Exceptions to Administrative Law Judge's Findings and Conclusions on September 5, 1989. While the Respondent's exceptions are numerous, they simply seek to amplify the factual findings of the ALJ to include additional non-material facts. Enforcement agrees with the legal conclusions of the Recommended Decision.

V. <u>Discussion</u>

As a result of the transactions describe above, Saratoga suffered approximately $1,067,395 in damages through the usurpation of corporate opportunities by the Respondents. All of the above transactions were completed in violation of the then existing Bank Board's, and current OTS regulations. In all of the transactions, Jess A. Rodrigues and Donna Rodrigues intentionally secured personal financial benefits for themselves to the detriment of Saratoga, causing Saratoga to make, unsecured loan transactions which made no economic sense for Saratoga without including the benefits derived from such transactions by the Respondents.

Flagrant and repeated disregard of the Bank Board regulations, unsafe and unsound practices, and breach of fiduciary duties of this nature by the Respondents warrant the imposition of the Director's enforcement measures. These actions evidenced a willful and continuing disregard for the safety and soundness of Saratoga. The ALJ found that:

> The actions of Mr. and Mrs. Rodrigues show that they perpetrated a fraudulent scheme of using "nominee loans" that redounded to their own personal benefit. They (1) surreptitiously orchestrated self-dealing transactions; (2) affirmatively concealed information from Saratoga's Board of Directors regarding the aforesaid practices, breaches of fiduciary duty, and violations; and (3) deceptively misinformed Saratoga's senior management about their role in the Continental Can Venture. Accordingly, the actions of Mr. and Mrs. Rodrigues in connection with the aforesaid violations, practices, and breaches of fiduciary duty involve "personal dishonesty" within the meaning of section 407(g) of the NHA.

(Recommended Decision at 42.)

The Director agrees for the reasons stated below that all the charges against Jess A. Rodrigues and Donna Rodrigues should be sustained.

A. The First Element: Committing Regulatory Violations, Breach of Fiduciary Duty, Engaging in Unsafe or Unsound Practices.

The first element of 12 U.S.C. 1818(e) has three alternative subparts, and the Government need only prove that one of the subparts has been established to satisfy the requirements of the element. The Director has determined that the misconduct of Mr. and Mrs. Rodrigues satisfies all three subparts of the first element.

1. Jess A. Rodrigues and Donna Rodrigues Participated in Violations of Regulations

a. Legal Standard

12 C.F.R. § 563.43(b) prohibits the making of loans to "affiliated persons." During the period from March 1984 through June 1985, paragraph (b)(1) of that regulation provided, in pertinent part, as follows: "(1) No insured institution or subsidiary thereof may, either directly or indirectly, make a loan to any affiliated person of such institution . . . " 12 C.F.R. § 563.43(b)(1)(1985 & 1986). During the relevant period,

the FSLIC's definition of the term "affiliated person" provided in pertinent part as follows:

> (d) Any corporation or organization (other than the insured institution or a corporation or organization through which the insured institution operates) of which a director, officer or controlling person or such institution: . . .
> (2) is a general partner; [or]
> (3) Is a limited partner who, directly or indirectly either alone or with his spouse and the members of his immediate family who are also affiliated persons of the institution, owns an interest of 10 percent or more in the partnership (based on the value of his contribution) or who, directly or indirectly with other directors, officers, and controlling persons of such institution and their spouses and their immediate family who are also affiliated persons of the institution, owns an interest of 25 percent or more in the partnership; . . .

12 C.F.R. § 561.29 (1985 & 1986).

b. Conclusions of Law on Violations of Regulations

Jess A. Rodrigues and Donna Rodrigues caused Saratoga to enter into transactions in violation of the FSLIC insurance regulations.[18] Mr. and Mrs. Rodrigues' involvement with respect to Saratoga loans 80-00312 (later no. 80-00518), 80-00473, 80-00559, and 80-00560 (collectively the "Subject Loans") caused Saratoga, on numerous occasions, to violate the FSLIC's

[18] The regulations cited as having been violated were in existence at the time the violations occurred, and were administered by the FSLIC. The enactment of FIRREA has created the OTS as the agency responsible for administration of the regulations cited herein.

regulation prohibiting the making of loans to "affiliated persons," codified at 12 C.F.R. § 563.43(b). This is demonstrated by a brief review of the Subject Loans.

(1) Cinnabar. The record is clear that $300,000 of the funds from loan 80-00312 (refinanced by loan 80-00518) were (a) deposited into the jointly owned "RH&C" account of the venture, of which Mr. and Mrs. Rodrigues were general partners owning a one-third share, and (b) used in connection with the activities of the RH&C venture, including the acquisition of the Cinnabar Property;

(2) Marina. The record is clear that the proceeds of Saratoga loan no. 80-00473 were used by the Marina venturers, including the Respondents, to fund their acquisition of the Marina Property; and

(3) Continental Can. The record shows that on or about July 2, 1985, Mr. and Mrs. Rodrigues became general partners of the Continental Can venture. There is no question that Saratoga made the two $800,000 loans (80-00559 and 80-00560) for the purpose of providing financing for Tate and Lazares' purchase of the Continental Can Property on July 2, 1985, and that the aggregate $1.6 million was so used. Effective as of July 2, 1985, those two loans were treated as obligations of the Continental Can

venture, which included the Respondents as one-third general partners.

Based upon the foregoing, it is clear that the Subject Loans constituted loans made by Saratoga that, either directly or indirectly, were made to affiliated persons. This is the proper conclusion because the phrase "either directly or indirectly" in section 563.43(b)(1) must be interpreted in a meaningful manner so as to effectuate the remedial purposes of the provision. The promissory notes for the Subject Loans did not identify either 1) Mr. and Mrs. Rodrigues or 2) the joint ventures as the obligors for the loans. Nevertheless, the plain meaning of the prohibition against "indirectly" making a loan to an affiliated person clearly connotes that the prohibition applies to loans where the affiliated person is not the obligor named on the promissory note for the loan. With respect to the Marina and Continental Can ventures, the record is clear that all the venturers of those joint ventures, including the Respondents, not only benefitted from the related Saratoga Loans (80-00473, 80-00559, and 80-00560), but also were responsible for repayment of the loans. With respect to the Cinnabar transaction, it is clear that 1) $300,000 of the proceeds of Saratoga loan no. 80-00312 were deposited into a checking account jointly owned by Mr. Rodrigues, Mr. Hall, and Mr. Cristina, and 2) those $300,000 were used for the benefit of the joint venture, including assisting the acquisition of the Cinnabar Property.

Mr. Rodrigues participated in the making of, and effectively caused his subordinates at Saratoga to make, the Subject Loans, which are "nominee loans." Accordingly, Mr. Rodrigues caused Saratoga to violate 12 C.F.R. § 563.43(b) in connection with those loans.

Mrs. Rodrigues is deemed to be responsible for these regulatory violations due to the operation of then in effect section 407(r)(3) of the NHA, 12 U.S.C. § 1730(r)(3)(1985 & 1986).[19] That section provided as follows: "As used in subsection (g) of this section, the term 'violation' includes without limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation." 12 U.S.C. § 1730(r)(3). The record shows that the actions of Mr. and Mrs. Rodrigues brought about the regulatory violations, unsafe or unsound practices, and breaches of fiduciary duty; that Mrs. Rodrigues knew of these wrongdoings, as she knew of the existence of the Subject Loans and the manner in which they funded the joint ventures; and Mrs. Rodrigues substantially participated in various activities in support of the joint ventures. In addition, her co-membership in each of the joint ventures was one cause of those ventures being deemed affiliated persons, because

[19] This provision has been moved by the FIRREA to 12 U.S.C. 1813(V).

she was an officer of Saratoga at the relevant times. Accordingly, Mrs. Rodrigues engaged in actions (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting the violations of 12 C.F.R. § 563.43(b)(1985 & 1986). See Landy v. FDIC, 486 F.2d 139, 162 (3rd Cir. 1973) (elements of "aiding and abetting" in civil cases).

2. Jess A. Rodrigues and Donna Rodrigues Breached Their Fiduciary Duty to Saratoga

a. Legal Standard

Directors and officers of Federally insured depository institutions owe fiduciary duties of loyalty and care to the institutions with which they are associated. See, 12 U.S.C. § 1730(g)(1)(1985 & 1986); 12 U.S.C. § 1818(e)(iii); 12 C.F.R. § § 571.7, 571.9; Memorandum R-62a, reprinted in SUPERVISORY SERVICE (U.S. League) Par. 9875 (director responsibilities).

The FSLIC's final decision in the Matter of M discussed these fiduciary duties as follows:

> Directors and officers occupy a position of trust and must safeguard the interest of their depositors and shareholders. They have the duty to act diligently, prudently, honestly, and carefully in carrying out their responsibilities and must ensure their institution's compliance with state and federal banking laws and regulations.

No. 87-765 at 42; see First National Bank of La Marque v. Smith, 436 F.Supp. 824, 831 (S.D.Tex. 1977), aff'd in part, vacated in part on other grounds, 610 F.2d 1258 (5th Cir. 1980); Gadd v. Pearson, 351 F.Supp. 895, 903 (M.D.Fla. 1972); also see Brickner v. FDIC, 747 F.2d 1198 (8th Cir. 1984)(upholding removal order); Rankin v. Cooper, 149 Fed. 1010, 1013 (C.C.W.D.Ark. 1907) (duties of bank directors). The courts also have held that the fiduciary duties of directors and officers of a depository institution require "standards of probity and fidelity more lofty than those of the 'market place.'" Fleishhacker, 109 F.2d at 543, 547 (9th Cir. 1940), reh'g denied, 311 U.S. 665, reh'g denied, 311 U.S. 726 (1940); FSLIC v. Huff, 237 Kan. 873, 704 F.2d 372 (Kan. 1985); see W. Fletcher, Cyclopedia § 838, pp. 838-39.

The directors and officers of a stockholder-owned depository institution owe their fiduciary duties not only to the stockholders of the institution but also to the institution and its depositors. In the Matter of M; 12 C.F.R. § 571.7, 571.9 (1988); see In re a Bank Director, No. 84-58e; Fletcher, Cyclopedia § 838. The FDIC, in its decision regarding its issuance of a removal order under 12 U.S.C. § 1818(e), ruled as follows: "Misappropriation of Bank funds for one's own use constitutes a breach of the fiduciary duty of loyalty to a bank, its depositors and shareholders." No. 84-58e, at 6024.

With regard to the fiduciary duty owed by directors and officers to their insured institutions, it has been the longstanding policy of the FSLIC that self-dealing transactions by such directors and officers constitute a breach of that duty of loyalty. The FSLIC's conflict-of-interest policy statement in effect at the time these transactions were entered into, and which was first published in the Federal Register in November of 1970, provides in pertinent part as follows:

> [e]ach director, officer, or other affiliated person of an insured institution has a fundamental duty to avoid placing himself in a position which creates, or which leads to or could lead to, a conflict of interest or appearance of a conflict of interest . . .

12 C.F.R. § 571.7 (1988).

In The Directors Guide: The Role and Responsibilities of a Savings Institution Director, 55 (FHLBank of San Francisco 1988), the duty of loyalty is explained as requiring a director to make "fair and unbiased decisions in the best interests of the institution." See also, In the Matter of V, No. 83-210 (FSLIC final decision dated Feb. 6, 1986)(conflict of interest existed for director who was instrumental in causing the institution to make improper loans).

A director's or officer's fiduciary duty may also be violated by an usurpation of a corporate opportunity. 12 C.F.R. § 571.9(a)(1988) discusses the concept of corporate opportunity and notes that it is a breach of the fiduciary relationship where a person takes advantage "of a business opportunity for his own or another persons' personal profit or benefit." See also, Goodman v. Perpetual Building Association, 320 F.Supp. 20 (D.D.C. 1970)(usurpation of corporate opportunity of an S&L); SEC v. Insurance Securities, 254 F.2d 642, 649-50 (9th Cir. 1958), cert. denied, 358 U.S. 323 (1958).

In the context of a savings institution, a corporate opportunity may only be "usurped" if it was an opportunity that the association could have taken advantage of based upon its own powers. In the "direct investment" arena, that is, investments in real estate through joint ventures, as is the case here, associations were at the time the transactions in this case were entered into, and still are, authorized to make such investments directly or though service corporations. See, 12 C.F.R. § 563.9-8, 12 C.F.R. § 545.74.

b. Conclusions of Law on Breaches of Fiduciary Duty by Mr. and Mrs. Rodrigues

In the instant case, the record establishes that Mr. and Mrs. Rodrigues are responsible for causing Saratoga to make loans that inured to their own benefit. In connection with the making of Saratoga loans numbered 80-00312 (Cinnabar) and 80-00473 (Marina), Mr. Rodrigues informed the named obligors that he would cause Saratoga to make the loans, before Saratoga's nonresidential loan officer (Winslow) even knew of the loan requests. In both instances Mr. Rodrigues had a personal interest in the making of the loans, because he was a partner in the real estate joint ventures that would benefit from the loans. Similarly, it is also clear that Mr. Rodrigues participated in the decisions to 1) refinance loan 80-00312 (which became 80-00518) and 2) to extend the due date for loan 80-00473. Accordingly, at each of these times Mr. Rodrigues was faced with a conflict of interest. Mr. Rodrigues, however, did not 1) recuse himself from participating in the loan decisions, 2) make full disclosure of his personal interest to either Saratoga's board of directors or committee, and 3) have the disinterested members of those deliberative bodies decide whether the making of those large dollar amount unsecured loans would be in the best interests of Saratoga. By failing to take these actions the Respondents engaged in improper self-dealing transactions, and thereby breached their fiduciary duty of loyalty to Saratoga and its depositors.

The Rodrigues' also violated their fiduciary relationship with Saratoga by usurping corporate opportunities. In connection with the Continental Can transaction, they usurped an equity-kicker which was originally meant to be for Saratoga. With respect to both the Cinnabar and Marina transactions, they usurped ownership interests in the underlying properties, without first providing full disclosure of the opportunities to

Saratoga's board of directors or its loan committee. They later aggravated these breaches, when without disclosure of their involvement in the Cinnabar and Marina ventures, they involved Saratoga as an unsecured lender.

The record indicates that in about early 1984 Saratoga began originating loans which would be retained in its loan portfolio instead of being sold to the secondary market. (Winslow, p. 70; McDonald, p. 874; Recommended Decision at 3.) Included in this category of loans were: 1) construction loans; 2) loans to finance the acquisition of undeveloped land; 3) unsecured loans; and 4) loans in large dollar amounts. During 1983 through early 1985 Saratoga made few unsecured loans. (Recommended Decision at 3.) Also since 1984, Saratoga has made direct investments in real estate projects, either directly or though a subsidiary, by participating in real estate joint ventures. (Winslow, pp. 74, 117; Tate, p. 435.) Saratoga has made real estate loans with "equity kicker" provisions. (J. Rodrigues, p. 1139.) Clearly, Saratoga and its subsidiaries were empowered to make loans of the type contemplated by the Subject Loans. 12 C.F.R. § 563.9-8, 12 C.F.R. § 545.74.

The regulations at 12 C.F.R. § 571.9 which concern corporate opportunities state as follows:

> It is a breach of this [corporate opportunity doctrine] for [a director or officer] to take advantage of a business opportunity for his own or another person's personal profit or benefit <u>when the opportunity is within the corporate powers of the institution or a service corporation of the institution and when the opportunity is of present or potential practical advantage to the institution</u>. If such a person so appropriates such an opportunity, the institution or service corporation may claim the benefit of the transaction or business and such person exposes himself to liability in this regard. In determining whether an opportunity is of present or potential practical advantage to an institution, the [FSLIC] will consider among other things, the financial, managerial, and technical resources of the institution and its service corporation, and the reasonable ability of the institution directly or through a service corporation to acquire such resources. (Emphasis added.)

It is clear therefore, that a corporate opportunity of Saratoga's was usurped by Mr. and Mrs. Rodrigues. The association had a clear record of making such "risky" loans. In fact, as long as the powers of the association enabled it to make such loans, the board of directors should at least have been given the opportunity to consider the merits of the loan transactions and could have then made informed decisions accordingly. As it was, Saratoga actually participated in the major risks associated with the transactions without being accorded the potential benefits, by making unsecured loans on these joint ventures, and granting extensions thereon.

3. **Jess A. Rodrigues and Donna Rodrigues Engaged or Participated in Unsafe or Unsound Practices**

a. **Legal Standard**

Federal banking law has constrained "unsafe or unsound practices" since 1933, Banking Act of 1933, § 30, 48 Stat. 162, 193, and it currently is a phrase included in the enforcement power statutes for all Federal depository institution regulators. See, 12 U.S.C. § 1818. In general, an "unsafe or unsound practice" embraces any "action or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk of loss or damage to an institution, its shareholders, or the agencies administering the insurance funds." Horne Memorandum, reprinted in Hearings Before the House Comm. on Banking and Currency on S. 3158 and S. 3695, 89th Cong., 2d Sess. 49-52 (1966); also see 112 Cong. Rec. 29,984 (1966) (testimony of J. Horne).

FSLIC's longstanding policy has been that conflict-of-interest situations and usurpations of corporate opportunities are inherently unsafe or unsound practices. 12 C.F.R. § § 571.7

(conflicts of interest), 571.9 (usurpation of corporate opportunities) (1988).

b. **Conclusions of Law on Unsafe and Unsound Practices by Mr. and Mrs. Rodrigues**

In connection with the Cinnabar, Marina, and Continental Can transactions, Mr. and Mrs. Rodrigues perpetrated a scheme whereby Mr. Rodrigues caused Saratoga to make "nominee loans" that redounded to the benefit of Mr. and Mrs. Rodrigues. Also in connection with these transactions, Mr. and Mrs. Rodrigues appropriated for their personal benefit corporate opportunities of Saratoga, as demonstrated above. This pattern of insider abuse constitutes an unsafe or unsound practice.

B. **The Second Element: Substantial Financial Loss to the Insured Institution or Financial Gain to the Respondents**

1. Legal Standard

The second prong of § 407(g)(1) (§ 1818(e)(B) of the FDIA, which is now applicable due to FIRREA) requires the showing that either the Institution suffered financial loss or the parties perpetrating a violation have received financial gain.

2. Conclusions of Law on Financial Loss to the Institution or Financial Gain to the Respondents

Mr. and Mrs. Rodrigues received financial gain by reason of their violations established above. Clearly, they have received financial gain by virtue of their participation in the RH&C, Marina, and Continental Can Ventures, and in fact received aggregate personal financial gain of $1,067,395. (GF 77.) In addition, Saratoga suffered financial loss due to their activities which usurped the very tangible "equity-kicker" which amounted to $200,000, and the partnership interest taken in connection with the Cinnabar and Marina transactions. Thus, the gain in excess of $1 million received by the Respondents could have -- and should have -- been received by Saratoga. Accordingly, by engaging in their wrongdoing Mr. and Mrs. Rodrigues caused Saratoga to suffer financial damage in excess of $1 million, which is quite substantial.[20]

C. The Third Element: Personal Dishonesty or Willful or Continuing Disregard for the Safety or Soundness of the Institution

The third element of the grounds for removal require a showing that the violations, practices or breaches of fiduciary

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[20] Mr. Rodrigues, as the indirect sole shareholder of Saratoga through CHS would not necessarily have been entitled to receive this amount in the form of dividends. The issuance of dividends is the subject of regulation. See, e.g., 12 C.F.R. § 584.5 (advance notice of proposed dividend declarations). Also, Saratoga is subject to capital requirements, and thus may not have been in the position to legally issue dividends. See, 12 C.F.R. § § 561, 563, 567.

duty, 1) involve personal dishonesty on the part of the Respondents; or 2) demonstrate a willful or continuing disregard for the safety or soundness of the institution. (12 U.S.C. § 407(g)(1)(1985 & 1986); see also, 12 U.S.C. § 1818(e)(1)(C).

1. Personal Dishonesty

a. Legal Standard

The "personal dishonesty" provision was enacted pursuant to the Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-965, 80 Stat. 1028 ("FISA"). Legislative history makes it clear that the provision includes officials causing institutions to make excessive loans that redounded to their own benefit. See, 112 Cong. Rec. § 2032 (Aug. 22, 1966). Another device cited as dishonest is the use of "nominee loans." H.R. Rep. No. 1137, 98th Cong., 2d Sess. 25-26 (1984).

b. Legal Conclusion Regarding Personal Dishonesty

The series of loans entered into by Saratoga set forth in the record included nominee loans aggregating more than $2.4 million. This pattern of nominee loans clearly falls into the category of personal dishonesty. The nominees argue that the loans were extended on the basis of the creditworthiness of the nominees. This argument is specious however, when one looks at each loan in context. Loan proceeds were clearly used for the benefit of all joint venturers, including Mr. and Mrs. Rodrigues, and testimony made it clear that while the nominees signed as obligors, repayment was clearly expected by such obligors to come from the joint venture as a whole. In addition, testimony makes it clear that Mr. Rodrigues wanted the loans to be made without his participation going of record.

2. Willful or Continuing Disregard for Safety or Soundness

a. Legal Standard

"Willful disregard" and "continuing disregard" are two distinct, alternative standards for removal and/or prohibition. While "continuing disregard" requires some showing of knowledge of wrongdoing, it does not require proof of the same degree of intent as "willful disregard." *See*, *Brickner v. FDIC*, 747 F.2d 1198, 1202-03 (8th Cir. 1984).(Construction of "willful or continuing disregard" language in 12 U.S.C. § 1818(e)). The "continuing disregard" standard is a mental state short of "willfulness" and similar to "recklessness."

"Willful disregard" for the safety or soundness of an insured institution is established when an individual: a) purposely (as opposed to accidentally) commits an act and that act evidences neglect or lack of thoughtful attention to the institution's safety or soundness, or b) acts with plain indifference to the institution's safety or soundness. In the case of a remedial statute such as section 407(g), the only requirement is that the individual acted intentionally in committing the acts which constitute the violation and was aware of or knew what he was doing. See Arthur Lipper Corp. v. SEC, 547 F.2d 171, 180 (2d Cir. 1976), cert. denied, 434 U.S. 1009 (1978).

b. **Legal Conclusion Regarding Willful or Continuing Disregard for Safety or Soundness**

In the instant proceeding, Mr. and Mrs. Rodrigues are responsible, in at least four instances, for causing Saratoga to engage in unsafe or unsound practices. This is because they are responsible for causing Saratoga to make the four unsecured Subject Loans, aggregating more than $2.6 million, in violation of the FSLIC's regulations and in breach of their fiduciary duty of loyalty. Accordingly, the misconduct of the Respondents evidences "continuing disregard" for the safety or soundness of Saratoga.

In addition, the record establishes that Mr. and Mrs. Rodrigues' misconduct is of the type that establishes a "willful disregard" for safety or soundness under the more stringent test. Either Mr. and Mrs. Rodrigues intentionally disregarded the FSLIC's conflict-of-interest regulations and their fiduciary duties or they were plainly indifferent to the limitations imposed thereby. This is because, before Mr. and Mrs. Rodrigues orchestrated their activities of self-dealing transactions, they had (or should have had) personal knowledge that such activity would be 1) violative of the FSLIC's conflict-of-interest regulations and policy statements and 2) in breach of their fiduciary duties of loyalty owed to Saratoga and its depositors. (See, GF 81.) In light of the foregoing, the third element of Section 407(g)(1) (and new § 1818(e)) has been established.

D. Exceptions Raised by Respondents to ALJ Findings of Fact and Decision

In their Exceptions to the Recommended Decision, Mr. and Mrs. Rodrigues make several arguments against the ALJ's legal and factual conclusions. They contend that the ALJ failed to address nine legal issues, however we may dispose of their arguments as follows: 1) They argue that 12 C.F.R. § 563.43 regarding loans to affiliates did not prohibit Saratoga from making the loans to the various joint ventures of which Mr. and Mrs. Rodrigues were partners. However, it is clear that the term "affiliated persons" as that term is defined at 12 C.F.R. § 561.29 clearly prohibits loans to "organizations" (which the joint ventures clearly were) which have an officer of director as a general partner (which the Rodrigues' also clearly were).

2) They argue that FSLIC's failure to specifically charge Respondents with violations of 12 C.F.R. § § 571.7 (conflicts of interest), 571.9 (corporate opportunity) in the Notice of Intention to Remove and Prohibit is contrary to FSLIC rules of procedure and/or constitutes a denial of due process. This was

dealt with by the ALJ (Appendix Finding 2) which noted that the charges specifically referred to a breach of fiduciary duty which is fair notice of a conflict-of-interest charge. The ALJ's determination that there was a violation of NHA section 407(g)(1) is based upon violations of the FSLIC conflict-of-interest regulation codified at 12 C.F.R. § 563.43(b), and it is not based on violations of the policy statements at 12 C.F.R. § § 571.7 and 571.9. The ALJ also found that Enforcement established the existence of the breach-of-fiduciary duty element of NHA section 407(g)(1). References in Enforcement's filings to 12 C.F.R. § § 571.7 and 571.9 merely support Enforcement's legal analysis demonstrating that Respondents breached their fiduciary duties by a) usurping corporate opportunities of Saratoga, and b) engaging in self-dealing transactions without proper disclosure to Saratoga's board of directors, officers, or loan committee. Accordingly, the Respondents were clearly on notice as to the breach-of-fiduciary-duty/conflict-of-interest charge.

3) Respondents argue that the real estate investments were risky and therefore unsuitable for Saratoga. This argument ignores the fact that Saratoga assumed the primary risks of the investments anyway by making unsecured loans, and that in the past, Saratoga had made other real estate loans and had gotten some equity kickers in connection with such loans. In addition, with respect to the Continental Can Property venture, the

Respondent's in effect secured for themselves an equity kicker which they had initially negotiated for Saratoga.

4) Respondents argue that Enforcement did not adduce sufficient evidence of "personal dishonesty" on the part of Jess Rodrigues to meet its burden of proof. However, the ALJ Recommended Decision clearly establishes a fraudulent scheme involving nominee loans, improper loans, and failures to disclose.

5) Respondents contend that Enforcement failed to adduce sufficient evidence of "personal dishonesty" of Donna Rodrigues to meet its burden of proof. The record however is clear that Donna Rodrigues participated in, counseled, and/or aided or abetted the activities of her husband while she was a fiduciary of Saratoga, and accordingly had a duty to disclose or see to it that disclosure was made of their interests in the various loan transactions.

6) Respondents contend that the "safety or soundness" of Saratoga was not compromised by any of the loan transactions. The ALJ clearly determined that the record established safety and soundness violations as a result of the conflict-of-interest transactions and usurpations of corporate opportunities entered into by the Respondents, which are deemed by regulation inherently unsafe and unsound.

7) Respondents contend that Enforcement failed to establish that the practices in question, if continued, would entail an abnormal risk of loss or damage to Saratoga, and were therefore unsafe or unsound practices. These loans were the function of insider transactions, which have historically contributed to the demise of numerous financial institutions. As unsecured real estate venture loans the record clearly establishes that such practices carried abnormal risk of loss.

8) Respondents contend that the record does not establish that Jess A. Rodrigues showed a "willful or continuing disregard" for the safety or soundness of Saratoga. The Recommended Decision discusses this allegation by noting "[t]he actions and inactions of both Jess A. Rodrigues and Donna Rodrigues in connection with the aforesaid violations, practices, and breaches of fiduciary duty demonstrate a 'willful and continuing disregard for the safety and soundness' of Saratoga." (Recommended Decision at 42 (emphasis added)).

9) Respondents contend that the record does not establish that Donna Rodrigues showed a "willful or continuing disregard" for the safety or soundness of Saratoga. Again, the record clearly establishes that she showed a "willful or continuing disregard" for the safety or soundness of Saratoga by her

participation in the loan transactions, and her failure to disclose her participation to Saratoga.

VI. Order

No. 89-447

Date: December 5, 1989

OFFICE OF THRIFT SUPERVISION

IT IS ORDERED THAT

1. Jess A. Rodrigues and Donna R. Rodrigues each are removed from any and all positions they currently hold as directors and/or officers of Saratoga Savings and Loan Association, San Jose, California ("Saratoga");

2. Jess A. Rodrigues and Donna R. Rodrigues each are prohibited from participating in any manner in the conduct of the affairs of Saratoga and any and all subsidiaries or holding companies affiliated with such savings association, including (but not limited to), California Housing Securities, Inc. ("CHS"), the holding company of Saratoga;

3. Without the prior written approval of the OTS (and, if appropriate, another Federal financial institutions regulatory agency), Jess A. Rodrigues and Donna R. Rodrigues shall not hold any office in, or participate in any manner in the conduct of the

affairs of any institution(s) or other entity as set forth in Section 8(e)(7)(A) of the Federal Deposit Insurance Act, as amended by Title IX of the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA")(codified at 12 U.S.C. § 1818(e)(7)(A)). Pursuant to Section 8(e)(6) of the FDIA, as amended by Title IX of FIRREA (codified at 12 U.S.C. § 1818(e)(6)), conduct prohibited by this Order includes, inter alia, the solicitation or exercise of any voting with respect to any securities issued by any insured depository institution; and

4. In order to 1) effectuate the requirements of this order, and 2) allow Saratoga and CHS to continue to conduct their corporate affairs without undue difficulty, it is necessary for the voting rights attendant to the outstanding stock of CHS currently controlled by Jess A. Rodrigues, to be placed in the control of one or more persons other than Jess A. Rodrigues or Donna R. Rodrigues. Accordingly, Jess A. Rodrigues, no later than five business days following service of this order on him, shall a) execute a proxy in the form set forth below, and b) deliver said proxy to the president or secretary of CHS, and c) deliver a copy of the executed proxy to the Director of Enforcement at the Office of Thrift Supervision at 1700 G Street, N.W., Washington, D.C. 20552.

Jess A. Rodrigues, the owner of all of the outstanding stock of California Housing Securities, Inc. ("CHS"), a California corporation that is the holding company of Saratoga Savings and Loan Association, San Jose, California, (the "Association") hereby appoints as my proxy the board of directors of CHS, to vote all stock of CHS with respect to any and all matters that may come before any meeting of the stockholders of CHS and any adjournments thereof.

The aforesaid board of directors shall vote the aforesaid stock in CHS in a manner that in their informed best judgement best serves the interests of the Association and its depositors. All such decisions of the board of directors shall i) be made at one or more meetings of said board of directors, duly called and held, at which a quorum was present, and ii) be reflected in the corporate minute book of CHS.

This proxy may not be revoked except with the prior written consent of the Office of Thrift Supervision, an agency of the United States Government, which has directed the execution and delivery of this proxy pursuant to an order issued under Section 8(e) of the Federal Deposit Insurance Act, as amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified at, 12 U.S.C. § 1818(e)).

On this __________ day of __________________, 19__, CALIFORNIA HOUSING SECURITIES, INC., hereby executes this proxy.

____

Jess A. Rodrigues

END OF FORM OF PROXY

IT IS SO ORDERED on this 5th day of December, 1989.

DIRECTOR, OFFICE OF THRIFT SUPERVISION

By

____

EXHIBIT I

UNITED STATES OF AMERICA
Before The
FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

In the Matter of)
)
Jess A. Rodrigues)
and)
Donna A. Rodrigues)
)

Re: FHLBB Res. No. 88-1564

DECISION

The Administrative Law Judge hereby submits his Findings of Fact, Conclusions of Law, and Recommended Decision. The conclusions of law are supported by an opening and reply briefs of the Office of Enforcement which briefs are incorporated by reference.

The findings of fact are supported by (1) the testimony and exhibits received into evidence during the course of the evidentiary hearing of this matter held before the Administrative Law Judge between April 18, 1989 and April 26, 1989, and (2) certain of the admissions of the respondents set forth in their Answer. The Government commenced this proceeding by issuing to the Respondents a Notice of Intention to Remove and Prohibit dated December 30, 1988.

The Administrative Law Judge recommends that the Federal Savings and Loan Insurance Corporation issue a removal-and-prohibition order to the Respondents pursuant to section 407(g) of the National Housing Act, as amended ("NHA"), 12 U.S.C. §1730(g). The order properly may be issued based upon the findings of fact and conclusions of law that follow.

I

FINDINGS OF FACT

A. Background

Saratoga Savings and Loan Association

1. Saratoga Savings and Loan Association ("Saratoga") is a California corporation, that in 1983 was licensed by the California Department of Savings and Loan ("CDSL") to conduct the business of a savings and loan association. Its main office is located in San Jose, California. (Answer, Par. 2(a); GX 10). As a California-chartered savings and loan, Saratoga is subject to examination and supervision by the CDSL. (See Newsom, p. 966).

2. On or about April 15, 1983, the FSLIC, an agency of the United States Government, granted Saratoga Federal deposit insurance pursuant to Title IV of the NHA, 12 U.S.C. §§ 1724 - 1730i. (Answer, Par. 2(b)). As a FSLIC-insured institution, Saratoga is subject to examination and supervision by the FSLIC.

3. Saratoga commenced operations on or about April 18, 1983, and it remains in operation through the date hereof. During that period the operations and activities of Saratoga and its directors, officers, and employees have been subject to the numerous Federal laws, rules, and regulations applicable to all FSLIC-insured depository institutions. (Answer, Par. 3). Included among such Federal laws, rules, and regulations are the FSLIC's conflict-of-interest regulations, codified at 12 C.F.R. §§ 563.40 - 563.44, and the Statements of Policy, codified at 12 C.F.R. § 571.7 (conflicts of interest) and § 571.9 (usurpation of corporate opportunity).

4. During the period of April 1983 through early 1984 Saratoga's lending operations for the most part concerned the origination of loans, in amounts less than $100,000, secured by 1-to-4-family residential real estate ("Conforming Loans"). These Conforming Loans qualified for purchase by the secondary market agencies known as the Government National Mortgage Association ("GNMA"), the Federal National Mortgage Association ("FNMA"), and the Federal Home Loan Mortgage Corporation ("FHLMC"). (See, e.g., Winslow, pp. 54-55, 65-67).

5. In about early 1984 Saratoga began originating loans other than Conforming Loans, and Saratoga personnel refer to these loans as "Portfolio Loans," because they generally were retained in Saratoga's loan portfolio instead of being sold to the secondary market. (Winslow, p. 70; McDonald, p. 874.) Included in this category of Portfolio Loans are: (1) construction loans; (2) loans to finance the acquisition of undeveloped land ("land loans"); (3) unsecured loans; and (4) loans in large dollar amounts ("major loans"). During 1983 through early 1985 Saratoga made few unsecured loans. (Winslow, pp. 69-72; see J. Rodrigues, p. 1126). Also since 1984, Saratoga has made direct investments in real estate projects, either directly or through a subsidiary, by participating in real estate joint ventures. (Winslow, pp. 74, 117; Tate, p. 435.) Saratoga also has made real estate loans with "equity kicker" provisions. (J. Rodrigues, p. 1139).

The Respondents

6. Jess A. Rodrigues, one of the Respondents in this proceeding, currently serves as the Chairman of the Board of

Directors of Saratoga. (Answer, Par. 5(c); J. Rodrigues, p. 1005.)

7. Since 1982, Mr. Rodrigues, directly or indirectly, has owned and controlled Saratoga. (Answer, Par. 5(f)). From 1982 through September 1984, Jess A. Rodrigues, owned all the outstanding stock issued by Saratoga. (GX 10; Winslow, p. 58). On or about September 24, 1984, Jess A. Rodrigues transferred all of his Saratoga stock to California Housing Securities, Inc. ("CHS"). CHS, a savings-and-loan holding company, is a California corporation. Since about late 1970, Jess A. Rodrigues has owned, and continues to own, all of the outstanding stock issued by CHS. Since on or about September 24, 1984, CHS has owned, and continues to own, all of the outstanding stock of Saratoga. (Answer, Par. 5; J. Rodrigues, p. 1008.)

8. Jess A. Rodrigues played a central role in the organization of Saratoga. Since Saratoga commenced operations in April 1983, Mr. Rodrigues has dominated Saratoga's board of directors and management. Mr. Rodrigues has served as a director of Saratoga at all times since it commenced operations in April 1983, and has served as its Chairman of the Board at all times since April 1986. During the period from April 1983 through July 23, 1987, Jess A. Rodrigues also served as an officer of Saratoga with the title sometimes being President and other times being Chief Executive Officer. During the time that he served as an executive officer of Saratoga, Jess A. Rodrigues also served as a member of Saratoga's Loan Committee. (Answer, Par. 5; GX 10; Winslow, pp. 57; 72-80; See Tate, p. 375; Lazares, p. 196;

Fleischman, p. 950).

9. Jess A. Rodrigues, during the period of early 1984 through at least early 1986, played a significant part in the development of Saratoga's operations concerning Portfolio Loans. During that time, Jess A. Rodrigues met with numerous real estate developers, including Ronald Tate and Richard Cristina, who were interested in obtaining loans that Saratoga personnel refer to as Portfolio Loans. During such meetings, at which other Saratoga personnel generally were not present, Jess A. Rodrigues would negotiate the terms of such Portfolio Loans. After the terms of such Portfolio Loans were agreed upon Mr. Rodrigues would inform persons in Saratoga's Major Loan Department about the loans, and would ask such personnel to have the documentation for the loans prepared. Until about late January 1985, Mr. Rodrigues would instruct Lawrence Winslow to have the loan documents prepared, and after late January 1985 Mr. Rodrigues generally assigned this work to David Huibregtse. (Winslow, pp. 72-80; Huibregtse, pp. 788-90; also see Tate, pp. 400-53; J. Rodrigues, pp. 1123-25.)

10. Donna R. Rodrigues, one of the Respondents in this proceeding, currently serves as a Senior Vice President of Saratoga. (Fleischman, p. 944). Mrs. Rodrigues also served as a director of Saratoga during the periods of September 27, 1982, through March 25, 1985, and June 10, 1986, through June 28, 1988. During these times Mrs. Rodrigues was, and currently is, the wife of Jess A. Rodrigues. (Answer, Par. 6; J. Rodrigues, p. 1092).

Certain Officers and/or Directors of Saratoga

11. Lawrence J. Winslow ("Winslow") served as the Executive

Vice President and a director of Saratoga during the period from April 18, 1983, through January 1985. From January 1985 through February 22, 1985, Mr. Winslow served as the President of Saratoga. On February 22, 1985, Winslow left Saratoga following a dispute with Jess A. Rodrigues. (Winslow, pp. 98-100).

12. From 1983 through part of 1984, Mr. Winslow's activities on behalf of Saratoga primarily concerned the supervision of deposit operations. (Winslow, p. 60). In late 1983, Winslow became involved in assisting Saratoga with its origination of Conforming Loans, and in 1984 he became involved in preparing documention for some Portfolio Loans. (Winslow, pp. 67-68). Winslow did not serve as a "compliance officer" for Saratoga, and it is clear that he was not aware that Mr. Rodrigues arguably may have expected him to routinely advise Saratoga personnel on matters concerning regulatory compliance with respect to lending matters. Mr. Winslow also testified that he did not generally advise Saratoga personnel on matters concerning regulatory compliance, and he indicated his view that an attorney named Doug Daggs seemed to be generally advising Saratoga personnel about regulatory matters during 1983 through late 1984. (Winslow, pp. 82-3, 87).

13. David L. Huibregtse ("Huibregtse") currently serves as a Vice President of Saratoga. Since 1986 he has been the head of Saratoga's Major Loan Department, which processes the paperwork for Portfolio Loans. Saratoga has a separate department for the origination of residential loans. Mr. Huibregtse was hired by Saratoga in December 1984 to assist with the making of Portfolio

Loans, and he was appointed a vice president of Saratoga in November 1985. Mr. Huibregtse is a member of Saratoga's Loan Committee, and has been a member of that committee since 1985. (Huibregtse, pp. 772-74, 782; GX 63; GX 66.)

14. Warren G. McDonald ("McDonald") currently serves as the President and as a director of Saratoga. Jess A. Rodrigues hired Mr. McDonald to replace Lawrence Winslow as an executive officer and director of Saratoga. He was hired as an Executive Vice President of Saratoga in February 1985, and he began working at Saratoga in March 1985. Since March 1985 Mr. McDonald has been a director of Saratoga and a member of Saratoga's Loan Committee. In 1986, McDonald was appointed President of Saratoga. He also has been an officer of CHS since February 1985. (McDonald, pp. 872-77, 880.)

15. Donna Lynn Fleischman ("Fleischman") currently serves as a Vice President and the Controller for both Saratoga and CHS. She began working for Saratoga before it commenced operations, and for a while served as Saratoga's Corporate Secretary and as a director. She has known Jess A. Rodrigues since 1970 when she began working for CHS. (Fleischman, pp. 941-43).

16. In addition to doing work for Saratoga and CHS, Fleischman has done work for Mr. and Mrs. Rodrigues in their individual capacities. For example, Fleischman has been a signatory on various checking accounts maintained by the Respondents, including accounts at Saratoga and at Security Pacific National Bank bearing the name JARDONA INVESTMENTS. (GX 70). Also, at the request of and under the direction of the

Respondents, Ms. Fleischman has prepared personal financial statements concerning the Respondents. (GX 71; GX 72; Fleischman, pp. 944-56).

B. The RH&C Venture Regarding the Cinnabar Property

Saratoga Loan No. 80-00312 and Background

17. In March 1984, Mr. Rodrigues caused Saratoga to make its loan no. 80-00312 in the amount of $400,000, the proceeds of which were used to help finance the acquisition of real property by a business venture in which Mr. and Mrs. Rodrigues were co-venturers, as explained below. The loan, which was unsecured, was evidenced by a promissory note executed by Richard A. Cristina ("Cristina") and Murray B. Hall ("Hall"). (GX 3, p. 55).

18. Cristina and Hall are the sole general partners of a California general partnership named Cristina & Hall, which is in the real estate development business. (Cristina, p. 548; Hall, p. 614). In connection with this business, Messrs. Cristina and Hall purchase real property for development and investment. Often Messrs. Cristina and Hall enter into partnerships or joint ventures with third parties in connection with their real estate investments. (Cristina, p. 560; Hall, pp. 615-16).

19. Cristina is the son of Vernon Cristina, a former director of Saratoga and friend of Jess A. Rodrigues. Cristina was personally acquainted with Jess A. Rodrigues, and had worked for CHS during the late 1970s. (Cristina, p. 549; J. Rodrigues, p. 1050.)

20. Hall has been personally acquainted with Jess A. Rodrigues for about ten years. (Hall, p. 616; J. Rodrigues, p.

1054).

21. In January or early February 1984, Cristina learned of an opportunity to buy a parcel of real property with warehouses located on Cinnabar Street in San Jose, California (the "Cinnabar Property"). (Cristina, p. 553; Hall, p. 619). On February 9, 1984, Cristina & Hall executed an agreement offering to buy from Bay-Valley Ventures the Cinnabar property for $4,300,000. (GX 39; Cristina, pp. 552-53; Hall, pp. 620-21). At the time the Cristina & Hall partnership executed that agreement it paid $50,000 in earnest money, which was deposited into Escrow #325259 of the Golden State Title Division of Commonwealth Land Title Company ("Golden State Title"). (GX 47, pp. 8, 9).

22. On or before February 16, 1984,[3] Messrs. Cristina and Hall had spoken with Jess A. Rodrigues about having him (and his wife Donna) participate as investors in the Cinnabar property. At about that time Messrs. Cristina, Hall and Rodrigues entered into an oral agreement, the terms of which, included among other things, the following:

(1) Mr. and Mrs. Rodrigues (together), Cristina (and wife), and Hall (and wife) would acquire the Cinnabar Property, each having a one-third ownership interest;

(2) Mr. and Mrs. Rodrigues (together), Cristina (and wife), and Hall (and wife) each would contribute one-third of the funds needed for the acquisition of, other expenses relating to, the Cinnabar Property; and

(3) Mr. and Mrs. Rodrigues (together), Cristina (and wife), and Hall (and wife) each would share one-third in the

profits or losses related their ownership in the Cinnabar Property. (Cristina, pp. 554-55; Hall, p. 617; Answer Par. 7). The participants in this real estate venture referred to the venture group as "RH&C." (Hall, p. 619; see GX 48).

23. In February and March 1984, Jess A. Rodrigues and Donna Rodrigues participated in various activities in support of the RH&C venture. For instance, they executed a lease agreement, dated March 1, 1984, regarding a lease of part of the Cinnabar Warehouse to C.C.B.S. Warehousing Services, Inc. (GX 41; Answer Par. 13).

24. In mid-February 1984, the RH&C venturers applied to, and obtained approval from, San Francisco Federal Savings and Loan Association ("San Francisco Federal") for a $3 million loan to be secured by a first deed of trust against the Cinnabar Property. (GX 51; Hall, p. 656). RH&C, however, would still require roughly another $1.3 million in order to pay the purchase price of $4,300,000 (less the earnest money deposit) and closing costs. (See GX 47, p. 38; Cristina, p. 553).

25. The RH&C venturers came up with the additional $1.3 million from the following sources: (1) three line-of-credit loans, aggregating $1 million, from Crocker National Bank that were secured by (a) a second deed of trust against the Cinnabar property in favor of CHS and assigned to Crocker, and (b) a take-out commitment from CHS, prepared and signed by Mr. Rodrigues;[3] (2) funds from Saratoga loan no. 80-00312; and (3) $150,000 contributed by Mr. and Mrs. Rodrigues. (GX 48; GX 49; GX 52; Cristina, pp. 561-62; 749-51; Hall, p. 659).

26. Jess A. Rodrigues participated in the making of Saratoga loan no. 80-00312, and he was instrumental in causing that loan to be made. Winslow testified that, in or about March 1984, Jess A. Rodrigues told him that Saratoga would be making this $400,000 unsecured loan, and that based on this information he gathered the documentation to support the loan. (Winslow, pp. 104-6). This is consistent with the testimony of Cristina. Cristina testified that, in March 1984, he had met with Jess A. Rodrigues in his office at Saratoga, and they discussed the making of the $400,000 loan. Cristina testified further that after this discussion with Jess A. Rodrigues he met with Winslow to assist Winslow with preparing the documentation in connection with the loan. (Cristina, pp. 714-15).[4]

27. Prior to the funding of Saratoga loan no. 80-00312, neither Jess A. Rodrigues nor Donna Rodrigues disclosed to Winslow or to Saratoga's Board of Directors that they were participants with Cristina and Hall in the RH&C venture concerning the Cinnabar Property. This is supported by Winslow's testimony to that effect. (Winslow, pp. 111, 113, 128). There is no testimony or other evidence that conflicts with Mr. Winslow's testimony on this point. It should be noted that Jess A. Rodrigues's testimony on this matter did not directly conflict with Winslow's testimony, but rather Mr. Rodrigues seems to infer that, immediately after the loan was funded, Winslow should have been able to figure out Rodrigues was involved in a venture with Cristina and Hall. (J. Rodrigues, p. 1072.)

28. On March 26, 1984, Saratoga funded the $400,000 loan by

issuing two checks payable to the order of Messrs. Cristina and Hall: one was in the amount of $300,000 (check no. 2396), and the other was in the amount of $100,000 (check no. 2397). (GX 2; DX 1).

29. On March 26, 1984, Jess A. Rodrigues, Cristina, and Hall together opened a checking account, bearing the name "RH&C," at Saratoga (account no. 01-28-337) with a deposit of $450,000. $300,000 of the opening deposit was made by the deposit of the $300,000 check (no. 2396), representing a portion of the proceeds from Saratoga loan no. 80-00312. The remaining $150,000 of the deposit was made by a $150,000 check drawn against a checking account of Mr. and Mrs. Rodrigues at Saratoga (no. 01-20-1594), bearing the name "J.A. Rodrigues & Ventures."[5] (GX 48; GX 49; Hall, pp. 633-47).

30. The RH&C venture consummated its acquisition of the Cinnabar Property on March 28, 1984. The closing statement, prepared by Golden State Title, shows that RH&C used the following funds to consummate the purchase of the Cinnabar Property:

Tax Prorata 1/1 to 3/23/84	5,324.52
Loan, SF Fed'l Sav/Ln	3,000,000.00
Loan, Calif. Housing Securities	1,000,000.00
Credit on commission due Cristina & Hall	107,500.00
Deposit to escrow	50,000.00
Deposited to close	231,083.07
TOTAL	$4,393,907.59

(GX 47, p. 38). The escrow documents show that the RH&C venturers, including Mr. and Mrs. Rodrigues, took title to the Cinnabar Property on March 28, 1984, as shown by the deed recorded with the county land records. (GX 53).

31. The $231,083.07 amount shown as "Deposited to close" on the closing statement was derived, in whole or in part, from the proceeds of Saratoga loan no. 80-00312. This is because (1) the escrow documents show that the $231,083.07 amount was deposited into the escrow by a check drawn against the RH&C checking account at Saratoga (GX 47, p. 10), and (2) $300,000 of the $450,000 that had been deposited into the RH&C checking account was derived from the proceeds of Saratoga loan no. 80-00312, as discussed above.

32. In 1984, RH&C had leased the space in the Cinnabar Property warehouses, and Mr. and Mrs. Rodrigues had executed various of the lease agreements on behalf of the lessor. (GX 41). The property remained fully leased during 1984 and 1985. (Hall, p. 664).

Profit Disbursements and Saratoga's Refinance Loan

33. On February 1, 1985, RH&C commenced the disbursement of profits to each of the RH&C venturers, and on that date RH&C issued a check in the amount of $1,000 payable to Jess Rodrigues. (GX 55, p. 1). Thereafter, RH&C made disbursements of profits virtually on a monthly basis, derived principally from the positive cash flow from the rental of the Cinnabar Property. (Cristina, p. 718). Through July 1, 1987, RH&C had made disbursements to Mr. and Mrs. Rodrigues in an aggregate amount of $216,000, including a disbursement of $170,000 on January 16, 1987, and a disbursement of $25,000 on April 1, 1987. (GX 55; Cristina, p. 720; Hall, pp. 667-71).

34. Saratoga loan no. 80-00312 became due and payable on March 26, 1985, but the loan was not paid off on or before that

date. Instead, Saratoga refinanced that loan by making its loan no. 80-00518 in the principal amount of $400,000, which was to be due and payable on April 8, 1986.(GX 56; <u>see</u> GX 2 @ pp. 347-48; Cristina, pp. 752; Hall, pp. 674-75).

35. <u>At the time of, and subsequent to, the making of the refinance loan (# 80-00518), Mr. and Mrs. Rodrigues concealed from Saratoga's loan committee and Board of Directors that they were involved with Cristina and Hall in a venture concerning the Cinnabar Property.</u> This is supported by, <u>inter alia</u>, the following: A document in Saratoga's file for loan no. 80-00518, headed the COMMERCIAL AND MISC. UNDERWRITING SHEET, shows that on March 26, 1985, the following three members of Saratoga's loan committee approved this refinancing: Jess A. Rodrigues, Gary Rodrigues, and David Huibregtse. (GX 2, pp. 324, 326; Huibregtse, p. 795-96). That document also states that this refinance loan was underwritten by Huibregtse. The testimony of Huibregtse also shows that Jess A. Rodrigues had not disclosed to him that Mr. and Mrs. Rodrigues were involved in a venture with Messrs. Cristina and Hall with respect to the Cinnabar Property. (Huibregtse, pp. 797-99).

36. Saratoga loan no. 80-00518 was not paid off on or before April 8, 1986, but rather Saratoga extended the due date until August 1, 1986, as memorialized by an executed extension agreement dated March 31, 1986. (GX 2, p. 344; Cristina, p. 733) This extension was approved on March 25, 1986, by the following two members of Saratoga's loan committee: Huibregtse and McDonald. (GX 2, p. 345). McDonald's testimony suggests that, in March 1986, he

was not aware that Mr. and Mrs. Rodrigues were involved in a venture with Messrs. Cristina and Hall with respect to the Cinnabar Property. (McDonald, pp. 905-8.)

37. On or about September 5, 1986, Saratoga loan no. 80-00518 was paid off with a cashier's check issued by Wells Fargo Bank. (GX 2, pp. 331-34).

38. On January 14, 1987, RH&C obtained funding of a consolidation loan in the amount of $5 million made by General Electric Credit Corporation ("GECC"), as shown by various documents in the escrow files of Valley Title Company (escrow no. 197673). (GX 58; Hall, p. 680). The promissory note for this consolidation loan was signed by each of the RH&C venturers, including Mr. and Mrs. Rodrigues. (GX 57). The escrow file documents show that funds from this GECC loan were used, *inter alia*, to pay off the (1) $3 million loan from San Francisco Federal and (2) the three Crocker line-of-credit loans aggregating $1 million (prior to this time Crocker had been merged into Wells Fargo Bank). Those documents also show that out of the GECC loan proceeds $878,819.23 had been disbursed to RH&C. (GX 58, p. 38; GX 59, pp. 3-4). RH&C used a portion of these funds for disbursement to the venturers, and $170,000 of these funds were disbursed to Jess Rodrigues by a check dated January 16, 1987, which was issued against the Cristina & Hall Clearing Account. (GX 55, p. 13; Cristina, pp. 720-30; *see* Answer Par. 15).

39. On September 23, 1987, Mr. and Mrs. Rodrigues sold their one-third interest in the Cinnabar Property to Mr. and Mrs. Gene Carter, Co-trustees, in consideration of (1) the payment of a

sales price of $440,000, and (2) the assumption by the Carters of Mr. and Mrs. Rodrigues's obligations to GECC with respect to the consolidation loan. (GX 61, pp. 108, 33-53; Cristina, p. 735; Hall, pp. 690-91; see Answer Par. 16(a)). The net amount of the sales proceeds disbursed to Mr. and Mrs. Rodrigues was $381,583.08. (GX 62, p. 1; GX 61, pp. 103, 108; GX 70).

40. Mr. and Mrs. Rodrigues received personal financial gain in the net amount of $447,583.08 by virtue of their participation in the RH&C venture and the sale of their one-third interest in the Cinnabar Property. This is determined as follows:

	RH&C distributions of profits..........	$216,000.00
plus	Net proceeds from sale to Carters......	381,583.08
less	Contribution to RH&C....................	150,000.00
	TOTAL...................................	$447,583.08

C. The Ventures with Tate and Lazares

(1) Background

41. Mr. Rodrigues and Ronald M. Tate ("Tate") have been acquainted personally since about 1962. During 1984 through 1986, Mr. and Mrs. Rodrigues lived across the street from Tate. During the period from about 1980 through at least 1985, Mr. Rodrigues and Tate were friends, and they were business associates. (Tate, pp. 368-69, 372).

42. Prior to the spring of 1984, Mr. and Mrs. Rodrigues had been involved in various real estate investments with Tate and David L. Lazares ("Lazares"). Thei- first investment together was in the Los Gatos Golf and Country Club property in 1979 or 1980. (Lazares, pp. 190-95; Tate, 377; J. Rodrigues, p. 1039.)

43. Due to the nature of their relationship Mr. Rodrigues and

Tate had engaged in candid conversations. During one such conversation in Mr. Tate's home in late 1983, Mr. Rodrigues explained to Tate and Lazares why he wanted to own and operate a stock-form savings and loan. Tate testified on this as follows: "Well, I think he felt that because he owned all of the stock, that he had pretty wide latitude what he could do with the money in the savings and loan versus if you're a publicly held corporation and had to go through all kinds of, you know, board of directors meetings and other governmental approvals if you owned a hundred percent of the stock." (Tate, p. 375). Lazares recalls Mr. Rodrigues's comments as follows: "Well, he said since he was a hundred percent shareholder and he owned all the stock, it was like his own private cookie jar, he could borrow money, make deals, make transactions, and he could do whatever he wanted because he was the single shareholder of all the stock. And I think at the time he told me he was -- I can't remember if he said he was the only person in the United States who had such a charter or whether there was another individual who had such a charter." (Lazares, p. 196).

44. Tate and Lazares are in the real estate development business. During the period including 1983 through 1985, they operated through two businesses owned by them: Regency Monarch Development Company ("Regency Monarch") and Regency Monarch Realty Management. (Tate, p. 367; Lazares, pp. 184-85).

45. By early 1985 Saratoga had made many loans to Tate and Lazares. (Winslow, p. 145). When Tate and Lazares were interested in obtaining a loan from Saratoga they would discuss

the proposal with Jess Rodrigues personally. Lazares testified about this as follows:

> Jess Rodrigues made all the decisions. I mean, we'd go to Jess and explain, you know, the deal, and he would say yes or no. And other than on one occasion, I believe he said yes to everything we did.
>
> You know, over the years we made a lot of money together, but he was a single individual we would talk to, and then he would say yes or no, he would have it -- first Larry Winslow or later on Warren McDonald, and later on also at times Dave Huibregtse -- administer the documentation or asked them to do the documentation that was necessary. (Lazares, p. 198; see Winslow, p. 117).

Further illustrating Mr. Rodrigues's control over the lending decisions at Saratoga is the following. Tate recalls that, in or about 1984, Mr. Rodrigues told him that Tate had a line of credit with Saratoga Savings for about $1.5 million, and Mr. Rodrigues's testimony corroborates this. (Tate, pp. 453; Rodrigues, p. 1119.) However, Winslow testified that he was not aware that Saratoga Savings had in fact granted such a line of credit, and that at that time Saratoga Savings did not have the facilities to make line-of-credit loans. (Winslow, pp. 118-19; also see Huibregtse at p. 831.)

(2) The Joint Venture Regarding the Marina Property

46. In late March 1984, Regency Monarch entered into a contract to purchase (for itself or its nominee or assignee) approximately 3.9 acres of real property in Marina, California (the "Marina Property"), for a price of $500,000. Pursuant to this contract, Regency Monarch (or its nominee or assignee) was required to consummate its purchase of the Marina Property in or about November 1984. (GX 13-A; GX 13-B; Tate, pp. 380-81; Lazares,

pp. 210-13; Answer Par. 19).

47. Shortly after Regency Monarch entered into the above-mentioned purchase contract, Tate contacted Mr. Rodrigues about this investment opportunity. They met, and Tate asked Mr. Rodrigues whether he and his wife would be interested in participating with Tate and Lazares in the purchase of the Marina Property. Following some discussions about what Tate expected Mr. and Mrs. Rodrigues to contribute to the venture, Tate and Mr. Rodrigues together inspected the Marina Property, and had further discussions about various matters, including development plans and zoning. At that time Mr. Rodrigues told Tate that he and Mrs. Rodrigues would participate with Tate and Lazares in the purchase of the Marina Property. (Tate, pp. 381-85). Subsequently, two written agreements were drafted up to memorialize the oral agreement regarding the rights and obligations of Tate, Lazares, and the Rodrigueses in their venture concerning the Marina Property, but neither of the written agreements were executed by the parties thereto. (GX 37; GX 38; Tate, pp. 386-97; Lazares, pp. 207-8). According to the testimony of both Tate and Lazares, their agreement with the Rodrigueses and the course of conduct of the parties provided, among other things, as follows:

> (1) Tate, Lazares, and Mr. and Mrs. Rodrigues (together) (collectively the "Marina Joint Venture") would acquire and develop the Marina Property with each of them owning a one-third interest;
>
> (2) Tate, Lazares, and Mr. and Mrs. Rodrigues (together) each would share equally (one-third each) in the costs relating to the acquisition and development of the Marina Property; and

(3) Tate, Lazares, and Mr. and Mrs. Rodriques (together) each would share equally (one-third each) in the profits or losses related to their ownership of the Marina Property.

(Lazares, pp. 217-18; Tate, pp. 391, 428; Answer Par. 20).

48. During the spring and summer of 1984, the Marina Joint Venture incurred expenses, including earnest money deposits aggregating $45,000, prior to consummating its acquisition of the Marina Property. (GX 14; Lazares, pp. 213-17). According to the business records of the venture maintained by Tate and Lazares, the Rodrigueses contributed $3,447.91 to the Marina Joint Venture, on June 29, 1984, as reimbursement for their one-third share of the expenses incurred to that date. (GX 15; Lazares, pp. 219-22).

49. On November 5, 1984, the Marina Joint Venture consummated its acquisition of the Marina Property, which was handled through an escrow with Ticor Title Company ("Ticor"). The deed conveying title to the Marina Property was made in favor of Tate and Lazares, as the Rodrigueses had asked that they not take record title to the property. (GX 17 -- especially see pp. 96; Tate, p. 403; <u>also see</u> GX 23). The Marina Joint Venture needed to deposit $456,000 to the escrow in order to consummate its purchase of the Marina Property. The Marina Joint Venture paid this $456,000 amount with the proceeds from an unsecured loan in that amount made by Saratoga to Tate as the named obligor (Saratoga Loan No. 80-00473); tne funding check (#4309) was made payable to Ticor and deposited into escrow. This Saratoga loan in the name of Tate was a "nominee loan," because Tate testified that: "Well, yes, I signed the note, but the venture was responsible for the

repayment." (Tate, pp. 397-98; see GX 17; GX 4; Lazares, pp. 230-31).

50. It is clear that, by late June 1984, Mr. and Mrs. Rodrigues were co-venturers in the Marina Joint Venture, and in November 1984, they acquired a non-record one-third interest in the Marina Property. Also in November 1984, Mr. and Mrs. Rodrigues assumed responsibility for the repayment of one-third of Saratoga loan no. 80-00473 in the amount of $456,000. This is supported not only by the above findings, but also by information on Mr. and Mrs. Rodrigues's signed personal financial statement dated as of December 31, 1984, which shows that, as of December 31, 1984, he and Mrs. Rodrigues were responsible for repayment of a "Private loan, Marina land" in the amount of $152,000, which is one-third of the $456,000 Saratoga loan. (GX 72; J.Rodrigues, p. 1099). Although Mr. and Mrs. Rodrigues signed this personal financial statement and it was received by Home Federal on February 11, 1985, Mr. Rodrigues testified that he did not know of the existence of the $456,000 loan until March 15, 1985. (J. Rodrigues, p. 1179.) Mr. Rodrigues's testimony on this point is not credible.

51. **Jess A.** Rodrigues participated in the making of, and caused Saratoga to make, Saratoga Loan No. 80-00473). This is supported by the following:

(a) Tate testified as follows: "The original loan of $456,000 Jess loaned to me in lieu of putting up the money himself, as I recall." . . . "Saratoga loaned to me $456,000 because Jess didn't want to put up the money himself at that time, so they loaned me the money and the venture was responsible for the repayment of it." (Tate, pp. 397-98; also see p. 392). Tate also testified that it was Mr. Rodrigues and not Winslow with whom he met to discuss the loan, as he testified as follows: "I never really met with Larry Winslow much. I usually -- I saw him, said hello, but generally speaking, my business was with Mr. Rodrigues." (Tate, p. 401).

(b) Tate's testimony is consistent with the testimony of Winslow. Winslow testified that he prepared documentation for the loan, but he was informed about the loan by Mr. Rodrigues. Winslow testimony on this was as follows:

> Q. Now, during -- you had mentioned there was a conference in Mr. Rodrigues's office regarding the making of this loan?
>
> A. My recollection is, somehow I got the information {about the loan}, and I'm sure I got it {when} all 3 or 4 of us {were} sitting together. Now, on what day that was, it could have been 3 months before we finally did the deal, I don't know." (Winslow, p. 125; also see pp. 122-23).

(c) Mr. Rodrigues's testimony infers that he could not have participated in the making of the loan because he was on vacation in China during late October and early November 1984. (J. Rodrigues, p. 1100-09). However, even if Rodrigues were on vacation at that time, this does not conflict with the testimony of Tate and Winslow. This is because Winslow's own testimony suggests that Mr. Rodrigues participated in the loan decision well before the loan was funded and documented. In fact, Mr. Rodrigues testified that he had met with Tate on September 27, 1984, and at that time they talked about financing for the purchase of the Marina Property.[6] (J. Rodrigues, p. 1104; Answer Par. 22(b)).

52. Neither of the Respondents, at any time prior to the making of Saratoga loan no. 80-00473, informed Winslow or Saratoga's Board of Directors that they were involved in a venture with Tate and Lazares with respect to the Marina Property. (Winslow, pp. 126, 129, 149.)

53. Subsequent to buying the Marina Property the Marina Joint Venture set about to build an apartment complex on the property. In connection with this, the Marina Joint Venture participants applied to Home Federal Savings and Loan Association of San Diego ("Home Federal") for a secured loan the proceeds of which would (1) pay off Saratoga Loan No. 80-00473 and (2) finance the construction of the apartment buildings and related improvements. (Lazares, pp. 232-35; Tate, pp. 405-7).

Extension of Due Date and Pay-off of the Loan

54. Saratoga Loan No. 80-00473 became due and payable on January 1, 1985, according to the promissory note therefor (GX 6, p. 125). Home Federal was not prepared, prior to January 1, 1985, to fund the construction loan mentioned above. Tate brought this to the attention of Mr. Rodrigues, who arranged to have Saratoga extend the due date of the loan. Tate testified as follows:

> Q. Do you have any recollection as to whether the loan was paid off in full on or before January 1, 1985?
>
> A. No, as I recall, Jess gave us an extension to that because our construction loan did not close until after that. I believe or construction loan closed anywhere from 30 to 90 days thereafter. (Tate, pp. 403-4).

Winslow prepared the documentation regarding the extension, and Tate and Winslow (on behalf of Saratoga) executed an agreement regarding the extension of the due date until March 1, 1985. (GX

4, p. 94).

55. Saratoga Loan No. 80-00473 was paid off in late March 1985 with funds paid out of the Ticor escrow (# 509860) for the Home Federal construction loan (Home Federal Loan No. 9028115) in the amount of $3,319,000. (GX 5, pp. 298-99; GX 16 pp. 64-65; Lazares, p. 231.)

56. The named obligors for this secured Home Federal were Tate, Lazares, and Mr. and Mrs. Rodrigues. (GX 24 (promissory note)). Documents in Home Federal's file for this loan show that no later than January 22, 1985, Home Federal was informed that Mr. and Mrs. Rodrigues would be borrowers on this loan, as indicated by, _inter alia_, an internal memorandum dated February 14, 1985. (GX 16, pp. 2-3; _also see_ p. 93, an internal memorandum of Home Federal suggesting that the Rodrigues were intended as named obligors as early as November 1984). Both Mr. and Mrs. Rodrigues signed various documents in connection with the obtaining of this loan. (GX 16, _passim_). Mr. and Mrs. Rodrigues obtained a one-third ownership interest in the Marina Property at the time it was acquired by the Marina Joint Venture in November 1984, but, it was not until March 1985 that a deed was recorded in the county land records showing their interest in that property. (_See_ Answer Par. 28). This was done so that they could join Tate and Lazares in executing a deed of trust in favor of Home Federal, which was recorded on March 29, 1985. (GX 16, pp. 46-49). In addition, in connection with this Home Federal loan the borrowers were required to contribute $574,148.06 of their own funds to a collateral pledge account, and in early April 1985, Mr. and Mrs. Rodrigues

contributed $200,000 of their funds to that account. (GX 18, p. 11; Lazares, pp. 240-41; Tate, pp. 405, 408-19).

57. The Marina Joint Venture constructed an 84 unit apartment complex on the Marina Property, and, it quickly rented out the units in the complex. (Lazares, p. 242; Answer Par. 29.) In March 1986, based on the improved value of the Marina Property, it obtained a permanent loan from Home Federal in the amount of $3,890,000. (GX 25; Lazares, p. 242; Tate, pp. 419-21). The Marina Joint Venture began to disburse profits to each of the venturers on March 26, 1986. Between the period of March 26, 1986, through June 10, 1986, the Marina Joint Venture disbursed a total of $157,663.33 to Mr. and Mrs. Rodrigues. (GX 19; Lazares, pp. 243-47; Tate, p. 424).

58. On December 31, 1986, the Marina Joint Venture consummated its sale of the Marina Property to William Brooks and Verling Brooks for a price of $5,235,000. The Golden State Title Division of Commonwealth Land Title Company ("Golden State") served as the escrow company for this transaction. Out of the $932,113.61 net sales proceeds Golden State issued a check in the amount of $322,037.87 to Mr. and Mrs. Rodrigues. The permanent loan from Home Federal also was paid off with a portion of the sales proceeds. (GX 22 (see pp. 4, 38, 39); Lazares, pp. 253-56; Tate, pp. 428-32; see Answer Par. 30).

59. As a result of their participation in the Marina Joint Venture, Mr. and Mrs. Rodrigues received personal financial gain of at least $276,253.29. This is determined as follows:

	Sales proceeds received..........	$322,037.87
plus	Profit distributions received...	157,663.33
less	Contribution on 6/29/84.........	3,447.91
less	Contribution to collat. pledge..	200,000.00
	NET PERSONAL BENEFIT............	$276,253.29

(3) The Joint Venture Regarding the Continental Can Property

60. On or about June 26, 1985, a real estate agent informed Lazares that an individual, named Ron Sakauye, held an option to purchase from the Continental Can Company a parcel of real property on Taylor Street in San Jose, California (the "Continental Can Property") for a price of $1,500,000. Located on the property was a 150,000 square foot industrial building. The real estate agent informed Lazares that Sakauye would sell the option for $50,000, but, the purchaser of the option would have to come up with the funds to consummate the purchase by on or about July 1, 1985. (Lazares, p. 263; Tate, p. 442-44).

61. On the following day, Tate and Lazares met with Mr. Rodrigues. At that meeting, Tate and Lazares asked whether Rodrigues could arrange for Saratoga to lend them $1.6 million on or before July 1, 1985, so that Tate and Lazares could purchase the Continental Can Property. (Lazares, p. 265). Following that meeting and on that same day, Tate and Mr. Rodrigues visited the Continental Can Property. (Tate, pp. 447-48). Tate testified as follows: "[W]e drove by and looked at the property. And he said it was a hell of a deal, because we purchased the Lick Avenue property which was another similar piece of property, and this was in a good or better location." (Tate, p. 449).

62. Mr. Rodrigues then informed Tate that he would cause Saratoga to provide them with the $1.6 million in financing. Tate

testified as follows:

A. So, I said [to Mr. Rodrigues], would you be willing to fund the transaction for us. And he said, yes. He said, however, he said, since we're doing this with Saratoga Savings, I would like to get some sort of an additional kicker for Saratoga Savings.

Q. And what was he talking about -- what were you understanding him to be talking about?

A. Well, we got very specific. And I said, what do you mean by that?

And he says, well, I think it would be fair, in addition to us getting our interest rate on it, that we should get an additional $200,000. And he said, we would secure that by a note and deed of trust, interest free, that would be paid at the time of refinance or the property or you sell it or develop it.

Q. And did this concept get put into writing?

A. No.

Q. Well, did Saratoga Savings provide you with 1.6 million dollars in financing?

A. They did. What they did is they loaned Dave Lazares $800,000 and they loaned me $800,000. (Tate, pp. 450-51; see Lazares, pp. 266-70).

63. On Friday, June 28, 1985, Saratoga, with Mr. Rodrigues's participation, made and funded two unsecured $800,000 loans: one to Tate (Saratoga Loan No. 80-00559) and the other to Lazares (Saratoga Loan No. 80-00560). (GX 7; GX 8; GX 66; Huibregtse, pp. 826, 828, 833-34, 836.) The loan files for each of these loans contain a document entitled "COMMERCIAL AND MISC. UNDERWRITING SHEET," which were signed by Mr. Rodrigues, McDonald, and Huibregtse on June 28, 1985. Each of those documents includes, inter alia, the following notations:

Purpose of loan[:] To purchase a 150,000 sq. ft. industrial building at 357 Taylor Street, San Jose, CA

Comments[:] This loan was made to purchase a property, and will then be repaid from permanent financing. Borrowers found an excellent purchase and needed to react quickly. (GX 7, pp. 191, 192; GX 8, p.481.)

64. Mr. Rodrigues failed to disclose to McDonald and Huibregtse that he had negotiated a $200,000 equity kicker on behalf of Saratoga in connection with the two $800,000 loans.[7] The Commercial and Misc. Underwriting Sheets make no mention of the $200,000 equity kicker that Mr. Rodrigues had negotiated on behalf of Saratoga. In addition, both McDonald and Huibregtse testified that Mr. Rodrigues had not informed them about any such equity kicker arrangement. (McDonald, p. 928; Huibregtse, pp. 829, 834, 846.)

65. Mr. Rodrigues testified that Saratoga has taken equity kickers in connection with loans made by it. (J. Rodrigues, p. 1139). However, he denies that he had negotiated an equity kicker in connection with these two $800,000 loans. When questioned about that equity kicker Mr. Rodrigues testified as follows: "That's just an absolute fabrication on the part of Ron Tate and Dave Lazares." (J. Rodrigues, p. 1122 @ 17-18.) In light of all the evidence, Mr. Rodrigues's denial that he had negotiated the equity kicker is not credible.[8] Instead, in view of the findings set forth below, it is reasonable to conclude that Mr. Rodrigues failed to disclose the existence of the equity kicker because he had decided that he would attempt to take a personal equity interest in the Continental Can Property in lieu of having Saratoga receive the $200,000 equity kicker.

66. On Tuesday, July 2, 1985, Tate and Lazares consummated their purchase of the Continental Can Property by using the $1.6

million loaned to them through Saratoga Loans 80-00559 and 80-00560. (GX 28; GX 29; GX 7, pp. 170, 176; GX 8, p. 500; Tate, pp. 456-57; Lazares, p. 264). Within a day or two thereafter, Mr. Rodrigues had arranged with Tate and Lazares for himself and his wife to obtain a one-third non-record ownership interest in the Continental Can Property in lieu of having Saratoga benefit from the equity kicker arrangement, which had not been memorialized in a writing. (Tate, pp. 459-61). Tate testified about this as follows:

> A. Well, I asked Jess how he wanted to handle the note and deed of trust [concerning the equity kicker]. How we were going to do it. And Jess said he changed his mind, what he wanted to do was take it personally.
>
> And I said, how are you going to do that?
>
> And he said, what I want to do is take the deal personally.
>
> And I said, how do you do that?
>
> And he said, give us a third of the deal as we have in the other deals.
>
> Q. And did you indicate to him one way of the other whether that was accepatable?
>
> A. No. I says, that was fine with us. That's what we had done in the past with all the rest of the deals and that's what took place. (Tate, p. 461; see Lazares, pp. 269-70).

67. Accordingly, in early July 1985, Tate, Lazares, and Mr. and Mrs. Rodrigues (together) entered into an oral agreement, the terms of which included, among other things, the following:

(1) Effective as of July 2, 1985, Tate, Lazares, and Mr. and Mrs. Rodrigues (together) (collectively the "Continental Can Joint Venture") would each have a one-third ownership interest in the Continental Can Property;

(2) Tate, Lazares, and Mr. and Mrs. Rodrigues (together)

each would share equally (one-third) each in the costs and expenses relative to the acquisition and ownership of the Continental Can Property; and

(3) Tate, Lazares, and Mr. and Mrs. Rodrigues (together) each would share equally (one-third each) in the profits or losses related to their ownership of the Continental Can Property. (Tate, p. 466; Lazares, pp. 269-73).

68. In addition to the testimony of Tate and Lazares about this matter, documents prepared by Mr. and Mrs. Rodrigues show that they had acquired a one-third interest in the Continental Can Property in July 1985. See 1985 Federal Income Tax Return, which at pages 10 and 11 of Statement 5 shows that the Rodrigueses reported the acquisition on July 1, 1985, of a 33.3334 percent ownership interest in property identified as "CONTINENTAL CAN." (GX 73.)

69. Until about May 1987, Mr. and Mrs. Rodrigues concealed from Saratoga's management and Board of Directors that they had acquired an in interest in the Continental Can Property in 1985. (See Huibregtse, p. 834; McDonald, p. 891.) In about May 1987, after Federal and State S&L examiners had commented on this matter to the management of Saratoga, Mr. Rodrigues told McDonald that he had acquired an interest in the Continental Can Property in December 1985 -- not July 1985. (McDonald, pp. 919-21; GX 68; see GX 45 (letter from examiners)). This same false information was relayed to the Board of Directors of Saratoga as shown by comments at page 18 of the document entitled "SARATOGA SAVINGS AND LOAN ASSOCIATION RESPONSE TO REPORT OF EXAMINTION DELIVERED BY THE

FEDERAL HOME LOAN BANK OF SAN FRANCISCO ON MAY 5, 1988." (GX 59, p. 18.)

Extension of the Due Dates and the Pay-offs

70. In October 1985, Saratoga extended the due dates on the two $800,000 loans from October 1, 1985, to January 1, 1986. (GX 7, p. 183; GX 8, p. 495). This was to allow Tate and Lazares more time to obtain financing from Home Federal. (Tate, pp. 494 @ 20-22).

71. In December 1985, the parties to the Continental Can Joint Venture memorialized the above oral agreement of July 1985 in a signed writing, identified as a Preliminary Partnership Agreement, which is dated December 24, 1985 (GX 26). The terms of that written agreement are consistent with the oral agreement, as testified to by Tate and Lazares. (Tate, pp. 471-72; Lazares, pp. 271-73). Mr. Rodrigues asserts that he (and Donna Rodrigues) did not become partners in the Continental Can Joint Venture until December 1985. (J. Rodrigues, pp. 1121-22, 1184). Mr. Rodrigues's testimony on this point is not credible for a number of reasons, including the following: (1) It is contrary to the credible testimony of both Tate and Lazares; and (2) it is inconsistent with information set forth in the Rodrigues's 1985 personal Federal income tax returns. (GX 73 @ Statement 5, pp. 10-11.)[9]

72. In December 1985, Home Federal made a loan to Tate and Lazares in the amount of $3,564,000, secured by the Continental Can Property. (GX 30, pp. 58-59). Mr. and Mrs. Rodrigues were not obligors on this loan, as Mr. Rodrigues had arranged with Tate and Lazares for him (and his wife) not to be named as

obligors with respect to that loan. Tate testified about this as follows:

> Q. Now, who were to be the borrowers on this Home Federal loan?
>
> A. Dave Lazares and myself.
>
> Q. What is your understanding as to why not all of the equity venturers were to be borrowing from --
>
> A. Because Jess said he didn't want to go of record, for Dave and I to go of record and just give him his third at the end. (Tate, p. 469; see Lazares at p. 287).

73. On or about December 27, 1985, Saratoga Savings loans numbered 80-00559 and 80-00560 were paid off with a portion of the proceeds from the above-mentioned Home Federal loan. (Lazares, p. 292; Tate, pp. 475-76). In addition, there were funds from the Home Federal loan that were available for distribution to the partners in the Continental Can Joint Venture. On December 27, 1985, the Continental Can Joint Venture disbursed $143,000 of these funds to Mr. and Mrs. Rodrigues. (GX 31, pp. 5-6; Lazares, p. 291).

74. In early January 1986, Lazares discovered that he had disbursed too much money to each of the Continental Can Joint Venture partners, and he asked each of the partners to reimburse $24,000 to the joint venture. (Lazares, p. 295). Each of the partners, including Mr. and Mrs. Rodrigues, provided such reimbursement; Mr. and Mrs. Rodrigues provided the reimbursement by causing a check to be issued against their jointly owned JARDONA Investments checking account at Saratoga. (GX 32; Fleischman, pp. 959-60).

75. On April 15, 1986, the Continental Can Joint Venture

consummated its sale of the Continental Can Property to Mr. and Mrs. Stan Davis, Trustees, for a price of $3,300,000. (GX 33 (escrow file); see Answer Par. 45(a)). Mr. and Mrs. Rodrigues received personal financial gain of roughly $224,559 from the sale of the Continental Can Property, determined as follows. The Continental Can Joint Venture partners took part of the sales consideration in the form a secured promissory note in the amount of $200,000, payable to the order of Tate, Lazares, and Jess A. Rodrigues and Donna R. Rodrigues. A portion of the cash consideration for the sale was used to pay off the Home Federal loan that was secured by the Continental Can Property. In mid April, the escrow company conducting the closing, disbursed directly to Mr. and Mrs. Rodrigues, two checks representing their one-third interest in the sales proceeds available at that time. These checks were in the following amounts: $155,816.79 (GX 34, p. 44) and $1742.10 (GX 34, p. 45). In addition, the Continental Can Joint Venture disbursed another $62,000 to Mr. and Mrs. Rodrigues. (GX 35, pp. 1-2). Finally, the Mr. and Mrs. Davis paid off their $200,000 promissory note (plus interest), and Lazares applied one-third of this amount (roughly $67,000) for the benefit of Mr. and Mrs. Rodrigues. (Tate, pp. 479-82; Lazares, pp. 296-302, 310).

76. Mr. and Mrs. Rodrigues received approximately $343,559 of personal financial gain from their participation in the Continental Can Joint Venture. This is determined as follows:

	Net sales proceeds..............	$224,559
plus	December 1985 distribution......	143,000
less	January reimbursement...........	24,000
	Net Personal Benefit............	$343,559

D. <u>Other Matters</u>

<u>Personal Financial Gain Received by the Respondents</u>

77. Mr. and Mrs. Rodrigues received personal financial gain of approximately $1,067,395 by participating in the three above-described real estate ventures. This is determined as follows:

	Net benefit from RH&C/Cinnabar..........	$447,583
plus	Net benefit from Marina JV..............	276,253
plus	Net benefit from Continental Can JV....	343,559
	Aggregate Net Personal Benefit........	$1,067,395

<u>Substantial Financial Damage Suffered by Saratoga</u>

78. The aggregate net personal benefit of more than $1 million received by Mr. and Mrs. Rodrigues could, and should, have been earned by Saratoga through its participation in the joint ventures or by benefitting from equity kickers relating to the loans it made.

<u>Participation by Donna Rodrigues</u>

79. Although Donna Rodrigues did not engage in activities that directly caused Saratoga to make the aforementioned loans, she actively participated in, and benefitted from, the real estate ventures, as the above findings clearly demonstrate. In addition, she had knowledge that Saratoga had made loans that, directly or indirectly, provided financing for those real estate ventures, as indicated by certain documents signed by her, including the following: (1) the 1985 Federal income tax return of Mr. and Mrs. Rodrigues (GX 73); and (2) the personal financial statements of Mr. and Mrs. Rodrigues, dated as of December 31, 1984, and December 31, 1985 (GX 71; GX 72.)

Timeliness of the FSLIC's Enforcement Action

80. The examiners, in the spring of 1987, first discovered information suggesting that the aforementioned loans may have, directly or indirectly, provided funding to real estate ventures in which the Respondents had an interest. This information was discovered by state examiner Newsom and federal examiner Gnusti when Newsom was reviewing a copy of the Respondents' 1985 Federal income tax return, which was included in a Saratoga loan file. (Newsom, pp. 971-74; GX 73; also see GX 44; GX 45). Subsequently, the FSLIC conducted a formal examination and investigation of the affairs of Saratoga to obtain additional information about this matter (See GX 78).

Actual Knowledge of Duties and Regulatory Limitations

81. In or about 1983, Mr. Rodrigues and Mrs. Rodigues were aware that, as a savings and loan directors and officers, they owed duties to the depositors of the savings and loan. (Winslow, pp. 88, 84-5). By late 1984, Mr. and Mrs. Rodrigues also were put on notice about the existence of, and the limitations in, the FSLIC conflict-of-interest regulations. (Winslow, pp, 98, 88-98).

Breach of Fiduciary Duty

82. Mr. Rodrigues did not bring to the attention of Saratoga's Board of Directors the opportunities to have Saratoga obtain benefits in addition to interest in connection with the $400,000 unsecured loan to Cristina and Hall (# 80-00312); such additional benefits could have included, inter alia, the rights of a limited partner in a joint venture or an "equity kicker." Instead Mr. Rodrigues decided, without consulting with the Board

of Directors, that he -- and not Saratoga -- should obtain such additional benefits. This is supported by the following testimony of McDonald:

> Jess told me that in the newly deregulated environment that savings and loans were permitted to operate in California during that time, Jess, as sole stockholder of Saratoga Savings with a substantial investment in the equity of that company, was constantly faced with decisions of this sort involving successful businessmen who were presenting him with opportunities.
>
> Those decisions were, were the investments appropriate for a financial institution or were they more appropriate for an entrepreneur such as Jess. As he made those decisions, he took into account all of the elements of risk he could assess at the time.
>
> He told me that the elements of risk he assessed for that project at the time was such that he didn't deem them appropriate for a savings and loan association because the risk was too high.
>
> Q. But as to the relationship to the unsecured loan, did he talk about that?
>
> A. He may have talked about it, I'm not sure whether he was involved in the making of that original loan or not.
>
> Q. You don't know?
>
> A. I don't know.
>
> (McDonald, p. 935.)

<u>Personal Dishonesty</u>

83. In 1987, Mr. Rodrigues fraudulently misrepresented to Saratoga's president and Board of Directors material facts about the above transactions. This is demonstrated by the letter, dated May 7, 1987, from McDonald to the Saratoga's examiners regarding the Continental Can transaction. That letter provides in pertinent part as follows:

2. At about the same time (Saratoga made the two $800,000 loans), Mr. Tate and Mr. Lazares bought the Continental Can property. Included as an attachment to your letter was a deed, dated July 2, 1985, vesting ownership in these two individuals. There was no involvement in this property by either Saratoga or Jess Rodrigues at this point.

3. Some months later, the property was financed with a loan from Home Federal Savings of San Diego. Some of the proceeds of this loan were used by Tate and Lazares to pay their unsecured debt to Saratoga Savings. Jess Rodrigues allowed his personal financial capability to be used to support the Home Federal Loan, and so became involved with the property at the same time Saratoga's loans were paid off. (GX 68; GX 69.)

McDonald testified that he wrote that letter in reliance on information provided by Mr. Rodrigues. (McDonald, pp. 919-21.) The findings made above, however, demonstrate that Mr. Rodrigues knowingly misrepresented material facts to McDonald, as (1) the Rodrigueses acquired a non-record interest in the Continental Can Property in early July 1985, and (2) Mr. Rodrigues was not a borrower with respect to the Home Federal loan in question, and his personal financial capability had nothing to do with the making of that loan.[10]

84. Based on the examiners' comments to the management of Saratoga regarding their concerns that the aforementioned loans may have been made in violation of the FSLIC's conflict-of-interest regulations (see GX 44; GX 45), the Board of Directors of Saratoga conducted an investigation into those matters. Both Jess A. Rodrigues and Donna R. Rodrigues were directors of Saratoga at that time. During the course of that inquiry both Jess A. Rodrigues and Donna R. Rodrigues concealed from the Board of Directors, management, and an outside law firm material information regarding the aforementioned loans and the real estate

ventures that benefitted from them. (*See* McDonald, pp. 889-92, 905-08, 915, 925-37; Fontana, pp. 574-613; *also see* GX 69.)

85. On October 7, 1987, the San Francisco law firm of Thelen, Marrin, Johnson & Bridges issued its opinion letter to Saratoga that states in part as follows:

> We have reviewed the complete loan files for the five remaining transactions (including Cinnabar, Marina, and Continental Can) as well as other documents which have been made available to us from the Association's files. *Based upon that review, and subject to the qualifications listed below, we are of* the opinion that none of the loans made in connection with the five transactions violate any federal or state law or banking regulation. (GX 42 (emphasis added)).

That opinion letter was supplied by Saratoga to the FSLIC's supervisory agents in California in response to the concerns raised by the FSLIC's examiners. The testimony of the attorney who signed that opinion letter, Gary L. Fontana, however, makes clear that neither his firm nor Saratoga's Board of Directors was informed by either of the Respondents of material information concerning, *inter alia*, Mr. Rodrigues's involvement in the making of the loans to provide financing for the *specific* real estate ventures at issue. (Fontana, pp. 568-613). Accordingly, the legal conclusions reached in the opinion letter are without merit, as they are based on inadequate factual information.

II

CONCLUSIONS OF LAW

1. Saratoga Savings is a California-chartered stock savings and loan association whose deposits are insured by the FSLIC under Title IV of the NHA, 12 U.S.C. §§ 1724 - 1730i, and accordingly, it is an "insured institution" within the meaning of 12 U.S.C. § 1724(a).

2. The FSLIC has jurisdiction to maintain this proceeding against Jess A. Rodrigues and Donna R. Rodrigues pursuant to section 407(g) of the NHA, 12 U.S.C. § 1730(g). This is because (1) Jess A. Rodrigues, as the Chairman of the Board of Directors of Saratoga, is a director and a person participating in the conduct of the affairs of an insured institution, and (2) Donna Rodrigues, as a Senior Vice President of Saratoga, is an officer and person participating in the conduct of the affairs of an insured institution. At the time of the events the subject of this proceeding, both Respondents served as directors and/or officers (and persons participating in the conduct) of an insured institution. Also, at all relevant times, Mr. Rodrigues, either directly or indirectly, has owned all the outstanding stock of Saratoga.

3. The business associations involving the Respondents, which are identified herein as the RH&C venture, the Marina venture and the Continental Can venture, each constitute an "affiliated person" of Saratoga. This is because each is an "organization (other than the insured institution or a corporation

or organization through which the insured institution operates) of which a director, officer or controlling person of such institution: . . . (2) is a general partner" within the meaning of 12 C.F.R. § 561.29.

4. Saratoga violated the conflict-of-interest regulation codified at 12 C.F.R. § 563.43(b) by making loans numbered 80-00312 and 80-00518 (Cinnabar), 80-00473 (Marina), and 80-00559 and 80-00560 (Continental Can). This is because with respect to the making of each of those loans Saratoga violated the prohibition against "either directly or <u>indirectly</u>, mak[ing] a loan to any affiliated person of such institution . . . ." 12 C.F.R. § 563.43(b)(1) (emphasis added). Additionally, the loans were not of the type permitted in paragraphs (b)(1)(i) - (iii), and there was not the type of disclosure required by paragraph (b)(2).

5. Jess A. Rodrigues participated in the making of, and caused Saratoga to make, loans numbered 80-00312, 80-00518, 80-00473, 80-00559, and 80-00560. Mr. Rodrigues caused Saratoga to violate section 563.43(b) of the conflict-of-interest regulations on several occasions in connection with the granting of these loans.

6. Donna Rodrigues caused Saratoga to violate, within the meaning of section 407(g) of the NHA, the aforesaid conflict-of-interest regulation on several occasions. Section 407(r)(3) of the NHA provides that "as used in subsection (g) of this section, the term 'violation' includes without limitation any action (alone or with another or others) for or toward causing,

bringing about, participating in, counseling, or aiding or abetting a violation." 12 U.S.C. § 1730(r)(3). Donna Rodrigues engaged in actions with her husband, Jess A. Rodrigues, whereby she participated in, and aided and abetted, the regulatory violations.

7. With respect to the making of the aforementioned unlawful loans, both Jess A. Rodrigues and Donna R. Rodrigues engaged or participated in one or more unsafe or unsound practices in connection with the affairs of Saratoga, an insured institution. See, e.g., 12 C.F.R. §§ 571.7, 571.9.

8. During the period in question both Mr. and Mrs. Rodrigues owed a fiduciary duty of loyalty to Saratoga and its depositors. With respect to their involvement in the aforesaid ventures that were funded by "nominee loans" both Mr. and Mrs. Rodrigues engaged in acts, omissions, or practices which constituted breaches of their fiduciary duties owed to Saratoga and its depositors. They breached their fiduciary duties by, inter alia, (1) usurping a corporate opportunities of Saratoga, and (2) engaging in self-dealing transactions without proper disclosure to Saratoga's board of directors, officers, or loan committee.

9. Saratoga has suffered substantial financial damage by reason of the above-mentioned regulatory violations, unsafe or unsound practices, and breaches of fiduciary duty. This is because the Respondents diverted to themselves profits in excess of $1 million that could have been earned by Saratoga.

10. Both Jess A. Rodrigues and Donna Rodrigues have received financial gain by reason of the aforesaid regulatory violations,

unsafe or unsound practices, and breaches of fiduciary duty. Specifically, they received aggregate financial gain in an amount exceeding $1,067,000.

11. The actions of Mr. and Mrs. Rodrigues show that they perpetrated a fraudulent scheme of using "nominee loans" that redounded to their own personal benefit. They (1) surreptitiously orchestrated self-dealing transactions; (2) affirmatively concealed information from Saratoga's Board of Directors regarding the aforesaid practices, breaches of fiduciary duty, and violations; and (3) deceptively misinformed Saratoga's senior management about their role in the Continental Can venture. Accordingly, the actions of Mr. and Mrs. Rodrigues in connection with the aforesaid violations, practices, and breaches of fiduciary duty involve "personal dishonesty" within the meaning of section 407(g) of the NHA.

12. The actions and inactions of both Jess A. Rodrigues and Donna Rodrigues in connection with the aforesaid violations, practices, and breaches of fiduciary duty demonstrate a "willful and continuing disregard for the safety and soundness" of Saratoga.

13. In view of the foregoing findings of fact and conclusions of law, the grounds specified in the Notice have been established by a preponderance of the evidence. Accordingly, the FSLIC is authorized to issue to the Respondents such an order of removal from office, and/or prohibition from participation in the conduct of the affairs of Saratoga, as it may deem appropriate, pursuant to section 407(g)(5) of the NHA, 12 U.S.C. § 1730(g)(5).

14. The Respondents have failed to establish the ground to support a finding in favor of any of the affirmative defenses asserted by them in their Answer, and accordingly, there is no reason why the FSLIC should not issue removal-and-prohibition orders to the Respondents.

15. Although the foregoing findings are sufficient in themself, an appendix is attached which discusses certain of the issues raised by respondents on brief.

III

ORDER

The Administrative Law Judge recommends issuance of an order of removal and prohibition, as follows:

> In view of the foregoing findings of fact and conclusions of law, the Federal Savings and Loan Insurance Corporation hereby orders that:
>
> 1. Jess A. Rodrigues and Donna R. Rodrigues each are removed from any and all positions they currently hold as directors and/or officers of Saratoga Savings and Loan Association, San Jose, California;
>
> 2. Jess A. Rodrigues and Donna R. Rodrigues each are prohibited from participating in any manner in the conduct of the affairs of Saratoga Savings and Loan Association;
>
> 3. Pursuant to section 407(p) of the NHA, 12 U.S.C. § 1730(p), Jess A. Rodrigues and Donna R. Rodrigues each are prohibited from voting for a director, or from serving or acting as a director, officer or employee of any institution the deposits of which are insured by the Federal Savings and Loan Insurance

Corporation, without the prior written permission of the Federal Savings and Loan Insurance Corporation;

4. In order to (1) effectuate the requirements of this order and those of 12 U.S.C. § 1730(p)(1), and (2) allow Saratoga to continue to conduct its corporate affairs without undue difficulty, it is necessary for the voting rights attendant to the outstanding stock of Saratoga Savings, currently controlled by Jess A. Rodrigues through California Housing Securities, Inc. ("CHS"), to be placed in the control of one or more persons other than Jess A. Rodrigues or Donna R. Rodrigues. Accordingly, Jess A. Rodrigues, on behalf of CHS, no later than five business days following service of this order on him, shall (1) execute a proxy in the form set forth below, and (2) deliver said proxy to the President or Secretary of Saratoga Savings.

PROXY

CALIFORNIA HOUSING SECURITIES, INC., a California corporation, by and through the undersigned, Jess A. Rodrigues, its President, hereby appoints the Board of Directors of Saratoga Savings and Loan Association (the "Association"), San Jose, California, as proxy, to vote all stock in the Association that California Housing Securities, Inc., would be entitled to vote with respect to any and all matters that may come before any Meeting of the Share Owners of the Association and any adjournments thereof.

The Board of Directors of the Association shall vote the aforesaid stock in the Association in a manner that in their best judgment best serves the interests of the Association and its depositors. All such decisions of the Board of Directors shall (i) be made at one or more meetings of said Board of Directors, duly called and held, at which a quorum was present, and (ii) be reflected in the corporate minute book of the Association.

This proxy may not be revoked except with the prior written consent of the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, an agency of the United States Government, which has directed the execution and delivery of this proxy pursuant to an order issued under Section 407(g) of the National Housing Act, as amended, 12 U.S.C. § 1730(g).

On this _____ day of ____________________, 1989, CALIFORNIA HOUSING SECURITIES, INC., hereby executes this proxy.

CALIFORNIA HOUSING SECURITIES, INC.
By:

____
Jess A. Rodrigues, President

Paul S. Cross

By Paul S. Cross, Administrative Law Judge, on this 13th day of July, 1989.

ENDNOTES

1. Factual statements set forth below are supported by references to the record herein. Documents received as a Government Exhibit are referred to by their exhibit number, so that Government Exhibit #1 would be GX 1. Similarly, Defense Exhibit #1 would be DX 1. References to the testimony of a witness will be made by referring to the name of the witness and the relevant page(s) in the transcript of this proceeding, e.g., Lazares, pp. 219-22. References to the Answer of the Respondents refer to the Answer and the relevant paragraph number, e.g., Answer Par. 1.

2. The date of February 16, 1984 is supported by a letter of that date indicating that Rodrigues, Hall, and Cristina were removing contingencies to the purchase of the property. (GX 40).

3. During the course of the FSLIC's investigation of this matter in 1988, it issued a subpoena duces tecum to CHS for documents regarding this $1 million obligation of CHS. (GX 78.) CHS, however, acting through its counsel, responded to the FSLIC that it had no documents regarding this $1 million obligation, and it inferred that there was no such obligation. (GX 79; see J. Rodrigues, p. 1172.)

4. Mr. Rodrigues denies that, prior to the making of this loan, he spoke with Winslow about making the loan. (J. Rodrigues, p. 1069.)

5. The issuance of this $150,000 check caused the J.A. Rodrigues & Ventures account to be overdrawn. (GX 76; GX 77; J. Rodrigues, pp. 1164-67.)

6. Mr. Rodrigues also testified that he did not know of the existence of this loan until March 15, 1985, and that he had not spoken with Winslow about the making of this loan at any time during the autumn of 1984. (J. Rodrigues, pp. 1176-77.) This testimony of Mr. Rodrigues is not credible.

7. Mr. Rodrigues testified that Winslow was responsible for the making of these loans. (J. Rodrigues, p. 1183.) This clearly is wrong, because Winslow left Saratoga approximately six months earlier.

8. Mr. Rodrigues asserted that the testimony of Tate about the "equity kicker" was a "fabrication." (Rodrigues, p. 1122). Mr. Rodrigues thereby placed his testimony on this point squarely in opposition to that of Tate's testimony on the subject, which is corroborated by other evidence, including the testimony of Lazares. Accordingly, Mr. Rodrigues perjured his testimony on this issue at least. It should be noted that findings adverse to Mr. Rodrigues are not new. In January 1976, a jury found Mr. Rodrigues liable for violation of corporate securities law, breach of fiduciary duty, negligent misrepresentation, and fraud. See Abe Schestopol v. Universal Capital Corporation, et al., No. 277308 (Cal. Super. Ct., Santa Clara Co., verdict filed Jan. 13, 1976). (GX 81). Mr. Rodrigues also had been convicted of a crime in 1955. (GX 80).

9. Mr. Rodrigues refused to produce this document to the FSLIC. First he refused to produce it (and other tax returns) in compliance with the FSLIC's investigative subpoena duces tecum dated May 12, 1988. The FSLIC obtained a Federal court order directing Rodrigues to comply with the subpoena, but he has not done so in light of a stay of that order issued in connection with his appeal of the lower court order. FSLIC v. Jess A. Rodrigues, No. C-88-20472-WAI (N.D.Calif., subpoena enforcement order issued Nov. 28, 1988), appeal docketed, No. 89-15084, (9th Cir., Jan. 23, 1989)(concerning Fifth Amendment assertion). Mr. Rodrigues, again invoking his Fifth Amendment privilege, refused to produce this document, during the course of this proceeding, in response to the Government's First Request for Production of Documents. See the Respondents' Response thereto dated April 7, 1989.

10. It also should be noted that the Commercial and Misc. Underwriting Sheets, signed by McDonald, with respect to the two $800,000 loans showed that McDonald knew, or should have known, that the loans related to the Continental Can Property. This is because those forms include the following notation: "Purpose of loan[:] To purchase a 150,000 sq. ft. industrial building at 357 Taylor Street, San Jose, CA."

APPENDIX

This decision incorporates by reference (adopts) the opening and reply briefs of the Office of Enforcement of the Federal Home Loan Bank Board respectively dated June 5 and June 26, 1989. However, certain central facts are intensely disputed by respondents. In respect of these central issues, the following supplemental findings are made and are supported by the findings in the body of this decision.

1. The initial arrangement for the Continental Can loans to Tate and Lazares involved an "equity kicker" for Saratoga which Mr. and Mrs. Rodrigues in effect took for themselves in a breach of their fiduciary duty. There is no other rational explanation of the Continental Can partnership which was expected to be very profitable and had to be done quickly. Two witnesses support the Government version of the transaction. So does the 1984 tax return of the respondents. The subsequent paper discard of the equity kicker was the entree for respondents' one-third interest in the property. Also, the failure of Mr. Rodrigues to inform Saratoga officials of his imminent intention to benefit from the loans he knew would be made to Tate and Lazares was a breach of fiduciary duty.

2. From its inception, this proceeding has involved conflict-of-interest charges. The notice of charges refers to a breach of fiduciary duty which is fair notice of a conflict-of-interest charge, which was not stated as such in the notice.

3. In the case of the Marina loans, the partnership interest of Mr. and Mrs. Rodrigues and the understanding of the parties that loans would be made by Saratoga for the benefit of the partnership were established before Mr. and Mrs. Rodrigues departed for China. They, therefore, cannct use their China trip as a shield.

4 . In the case of the Cinnabar property, the partnership interest of Mr. and Mrs. Rodrigues was created before the subject loan was made for the benefit of the partnership, and again there was a breach of fiduciary duty by the respondents. Further, a contention of Mr. Rodrigues that his interest in the Cinnabar Property was disclosed to a quorum of the Board of Directors including Mrs. Rodrigues on December 20, 1983, at a post-board meeting for cocktails and dinner lacks coherence and conflicts with other testimony of Mr. Rodrigues that his initial conversations concerning the Cinnabar Property were only with his partner's father Vernon Cristina, (Rodrigues, pp 1056-1059), who incidentally was at the December 20, 1983, dinner with Mr. and Mrs. Rodrigues.

5. Mrs. Rodrigues is not an innocent participant. She is very informed of the affairs of Saratoga and is almost co-equal to Mr. Rodrigues in their management of the business.

6. All of the loans in question except a minor portion of the Cinnabar funds were applied to the property interests of

Mr. and Mrs. Rodrigues, and there was a gross violation of their fiduciary duty.

7. These matters have not been previously adjudicated and there has been no delay in bringing the charges because of the concealment of respondents.

8. There also is no believable evidence of intent on the part of other saving and loan officials to injure Saratoga.

UNITED STATES OF AMERICA

OFFICE OF THRIFT SUPERVISION

In the Matter of Jess A. Rodrigues and Donna R. Rodrigues	A Removal and Prohibition Proceeding No. 88-1564 Order No. 89-411 Dated: November 22, 1989

ORDER ON MOTION FOR LEAVE TO FILE A RESPONSE TO EXCEPTIONS

On July 17, 1989, the Administrative Law Judge filed his recommended decision in this matter. Thereafter, on July 28, 1989, the Office of Enforcement filed a motion seeking leave to file a response to either or both respondents' Exceptions to the recommended decision should any such exceptions be filed. Subsequently, on August 17, 1989, respondents served and filed such exceptions. On September 5, 1989, the Office of Enforcement served its response to respondents' exceptions. Thus, the motion is now ripe for decision.

During the pendency of this proceeding, the Board amended its rules of Practice and Procedure in Adjudicatory Proceedings, 12 C.F.R. Part 509. Former rules 509.12 (12 C.F.R. 509.12) and 509.13 (12 C.F.R. 509.13) dealing with the filing of briefs and exceptions should be read together. The same is true for the amendments to those rules -- rules 509.28 and 509.29 (54 Fed. Reg. 26349, 26368 (June 23, 1989)). Any set of exceptions to the recommended decision of an Administrative Law Judge which contains argument in addition to a listing of the findings to which the party takes exception constitutes both a brief within the meaning of old rule 509.13 (amended rule 509.28) and the party's exceptions within the meaning of old rule 509.12 (amended rule 509.29). Indeed, old rule 509.12(a) and its counterpart in the amended rules (rule 509.29(a)) both contemplate that the exceptions will be "supported by such brief as may appear advisable." In the instant situation, the respondents filed exceptions which contain both argument and an identification of findings to which they take exception. Therefore, respondents' exceptions constitute a "brief" within the meaning of former rule 509.13 (12 C.F.R. 509.13 (1988)) and amended rule 509.28 (54 Fed. Reg. 26368). Under subsection (b) of each of those rules a party may file a reply brief. See, 12 C.F.R. 509.13(b) (1988); 54 Fed. Reg. at 26368. Thus, the Office of Enforcement may file a responsive brief.

The time within which such a brief must be filed must also be determined. Under the old rules, a party could file a reply brief within ten days; the amended rules increased the time for filing a reply brief to twenty days. Compare, 12 C.F.R. 509.13(b)(1988) with 54 Fed. Reg. at 26368 (to be codified at 12 C.F.R. 509.28(b)). The Federal Register notice of the amendments to Part 509 of title 12 of the Code of Federal Regulations (the Rules of Practice and Procedure of the Federal Home Loan Bank Board) states that the amendments will be effective on June 14, 1989. See, 54 Fed. Reg. at 26350). That notice further states that the amended "rules will apply to all adjudicatory proceedings in which the notice initiating the proceeding is issued after June 23, 1989." Id. The latter statement was not intended to change the effective date of the rule amendments. Rather, that statement was intended to make clear that the amended rules would completely govern all proceedings commenced after June 23, 1989. The amended rules will also control matters which occur on or after June 14, 1989, in proceedings in progress before June 23, 1989, provided that the application of the amended rules does not prejudice any party to the proceeding. See, Hatch v. Federal Energy Regulatory Commission, 654 F.2d 825, 837 (D.C. Cir. 1981); see also, Friel v. Cessna Aircraft Co., 751 F.2d 1037, 1039 (9th Cir. 1985); cf., Bradley v. Richmond School Board, 416 U.S. 696, 711 (1974) (changes in the law should be applied to ongoing proceedings unless doing so would result in manifest injustice). Application of the amended rule to the instant proceeding does not prejudice any party. Accordingly, the amended rule permitting a responsive brief to be filed within twenty days of service of the original brief (Rule 509.28(b)) will be applied in this proceeding. The responsive brief of the Office of Enforcement was filed on September 5, 1989, within the twenty day period provided, and thus was timely filed.[1] Therefore, the motion for leave to file is granted and the Office of Enforcement's response to respondents' exceptions is received.

Dated: November 22, 1989

/S/

M. Danny Wall
Director

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[1] Even if former rule 509.13(b) were deemed to apply, the result here would not change. In consideration of the facts stated above as well as the fact that the respondents were given the enlarged time period provided by amended rule 509.29 in which to file their exceptions and the fact that respondents have not filed any objection to the pending motion, we would exercise our discretion under former rule 509.13(c) (12 C.F.R. 509.13(c) (1988)) to receive the responsive brief of the Office of Enforcement.