#2012-241

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

In the Matter of		
LAWRENCE DODGE	)	
Former President, Co-Chief Executive Officer, and Institution-Affiliated Party of	)	OTS AP 10-03
American Sterling Bank Sugar City, Missouri OTS Docket No. 15909	)	

ORDER OF PROHIBITION

On June 25, 2010, the Office of Thrift Supervision ("OTS") [1] issued a Notice of Intention to Prohibit and Notice of Assessment of a Civil Money Penalty against Respondent Lawrence K. Dodge, an institution-affiliated party of American Sterling Bank, Sugar Creek, Missouri. The Respondent timely filed an answer to the notice.

A hearing was held from March 7-10, 2011 in Kansas City, Missouri to determine whether an order should issue permanently prohibiting the Respondent from further participation in the affairs of other insured depository institutions pursuant to Section 8(e) of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1818(e); and whether a civil money penalty should be assessed against the Respondent pursuant to Section 8(i)(2)(B) of the FDIA, 12 U.S.C. § 1818(i)(2)(B). The Respondent appeared at the hearing, represented by counsel, and was given

[1] Pursuant to Section 316(a)(2)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5414(a)(2)(B), the OCC and the Comptroller of the Currency have been substituted for the OTS and the Director of the OTS as parties to this action.

the opportunity to be heard, and evidence was taken.

Having considered the evidence presented at said hearing and the record as a whole, and the arguments of both parties, and the Recommended Decision issued by the presiding administrative law judge,

Pursuant to Section 8(e) of the FDIA, 12 U.S.C. § 1818(e):

1. Lawrence K. Dodge shall not participate in any manner in the conduct of the affairs of any insured depository institution, agency, or organization enumerated in Section 8(e)(7)(A) of the FDIA, 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the appropriate Federal financial institutions regulatory agency, as that term is defined in Section 8(e)(7)(D) of the FDIA, 12 U.S.C. § 1818(e)(7)(D); and

2. Lawrence K. Dodge shall not solicit, procure, transfer, attempt to transfer, vote or attempt to vote any proxy, consent, or authorization with respect to any voting rights in any institution described in Section 8(e)(7)(A) of the FDIA, 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the appropriate Federal financial institutions regulatory agency, as that term is defined in Section 8(e)(7)(D) of the FDIA, 12 U.S.C. § 1818(e)(7)(D); and

3. Lawrence K. Dodge shall not violate any voting agreement with respect to any insured depository institution, agency, or organization enumerated in Section 8(e)(7)(A) of the FDIA, 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the appropriate Federal financial institutions regulatory agency, as that term is defined in Section 8(e)(7)(D) of the FDIA, 12 U.S.C. § 1818(e)(7)(D); and

4. Lawrence K. Dodge shall not vote for a director, or serve or act as an institution-affiliated party, as that term is defined in Section 3(u) of the FDIA, 12 U.S.C. § 1813(u), of any insured depository institution, agency, or organization enumerated in Section 8(e)(7)(A) of the

FDIA, 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the appropriate Federal financial institutions regulatory agency, as that term is defined in Section 8(e)(7)(D) of the FDIA, 12 U.S.C. § 1818(e)(7)(D).

This ORDER will become effective thirty (30) days from the date of its issuance.

The provisions of this ORDER will remain effective and in force except in the event that, and until such time as, any provision of this ORDER shall have been modified, terminated, suspended, or set aside by the Office of the Comptroller of the Currency.

IT IS SO ORDERED.

Dated at Washington, D.C., this 17 day of September, 2012

/s/ Thomas J. Curry
Thomas J. Curry
Comptroller of the Currency
Office of the Comptroller of the Currency

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

In the Matter of:	)	
Lawrence Dodge Former Director, Co-Chief Executive Officer, and Institution-Affiliated Party	)	OTS AP 10-03
American Sterling Bank Sugar Creek, Missouri OTS Docket 15909	)	

FINAL DECISION AND ORDER

This administrative proceeding, now pending before the Comptroller of the Currency, arises out of a Notice of Intention to Prohibit and Notice of Assessment of a Civil Money Penalty ("Notice") issued by the Office of Thrift Supervision ("OTS") on June 25, 2010 against Respondent Lawrence Dodge, former director, co-chief executive officer and institution-affiliated party ("IAP") of American Sterling Bank, Sugar Creek, Missouri ("Bank" or "ASB").[1] Under the authority of section 8(e) of the Federal Deposit Insurance Act, 12 U.S.C. § 1818(e), the Notice seeks an order prohibiting Respondent from participating in the affairs of any federally insured financial institution. Under section 8(i)(2)(B) of the same Act, 12 U.S.C. § 1818(i)(2)(B), the Notice seeks to impose a civil money penalty ("CMP") of $2,500,000 on Respondent.

This enforcement proceeding focuses on three contributions to the Bank's capital account that allegedly fail to comport with Generally Accepted Accounting Principles or with regulatory reporting requirements specifying that contributed capital must be in the form of cash, a cash equivalent, or a high quality, marketable asset, or have the prior permission of the OTS Regional Director for the capital contribution. The charges in the Notice include a fourth transaction, in which the bank booked as income fees that had not yet been earned. The Comptroller's conclusions on these four transactions and Respondent's participation therein will determine whether an order of prohibition and a CMP will be imposed on Respondent.

[1] Under Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), all functions of the OTS related to federal savings associations were transferred to the Office of the Comptroller of the Currency ("OCC") effective July 21, 2011. *See* 12 U.S.C. § 5412(B)(2)(b). Under that Act, for any OTS proceeding pending on July 21, 2011, the OCC or the Comptroller of the Currency is substituted for the OTS or the Director of the OTS as a party to the action. *See* 12 U.S.C. § 5414(a)(2)(B).

Following a hearing on March 7-10, 2011, at which OTS enforcement counsel and Respondent presented evidence and filed post-hearing briefs, Administrative Law Judge C. Richard Miserendino ("ALJ") issued a 52-page Recommended Decision ("RD") on November 1, 2011, concluding that the Comptroller should issue orders (1) prohibiting Respondent's future participation in the affairs of a federally insured financial institution, and (2) assessing a second tier CMP on Respondent in the mount of $1,000,000. The RD included a proposed Order of Prohibition and a proposed Assessment of a Civil Money Penalty. Respondent filed exceptions, and enforcement counsel filed a reply.

For the reasons below, the Comptroller denies Respondent's exceptions, adopts the ALJ's RD in its entirety, and issues the attached prohibition and CMP orders.

I. Regulatory Framework

The Federal Deposit Insurance Act, 12 U.S.C. § 1831o(b), and OTS regulations, 12 C.F.R. § 565.4(b), now codified with OCC regulations at 12 C.F.R. § 165.4(b),[2] define capital categories that are assigned to insured depository institutions for purposes of Prompt Corrective Action. The five capital categories are: well capitalized, adequately capitalized, undercapitalized, significantly undercapitalized, and critically undercapitalized. Based on capital levels reported to the appropriate regulatory agency (in this case, OTS), every insured financial institution is assigned to one of these five capital categories. Both the OTS and the banks it regulated were primarily apprised of a bank's capital levels through the bank's filing of Thrift Financial Reports ("TFRs"). See 12 C.F.R. § 565.3(b) (now 12 C.F.R. § 165.3(b)). As a bank's capitalization level falls, increased supervision by the regulator is triggered and restrictions are placed on the bank's actions. When a bank's capital level drops to a category below adequately capitalized, the applicable statutes and corresponding regulations impose a regimen called "prompt corrective action" requiring recapitalization. RD 5-6.

Particularly relevant here are the regulatory reporting requirements defined in 12 C.F.R. § 562.2(b) (now 12 C.F.R. § 162.2(b)) that incorporate the requirements for reporting contributed capital contained in Section 110.16 of the OTS Examination Handbook, which provides that savings associations may accept without limit the following capital contributions:

- Cash;
- Cash equivalents;
- Other high quality, marketable assets provided they are otherwise permissible for the savings association; or
- Other forms of contributed capital if the association receives prior OTS Regional Director approval.

[2] Section 316(b) of the Dodd-Frank Act, 12 U.S.C. § 5414(b), continues in effect all OTS orders, resolutions, determinations, agreements, regulations, interpretive rules, other interpretations, guidelines, procedures and other advisory materials in effect the day before the transfer date, and allows the OCC to enforce these materials with respect to federal savings associations until modified, terminated, set aside or superseded by the OCC, a court, or by operation of law. On August 9, 2011, the OCC published an interim final rule recodifying OTS regulations with the OCC's regulations in Chapter I of the C.F.R. at parts 100 through 197. 76 Fed. Reg. 48950 (Aug. 9, 2011).

II. Facts

Set out below is an abbreviated version of the ALJ's findings of fact.

Prior to 2006, the Bank did not require close OTS supervision because it had previously received high composite ratings. By April 2007, the OTS had become concerned about the Bank's declining capital levels, which had rendered the Bank "adequately capitalized" under OTS regulations. At the request of OTS, the board of directors of the Bank's parent holding company, American Sterling Corporation ("ASC" or "holding company"), adopted a resolution on April 25, 2007 pledging to "take appropriate steps to assure American Sterling Bank meets or exceeds the . . . required capital ratios in order to remain well capitalized at the end of each regulatory financial reporting period. . . ." Respondent was among the signatories to the resolution. RD 7-8. To this end, the holding company and the Bank took the following actions between April 2007 and May 2008:

- California Republican Party Loan Participation. In 2006, the holding company made a \$3 million loan to the California Republican Party ("CRP") using funds personally supplied by Respondent for that purpose. When the CRP failed to repay the loan at maturity on February 9, 2007, the due date was extended to June 30, 2007 – the first of several extensions. In the meantime, in April 2007, the holding company, after receiving notice from OTS that the Bank needed capital, contributed a \$2 million participation in the CRP loan to the Bank's capital account. The explicit purpose of the contribution was to increase the levels of capital reported by the Bank. Both the OTS and Bank's board of directors were informed that a \$2 million participation in a loan due to be paid in June 2007 had been contributed to the Bank's capital, and the directors were led to believe that the Bank would be receiving \$2 million in cash by the end of that month. When the CRP failed to pay on June 30, 2007, Respondent personally extended the maturity date several times to March 17, 2008, at which point the holding company conveyed the note back to Respondent, who paid ASC nothing in exchange and then personally forgave the loan on June 6, 2008. Respondent admitted that he caused the Bank's TFR for March 31, 2007 and all subsequent TFRs through the second quarter of 2008 to reflect the claimed contribution of the \$2 million loan participation as capital. After unilaterally extending the loan's maturity date four times and finally forgiving it, Respondent never informed the Bank's board or the OTS that the maturity date had been extended or that the loan would never be repaid. RD 12-14. See also RD 8 (overview titled "Purported Capital Infusions Into ASB").
- Millennium Gate Foundation Loan Purchase. In 2001, Respondent proposed and the Bank's board approved a \$400,000 loan to Millenium Gate Foundation ("MGF") to build a monument in Washington, D.C., in honor of the 21st Millenium. Respondent personally guaranteed repayment. When the loan was not repaid, the Bank charged it off in 2004, and Respondent failed to perform on his guarantee. In April 2007, the Bank transferred the charged-off promissory note to its holding company, and recorded an inter-company receivable from ASC for \$400,000 in the Bank's capital account, effective March 31, 2007, even though the MGF loan file contained no documentation supporting a receivable or ASC's obligation to pay the Bank. About that time, a Bank officer informed the OTS that ASC had "purchased a \$400,000 charged off loan from the Bank,"

resulting in $265,000 being added to capital. The Bank's directors believed that the Bank would receive $400,000 in cash, but at no point prior to June 30, 2008 did ASC pay the Bank any cash to satisfy the receivable. Nonetheless, Respondent caused the so-called MGF Loan Purchase to be reported as capital on the Bank's TFRs, beginning on March 31, 2007, and continuing every quarter thereafter until June 30, 2008. RD 14-15. See also RD 8 (overview).

- 9800 Muirlands / Inter-Company Receivables. On January 16, 2008 and February 12, 2008, a Bank employee at Respondent's direction recorded $470,000 and $280,000, respectively, on the Bank's books as capital contributions from the holding company and a corresponding intercompany receivable from the holding company. The two transactions, both backdated to December 31, 2007, were made for the explicit purpose of making the Bank appear "well capitalized," and were reported on the Bank's TFRs for the fourth quarter of 2007 and for the first quarter of 2008. In his communications to OTS and senior bank managers, Respondent attributed the two "inter-company receivables" and the corresponding capital increases totaling $750,000 to the holding company's sale of a commercial property known as 9800 Muirlands. However, as of December 31, 2007, there was no executed agreement or note between the holding company and the bank evidencing the holding company's agreement to pay the Bank $750,000 upon the sale of 9800 Muirlands. Nor had a contract been executed for the sale of 9800 Muirlands by either January 16, 2008 or February 12, 2008, and no such sale had taken place by June 2008, at which time OTS ordered the Bank to reverse the transaction. RD 15-17. See also RD 9 (overview).
- Mountain View Pipeline Income. In 2008, the Bank's executive management team, which included Respondent, considered a proposal to service loans owned by Mountain View Capital. The executive management team asked one of its members (Dearden) to calculate the potential income that the bank could earn from its proposed role in servicing these loans. Dearden estimated the potential fee income at $706,249, whereupon the executive management team, including Respondent, instructed another employee (CFO Johnson) to record this potential income stream as income on the Bank's books, even though the Bank had no written agreement with Mountain View to service the loans. The $706,949 was booked to the bank's income effective May 5, 2008 and backdated to April 30, 2008. Seven months later, in December 2008, when the board of directors learned upon questioning Respondent that there was "confusion" whether an agreement with Mountain View existed and, since the income had been booked and reported on the Bank's TFRs for the second and third quarters of 2008, the board decided to engage an outside auditor to determine the proper treatment under Generally Accepted Accounting Principles (GAAP). The auditor's report concluded that the revenue should not have been reported in the Bank's TFRs as income. RD 17-19. See also RD 9 (overview).

During an examination commencing on June 30, 2008, the OTS ordered the Bank to reverse three of the holding company's capital infusions: the CRP Loan Participation, the MGF Loan Purchase and the 9800 Muirlands / Inter-Company Receivables (jointly, the "Non-Cash Capital Contributions") totaling $3,015,000. The OTS also ordered the Bank to amend its June 30, 2008 TFR to reflect this reversal. These reversals and other write-downs reduced the Bank's core capital ratio to 1.6%, and its risk-based capital to 3.1%, rendering it "critically undercapitalized" according to OTS regulations. Following the issuance on August 20, 2008 of a

Cease and Desist Order, which established capital levels with which the Bank did not comply, the OTS placed the Bank in receivership on April 17, 2009. RD 10-12.

Respondent's conduct did not cause the Bank's failure but it "did place ASB at risk of failure." RD 45, 48. Respondent, upon learning of OTS's position on the four questioned transactions, promptly ordered the transactions reversed and replaced them with cash. In this regard, Respondent secured the full replacement of the $3.015 million in questioned capital, and caused the holding company, ASC, to infuse nearly $17.5 million in additional capital. Respondent also cooperated with OTS in attempting to sell the bank prior to its failure. RD 47-48. See also RD 11.

III. ALJ's Conclusions on Statutory Criteria

A. Prohibition

Under the prohibition statute, 12 U.S.C. § 1818(e)(1), the appropriate federal banking agency may impose an order prohibiting an IAP from further participation in the affairs of an insured depository institution when the agency determines that the statute's three prongs have been met, specifically that:

> (A) any IAP has, directly or indirectly -
> (i) violated -
> (I) any law or regulation;
> …
> (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;
> (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....

In other words before the Comptroller may lawfully impose a permanent prohibition order on Respondent, enforcement counsel must prove that Respondent's actions establish each of three prongs: (1) "misconduct" under § 1818(e)(1)(A); (2) "effect" under § 1818(e)(1)(B); and (3) "culpability" under § 1818(e)(1)(C). *Kim v. OTS*, 40 F.3d 1050, 1054 (9th Cir. 1994).

1. Misconduct Prong

The misconduct prong can be satisfied by proving any one of the following: a violation of a law or regulation; participation in an unsafe or unsound banking practice; or the breach of a fiduciary duty. The ALJ found that enforcement counsel proved all three. RD 21.

(a) Violation of law - § 1818(e)(1)(A)(i)(I)

With respect to violating a law or regulation, the ALJ found that Respondent had violated OTS regulations requiring savings associations like the Bank to maintain accurate and complete records that comport with regulatory reporting requirements and Generally Accepted Accounting Principles (GAAP). See 12 C.F.R. §§ 562.1(b) and 562.2(b) (now 12 C.F.R. §§ 162.1(b) and 162.2(b)). According to the ALJ, the Bank's reporting of each of the three capital contributions at issue here – the CRP Loan Participation, the MGF Loan Purchase, and the 9800 Muirlands inter-company receivables – failed to comport with GAAP or with the regulatory reporting requirement that contributed capital be in the form of cash, a cash equivalent, or a high quality marketable asset, or be contributed with the express permission of the OTS Regional Director. See 12 C.F.R. § 162.2(b) and section 110 of the OTS Examination Handbook. The ALJ also found that booking the Mountain View Pipeline Income was inconsistent with GAAP. At trial, all the expert testimony and Respondent's admissions supported this conclusion, according to the ALJ. RD 22. See also RD 22-25 (describing testimony of expert witnesses, including Leonard Lyons for Respondent).

In addition to failing to comply with GAAP and regulatory reporting requirements, Respondent, in the ALJ's judgment, violated 18 U.S.C. § 1005, which makes it a crime for a bank director or officer to make a false entry in any book, report or statement of the bank with intent to deceive an examiner appointed to examine the bank. The ALJ found that Respondent admitted that he caused the March 31, 2007 TFR and all subsequent TFRs through the second quarter of 2008 to reflect the claimed contribution of the $2 million CRP Loan Participation and the $400,000 MGF Loan Purchase as capital, and that these two contributions had the effect of portraying the Bank as well capitalized. RD 26. This, and other evidence related to the booking of proceeds from the anticipated sale of 9800 Muirlands, persuaded the ALJ to conclude that Respondent, by causing the TFRs to reflect the presence of this contributed capital for six regulatory reporting periods, caused false or misleading statements to be made to OTS in violation of 18 U.S.C. § 1005. RD 26-27. Additionally, the ALJ found that Respondent violated an OTS regulation, 12 C.F.R. § 563.180(b)(1) (now 12 C.F.R. § 163.180(b)(1)), prohibiting an officer or director of a savings association from making any written or oral statement to the OTS that is false or misleading with respect to any material fact. According to the ALJ, "Dodge was aware that the capital was not actually contributed to ASB, that it remained on ASB's TFRs for six reporting periods, and that it caused the OTS to believe that ASB was 'well capitalized' when in fact it was not." RD 27. See also RD 8-9 (without the three Non-Cash Capital Contributions the Bank would not have been considered "well capitalized").

Finally, the ALJ found that Respondent violated 12 U.S.C. § 1831f(a) and 12 C.F.R. § 337.6(b), which preclude an insured depository institution that is not "well capitalized" from accepting brokered deposits, absent a waiver from the FDIC. According to the ALJ, the Bank,

while appearing to be "well capitalized" due to the presence of the three disputed Non-Cash Capital Contributions on its books, accepted $19,035,000 in brokered deposits in the Spring of 2008, even though the Bank was insufficiently capitalized at the time. RD 27-28.

In the course of finding Respondent committed these violations of law and regulation, the ALJ considered and rejected Respondent's explanations, including his arguments that he was merely part of a "management team" that made the decisions to record the transactions at issue, that he did not fully comprehend the accounting treatment of these transactions, and that the question whether non-cash contributions could be used to satisfy capital requirements was not as clear as enforcement counsel maintains. RD 28-30.

(b) Unsafe or unsound practices - § 1818(e)(1)(A)(ii)

With respect to whether Respondent engaged or participated in unsafe or unsound practices, the ALJ held that the falsification of bank records by definition constitutes an unsafe or unsound practice, but even if that were not the case, "the testimony at the hearing uniformly supports the finding that the recording of the four transactions at issue here constituted an unsafe or unsound banking practice." RD 32. Thus, the ALJ had "no hesitation in finding that Dodge engaged in an unsafe or unsound banking practice when he caused ASB's books and records, and their TFRs, to report the three non-cash contributions as capital for six regulatory reporting periods, and when he directed that the Mountain View Pipeline Income be prematurely reported as an asset." RD 33.

(c) Breach of fiduciary duty - § 1818(e)(1)(A)(iii)

With respect to whether Respondent breached his fiduciary duty to the Bank, the ALJ concluded that Respondent had violated both his duty of care and his duty of loyalty. According to the ALJ,

> Not only did Dodge fail to ensure that the Bank complied with the relevant statutory and regulatory requirements, but he actively directed other officers and employees of the Bank to take actions which were contrary to law. Dodge claimed that no one from the OTS informed him of the requirements for capital contributions, and freely admitted that he did not otherwise familiarize himself with the definition of capital or the requirements for capital contributions. As a director and officer of the Bank with more than 36 years of experience, and particularly given his nearly singular control over the affairs of the bank, Dodge had a[] duty to know what the legal requirements were, to follow them, and to ensure that his employees and fellow officers and directors followed them. That Dodge failed to do so after being specifically informed of the OTS's concerns regarding ASB's capital levels and lending activities plainly evidences his dereliction of duty.

RD 34 (citations omitted).

The ALJ also concluded that Respondent breached his duty of loyalty, noting that during 2007 and 2008 he "withheld numerous pieces of crucial information uniquely within his knowledge from his fellow Board members." These included leading the board to believe that the Bank would receive cash for all three non-cash capital contributions, when in fact no cash was received until the OTS ordered the Bank to replace the receivables with cash in August 2008. RD 35-36. After describing the evidence related to the CRP loan, the MGF Loan Purchase and the Mountain View Pipeline Income transaction, the ALJ concluded that "[b]y depriving his fellow Board members of these relevant pieces of information, Dodge deprived them of the ability to knowingly and intelligently conduct the affairs of the Bank." RD 36.

2. Effect Prong

To satisfy the "effect" prong, enforcement counsel must show that, as a result of the above misconduct, the Bank has suffered or will probably suffer financial loss or other damage; the interests of the Bank's depositors have been or could be prejudiced; or Respondent received financial gain or other benefit. While proof of only one element is required, the ALJ found that enforcement counsel proved all three.

(a) Probable financial loss or other damage to the Bank - § 1818(e)(1)(B)(i)

Although the ALJ found that the Bank did not suffer actual financial loss from the four questioned transactions, he concluded that Respondent's "manipulation of the Bank's capital accounts and his plain violation of the statutes and regulations governing capital and capital contributions *could have* caused the Bank to suffer financial loss or other damage." (Emphasis original.) Accordingly, the ALJ concluded that enforcement counsel met its burden of proving that there was a sufficient probability that Respondent's actions could have caused the Bank to suffer financial loss or other damage. RD 38.

(b) Prejudice to interests of depositors - § 1818(e)(1)(B)(ii)

The ALJ found that while the Bank did not actually suffer a liquidity crisis, the record shows that insufficient liquidity was a distinct possibility in August 2008. According to the ALJ, the potential crisis was due, at least in part, to the Bank's acceptance of brokered deposits, which it would have been statutorily barred from accepting had the true state of its capital been disclosed. Accordingly, in light of the Bank's "close proximity" to a liquidity crisis, the ALJ held that the interests of the Bank's depositors could have been prejudiced by Respondent's actions. RD 39.

(c) Respondent's financial gain or other benefit - § 1818(e)(1)(B)(iii)

The ALJ concluded that Respondent did not directly profit from the four disputed transactions, but that Respondent nonetheless received a benefit by having the opportunity to use his own personal funds and funds of the holding company (of which Respondent owned 85%) and its affiliates instead of using them to buttress the Bank's capital. RD 39-40.

3. Culpability Prong

To satisfy the "culpability" prong, enforcement counsel must prove that Respondent's misconduct involved either personal dishonesty or a willful or continuing disregard for the safety or soundness of the Bank. The ALJ concluded that enforcement counsel proved both.

(a) Personal dishonesty - § 1818(e)(1)(C)(i)

Reviewing the case law, the ALJ noted that "[t]his prong has repeatedly been found to be satisfied when the respondent has misled or withheld material information from either the bank's directors or the regulators." Here, according to the ALJ, the four disputed transactions "simply were not what Dodge represented them to be." In the ALJ's view, Respondent misrepresented the transactions and the Bank's capital in the following ways:

- Respondent failed to disclose that the inter-company receivable placed on the Bank's books stemming from the holding company's "purchase" of the MGF loan involved a valueless asset that the Bank had already written off, and that the holding company's "purchase" did not involve the transfer of any cash from the holding company to the bank between March 31, 2007 and August 2008;
- Respondent told the OTS that the $2 million CRP loan participation would be paid in June 2007, but in fact it was not paid until Respondent was ordered to reverse the transaction in August 2008. Nor did Respondent tell the Bank's board or the OTS of the multiple extensions given to the CRP, or that the loan was ultimately forgiven;
- Respondent ordered the 9800 Muirlands /Inter-Company Receivable to be recorded on the Bank's books and reported in its TFRs knowing there was no agreement of sale in place, and took no steps to correct this entry when a sale failed to materialize; and
- Respondent directed the entry of the Mountain View Pipeline income over the protests of other board members and advisors, and with the knowledge that no agreement was in place and no income had been realized.

The ALJ concluded that Respondent's "misrepresentation of these facts and deliberate deception by stealth constitute personal dishonesty." RD 41-42. See also RD 13-19.

(b) Willful or continuing disregard for bank's safety or soundness - § 1818(e)(1)(C)(ii)

The ALJ concluded that Respondent deliberately and with full knowledge manipulated the Bank's capital account so as to report the Bank as "well capitalized" on the March 31, 2007 TFR, and five TFRs thereafter, "thereby knowingly disregarding the risk associated with the Bank having insufficient capital to meet its needs." The ALJ continued, "These multiple instances of falsifying the balance in the capital account, and Dodge's inaction in replacing these transactions with cash until ordered to do so by the OTS, demonstrate a continuing and willful disregard for the safety and soundness" of the Bank and/or the holding company. Accordingly, enforcement counsel satisfied this prong as well, according to the ALJ. RD 42-43.

B. Civil Money Penalty

In addition to an order of prohibition, the Notice assessed a second tier CMP against Respondent in the amount of $2.5 million. See 12 U.S.C. § 1818(i)(2)(B). The statutory requirements for imposing a second tier CMP involve determining that Respondent's actions meet the CMP statute's two prongs, misconduct and effect, that mirror elements found in the prohibition statute. Thus, the Comptroller may impose a second tier CMP against any IAP who engages in (A) misconduct by violating any law or regulation, recklessly engaging in an unsafe or unsound practice in conducting the affairs of the insured depository institution, or breaching any fiduciary duty, (B) whose violation, practice or breach has the requisite effect of being part of a pattern of misconduct, causing or being likely to cause more than a minimal loss to the depository institution, or results in pecuniary gain or other benefit to the IAP. Id.

With respect to the misconduct prong, the ALJ observed that the statutory elements largely mirror those required to justify a prohibition, although for a second tier CMP the engagement in unsafe or unsound practices must be shown to have been reckless. On this point, the ALJ said he had no hesitation in finding that Respondent recklessly engaged in unsafe or unsound banking practices. RD 44. This finding supplements the ALJ's earlier findings under the prohibition statute that Respondent violated laws and regulations and breached his fiduciary duty. In sum, the ALJ concluded that Respondent's actions satisfied all three alternative tests under the misconduct prong of the second tier CMP statute.

With respect to the effects of Respondent's conduct, the ALJ found that his behavior was "part of a pattern of misconduct" within the statute. RD 44-45. The ALJ also concluded that Respondent's actions met the alternative effects tests, namely, his conduct created the risk of more than a minimal loss, and his failure to transfer holding company and affiliate deposits into the Bank's capital accounts resulted in a benefit to Respondent. With the statutory requirements amply satisfied, the ALJ concluded that a second tier CMP is warranted. RD 45. To determine the appropriate amount of the CMP, the ALJ reviewed the statutory factors and recommended a CMP of $1 million, giving credit to Respondent's promptly replacing the $3.015 million in questioned transactions with cash when ordered by OTS; his causing the holding company to contribute $17.5 million in additional capital; his history of no violations or other supervisory concerns; and because his actions were not the cause of the Bank's failure. RD 47-48.

IV. Respondent's Exceptions

Respondent filed exceptions to the ALJ's RD, and enforcement counsel filed a reply. Finding the ALJ's decision well reasoned and supported by a preponderance of the evidence, the Comptroller denies Respondent's exceptions for the reasons given by the ALJ and limits his comments to several exceptions.[3]

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[3] In his exceptions, Respondent briefly discussed the appropriate standard of proof, R. Exc. 3-4, and enforcement counsel replied. Enf. Reply 2-4. However, both parties seem to agree, as does the Comptroller, that the decision in *Steadman v. SEC*, 450 U.S. 91 (1981), answers this question. There, the Supreme Court held that the preponderance of the evidence standard is appropriate for an on-the-record disciplinary proceeding under section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d). 450 U.S. at 104 ("In § 7(c), Congress has similarly expressed its

A. Risk to the Bank

Respondent's most strongly urged exception is that the ALJ "ignored a key, undisputed fact," that the four questioned capital transactions posed no risk to the Bank because "the cash to make good on all four of the challenged transactions . . . was effectively guaranteed by ASB's holding company ('ASC') with ASC ensuring that ASB's capital needs could be met by holding enough cash, including in ASB's own money market accounts, as well as having tens of millions more in assets on its positive balance sheet." (Record citations omitted.) This, Respondent claims, led the ALJ to incorrectly analyze the effect prong of the prohibition statute and the civil money penalty statute, and also led the ALJ to conclude erroneously that Respondent "acted wrongfully in believing that ASC's cash on deposit in the bank, available to fund these receivables, was a 'cash equivalent.'" R. Exc. 1-3, 19.

Contrary to Respondent's exception, the ALJ did not "ignor[e]" Respondent's contention that the holding company's cash on deposit at the Bank should be considered capital. Citing Respondent's own testimony, the ALJ reasonably concluded that the funds were not actually available to the Bank:

> Throughout the hearing, Dodge insisted that it was unnecessary to inject actual capital into ASB when ASC and its subsidiaries had millions of dollars on deposit at the Bank. (Tr. 419, 451.) When questioned as to why, if ASC had so much cash on hand, it was not simply transferred to the Bank's capital account when ASB was informed by the OTS that it needed more capital, Dodge indicated that the cash was being used for other business purposes. [] Tr. 428-29 (Dodge) ("Well, but there [were] obviously many business reasons to decide as it related to that and any other cash transactions, so that's just one piece of the puzzle. We have to put the entire puzzle together if we're going to talk about cash and timing the cash."); Tr. 441 (Dodge) (responding, when asked why ASC didn't just write a check to ASB for $400,000, "That wasn't the only obligation that they had."); Tr. 451 (Dodge) ("We felt we needed to keep other credit that we had at the moment.")

RD 39-40. Clearly, Respondent is inconsistent in claiming that he reasonably viewed the holding company and affiliate cash on deposit in the Bank as a "cash equivalent" for capital adequacy purposes, R. Exc. 19, while at the same time scrambling to contribute highly questionable loans/receivables to the Bank's capital account. If he truly regarded the deposits to be capital, he did not need to make the three Non-Cash Capital Contributions. Moreover, it should be obvious even to someone without much banking experience that deposits in the name of others, a bank liability, cannot be considered cash or a cash equivalent qualifying as bank capital, an asset. As a banker with 36 years experience, Respondent should have known that GAAP and OTS regulations do not support such treatment, and no witness opined otherwise. As a result, the deposits touted by Respondent did not decrease risk to the Bank, and the Bank was less well capitalized than its TFRs indicated.

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intent that adjudicatory proceedings subject to the APA satisfy the statute where determinations are made according to the preponderance of the evidence.")

The Comptroller finds that a preponderance of the evidence supports the ALJ's conclusions on the effect prong of the prohibition statute and the civil money penalty statute, and denies Respondent's exception.

B. Other exceptions

Though not described as exceptions, Respondent's assertions, laid out beneath the bold heading "There Is Substantial Evidence, Not Adequately Addressed by the Recommended Decision, That Compels Findings In Mr. Dodge's Favor" will be treated as exceptions to the ALJ's RD R. Exc. 4-14. While this material fails to pinpoint precisely which of the ALJ's conclusions are erroneous and how Respondent's "substantial evidence" undermines the ALJ's conclusions, the record shows that the ALJ was aware of Respondent's "substantial evidence" (primarily Respondent's testimony) but gave it less weight than the OTS evidence, which included three OTS expert witnesses, Respondent's expert, and admissions in Respondent's closing brief.[4] RD 22-24.

1. Respondent's experience

Respondent first cites four sentences describing his career at the Bank and its holding company. R. Exc. 4-5. He argues that for 36 years the Bank was a well run institution, with Respondent either owning the Bank outright or about 85% of the parent holding company. Respondent notes that during this time he was a director and served as the Bank's CEO or co-CEO. Respondent also notes that while he was neither a CPA nor a lawyer, both the Bank and the holding company employed people with accounting and legal skills.

Respondent does not explain how these facts should have affected the ALJ's RD and why they warrant the Comptroller reaching a dfferent conclusion than the ALJ with respect to the charges in the Notice. To the extent that Respondent is arguing that the ALJ failed to mention these facts or failed to assign them sufficient weight, the record, including the ALJ's RD, demonstrates that this is not the case. The ALJ not only noted these facts but expanded on what Respondent suggests was ignored, presenting an overall picture of a "pretty hands-on" CEO in the management of "his bank." RD 4 (quoting senior officer Dearden). However, the ALJ weighed these facts differently than Respondent would, concluding that "the risk of harm from falsifying capital entries rather than contributing capital should have been obvious to Dodge" in view of his 36 years as CEO of the Bank. The ALJ added, "Dodge's actions evidence an indifference to the clearly established requirements for keeping financial institutions well capitalized." RD 44. Moreover, the ALJ relied on record evidence of Respondent's being "intimately involved in all aspects of the Bank's business, exercising control over bank matters large and small," to reject Respondent's argument that he was merely part of a "management team," and that the CFOs were the ones who actually recorded the transactions and prepared the

[4] Enforcement counsel's reply argues that the Comptroller should strike the material on pp. 4-14 because it fails to comply with the requirements of 12 C.F.R. § 109.39(c)(2). Enf. Reply 17. While Respondent's lack of precision leaves the Comptroller to guess as to which of the ALJ's findings are contested, the Comptroller will address selected "exceptions."

TFRs. RD 28-29 (discussing Respondent's evidence).[5] In short, the ALJ considered Respondent's 36 year career but concluded it could not free him from responsibility for his participation in the four disputed transactions that violated OTS regulations.

The Comptroller concludes that the ALJ's interpretation of Respondent's extensive banking career is supported by a preponderance of the evidence. The Respondent's exception is therefore denied.

2. OTS Acquiescence in Bank's Plans to Improve Capital

Respondent argues that in the Spring of 2007 he and other bank executives discussed with OTS field manager Donald Kramer their efforts to return the Bank to "well capitalized" status from "adequately capitalized." Among other things, Bank officials told Kramer that the holding company would contribute to the Bank a $2 million participation in the holding company's $3 million loan to the CRP due to be paid in June 2007, and that the holding company would purchase the $400,000 charged off MGF loan, adding another $265,000 in after-tax value to the Bank's capital. In addition to orally reporting these plans to Kramer, the Bank made the same points in a letter to Kramer dated April 10, 2007. According to Respondent, Kramer and OTS did not object to the Bank's plans at the time. R. Exc. 5-6.

These actions do not exonerate Respondent. As noted earlier, contributions to capital must be in the form of cash, cash equivalents or high quality marketable assets, unless the savings association receives *prior approval of the OTS Regional Director*. Plainly, the OTS Handbook requires an affirmative approval, and OTS's failure to object is not sufficient. Even assuming OTS examiner Kramer "approved" the holding company's plan to contribute the CRP participation and the MGF loan to the Bank's capital, Kramer was not the OTS Regional Director. As a result, the Bank did not receive the requisite OTS approval. Tr. 657 (Hildebrand) (noting that the Bank "had not received prior approval from the OTS Regional Director" for contributing the MGF loan to the capital account). Respondent should have known this. RD 34 ("As a director and officer of the Bank with more than 36 years experience, and particularly given his nearly singular control over the affairs of the bank, Dodge had a duty to know what the legal requirements were . . . .").[6]

The Comptroller denies Respondent's exception that OTS approved the inclusion of two non-qualifying contributions to the Bank's capital.

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[5] The ALJ also cited Respondent's extensive banking experience to support a finding that Respondent should have been aware of provisions in the OTS Examination Handbook defining acceptable capital, notwithstanding OTS's delay in responding to the Bank's proposal to make a non-cash capital contribution. RD 30.

[6] Enforcement counsel's reply asserts that even if the Bank's April 10, 2007 letter to field manager Kramer is assumed to constitute approval by the OTS Regional Director, the Bank's description of the transactions would make the approval void as fraudulently obtained. Enf. Reply 22-23. For example, while the Bank's letter said that the holding company had "purchased" the MGF loan, the ALJ found that no cash was exchanged prior to June 30, 2008, nor was there any documentation supporting a receivable or other obligation by the holding company to pay the Bank. RD 15; 23 (describing Hildebrand's expert testimony that there was no evidence the holding company "purchased" the note from the Bank). Enforcement counsel makes similar observations about the CRP loan participation noting, *inter alia*, that the Bank's letter to Kramer failed to mention the loan's unsecured character and that the debtor had failed to repay the loan on February 9, 2007 and had subsequently requested an extension. Enf. Reply 23; see also RD 12.

3. The 9800 Muirlands Receivable

Without specifying precisely how the ALJ erred, Respondent says that in late 2007 the holding company executed another transaction "using an identical approach as those disclosed to the OTS earlier in the year" for the CRP loan participation and the MGF note. "Believing this to be acceptable," Respondent concentrated on other pressing matters. As Respondent notes, the sale of 9800 Muirlands, which was expected to fund the receivable, did not take place. R. Exc. 8.

The Comptroller denies Respondent's exception for the same reasons given earlier. The Bank failed to obtain the prior written approval of the OTS Regional Director for a contribution to capital that was not cash, a cash equivalent or a high quality marketable asset. Further, as of December 31, 2007, there was no executed agreement or note between the holding company and the Bank evidencing the holding company's agreement to pay the Bank $750,000 upon the sale of 9800 Muirlands. RD 16. Nor was such a sale completed by June 2008. RD 17. To the extent that Respondent is suggesting that his subjective belief in the acceptability of this and other capital contributions justifies his actions, the Comptroller concludes that the ALJ has weighed the evidence properly, made appropriate factual findings, and correctly applied the law.

4. Mountain View Pipeline Income

Respondent argues that he acted in good faith when the Bank recognized the potential income from servicing the Mountain View loan portfolio. The Bank's action, Respondent says, was "consistent with its representation to the OTS in its April 10, 2007 letter that it was booking non-closed loans in its pipeline as revenue." R. Exc. 10-11. The ALJ, however, noted many red flags about this practice and Respondent's awareness of them. Respondent knew there was no written agreement authorizing the Bank to begin servicing the Mountain View loan portfolio, and he was aware of the view of Chief Financial Officer Dearden, a CPA, that booking the revenue solely on the calculation of potential income was "fairly aggressive" and "might be challenged under GAAP." RD 17-18. Even more emphatic criticism was leveled by Bank Chief Operating Officer John Kopecky and John Meara, a director who was also a CPA. This internal dissent prompted the Bank's board in December 2008 to engage an outside auditor to determine the proper GAAP treatment of the Mountain View portfolio. The outside auditor concluded that the income should not have been reported in the Bank's TFRs as income. RD 18-19.

Respondent's exception admits the dissent within the Bank on the proper treatment of this anticipated income. R. Exc. 11. The admission undercuts Respondent's claim, properly discredited by the ALJ, that he relied on experts to determine the proper accounting treatment. Instead, the record shows that Respondent argued with these professionals and ordered the booking of non-existent income. RD 28-29. The income should not have been reported on the Bank's TFR for the second and third quarters of 2008. The Comptroller denies Respondent's exception.

5. Effect of misconduct under second prong, 12 U.S.C. § 1818(e)(1)(B)

Respondent excepts to the ALJ's conclusion that Respondent's misconduct caused all three adverse effects listed in the prohibition statute's second prong.

With respect to the first effect, the four questioned transactions did not, by enforcement counsel's own admission, cause a financial loss to the Bank, RD 38, and Respondent's exception emphasizes this point. R. Exc. 15. However, the crucial point, made by the ALJ, is that Respondent's "manipulation of the Bank's capital accounts and his plain violation of the statutes and regulations governing capital and capital contributions *could have* caused the Bank to suffer financial loss or other damage." (Emphasis in the original) RD 38. As the ALJ explained, the purpose of requiring banks to maintain a prescribed level of capital is to shield them from the possibility of financial loss, and therefore it would be "nonsensical" to conclude there was no probability that Respondent's misrepresentation of the Bank's true capital status and his interference with the OTS's regulatory responsibilities could have caused the Bank to suffer financial loss or other damage. *Id.* The Comptroller agrees that the possibility of loss to the Bank was reasonably foreseeable and within the case law cited by the ALJ. This finding, based on a preponderance of the evidence, is sufficient by itself to support the conclusion that Respondent's actions had the requisite adverse effect to support the prohibition.

With respect to the second and third effects, Respondent excepts to the ALJ's findings that Respondent's actions could prejudice the interests of depositors and that Respondent received financial gain or other benefit. R. Exc. 16-17. The ALJ found that in August 2008 there was a distinct possibility of the Bank's experiencing a liquidity crisis brought on, at least in part, by the Bank's acceptance of brokered deposits, which it would have been statutorily barred from accepting had the true state of its capital been disclosed. RD 39. Respondent's exception that the Bank never experienced a liquidity crisis misses the point: the likelihood of an actual liquidity crisis was so great that OTS had to make multiple calls to the Bank on a daily basis and ask the FDIC to station personnel one block away to take the Bank into receivership if necessary. RD 19-20. On Respondent's receipt of financial gain, Respondent again misses the point when he argues that enforcement counsel failed to show "that there was ever a time when the [holding company's] cash sitting at ASB, or other places, could not be accessed" to "reconcile" the receivables contributed to the Bank's capital accounts. The point, correctly made by the ALJ, is that the very availability of the cash deposits for use in other business opportunities was a benefit to the Respondent. In effect, Respondent, by contributing ineligible assets to the Bank's capital accounts, absolved himself from the obligation to inject actual capital into the Bank, and this constitutes "financial gain or other benefit" within the statute's "effect" prong. Thus, it was not necessary for enforcement counsel to show that the cash was actually being used for other purposes.[7]

Accordingly, the Comptroller adopts the ALJ's conclusion that enforcement counsel proved an adverse effect stemming from Respondent's actions.

[7] In this discussion, the Comptroller has assumed that the deposits held by Respondent-controlled companies at the Bank were indeed available, even though Respondent's evasive, non-responsive testimony on this subject led the ALJ to conclude that the cash was indeed being used for other purposes. RD 39-40.

6. Culpability under third prong, 12 U.S.C. § 1818(e)(1)C)

Respondent excepts, R. Ex. 18-26, to the ALJ's conclusion that Respondent's misconduct involved personal dishonesty and demonstrated willful or continuing disregard for the Bank's safety or soundness. RD 40-43.

Respondent emphasizes the reasonableness of his belief that the deposits placed in the Bank by the holding company and other affiliates, combined with the holding company's "commitment to funding the items booked as 'receivables' rather than contingencies, was no different than cash or its equivalents for ASB," and therefore qualified as capital. Because the OTS examiners did not immediately criticize the four transactions as non-qualifying contributions to capital, Respondent avers that his disclosure to OTS of the ineligible contributions to capital "and the resulting nonchalance of OTS personnel" should be "dispositive" on the personal dishonesty issue. R. Exc. 19-20.

In the Comptroller's view, the ALJ acted reasonably in giving greater weight to other evidence. While Respondent contends that he did not try to hide the disputed transactions on the balance sheet but disclosed the CRP loan participation and the MGF loan purchase to OTS, the inquiry does not end there. As the ALJ noted, RD 41, three appellate court decisions have held that the statute's culpability prong is satisfied when an IAP has misled or withheld material information from either the bank's directors or the regulators. On this score, numerous examples, described earlier in this decision (pp. 9-10), illustrate Respondent's culpable behavior. The ALJ's conclusion, RD 41, that "[t]his proceeding is rife with examples of Dodge's person[al] dishonesty," is supported by a preponderance of the evidence.

Alternatively, the culpability prong of 12 U.S.C. § 1818(e)(1)(C) can be satisfied by proving that Respondent demonstrated willful or continuing disregard for the Bank's safety or soundness. The Comptroller agrees with the ALJ that the record reflects enough evidence to satisfy this element as well. RD 42-43. Respondent deliberately and with full knowledge manipulated the capital account to show that the Bank was "well capitalized" on the March 31, 2007 TFR, and five TFRs thereafter, thereby knowingly disregarding the risk that the amount of legitimate or qualifying capital might be insufficient to meet the considerable losses the Bank was experiencing. Respondent's argument, R. Exc. 25, that he "stood behind his commitment to ASB not just for the $3.1 million in challenged transactions, but for millions more" misses the point, which is that Respondent failed to reverse the non-qualifying contributions to capital until ordered to do so by OTS on July 24, 2008. Prior to that reversal, Respondent's inaction in replacing the disputed transactions with cash amounted to a willful or continuing disregard for the Bank's safety or soundness, a finding that is not diminished as Respondent claims by the fact that "the money *and millions more* always remained available [in the holding company's deposits at the Bank] and was in fact [ultimately] provided by ASC in accord with Mr. Dodge's duties to ASB and ASC." R. Exc. 26 (emphasis original). Contrary to Respondent's exception, the case law discussed by the ALJ, including *De La Fuente v. FDIC*, 332 F.3d 1209 (9th Cir. 2003), supports the ALJ's conclusion.[8]

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[8] Respondent cites *Kim v. OTS*, 40 F.3d 1050 (9th Cir. 1994), which held that Kim lacked sufficient culpability inasmuch as he was "one of several officers and directors who approved a few questionable loans" and that "a few

C. Exception Related to Civil Money Penalty

The ALJ concluded that the evidence supports a second tier CMP under 12 U.S.C. § 1818(i)(2)(B), but the mitigating factors in 12 U.S.C. § 1818(i)(2)(G) caused him to recommend a CMP of $1 million in place of the $2.5 million penalty called for in the Notice. RD 43-48. Respondent excepts, R. Exc. 26-31, asserting "there is no basis for imposing any penalty." R. Exc. 28.

In the Comptroller's estimation, the ALJ properly found that evidence showed that both the misconduct and the effect prongs of the second tier CMP statute were proved.[9] In his analysis of the prohibition statute, the ALJ had found that Respondent violated a law or regulation and that he had breached his fiduciary duty to the bank. RD 21-30, RD 33-36. The ALJ also concluded that the evidence proved that Respondent had recklessly engaged in an unsafe or unsound practice. RD 44, *cf.* RD 32-33. Thus, all three elements of the misconduct prong of the CMP statute were established, even though it was only necessary for enforcement counsel to establish one. The ALJ also found that Respondent's actions established the effect prong of the CMP statute, specifically, that the violation, practice or breach was part of a pattern of misconduct, or caused or is likely to cause more than minimal loss to the bank, or resulted in pecuniary gain or other benefit to an IAP. 12 U.S.C. § 1818((i)(2)(B)(ii). On this inquiry, the ALJ found that Respondent's conduct constituted a pattern of misconduct. RD 44-45. Additionally, the ALJ reiterated his earlier findings under the prohibition statute that Respondent's actions were likely to cause more than a minimal loss to the bank, and that Respondent incurred a benefit, in that "by not transferring cash into the Bank from ASC, ASIC [an affiliate], or Dodge's personal funds, Dodge was free to, and apparently did, direct these funds towards other business opportunities." RD 45.

Respondent does not specifically except to the ALJ's conclusion that Respondent engaged in a "pattern of misconduct" within the "effect" portion of the civil money penalty statute. In any event, the Comptroller agrees with the ALJ that the evidence shows such a pattern. Respondent engineered four separate transactions, spanning six regulatory reporting periods, giving the Bank the illusion of being well capitalized when in fact it was not. See *Rapp v. Dep't of Treasury*, 52 F.3d 1510, 1517-18 (10th Cir. 1995) (repeated misconduct constitutes a pattern of misconduct for purposes of second tier penalty). This pattern alone is sufficient under the statute to warrant a second tier CMP. The evidence also shows that he knowingly and

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relatively minor and technical violations" of banking regulations occurred while he was at the helm. 40 F.3d at 1055, cited at R. Exc. 25. This analysis is of no assistance to Respondent, whose extensive participation in all aspects of the Bank's affairs and whose 85% ownership of the Bank's holding company made him more than "one of several officers and directors." RD 28. The participation of others in the four disputed transactions does not detract from Respondent's responsibility. Moreover, it can hardly be said that Respondent's participation in contributing nonqualifying assets to the Bank's capital accounts, thereby causing the Bank to appear "well capitalized" in its TFRs when it was only "adequately capitalized" over a period of time, was a minor or technical violation.

[9] Under the statute, a second tier CMP is warranted where a respondent has engaged in "misconduct," *i.e.*, the violation of a law or regulation, the reckless engagement in an unsafe or unsound practice, or the breach of a fiduciary duty, and the "misconduct" is part of a pattern of misconduct, causes or is likely to cause more than a minimal loss to the bank, or results in pecuniary gain or other benefit to the respondent. 12 U.S.C. § 1818(i)(2)(B).

intentionally caused the Bank to evade regulatory capital requirements, and that he misled OTS into believing the Bank was well capitalized when in fact it was not. Thus, Respondent created the risk that the Bank would suffer "more than a minimal loss" within the statute.

Of the few remaining exceptions, only Respondent's contention that he did not breach his fiduciary duty to the Bank merits comment. R. Exc. 30. The thrust of the one-paragraph exception on this element seems to be that Respondent "honestly believed" that the holding company and affiliate deposits in the Bank constituted a "cash equivalent" qualifying as a capital contribution under section 110.16 of the OTS Examination Handbook. Respondent's asserted ignorance of the meaning of "cash equivalent" is itself a breach of fiduciary duty because, as the CEO and controlling shareholder, he had a duty to understand regulatory requirements, and had he understood this, he would have readily acknowledged that funds in deposit accounts cannot be considered capital in the Bank's capital accounts. Equally telling is that Respondent never argued to OTS, or even to the Bank's board of directors, that the deposits could "satisfy all the receivables." Nor, as enforcement counsel's reply points out, did Respondent introduce any evidence that the deposit funds were pledged by the depositors (the holding company and affiliates) for this purpose. Enf. Reply 28-29. In short, there was no mechanism in place for the Bank to take control of the deposits and transfer them to its capital account. Respondent's "honest belief" appears to be a recent manufacture rather than an accurate depiction of his state of mind in April 2007 - June 2008 when the disputed Non-Cash Capital Contributions were booked.

With the elements of a second tier penalty amply satisfied, the final issue is the amount of the CMP. Under the statutory formula, OTS was entitled to seek a CMP of approximately $17 million. The Notice assessed a CMP of $2.5 million, and the ALJ recommended $1 million. Respondent excepts. R. Exc. 27-28.

The Comptroller denies Respondent's exception. Some of his claimed mitigating factors (*e.g.*, Respondent's lack of previous violations, his prompt replacement of the disputed transactions in the capital account with cash, his infusion of new capital, his cooperation with OTS's efforts to sell the Bank) were expressly considered by the ALJ, while others (*e.g.*, Respondent's lack of financial gain, the limited duration and frequency of the disputed transactions) were for good reason not considered mitigating factors.[10] The Comptroller finds the ALJ's recommendation of a $1 million CMP, rather than the $2.5 million set in the Notice, to be supported by the record.

[10] Respondent does not except to the ALJ's conclusion, RD 47, that Respondent has the financial resources to pay a $2.5 million CMP. Separately, Respondent suggests that his "lack of any financial gain" was not given adequate consideration. R. Exc. 28. However, as discussed above (p. 15), the ALJ found that Respondent's actions in crediting the disputed transactions to the Bank's capital account eliminated the need for the holding company, other affiliates, and Respondent himself to inject "actual capital" into the Bank. RD 39-40. According to the ALJ, "This absolution of an obligation to inject actual capital into the Bank constitutes 'financial gain or another benefit'" within the "effect" prong of the prohibition statute, 12 U.S.C. § 1818(e)(1)(B)(iii). RD 40. The Comptroller will not disturb this finding. See *De La Fuente v. FDIC*, 332 F.3d 1208, 1225 (9th Cir. 2003) (respondent's failure to disclose the true status of a loan to the FDIC "did result in an impermissible gain: he was relieved of his obligation to infuse capital into the bank to counterbalance FIB's over-leveraged status.").

Conclusion

The ALJ's recommendations to impose on Respondent an Order of Prohibition and an Assessment of a Civil Money Penalty in the amount of $1 million is well supported, and the Comptroller adopts them and the RD in their entirety. The Comptroller denies all of Respondent's exceptions, including any not discussed above.

/s/ Thomas J. Curry
Thomas J. Curry
Comptroller of the Currency

9/17/2012
Date