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

| IN THE MATTER OF<br><br>CHARLES R. VICKERY, JR.,<br>FORMER SENIOR CHAIRMAN OF THE BOARD<br>FIRST NATIONAL BANK OF BELLAIRE<br>BELLAIRE, TEXAS | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | DOCKET NO.:<br>OCC-AA-EC-96-05<br>OCC-AA-EC-96-06 |
|---|---|---|

# DECISION AND ORDER

## I. SUMMARY

Before the Comptroller of the Currency (the "Comptroller") is the recommended decision of the Administrative Law Judge ("ALJ") in an administrative enforcement proceeding that seeks the assessment of a civil money penalty ("CMP") against respondent Charles R. Vickery, Jr. ("respondent" or "Vickery"). Upon consideration of the entire record, the Comptroller adopts the findings of fact, conclusions of law, and the decision of the ALJ, except as modified herein, and orders respondent to pay a CMP of $250,000.[1]

## II. PROCEDURAL BACKGROUND

On January 26, 1996, the Office of the Comptroller of the Currency's Enforcement and Compliance Division (the "E&C") issued a Notice of Assessment of a Civil Money Penalty (the "Notice") against Charles R. Vickery, Jr., former Senior Chairman of the Board

---

[1]The ALJ also recommends that Vickery be prohibited from further participation in the conduct of the affairs of federally insured depository institutions for a limited period of three years. This issue has been certified to the Board of Governors of the Federal Reserve System for determination. 12 U.S.C. § 1818(e)(4). Accordingly, the Comptroller's decision does not address the parties' exceptions to this recommendation.

of First National Bank of Bellaire, Bellaire, Texas (the "bank" or "Bellaire"), assessing a CMP in the amount of $250,000. In the Notice, E&C alleged that respondent had repeatedly breached his fiduciary duty to the bank as a result of his negotiation and approval of 23 real estate loans to Jerry J. Moore, his wife Jean, and their related interests, for the purchase of shopping centers during 1991 and 1992. E&C further alleged that respondent's breaches of fiduciary duty to the bank were part of a pattern of misconduct and resulted in pecuniary gain to the respondent.

On February 9, 1996, respondent filed an answer to the Notice and requested an administrative hearing pursuant to 12 U.S.C. § 1818(h)(1) and the OCC's Rules of Practice and Procedure, 12 C.F.R. § 19.19. On March 11, 1996, respondent moved to strike certain allegations contained in the Notice concerning lending limit law violations and unsafe and unsound banking practices found to have been committed by Bellaire in a previous adjudicatory proceeding. Asserting that he was in privity with Bellaire, respondent moved to strike the allegations based upon the doctrine of res judicata. After granting E&C's cross-motion for a more definite statement of the motion to strike, and considering respondent's re-filed motion and E&C's response, on April 25, 1996, the ALJ denied Vickery's motion to strike.

On April 18, 1996, E&C filed a "Motion for Official Notice of Adjudicatory Findings," pursuant to 12 C.F.R. § 19.36 (b)(1) of the OCC Rules of Practice and Procedure, and requested that the ALJ take official notice of the Comptroller's Decision and Order in In the Matter of Texas National Bank of Baytown, Baytown, Texas; Mayde Creek Bank, N.A., Katy, Texas; and First National Bank of Bellaire, Bellaire, Texas, OCC-AA-

EC-92-88, 90 & 92; Texas Nat'l Bank v. OCC, 50 F.3d 1033 (5th Cir. 1995) (table) (per curiam) ("Bellaire"). In support of the motion, E&C asserted that the doctrine of collateral estoppel precluded relitigation of the issues decided in Bellaire. On May 8, 1996, respondent filed an opposition to the motion. On May 14, 1996, the ALJ granted E&C's motion for official notice. The ALJ found that issues determined by the Comptroller in Bellaire concerning the bank's lending limit violations and unsafe and unsound practices could be used against Vickery, who was considered to be a party in privity with Bellaire, in this CMP proceeding as an indication of the gravity of the offences in determining the amount of CMP, if any, that should be assessed against Vickery.

On May 14, 1996, respondent amended his answer to the Notice, and included fourteen affirmative defenses. A hearing was held before Administrative Law Judge Walter J. Alprin in Houston, Texas. The hearing commenced on June 18, 1996, and concluded on June 26, 1996. Following the hearing, the parties filed findings of fact and conclusions of law.

On November 25, 1996, the ALJ issued a recommended decision. Both parties filed exceptions to the ALJ's recommendations. On January 6, 1997, the case was submitted to the Comptroller for a final decision.

On December 26, 1996, respondent filed a request for an in-person hearing. On January 10, 1997, respondent filed a reply to E&C's exceptions. On January 13, 1997, E&C filed a motion to strike respondent's reply and to amend its exceptions to make a minor correction. On January 13, 1997, respondent filed an amended reply to E&C's exceptions. On January 17, 1997, respondent filed a response to E&C's motion to strike.

## III. THE ALJ'S RECOMMENDED DECISION

The ALJ's eighty-six findings of fact and sixteen conclusions of law are contained in his recommended decision. Thus, only a brief summary of the ALJ's factual findings and conclusions of law is provided in this decision.

### SUMMARY OF ALJ'S FACTUAL FINDINGS

During 1991 and 1992, Vickery was Senior Chairman of the Board of Bellaire, Chairman of Bellaire's Executive Committee, and a member of the Loan Committee. FF 4.[2] He owned and controlled approximately 40 percent of the bank's outstanding shares. FF 3.

Beginning on June 28, 1991, and continuing periodically until January 3, 1992, Vickery negotiated and approved 23 real estate loans of various amounts for the purchase of shopping centers to real estate developer Jerry J. Moore, his wife Jean, and corporations owned and controlled by the Moores (the "Moore loans" or the "loans"). FF 10-12. The Moore loans were originated by Bellaire and totaled approximately $46 million. FF 10. Bellaire retained approximately $24 million of the loans and sold participations in the remainder to its affiliates, Texas National Bank of Baytown, Baytown, Texas ("Baytown") and Mayde Creek Bank, N.A., Katy, Texas ("Mayde Creek"). FF 10.

Each of the 23 Moore loans was approved, booked and disbursed before Vickery presented the loans to the Board of Directors for their consideration. FF 74. During the period that Vickery negotiated and approved the Moore loans, Vickery received financial

---

[2]"FF ___." refers to the number of the ALJ's Finding of Fact. "CC ___." refers to the number of the ALJ's Conclusion of Law. "RD ____." refers to the page of the ALJ's Recommended Decision. "RE ___." refers to the page of the respondent's exceptions. "E&CE ___." refers to the page of E&C's exceptions.

gain in connection with the 23 loans from Commonwealth Land Title Company of Houston ("Commonwealth"), the title insurer which provided title insurance and closing services for the loans. FF 3, 24-26. In connection with the first Moore loan, Vickery received funds directly from the loan proceeds, which funds were paid by Commonwealth to Vickery Law Corporation. FF 24, 27-32.

Thereafter, in connection with the other 22 Moore loans, Vickery entered into an arrangement to receive financial gain with a Sovereign Title Insurance Co. ("Sovereign") agent, P.B. Dover, Jr. ("Dover"), who had previously paid Vickery fees for referrals of title insurance business. FF 23, 36. Dover entered into fee sharing agreements with Commonwealth and collected 20 percent of the gross title insurance premiums that Commonwealth collected from the loan proceeds. FF 37-41, 47-48, 54-55, 60-61, 65-66. Pursuant to Vickery's instruction, Dover kept the greater of five percent or $500 of the amount received for each loan and sent the remainder to Vickery. FF 42-43, 49-51, 56-57, 62-63, 67-68. In all instances, Vickery received financial gain without the knowledge or the approval of Bellaire's directors. FF 74. The personal financial gain that Vickery received in connection with the bank's 23 loans to the Moores totaled $52,880. FF 26.

## Summary of ALJ's Conclusions of Law

Based upon the record evidence, the ALJ concluded that the respondent, an institution affiliated party, repeatedly breached his fiduciary duty to the bank. CL 4, 10, 13. In addition, the ALJ concluded that the respondent's breaches of duty were part of a pattern of misconduct, CL 11, 14, and resulted in financial gain to the respondent. CL 10. Accordingly, the ALJ concluded that the requisite elements for assessment of a second tier

civil money penalty, pursuant to 12 U.S.C. § 1818(i)(2)(B), had been established by a preponderance of the evidence. RD 4-5. The ALJ recommended a CMP of $158,640 be assessed against respondent. Id.

## IV. DISCUSSION

### A. Assessment of a Second Tier Civil Money Penalty Is Appropriate

12 U.S.C. § 1818(i)(2)(B), in pertinent part, authorizes the OCC to assess a second tier civil money penalty against an institution-affiliated party who "breaches any fiduciary duty," which breach is "part of a pattern of misconduct" or "results in pecuniary gain or other benefit to such party." In his recommended decision, the ALJ found that Vickery had a fiduciary duty to the bank and that he breached his fiduciary duties of loyalty and candor by approving the 23 Moore loans and receiving payment in connection with these loans without the knowledge of the full board of directors. RD 30-46. Further, the ALJ found that Vickery received pecuniary gain and engaged in a pattern of misconduct as a result of his repeated breaches of fiduciary duty. RD 46-49, 58. Accordingly, the ALJ concluded that assessment of a second tier CMP against Vickery was appropriate.

In numerous and lengthy exceptions, respondent objects to virtually all findings of fact and conclusions of law that establish the appropriateness of the assessment of a second tier CMP. RE 2-85. The Comptroller finds that Vickery's exceptions, including those not specifically addressed in this decision, are lacking in merit. Respondent's exceptions are either unsupported by the record evidence or unnecessary to the determination of whether a second tier CMP should be assessed against him. Accordingly, as explained below, the Comptroller adopts the ALJ's recommended findings and conclusions (except as modified

herein) and concludes that a second tier CMP should be assessed against respondent.

In its exceptions, E&C objects to the ALJ's determination that Vickery's repeated breaches of his fiduciary duty to the bank constitute only breaches of his fiduciary duty of loyalty to the bank, and not also breaches of his fiduciary duty of care. E&CE 2-5. In assessing a second tier penalty against Vickery, it is unnecessary for the Comptroller to decide whether Vickery separately breached his duty of care because his repeated breaches of his duty of loyalty to the bank have been clearly established.

**1. Vickery Breached His Fiduciary Duty of Loyalty to the Bank**

When directors have a personal financial interest in a transaction of the bank, there is an inherent risk that their decision making will be influenced by the prospect of deriving personal financial benefit from the transaction. The duty of loyalty prohibits a director or officer from engaging in self dealing or engaging in transactions that involve conflicts of interest with the institution. Matter of Seidman 37 F.3d 911, 933 (3rd Cir. 1994); International Banker's Life Ins. Co. v. Holloway, 368 S.W. 2d 567, 576 (Tex. 1963). Moreover, a fiduciary has a duty to act with candor and to make disclosure of matters affecting the principal's interests or his personal interest in a transaction. Matter of Seidman 37 F.3d at 935 n.34 (3rd Cir. 1994); Chien v. Chen, 759 S.W. 2d 484, 495 (1988).

The ALJ found, and the Comptroller agrees, that Vickery repeatedly breached his fiduciary duty to the bank by approving the 23 Moore loans while receiving payment in connection with these loans; by failing to disclose his interest to Bellaire's board of directors; by failing to recuse himself from further negotiations and approval of the Moore loans; and by giving misleading sworn deposition testimony about his receipt of the money during a

subsequent state investigation concerning his involvement in the Moore loans. RD 45-46. Respondent does not dispute that as a director and decision-maker he had a fiduciary duty to the bank. RE 45. Rather, he excepts to the ALJ's conclusion that he repeatedly breached his fiduciary duty of loyalty and to the factual findings that support this conclusion. RE 45-70.

### a. Vickery Engaged In A Conflict Of Interest

The ALJ concluded that Vickery repeatedly breached his duty of loyalty to the bank by engaging in a conflict of interest. RD 33. Vickery excepts to the ALJ's findings that his control over the loan decision making process coupled with his personal financial interest in the Moore loans constituted a conflict of interest. RE 2-5, 12-13, 14-18, 67-70. The evidence establishes that at the same time that he was negotiating and approving the 23 Moore loans Vickery was receiving payments from Commonwealth; directly, with respect to the first loan, and indirectly, with respect to the 22 subsequent loans. FF 24, 27-69. As controlling stockholder, member of the loan committee, and senior chairman of the board, Vickery was the decision maker for these loans. Vickery's judgment on these lending decisions could have been influenced by his receipt of personal financial gain. Accordingly, the Comptroller agrees with the ALJ that Vickery engaged in a conflict of interest with respect to his involvement in the 23 Moore loans.

#### (i) Vickery's Receipt of Payments in Connection with the Moore Loans

Respondent does not deny that he received money in connection with the 23 Moore loans. RD 31. Instead, he argues that he did not engage in a conflict of interest because he legitimately earned the payments for real estate closing or title examination services that he

performed in connection with the Moore loans. RE 12-13, 14-16, 67-70. However, the legitimacy of Vickery's payments is irrelevant to the determination of whether Vickery engaged in a conflict of interest. Respondent's personal receipt of payments, legitimate or not, in connection with loans that he approved, from a source other than the bank simply does not negate Vickery's conflict of interest in this instance.[3]

**(ii) <u>Vickery's Approval of the Moore Loans</u>**

In concluding that Vickery engaged in a conflict of interest, the ALJ found that Vickery had total control over the approval of the Moore loans. RD 32-33. Although Vickery admits that he directly negotiated the loans with Moore, RE 3, he contends that the loan committee approved the loans and that the entire board made the decisions to originate the Moore loans. RE 3-5, 17-18. Contrary to Vickery's contentions, the evidence establishes that Vickery was in effect the loan committee and that the loans were made prior to the board's consideration of them. FF 11-12, 73-75.

Although a loan committee that consisted of respondent, the bank's chairman and president Warren Coles, and the bank's executive vice president and chief operating officer Craig Wooten existed at the time the Moore loans were made, the evidence establishes that respondent assumed responsibility for credit decisions and final approval of the loans. FF 12. Wooten testified that he was never again consulted about the Moore loans after he approached respondent to discuss possible lending limit violations following approval of the first group of Moore loans. FF 12. RD 32 n.17. Moreover, Coles testified that, although

---

[3]While these arguments are irrelevant to the issue of whether Vickery engaged in a conflict of interest, Vickery's contentions concerning the legitimacy of his payments is addressed by the Comptroller in the pattern of misconduct section.

he did not often disagree with respondent, if he objected to the approval of a loan and respondent was in favor of making the loan, the loan would still be made despite his objection. RD 32 n.16.

Similarly, the evidence establishes that Bellaire's board of directors also had little involvement in the approval of the Moore loans. Each of the 23 Moore loans was approved, booked and disbursed before Vickery presented the loans to the board of directors for their consideration. FF 74. Hence, the Comptroller agrees with the ALJ's determination that respondent had total control over approval of the Moore loans.

**b. Vickery Breached His Duty of Candor**

To fulfill his duty of candor, Vickery was required to make a full disclosure to the officers and directors at Bellaire regarding any financial interest in the Moore loans and to recuse himself from any decision regarding the loans. The ALJ found, and the Comptroller agrees, that Vickery did neither.

Vickery raises two objections to the ALJ's conclusion that he breached his duty of candor. First, he asserts that his duty of disclosure was fulfilled because board member Coles and advisory board member and officer Wooten were aware of his financial interest in the Moore loans. RE 18-23, 67-8. Secondly, he asserts that it was unnecessary to recuse himself from any involvement in the decision making process for the Moore loans because the board ultimately made the decisions to originate the Moore loans. RE 68-70.

Vickery is mistaken in his assertion that he fulfilled his duty of disclosure. Simply put, Vickery did not fulfill his duty of candor merely because a board member and advisory board members may have been aware that he was receiving payments in connection with the

Moore loans. His duty of candor required him to make formal disclosure to the entire board. Moreover, the evidence establishes that none of the directors, other than respondent, had direct knowledge of Vickery's receipt of funds at the time of the loans. RD 39-40. Although board member Coles and advisory board members Wooten and Constance Vickery[4] had an awareness that Vickery was receiving money in connection with the loans, Vickery never disclosed directly his financial interest in the loans even to Coles or Wooten. RD 39. Moreover, none of the other directors had any knowledge that Vickery was receiving funds in connection with the loans because Vickery never disclosed his financial interest to them. RD 40.

Vickery's failure to advise the entire board of his financial interest in the Moore loans was a breach of his duty of candor. The Comptroller notes that it is highly unusual for a bank loan officer to receive any outside compensation relating to a loan. See First National Bank of Lamarque v. Smith, 610 F.2d 1258, 1265 (5th Cir. 1980) (Comptroller reasonably exercised his authority in determining that distribution of credit life insurance commissions to bank "insiders" constitutes unsafe and unsound banking practice). As the ALJ stated, RD 42, the entire board had a right to know the facts of Vickery's financial interest in the loans and to consider the propriety of Vickery's interest prior to approving the loans.

Moreover, Vickery should have recused himself from decisional aspects of the loan process. By failing to abstain from participating in the Moore loans in which he had a conflicting interest by virtue of his acceptance of payments from the title insurer, Vickery

---

[4]Constance Vickery is respondent's wife.

violated his duties of candor and loyalty.[5]

### c. Vickery Breached His Fiduciary Duty By Giving Misleading Testimony During A Deposition

The ALJ found that Vickery breached his fiduciary duty to the bank by lying in a sworn deposition conducted by the Texas Department of Banking in a Texas Finance Commission proceeding related to the Moore loans. RD 43-45. During the deposition. Vickery denied receiving $2,432 from Commonwealth in connection with the first Moore loan. RD 44. Vickery's exception to the ALJ's conclusion is that his denial was not the result of an effort to conceal his receipt of payments in connection with the loans; rather. it was simply due to his failure to recall receiving payment.

As the ALJ found, it is incredible that Vickery could have forgotten the check from Commonwealth in the year and one half that had passed since he received the payment. RD 44-45. The fact that this payment was paid directly to the Vickery Law Corporation and was used by Vickery to reduce the balance on a loan by Mayde Creek Bank to the Constance Corporation supports this credibility determination. FF 27-30. RD 44. Further support for the ALJ's credibility determination is provided by the fact that this payment was the only payment that Vickery received directly from Commonwealth. FF 27. If Vickery had disclosed that he had received a payment from Commonwealth in connection with the first loan, this could have led to the discovery of his personal interest in the 22 subsequent Moore

---

[5]Vickery excepts to the ALJ's determination that he was required to avoid the appearance of a conflict of interest. RE 70. It is unnecessary for the Comptroller to address this exception because the evidence clearly establishes that Vickery engaged in an actual conflict of interest. For the same reason, the Comptroller does not adopt the ALJ's conclusion on the appearance issue.

loans. Hence, there was motivation for Vickery not to disclose information regarding his personal financial interest in the first Moore loan. Accordingly, the Comptroller accepts the ALJ's credibility determination. rejects Vickery's exception, and concludes that Vickery breached his fiduciary duty to the bank by lying during a sworn deposition in an effort to conceal his financial interest in the Moore loans.

**2. Vickery Engaged In A Pattern of Misconduct**

The ALJ concluded that Vickery's acceptance of fees between June 28, 1991 and January 3, 1992, his manner of receiving payments by diverting a portion of the title insurance premiums earned by Sovereign to himself, his failure to disclose his pecuniary interest to the board of directors, and his repeated breaches of his fiduciary duty to the bank were all part of a pattern of misconduct. RD 26-55, 58. Vickery excepts to these conclusions and the supporting factual findings based upon his claim that these recommendations are not supported by the evidence.

The evidence establishes that following Moore's refusal to use Sovereign as a title insurer, Vickery entered into an arrangement to receive financial gain in connection with 22 Moore loans with Sovereign agent Dover. FF 36. Vickery had a long standing relationship with Dover. FF 9, 36. RD 34. In the past, Dover had paid Vickery fees for referrals of title insurance business. Id. In the case of the Moore loans, Vickery instructed Dover to enter into a fee sharing agreement with Commonwealth and to collect 20 percent of the gross title insurance premiums collected by Commonwealth from the loan proceeds. FF 36. Vickery advised Dover to keep the greater of five percent or $500 of the amount received and send the remainder to Vickery. Id. Sovereign did not know of or receive the checks

made out by Commonwealth. RD 37. Instead, Dover cashed the checks, kept the lesser of five percent or $500 for himself, and gave the remainder to respondent. FF 36. RD 37.

Vickery advances numerous arguments concerning the legitimacy of his arrangement with Sovereign and his receipt of fees to demonstrate that he did not engage in a pattern of misconduct. RE 12-16, 68-69. The Comptroller rejects all of respondent's arguments. The ALJ found, and the Comptroller agrees, that in each instance the respondent did not earn the payments as a result of performing real estate closing work or title examinations. First, at the times the loans were originated, respondent was not an active attorney licensed to practice in the State of Texas, and therefore was not authorized to perform closings and to be paid for such services as an attorney. FF 8. RD 36.

Moreover, the evidence establishes that the T-00 disclosure forms required in fee sharing arrangements, which forms were submitted by Dover to Commonwealth for the Moore loans, were false. The T-00 disclosure forms submitted by Dover disclosed that Dover was splitting a 20 percent commission with Commonwealth for rendered services. FF 39, 47, 54, 60, 65. However, Dover did not receive 20 percent of the gross insurance premium from Commonwealth. FF 43, 51, 57, 62-63, 67-68. In reality, respondent received by way of Dover the 20 percent commission, minus the lesser of five percent or $500 paid to Dover. RD 35. Moreover, Dover admitted that he did not do any work on the Moore loans. FF 21.

In addition, the evidence establishes that Vickery was not an employee or agent of Commonwealth, Sovereign or Dover. FF 70-72. Therefore, Vickery was also precluded from receiving payments from a title insurance company or agent pursuant to article 9.02 of

the Texas Insurance Code. RD 36-37. Finally, the evidence establishes that during the relevant time period Vickery was not performing any activities related to title insurance or loan closings. As the ALJ found, the payments received by Vickery were referral fees. which at the time of these loans were prohibited under article 9.30(a) of the Texas Title Insurance Act. RD 34, 37-38.

Respondent arranged Sovereign's and Dover's role in the 22 loans in order to receive fees that Commonwealth could not or would not pay directly to Vickery. Moreover. respondent purposely devised this elaborate and circuitous method of payment. which included having Dover file false fee sharing disclosures. to conceal his personal financial gain. Thus. the Comptroller concludes that respondent engaged in a pattern of misconduct.

### 3. Vickery's Breaches of Fiduciary Duty Resulted In Pecuniary Gain

The ALJ concluded that as a result of his repeated breaches of fiduciary duty to the bank Vickery received financial gain totaling $52,880. RD 46-48. Vickery does not dispute that he received $52,880. RE 8-10. He essentially argues that he did not receive this gain as a result of his breaches of fiduciary duty to the bank. RE 9-10. The Comptroller has addressed Vickery's objections to the ALJ's conclusions that he repeatedly breached his fiduciary duty to the bank and rejected them. Accordingly, and for the same reasons explained above, the Comptroller rejects respondent's exceptions, and concludes that Vickery's repeated breaches of his fiduciary duty to the bank resulted in his receipt of pecuniary gain.[6]

---

[5]Vickery's exceptions contain several arguments concerning usurpation of corporate opportunity. RE 46-55. Essentially, Vickery asserts that he did not breach his fiduciary duty to the bank by usurping a corporate opportunity because the payments he received from the title

**B. The ALJ's Procedural Rulings**

During the course of proceedings, on E&C's motion, the ALJ took official notice of certain adjudicated findings and conclusions contained in Bellaire.[7] However, the ALJ limited the use of the Bellaire decision in the CMP proceeding to proof of factual and legal issues necessary to establish the gravity of Vickery's offenses, and the amount of CMP, if any, to be assessed against Vickery. The ALJ also considered whether the doctrine of collateral estoppel precluded Vickery from relitigating the issues adjudicated in the previous decision and concluded that it did because Vickery was in privity with Bellaire. Therefore, the ALJ took notice of the Bellaire decision and considered the findings and conclusions contained therein in determining that Vickery's repeated breaches of fiduciary duty were grave offenses. Subsequently, during the hearing, the ALJ precluded Vickery from introducing testimony and other evidence relating to the issue of privity and the adjudicated issues in the prior proceeding.

Vickery excepts to all recommendations in this proceeding that are based upon findings and conclusions contained in the Bellaire decision. RE 4, 25-43, 79-85. First, Vickery asserts that the doctrine of res judicata precludes the OCC from proceeding against him in this matter because he was in privity with Bellaire in the prior proceeding. Second,

---

insurer could not have been legally received by the bank. The Comptroller finds these exceptions irrelevant to the determination of whether Vickery violated his fiduciary duty by failing to inform the bank's board that he had a financial interest in the loans he made to the Moores.

[7] In Bellaire, the Comptroller issued cease and desist orders against Bellaire, Baytown, and Mayde Creek based upon his conclusions that the Moore-related loans violated applicable lending limit laws and resulted in an unsafe and unsound concentration of credit in one borrower.

Vickery argues that the ALJ should not have taken official notice of the Bellaire decision because he was *not* in privity with Bellaire for collateral estoppel purposes. Finally, respondent argues that he was improperly precluded from introducing evidence regarding the issue of privity and other issues adjudicated previously in the Bellaire proceeding.

A fundamental principle of common law adjudication is that an issue of law or fact put in issue and directly determined cannot be disputed in a subsequent action between the same parties or their privies. This basic rule is embodied in the related doctrines of collateral estoppel and res judicata. A final judgment on the merits bars further claims by parties or their privies based upon the same cause of action under the doctrine of res judicata or claim preclusion. Montana v. United States, 440 U.S. 147, 152 (1979); Cromwell v. County of Sac, 94 U.S. 351, 352 (1877). Under the doctrine of collateral estoppel or issue preclusion, once an issue is actually and necessarily determined, that determination is conclusive in subsequent actions based upon a different cause of action involving parties or their privies to the prior litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979). Central to the application of both doctrines is the conclusive resolution of disputes. Precluding parties from contesting matters that they have had a full and fair opportunity to litigate reduces unnecessary litigation, conserves judicial resources, and fosters reliance upon adjudications. Montana, 440 U.S. at 152; Southern Pacific R. Co. v. United States, 168 U.S. 1, 49 (1897).

Vickery's res judicata argument fails because there is no identity of claims between this CMP action against Vickery and the previous cease and desist action against Bellaire. The CMP action involves claims that Vickery repeatedly breached his fiduciary duty to the

bank by accepting payments, without the knowledge of the board, at the same time that he was approving the Moore loans. These claims are different *claims* than the claims adjudicated in Bellaire. The claims against Bellaire in the Bellaire cease and desist proceedings were that the Moore-related loans had caused the bank to repeatedly violate lending limit laws and had resulted in an unsafe and unsound concentration of credit at the bank.

The Comptroller rejects respondent's arguments that he lacks privity with Bellaire for purposes of applying the doctrine of collateral estoppel, was improperly precluded from introducing evidence establishing his lack of privity, and was improperly precluded from introducing evidence concerning issues determined against Bellaire in the previous proceeding. The term privity defines a legal conclusion that the relationship between a party and a nonparty is sufficiently close to mandate the application of the doctrine of res judicata. Southwest Airlines Co. v. Texas International Airlines, Inc., 546 F.2d 84, 95 n.38 (5th Cir. 1977). Federal courts have defined several types of relationships as "sufficiently close" to justify preclusion. Privity exists when a nonparty has succeeded to a party's interest in property, Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973); when a nonparty controls the original suit, Dudley v. Smith, 504 F.2d 979 (5th Cir. 1974); and when the interests of a nonparty are adequately represented by a party in the initial action. Ellentuck v. Klein, 570 F.2d 414 (2d Cir. 1978). A nonparty assumes control over the original litigation when the nonparty has a direct financial or proprietary interest in the original suit. Montana, 440 U.S. at 152. Moreover, the interests of a nonparty are adequately represented in prior litigation when the party and the nonparty have the same interests at stake in the

litigation. Amalgamated Sugar Co. v. NL Industries, Inc. 825 F.2d 634 (2d Cir. 1987), cert. denied. 484 U.S. 992 (1987), Southwest Airlines Co. v. Texas Int'l. Airlines, 546 F.2d at 95.

Although Vickery claims that he is Bellaire's privy in invoking the doctrine of res judicata, he argues that the doctrine of collateral estoppel may not be applied to preclude him from relitigating adjudicated issues in the Bellaire case because he was not a privy in the sense that he was not in control of the prior Bellaire litigation and his interests were not adequately represented in that proceeding. To support his arguments, respondent relies upon Bankers Trust Company v. Rhoades, 108 Bankr. 423 (1989). However, his reliance upon this bankruptcy decision is misplaced because Bankers Trust Company does not stand for the proposition that there are different tests for determining privity for purposes of applying the doctrines of res judicata and collateral estoppel. It merely reiterates the general rule that it is proper to bind nonparties to the results of prior litigation only when nonparties were in control of the litigation or when their interests were adequately represented by the party in the original suit. Bankers Trust Company v. Rhoades, 108 Bankr. at 427.

As a director and the major shareholder of Bellaire, Vickery had the same interests in defending against the issuance of a cease and desist order as the bank did. As a director, he was authorized to manage the affairs of the bank. As a major shareholder, he had a financial interest in the outcome of the Bellaire case. The ALJ found that Vickery was the bank's controlling stockholder, and owned enough shares to elect the board of directors. RD 33, n.18. Moreover, a director testified that any director who "crossed" respondent was not renominated the next year. RD at 33, n.18. Clearly, Vickery was in privity with Bellaire.

Moreover, in respondent's March 11, 1996 motion to strike. Vickery admits that he was in privity with the bank. Although he would like his admission to apply only to his res judicata argument, the privity rules for claim preclusion and issue preclusion are identical. Consequently, his conclusory statements that he was not in control of or adequately represented in the prior proceeding do not raise an issue of fact. If Vickery is in privity for purposes of applying the doctrine of res judicata to bar the E&C's CMP enforcement action against him, then he is also in privity with Bellaire for purposes of applying the doctrine of collateral estoppel to bar his relitigation of issues of fact and law adjudicated against Bellaire in the prior decision. Hence, there was no need for the ALJ to consider evidence at the hearing concerning the issue of whether Vickery and Bellaire were privies in the prior proceeding.

The Comptroller agrees with the ALJ that the doctrine of collateral estoppel or issue preclusion precludes Vickery from relitigating issues decided previously in Bellaire. Moreover, pursuant to Rule 19.36(b)(1) of the OCC's Rules of Practice and Procedure, the Comptroller takes official notice of the Bellaire decision, and the findings of fact and conclusions of law contained therein. The ALJ's recommended findings that are based upon adjudicated issues in Bellaire are adopted. Accordingly, the Comptroller will consider the recommended findings to which Vickery excepts in determining the gravity of respondent's offenses, and the penalty amount.

**C. A Second Tier Civil Money Penalty In the Amount of $250,000 Is Warranted**

The ALJ recommends a CMP of $158,640 against Vickery. Both Vickery and E&C except to the ALJ's recommended assessment. Vickery argues that the evidence fails to

establish a second tier penalty, or alternatively. that a first tier or a lesser amount of a second tier CMP should be assessed against him. RE 82. E&C argues that the $250,000 CMP contained in the Notice is a more appropriate penalty considering the gravity of the offense, Vickery's bad faith, and his sizable net worth. E&CE 16-17. As explained below, the Comptroller concludes that a $250.000 CMP is appropriate in this case.

In determining the appropriate amount of a CMP, the Comptroller is required to consider the mitigating factors specified in 12 U.S.C. § 1818(i)(G). The Comptroller agrees with the ALJ's analysis of the statutory factors. First, respondent's net worth of over $7.7 million is more than sufficient to pay the assessed $250,000 CMP. RD 58-59. Second, respondent's repeated breaches of his fiduciary duty to the bank are grave offenses because the loans, which represented approximately 350 percent of the bank's capital, and comprised approximately 64 percent of the bank's entire loan portfolio, created a substantial unsafe and unsound concentration of credit in one borrower and resulted in repeated violations of the bank's lending limits under 12 U.S.C. § 84. RD 59-60. Third, Vickery has acted in bad faith. Vickery concealed from the board of directors that he was approving the 23 Moore loans at the same time that he was receiving financial benefit from his approval of the loans. In addition, he deceived the Texas Finance Commission by lying in a sworn deposition about the Vickery Law Corporation's receipt of funds on the first Moore loan in order to prevent discovery of his acceptance of financial gain on this loan and the subsequent loans. RD 59. Finally, the evidence does not establish a history of prior violations. RD 60.

Although the ALJ recognized that the statute in these circumstances would authorize a much higher penalty than the $250,000 penalty imposed by the Notice, RD 61-62, he

recommended a CMP of $158.640. RD 62. The ALJ computed this amount by multiplying the $52,880 received by Vickery in connection with the Moore loans by a factor of three. Id. However, the ALJ did not explain his use of a factor of three. In support of his computation, the ALJ asserted that banking regulatory agencies frequently use the amount of financial gain as a starting point in determining the amount of assessment. RD 60. While the amount of financial gain is a factor to be considered in determining an appropriate CMP. the Comptroller finds no support in the statute for a factor of three and believes that this error led the ALJ to place insufficient emphasis on the statutory factors.[8]

Accordingly, considering all relevant factors, including the gravity of respondent's violations, his bad faith, his financial ability to pay the assessment, and his lack of previous violations, the Comptroller orders Vickery to pay a $250,000 CMP.

## V. OTHER MATTERS PENDING BEFORE THE COMPTROLLER

Several motions pend before the Comptroller. After considering the motions and respondent's response to E&C's motion to strike, the Comptroller denies respondent's request for an in-person hearing, grants E&C's motion to strike respondent's reply and amend its exceptions to make a minor correction, and strikes respondent's reply and amended reply.

In his motion for an in-person hearing, respondent argues that an oral hearing is required because this enforcement matter raises unique issues. The Comptroller is unpersuaded by respondent's arguments and finds that there is not good cause for granting

[8]The ALJ cited OTS v. Rapp, 52 F.3d 1510 (10th Cir. 1995) as support for his calculation of the CMP. However, in Rapp, the Director of OTS did not use a factor.

the motion. Respondent's reply and amended reply which concern E&C's exception to the recommended three year prohibition are stricken because the OCC's Rules of Practice and Procedure do not provide for a reply.[9] 12 C.F.R. § 19.39. In its motion to amend its exceptions, E&C seeks to correct a statement contained in footnote 4, at page 11, which states that In the Matter of Frank E. Jameson, FDIC-89-83E, 2 P-H FDIC Enf. Dec.and Orders ¶ 5154A, at A-1541 (FDIC Dec., June 12, 1990), was "decided before FIRREA was enacted." The Comptroller grants E&C's motion, and amends E&C's exceptions to clarify that In the Matter of Frank E. Jameson was decided *after* FIRREA was enacted.

## VI. CONCLUSION

For the foregoing reasons, the Comptroller adopts the findings of fact, conclusions of law, and the decision of the ALJ, except as modified herein, and orders respondent to pay a CMP of $250,000. Respondent's request for an in-person hearing is denied. E&C's motion to strike and to amend is granted, and respondent's reply and amended reply are stricken from the record.

---

[9] In its motion to strike respondent's reply, E&C alternatively moves for leave to reply to respondent's exceptions. Because the Comptroller has stricken respondent's reply and amended reply, it is unnecessary for the Comptroller to rule on this alternative request.

## ORDER

Based upon the entire record of the proceeding and the ALJ's recommended decision, and for the reasons set forth in the accompanying decision, the Comptroller, pursuant to his authority under 12 U.S.C. § 1818, orders respondent to pay a civil money penalty in the amount of $250,000.

Respondent's request for an in-person hearing is denied.

E&C's motion to strike respondent's reply is granted, and respondent's reply and amended reply are stricken from the record of proceedings.

E&C's motion to amend its exceptions is granted, and E&C's exceptions are amended to clarify that In the Matter of Frank E. Jameson was decided after FIRREA was enacted.

IT IS SO ORDERED, this 31st day of March, 1997.

EUGENE A. LUDWIG
Comptroller of the Currency