

#2002-13

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

In the Matter of:)
R. Stephen Cavender,) **AA-EC-01-13**
Former President and Director)
East Texas National Bank of Marshall (Failed))
Marshall, TX)

STIPULATION AND CONSENT ORDER

WHEREAS, the Comptroller of the Currency of the United States of America (“Comptroller”) has, pursuant to 12 U.S.C. § 1818(b), (e) and (i), initiated an administrative action against R. Stephen Cavender (“Respondent”), through the issuance of a combined Notice of Intention to Prohibit Further Participation, Notice of Charges for Issuance of an Order to Cease and Desist for Affirmative Relief Including Restitution and Guarantee Against Loss, and Notice of Assessment of Civil Money Penalty, dated September 26, 2001, (“Notice”) for certain actions, omissions, and violations of law of Respondent while serving as President, Director and/or loan officer of East Texas National Bank of Marshall, Marshall, Texas (“Bank”);

WHEREAS, in the interest of cooperation and to avoid the costs associated with administrative and judicial proceedings with respect to this matter, the Comptroller and Respondent desire to enter into this Stipulation and Consent Order (“Order”);

NOW, THEREFORE, the Comptroller, through his duly authorized representative, and Respondent, who neither admits nor denies the OCC’s Findings of Fact set out in Article II, but does expressly admit the statements and conclusions in Article I regarding jurisdiction, stipulate and agree to the following:

ARTICLE I
JURISDICTION

(1) The Bank was, at all times relevant hereto, a national banking association, chartered and examined by the Comptroller, pursuant to the National Bank Act of 1864, as amended, 12 U.S.C. § 1 *et seq.* Accordingly, the Bank is an “insured depository institution” as that term is defined in 12 U.S.C. § 1813(c)(2).

(2) Pursuant to 12 U.S.C. § 1813(q), the Office of the Comptroller of the Currency (OCC) is the “appropriate Federal banking agency” to maintain an enforcement proceeding against an “institution-affiliated party,” as that term is defined in 12 U.S.C. § 1813(u).

(3) From November 1991 until February 1, 1999, Respondent was President of the Bank. In addition, Respondent was a member of the Bank’s Board of Directors and a shareholder of the Bank. Beginning in or about April 1992 and until June 8, 1998, Respondent’s duties included acting as loan officer for extensions of credit to the Bank’s largest commercial borrowers. Respondent, having served in these capacities within six (6) years of the date of the service of the Notice of Charges in this proceeding, *see* 12 U.S.C. § 1818(i)(3), is an “institution-affiliated party” of the Bank. Therefore, Respondent is subject to the authority of the Comptroller to initiate and maintain these proceedings against him pursuant to 12 U.S.C. §§ 1818(b)(1), 1818(e), and 1818(i).

(4) On July 9, 1999, the Comptroller, pursuant to 12 U.S.C. § 191, determined that the Bank was insolvent and appointed the Federal Deposit Insurance Corporation (“FDIC”) as receiver.

(5) Respondent, while a director and executive officer of the Bank, was, as a matter of law, a fiduciary. This relationship carried with it a duty to not place his own interests above those of the Bank, and to conduct the affairs of the Bank with scrupulous honesty, loyalty and candor.

(6) Respondent, while a director and executive officer, was vested with responsibility for managing the Bank’s affairs through the exercise of reasonable skill, care and diligence. This

duty of care included the duty to operate, or to ensure the operation of, the Bank in a safe and sound manner, both with respect to assets and expenses, and to act in all instances in the best interests of the Bank and its depositors.

(7) To satisfy his duties of loyalty and care and to comply with applicable laws and regulations, Respondent was required, *inter alia*, to:

- (a) meaningfully disclose his interests in any proposed transactions involving the Bank to its Board of Directors so that the Board could make fully informed determinations as to whether the proposed transactions were in the Bank's best interests; and
- (b) abstain from voting on any proposed credit transactions whenever he had a financial and/or ownership interest in, and/or financial relationship with, the proposed borrower.

(8) Respondent, while a director and officer of the Bank, had a duty to insure that the Bank's records accurately described the uses of any funds that were to be disbursed through any extension of credit.

(9) Respondent, while a director and officer of the Bank, had a duty to ensure that transactions that the Bank entered into did not violate the Bank's lending limit, as specified in 12 U.S.C. § 84 and 12 C.F.R. Part 32.

ARTICLE II

OCC FINDINGS OF FACT

The Comptroller finds and Respondent neither admits nor denies:

(10) Respondent served as loan officer for three of the Bank's largest credits, Fresh-N-Lite, Inc., TideCraft Fiberglass Products, Inc., and Oden Metro Turfing, Inc. ("these three borrowers").

(11) Respondent's lending practices, especially with respect to these three borrowers, failed to adequately protect the Bank's interests.

(12) Respondent's lending practices referred to above disregarded sound banking practices and applicable banking laws and regulations, including violations of the Bank's lending limit, as specified in 12 U.S.C. § 84 and 12 C.F.R. Part 32. Respondent's actions that caused lending limit violations were knowing or reckless, which violations Respondent on occasion attempted to mask:

- (a) through origination of certain loans in the names of nominee borrowers, who Respondent knew or should have known lacked the financial capacity to repay the loans that were authorized in their names; and
- (b) through restructuring of loans during certain periods in 1997 and 1998, immediately following receipt by the Bank of notice from the OCC that its examination of the Bank would soon begin.

(13) Respondent's practices with respect to these three borrowers included:

- (a) extensions of additional credit despite the fact of his awareness that these borrowers had routinely been unable to meet their existing obligations to the Bank; and
- (b) routine allowance of huge checking account overdrafts of up to \$500,000, while causing the Bank to originate additional unsecured loans for the purpose of resolving these overdrafts and applying the funds from the additional loans to pay accrued but uncollected interest or other past due amounts on existing loans.

(14) Respondent permitted each of these three borrowers to use overdrafts to make current or past due payments on their existing loans. Respondent also caused the Bank to grant same-day availability for all funds deposited into the checking accounts of these three borrowers.

(15) As a result of Respondent's conduct, the Bank suffered significant losses on loans to, or for the benefit of, these three borrowers. Thus, Respondent's actions as loan officer were a

direct cause of the significant loss that led to the failure of the Bank. Moreover, Respondent's violations were breaches of his duty of care and loyalty, and/or reckless participation in unsafe and unsound practices.

(16) With regard to borrower Fresh-N-Lite, Respondent failed to disclose to the Bank his ownership interest in this company.

ARTICLE III

PROHIBITION FROM BANKING

(17) With respect to the institutions and agencies set forth in paragraph (18) of this Article, Respondent hereby agrees that he shall not:

- (a) participate in any manner in the conduct of their affairs;
- (b) solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent, or authorization with respect to any voting rights;
- (c) violate any voting agreement previously approved by the "appropriate Federal banking agency," as defined in 12 U.S.C. § 1813(q) (as amended);
or
- (d) vote for a director, or serve or act as an "institution-affiliated party," as defined in 12 U.S.C. § 1813(u) (as amended).

(18) The prohibitions in paragraph (17) of this Article apply to the following institutions and agencies:

- (a) any insured depository institution, as defined in 12 U.S.C. § 1813(c);
- (b) any institution treated as an insured bank under 12 U.S.C. § 1818(b)(3), (b)(4), or as a savings association under 12 U.S.C. § 1818(b)(9) (as amended);
- (c) any insured credit union under the Federal Credit Union Act;

- (d) any institution chartered under the Farm Credit Act of 1971;
- (e) any appropriate Federal depository institution regulatory agency; and
- (f) the Federal Housing Finance Board and any Federal home loan bank.

(19) The prohibitions of paragraphs (17) and (18) of this Article shall cease to apply with respect to a particular institution if Respondent obtains the prior written consent of both the Comptroller and the institution's "appropriate Federal financial institutions regulatory agency," as defined in 12 U.S.C. § 1818(e)(7)(D) (as amended).

ARTICLE IV RESTITUTION

(20) Respondent hereby consents to pay restitution to the FDIC as Receiver for the Bank in a total amount of one hundred thousand dollars (\$100,000), in accordance with following procedure and schedule:

- (a) Five hundred dollars (\$500) upon the signing of this Stipulation and Consent, and on or before June 1, 2003, and for each year thereafter, a minimum payment of five hundred dollars (\$500); and
- (b) Commencing in the year 2002, and on or before June 1 of each year thereafter, for every such year that Respondent's individual or joint adjusted gross income (as defined in Internal Revenue Service ("IRS") Publication 1040) during the prior calendar year exceeds sixty thousand dollars (\$60,000), Respondent shall pay an additional amount of fifteen percent (15%) of the excess over sixty thousand dollars.

(21) Respondent shall make the above-described payments by certified check or money order made payable to the FDIC as Receiver and shall deliver the check to the Director,

Enforcement & Compliance Division (“Director of E&C”), OCC, 250 E St. SW, Washington, DC 20219, or to any subsequent address the OCC may occupy.

(22) Until the restitution is paid in full, Respondent shall each year submit each of the following to the Director of E&C:

- (a) By June 1 of each year, an income statement setting forth the sources and amounts of all individual and joint income of Respondent and that of any corporation controlled¹ by Respondent for the previous calendar year, accompanied by a sworn affidavit attesting to the accuracy of the income statement. Said income statements shall include Respondent’s current residential address, business address, and telephone numbers.
- (b) A copy of the federal income tax returns individually or jointly filed each year by Respondent and those of any corporation(s) controlled by Respondent (see footnote 1 for definition of control), at the same time that such returns are filed with the IRS.

(23) In the event Respondent fails to provide the Director of E&C by June 1 of the year it is due with any required income statement, accompanying affidavit, or restitution payment, or with any required federal income tax return, the entire unpaid balance of the total amount of restitution shall become immediately due and payable.

(24) Within seven (7) days from the issuance of this Order, Respondent shall notify the Director of E&C of his current address on the form attached hereto as Appendix A. Until the total amount of restitution is paid in full, upon each and every subsequent change in address, if

¹ For the purposes of this Article, Respondent has “control” of any corporation if Respondent, directly or indirectly, or acting through or in concert with one or more persons, owns, controls, or has the power to vote ten percent (10%) or more of any class of voting securities of the corporation.

any, Respondent shall notify the Director of his new address within seven (7) days of such change in address.

ARTICLE V

OTHER AFFIRMATIVE ACTION

(25) Respondent agrees that, in connection with any prospective retention he is offered by any financial institution beyond those specified in Article III of this Order, Respondent will divulge this Order to such institution and, if requested, make the Order itself available for inspection. For purposes of this provision, “financial institution” means any institution engaged in securities or lending activities and not falling within the definition set out in Article III. For purposes of this provision, “retention” means any salaried, consultant, independent contractor or any such position where a company that is or may be formed with Respondent as a principal is engaged under such arrangement.

ARTICLE VI

RESPONDENT’S WAIVERS

- (26) By executing this Stipulation and Consent Order, Respondent waives:
- (a) all rights to a hearing and a final agency decision pursuant to 12 U.S.C. § 1818(b) and (e), and 12 C.F.R. Part 19;
 - (b) all rights to seek judicial review of this Order;
 - (c) all rights in any way to contest the validity of this Order;
 - (d) any and all claims for fees, costs or expenses against the Comptroller, or any of his agents or employees, related in any way to this enforcement matter and/or the Order, whether arising under common law or under the

terms of any statute, including but not limited to, the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412; and

- (e) all rights to assert a "double jeopardy" claim in the event of a criminal prosecution brought by the Department of Justice for the acts which form the basis for issuance of this Order.

ARTICLE VII

BANKRUPTCY STIPULATION

(27) In any bankruptcy proceeding in which it is or may be contended that Respondent's obligation to pay restitution pursuant to this Order is subject to discharge, Respondent will in no manner contest the Comptroller's or other officer, agent or representative of the United States', assertion that, pursuant to 11 U.S.C. § 523(a)(11) or otherwise, the restitution obligation in the Order arises out of acts which result in claims not dischargeable in bankruptcy.

ARTICLE VIII

RESPONDENT'S ACKNOWLEDGMENTS

(28) Respondent acknowledges that he has read and understands the premises and obligations of this Order and declares that no separate promise or inducement of any kind has been made, by the Comptroller, his agents or employees to cause or induce Respondent to agree to consent to the issuance of this Order and/or to execute this Stipulation.

(29) Respondent understands and agrees that this Order shall be enforceable to the same extent and in the same manner as an effective and outstanding order that has been issued and has become final pursuant to 12 U.S.C. § 1818 (b)(6) and (e) (as amended).

ARTICLE IX

RELEASE OF CLAIMS

(30) It is hereby agreed that the provisions of this Stipulation and Consent constitute a settlement of the entire combined administrative action against Respondent initiated by the

Comptroller and referred to in the opening preamble paragraph of this Stipulation and Consent. The Comptroller agrees not to institute proceedings for the specific acts, omissions, or violations contained in the Notice, unless such acts, omissions, or violations reoccur, or if Respondent fails or refuses to fulfill the obligations described in Article IV.

(31) It is further agreed that the provisions of this Stipulation and Consent shall not be construed as an adjudication on the merits and, except as set forth above, shall not inhibit, estop, bar, or otherwise prevent the Comptroller from taking any action affecting the Respondent if, at any time, he deems it appropriate to do so to fulfill the responsibilities placed upon him by the several laws of the United States of America.

(32) Respondent understands and agrees that nothing herein shall preclude any proceedings brought by the Comptroller to enforce the terms of this Stipulation and Consent, and that nothing herein constitutes, nor shall Respondent contend that it constitutes, a waiver of any right, power, or authority of any other representatives of the United States or agencies thereof, including the Department of Justice, to bring other actions deemed appropriate.

IN TESTIMONY WHEREOF, the undersigned have hereunto set their hands.

<u>/s/ Leann G. Britton</u>	<u>2-1-02</u>
Leann G. Britton	Date
Senior Deputy Comptroller	
for Midsize/Community Bank Supervision	

<u>Signed</u>	<u>1-18-02</u>
R. Stephen Cavender	Date