#N17-003

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

In the Matter of:	)	
	)	
Saul Ortega	)	AA-EC-2017-44
Former Chief Financial Officer, Director,	)	
President, Chief Executive Officer, and	)	
Chairman of the Board	)	
	)	
David Rogers, Jr.	)	AA-EC-2017-45
Former Chairman of the Board	)	
	)	
First National Bank	)	
Edinburg, Texas	)	

NOTICE OF CHARGES FOR ORDERS OF PROHIBITION AND NOTICE OF ASSESSMENTS OF A CIVIL MONEY PENALTY

Take notice that on a date to be determined by the Administrative Law Judge, a hearing will commence in the Southern District of Texas unless Respondents consent to another place, pursuant to 12 U.S.C. § 1818(e) and (i), concerning the charges set forth herein to determine whether Orders should be issued by the Comptroller of the Currency ("Comptroller") against Saul Ortega, former Chief Financial Officer ("CFO"), director, President, Chief Executive Officer ("CEO"), and Chairman of the Board ("Chairman") ("Respondent Ortega") and David Rogers, Jr., former Chairman ("Respondent Rogers") (collectively, the "Respondents"). Such Orders would prohibit each Respondent from participating in any manner in the conduct of the affairs of any insured depository institution or any other institution, credit union, agency or entity referred to in 12 U.S.C. § 1818(e), and require each Respondent to pay a civil money penalty.

A civil money penalty in the amount of two hundred fifty thousand dollars ($250,000) is hereby assessed against each of the Respondents, pursuant to the provisions of 12 U.S.C. § 1818(i), after having considered the factors set forth in 12 U.S.C. § 1818(i)(2)(G) and after having solicited and given full consideration to Respondents' views. The penalty is payable to the Treasurer of the United States.

The hearing afforded to Respondents shall be open to the public unless the Comptroller, in his discretion, determines that holding an open hearing would be contrary to the public interest.

In support of this Notice of Charges for Orders of Prohibition and Notice of Assessments of a Civil Money Penalty ("Notice"), the Office of the Comptroller of the Currency ("OCC") charges the following:

ARTICLE I

JURISDICTION

At all times relevant to the charges set forth below:

(1) The Bank was an "insured depository institution" as defined in 12 U.S.C. § 1813(c)(2).

(2) Respondents were officers and directors of the Bank and were "institution-affiliated parties" of the Bank as that term is defined in 12 U.S.C. § 1813(u), having served in such capacity within six (6) years from the date hereof. *See* 12 U.S.C. § 1818(i)(3).

(3) The Bank was a national banking association within the meaning of 12 U.S.C. § 1813(q)(1)(A).

(4) Accordingly, the OCC is the "appropriate Federal banking agency" as that term is defined in 12 U.S.C. § 1813(q) and is therefore authorized to initiate and maintain these prohibition and civil money penalty actions against Respondents pursuant to 12 U.S.C. § 1818(e) and (i).

ARTICLE II

BACKGROUND

(5) This Article repeats and realleges all previous Articles in this Notice.

Respondents' Background

(6) In or around 1981, Respondent Rogers became Chairman and remained in that position until his resignation on or about November 1, 2011.

(7) In or around 2001, Respondent Ortega became CFO and a director. He remained CFO until September 2011 when he was promoted from CFO to CEO. In or around January 2012, Respondent Ortega became President and Chairman. Respondent Ortega remained President, CEO, and Chairman until the Bank closed in September 2013.

Respondents' Responsibilities

(8) Between 2008 and 2011, Respondents and the Bank's then-President/CEO and then-Chief Lending Officer ("CLO") were responsible for the day-to-day management of the Bank.

(9) Between 2008 and 2011, Respondents served on the Board of Directors ("Board"). Respondent Rogers resigned from the Board in 2011. Respondent Ortega continued to serve on the Board until the Bank's closure in September 2013.

(10) Between 2008 and 2011, Respondents were voting members on the Loan and Discount Committee ("L&D Committee"), which consisted of all of the Bank's directors, met weekly, and approved all loans greater than $1 million. On certain occasions, a majority of the L&D Committee approved loans by "telephone tally" before the meeting, and the full L&D Committee ratified such loans at the actual meeting.

(11) At all times relevant to this Notice, the Board and L&D Committee also consisted of four to five outside directors ("Outside Directors").

(12) As officers and directors of the Bank, Respondents were obligated to comply with all applicable laws and regulations and to carry out their duties and responsibilities in a manner consistent with safe and sound banking practices.

(13) As officers and directors of the Bank, Respondents owed fiduciary duties of care and loyalty to the Bank.

(a) The fiduciary duty of care required that each Respondent act in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner reasonably believed to be in the best interest of the Bank, and ensure the Bank's compliance with laws and regulations.

(b) The fiduciary duty of loyalty required that each Respondent disclose material information to the Bank's Board and refrain from engaging in self-dealing at the expense of the Bank. The duty of loyalty further required Respondents to disclose the existence, nature, and extent of any conflicts of interest with the Bank, refrain from discussing, voting, or having any other involvement on matters where Respondents had a conflict of interest, and to place the interests of the Bank ahead of Respondents' own personal interests at all times.

(14) Respondents were responsible for ensuring that the Bank filed materially accurate Consolidated Reports of Condition and Income ("Call Reports"), which included ensuring the Call Reports were consistent with generally accepted accounting principles ("GAAP") and regulatory reporting requirements.

(15) As officers and directors of the Bank, Respondents were responsible for ensuring that the Bank complied with OCC enforcement actions and implemented corrective actions to address Matters Requiring Attention ("MRAs") in OCC Reports of Examination ("ROEs").

Bank Background and Supervisory History

(16) The Bank was a community bank headquartered in Edinburg, Texas with approximately $3.1 billion in total assets and $2.3 billion in total deposits as of June 30, 2013.

(17) The Bank was a wholly-owned subsidiary of First National Bank Group, Inc. ("Holding Company"), a bank holding company. Respondents were also officers and directors of the Holding Company.

(18) In September 2008, the Bank incurred a $174 million loss on investments in the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation causing the Bank to fall from "well capitalized" to "adequately capitalized" for Prompt Corrective Action purposes. *See* 12 U.S.C. § 1831o.

(19) In or around 2008, the Bank's other real estate owned ("OREO") increased significantly as a result of increasing delinquencies and foreclosures on loans made prior to 2008.

(20) On February 18, 2009, the OCC imposed an Individual Minimum Capital Ratio ("2009 IMCR") requiring the Bank to achieve and maintain an 8 percent Tier 1 Leverage Ratio and 12 percent Total Risk Based Capital ("TRBC") Ratio by May 10, 2009.

(21) The OCC determined that the higher levels of capital specified in the 2009 IMCR were necessary based on the Bank's deteriorating condition, including a deterioration in the Bank's asset quality, high concentrations in speculative commercial real estate, and inadequate risk management systems.

(22) On January 27, 2009, the OCC and the Bank entered into a Memorandum of Understanding ("2009 MOU") that required the Bank to, among other things, reduce criticized assets, improve loan risk rating accuracy, and improve accounting for nonaccrual loans.

(23) On February 8, 2011, the OCC issued a Consent Order against the Bank ("2011 Consent Order") that required the Bank to, among other things, achieve and maintain a 9 percent Tier 1 Leverage Ratio and 13 percent TRBC Ratio and correct unsafe or unsound practices concerning the Bank's loan portfolio management and nonaccrual loans.

(24) On January 18, 2012, the OCC replaced the 2011 Consent Order and with a new Consent Order against the Bank ("2012 Consent Order") that required the Bank to implement additional corrective actions, including, among other things, hiring competent management, addressing excessive compensation, and improving accounting for and management of OREO.

(25) The Bank's financial condition continued to deteriorate and the Bank became "critically undercapitalized" as of June 30, 2013.

(26) On September 13, 2013, the OCC closed the Bank and appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver.

(27) As of February 28, 2014, the FDIC estimated that the Bank's failure resulted in $637.5 million in losses to the Deposit Insurance Fund ("DIF").

Respondents' Efforts to Artificially Improve the Bank's Condition

(28) Beginning in or around late 2008, Respondents masked the Bank's deteriorating financial condition through misconduct that inflated earnings and capital and improperly reduced or delayed reported losses. Such misconduct included:

(a) Providing unsafe or unsound loans to finance the Bank's capital raise and improperly including the loan proceeds as capital as described in Article III;

(b) Providing unsafe or unsound loans to finance the sales of OREO at above-market prices to improperly reduce the Bank's nonperforming assets and avoid recording losses on the OREO sales as described in Article IV; and

(c) Improperly accruing interest on nonaccrual loans as described in Article V.

(29) With regard to one series of unsafe or unsound loans involving sales of OREO, Respondent Rogers also placed the interests of a member of his immediate family above those of the Bank as described in Article VI.

ARTICLE III

RESPONDENTS ENGAGED IN UNSAFE OR UNSOUND PRACTICES, BREACHED THEIR FIDUCIARY DUTY, AND VIOLATED 12 U.S.C. § 161 WITH REGARD TO LOANS TO FUND SALES OF HOLDING COMPANY STOCK AND IMPROPERLY INCLUDING THE LOAN PROCEEDS AS CAPITAL

(30) This Article repeats and realleges all previous Articles in this Notice.

(31) As described herein, Respondents engaged in unsafe or unsound practices, breached their fiduciary duty of care, and violated 12 U.S.C. § 161. From approximately April 2009 to March 2011, Respondents originated, approved, and/or ratified unsafe or unsound loans to finance the purchase of stock in the Holding Company ("Capital Raise Loans") and then transferred the proceeds to the Bank to raise capital. Contrary to GAAP and regulatory guidance, from June 30, 2009 to June 30, 2013, Respondents caused the Bank to improperly inflate its capital by including the proceeds of the Capital Raise Loans as regulatory capital in the Bank's Call Reports.

(32) Beginning in or around April 2009 and continuing until approximately March 2011, Respondents offered Holding Company stock to certain Bank officers, directors,

employees, and customers through a private placement memorandum and also offered Bank loans to finance their purchase of stock.

(33) Between approximately April 2009 through March 2011, certain Bank officers, directors, employees, and customers purchased Holding Company stock financed with Bank loans ("Capital Raise Loan Borrowers").

(34) The Holding Company, of which Respondents were officers and directors, transferred the proceeds of the Capital Raise Loans to the Bank.

(35) Respondents admitted to the OCC that the Bank provided loans to finance the purchase of Holding Company stock.

(36) Respondents ultimately originated, approved, and/or ratified approximately 63 Capital Raise Loans and sold approximately $21 million of Holding Company stock to the Capital Raise Loan Borrowers.

(37) The Capital Raise Loans had terms or features that included, but were not limited to:

(a) Unsecured or under-secured;

(b) Below-market interest rates that were not commensurate with the risk of the loan; and

(c) Balloon repayment terms.

(38) Most of the Capital Raise Loan Borrowers lacked the ability and/or intent to repay the Capital Raise Loans in accordance with their terms. For example, certain internal Bank documents related to the Capital Raise Loans specified that the borrower would only be required to pay 5 percent principal at maturity, and several Bank employees testified to the OCC that they were not expected to pay the loans when due.

(39) The L&D Committee loan packages only generally indicated that the purposes of the Capital Raise Loans were for "investments" but did not identify that the purposes were to purchase Holding Company stock.

(40) Respondents knew the loans' true purposes when they approved and/or ratified them. Respondents' failure to ensure that the Bank specified the true purposes of the Capital Raise Loans in the L&D Committee loan packages helped to obscure the specific purposes of the loans from the Bank's regulators.

(41) Respondents repeatedly approved and/or ratified the renewal of most of the Capital Raise Loans, and most of the Capital Raise Loans were outstanding when the Bank closed in September 2013.

(42) The Bank incurred $387,241 in losses on two of the Capital Raise Loans in June 2013.

(43) The DIF incurred approximately $3.8 million in losses on the Capital Raise Loans.

Materially Inaccurate Call Reports

(44) On May 10, 2009 and August 12, 2009, the Holding Company infused $30 million and $5 million, respectively, into the Bank to help meet the 2009 IMCR.

(45) The combined $35 million infused into the Bank by the Holding Company included proceeds from the sale of Holding Company stock financed with the Capital Raise Loans.

(46) On August 13, 2009, the Bank notified the OCC that it achieved the minimum capital requirements contained in the 2009 IMCR with a Tier 1 Leverage Ratio of 8.9 percent and TRBC Ratio of 12.01 percent.

(47) The Bank did not notify the OCC that the $35 million infused into the Bank included the loan proceeds from the Capital Raise Loans.

(48) Respondents caused the Bank to improperly include the proceeds from the sales of Holding Company stock financed with the Capital Raise Loans in its regulatory capital instead of as a deduction from stockholder's equity as required by GAAP and regulatory guidance. More specifically:

(a) Financial Accounting Standards Board Emerging Issues Task Force 85-1 ("EITF 85-1"), *Classifying Notes Received for Capital Stock*, (later codified at Accounting Standards Codification Subtopic 505-10, *Equity - Overall*), which was in effect at all relevant times, provides that there must be "substantial evidence of the ability and intent to pay the loan in a reasonably short period of time" to include stock financed with loans as capital.

(b) Between 2008 and 2012, the OCC's Bank Accounting Advisory Series ("BAAS") included a question on EITF 85-1 notifying banks that "[n]otes received in exchange for capital stock should be classified as a deduction from stockholder's equity." In 2012, the OCC incorporated this guidance into the Instructions to the Consolidated Reports of Condition and Income ("Call Report Instructions").

(49) Because the Bank provided loans to purchase Holding Company stock and most of the loans were outstanding when the Bank closed, the Bank did not have additional ability to absorb losses prior to its closure.

(50) Respondents admitted to the OCC that, in their experience in banking, they were not aware of any other bank that had raised capital by lending money to investors and including the same money as regulatory capital in the manner described in this Article.

(51) Respondents never caused the Bank to correct the improper accounting practices described in this Article. Therefore, the Bank's capital continued to be overstated until the Bank closed in September 2013.

(52) As a result of the accounting practices described within this Article and together with the accounting practices described in Article IV and Article V, Respondents caused, brought about, and/or participated in the Bank filing materially inaccurate Call Reports beginning with the quarter ending June 30, 2009 and continuing through the Call Report for the quarter ending June 30, 2013.

(53) The foregoing accounting practices, and Respondents' failure to correct them, masked the Bank's true financial condition and prevented the Bank's regulators and depositors from determining whether the Bank had adequate capital to safeguard deposits.

ARTICLE IV

RESPONDENTS ENGAGED IN UNSAFE OR UNSOUND PRACTICES, BREACHED THEIR FIDUCIARY DUTY, VIOLATED 12 U.S.C. § 161, AND VIOLATED FINAL ORDERS WITH REGARD TO LOANS TO FINANCE SALES OF OREO AND THE IMPROPER ACCOUNTING FOR SUCH SALES

(54) This Article repeats and realleges all previous Articles in this Notice.

(55) As described herein, Respondents engaged in unsafe or unsound practices, breached their fiduciary duty of care, violated 12 U.S.C. § 161, and violated final cease-and-desist orders. Respondents developed and implemented a new lending strategy from late 2008 through at least September 2011 designed to avoid further decreases to the Bank's capital ratios. Respondents reduced the Bank's assets by curtailing non-OREO new loan originations and

avoided reporting further decreases to capital by originating, approving, and/or ratifying unsafe or unsound loans to finance the sales of the Bank's OREO at above-market prices, which enabled the Bank to reduce or avoid reported losses that it would have otherwise recorded on sales at fair market values ("OREO Lending Strategy"). Contrary to GAAP and regulatory guidance, from June 30, 2009 to June 30, 2013, Respondents caused the Bank to inflate its capital by improperly accounting for the OREO sales and loans with below-market interest rates.

(56) The Bank's culture ensured that loan officers implemented the OREO Lending Strategy. For example:

(a) The Bank established an incentive compensation program that awarded cash bonuses to loan officers who sold OREO in the same month in which it was acquired, which included higher bonuses for sales at full asking price;

(b) The then-President/CEO sent frequent emails to the Bank's lending department pressuring loan officers to sell OREO quickly; and

(c) On at least two occasions, loan officers initially drafted L&D Committee loan packages to explicitly state that they recommended approval of the loan because the borrower was helping the Bank to reduce its loss on the sale of OREO. However, the Chief Credit Review Officer instructed loan officers to remove this language because he recognized that it may indicate that "we over-sold it or might have stretched to underwrite this borrower instead of recognizing a loss and possibly selling to a more qualified borrower."

(57) Pursuant to the OREO Lending Strategy, the Bank convinced buyers to purchase OREO at above-market prices by offering and issuing unsafe or unsound loans that Respondents originated, approved, and/or ratified. Some of the loans contained terms and features that were

inconsistent with the Bank’s Real Estate Loan Policy. These loan terms or features included, but were not limited to:

(a) Requiring no equity contribution from the borrower while providing new monies to finish construction and development;

(b) Requiring no personal guarantees or limited guarantees on loans to newly-formed entities that were formed for the sole purpose of purchasing the subject OREO property;

(c) Providing below-market interest rates that were not commensurate with the risk of the loan;

(d) Providing excessive interest-only repayment periods; and

(e) Providing excessive amortizations or terms.

(58) On certain occasions, the Bank capitalized property taxes and/or interest payments into a loan to improve the appearance of the borrower’s repayment performance and further reduce the borrower’s investment and risk in the property.

(59) On certain occasions, when the Bank required the borrower’s personal guarantee, the Bank released the guarantee instead of pursuing the borrower for the loan deficiency after defaulting.

(60) On certain occasions, Respondents originated, approved, and/or ratified loans to finance the sale of OREO without a credit analysis of the borrower from the Bank’s Credit Review department.

(61) Unsafe or unsound loans originated, approved, and/or ratified by Respondents pursuant to the OREO Lending Strategy included, but were not limited to:

(a) $56 million in loans to Company A[1] in June 2010, which consisted of $38 million (the Bank's carrying value) to finance the purchase of an unfinished commercial real estate property from OREO and $18 million in new monies to finish construction. Loan details and terms included:

i. No requirement from Company A to contribute any equity;

ii. A below-market 3.25 percent interest rate;

iii. A 30-month interest-only period and a 25-year repayment term; and

iv. Only $1.5 million in personal guarantees from each of the two guarantors (the owners of Company A), who combined had liquidity of $150,000 and one of whom had a credit score of 487.

(b) Several loans totaling approximately $74.6 million to three borrowers in 2009, which consisted of approximately $53 million to finance the purchase of three commercial real estate properties from OREO and $19 million in new monies. After the Bank foreclosed on the three borrowers, the Bank issued approximately $98 million in loans to three new purchasers in 2011 and 2012, which consisted of approximately $75 million (the Bank's carrying value) to finance the purchase of the OREO and $23 million in new monies;

(c) Four loans totaling approximately $24 million to Person A though four different single asset entities in 2009 and 2010, which included approximately $15 million to finance the OREO purchase and $9 million in new monies. Person

[1] The names of entities and individuals described by alias herein will be separately disclosed to Respondents.

A did not contribute any equity on the four loans and provided minimal financial support with respect to his guarantees;

(d) Five loans totaling approximately $21.5 million to Person B through the use of two newly-formed entities, which included approximately $20 million to finance the purchase of rental property out of OREO and $1.5 million in new monies. Person B did not contribute any equity, provided minimal financial support, and had no experience in managing real estate; and

(e) Four loans totaling approximately $5 million to Person W through three newly-formed entities in 2009 and 2010 and described more fully in Article VI.

(62) Respondents approved the $56 million in loans to Company A referenced in Paragraph (61)(a), which represented the largest loan relationship in the Bank, without a credit analysis from the Bank's Credit Review department. The Bank only prepared a credit analysis after OCC examiners requested it.

(63) Respondent Rogers and the then-CLO admitted to the OCC that originating the loans to Company A without a credit analysis would constitute an unsafe or unsound practice.

(64) The former Chief Credit Review Officer testified to the OCC that the Company A loans were unsafe or unsound, and the Bank should not have originated them.

(65) Throughout the period in which Respondents implemented the OREO Lending Strategy, several individuals at the Bank, including the Chief Credit Review Officer and the Senior Loan Review Officer, repeatedly expressed concerns with the OREO Lending Strategy. For example, in August 2010, the Chief Credit Review Officer expressed concerns with a proposed OREO sale and loan in an email to Respondent Rogers, the Bank's then-President/CEO, and the Bank's then-CLO:

> I'm very concerned that we're potentially tying up $9.5mm of the bank's capital in what could easibly [sic] be determined to be a non-performing asset . . . as opposed to finding a number on the sale of the dirt [OREO] that would allow us to not have to offer these kinds of concessions and take on the level of risks that will be associated with such a unique facility.

(66) Respondents continued implementing the OREO Lending Strategy despite the concerns described in Paragraph (65).

(67) Respondents caused the Bank to inaccurately risk rate loans and improperly recognize loans as accruing loans to reduce the Bank's reported nonperforming assets in connection with the OREO Lending Strategy. As a result, the OCC issued MRAs related to inaccurate risk rating and nonaccrual recognition every year from 2008 through 2012.

(68) As late as April 2013, the Bank continued to implement elements of the OREO Lending Strategy. More specifically, the Bank continued to improperly avoid reporting losses on OREO. For example:

(a) On April 10, 2013, the Senior Vice President ("SVP") for Special Assets sent an email to Respondent Ortega about the Bank's OREO asking prices noting, "[T]he fact that these properties have been marketed for a year without any reasonable offer being presented is evidence that our pricing is too high." Respondent Ortega responded, "This is not going to work I can't take a $5 million impairment let's review again?" (sic.) meaning that lowering the asking prices would require the Bank to record an impairment.

(b) On May 1, 2013, Respondent Ortega sent emails to the SVP for Special Assets pressuring him to accept an offer to purchase OREO because it had a higher purchase price than a competing offer even though the offeror was demanding a loan with liberal terms to finance his purchase. In response, the SVP for Special Assets cautioned Respondent Ortega, “Let’s just remember what happened in the past, when we sold at higher prices and inferior terms. We’re still selling a lot of those properties for the 2nd or 3rd time.”

(69) The Bank incurred at least $42 million in recorded losses on loans issued in connection with the OREO Lending Strategy, including approximately $12.5 million in losses recorded between September 25, 2012 and the Bank’s closing.

(70) The DIF incurred at least $103 million in losses on loans issued in connection with the OREO Lending Strategy.

Materially Inaccurate Call Reports

(71) Between 2009 and 2013, Respondents caused the Bank to fail to adhere to GAAP and regulatory reporting requirements with respect to the OREO Lending Strategy, causing the Bank to report inflated earnings and capital in its Call Reports. More specifically:

(a) Accounting Principles Board Opinion 21, *Interest on Receivables and Payables* (later codified at Accounting Standard Codification 835-30, *Broad Transactions – Interest - Overall*) requires banks to discount loans issued at below-market interest rates to finance the purchase of OREO to the present value of the loan’s future cash flows using a market interest rate. The discount increases the bank’s loss or reduces the bank’s gain on the sale of the property. The discount is accreted into income as the borrower pays principal over the term of the loan. If the bank forecloses on the loan, the discount remains on the books as a reduction in the asset’s cost basis.

(b) At all times relevant to this Notice, the BAAS provided that banks should discount loans with below-market interest rates to their fair market value using a market rate, which would reduce the effective sales price of the property.

(72) In the 2009 ROE, the OCC issued an MRA to the Bank related to its accounting for OREO sales financed with below-market rate loans. Specifically, the MRA required the Bank to adhere to Statement of Financial Accounting Standards No. 66, *Accounting for Sales of Real Estate*, properly recognize loans to finance the sale of OREO as nonaccrual, and discount loans using a present value of future cash flows analysis.

(73) The 2009 ROE indicates that the then-President/CEO committed that, by December 31, 2009, the Bank would review for proper accounting treatment all sales of OREO greater than $750,000. The then-President/CEO also committed that, by March 31, 2010, the Bank would review all OREO sales less than $750,000.

(74) Respondent Ortega and the Bank's Controller drafted a memorandum dated April 26, 2010, documenting the Bank's corrective actions to respond to the MRA ("April 2010 Memorandum"). Respondent Ortega presented this memorandum to the Board at the May 4, 2010 L&D Committee meeting and attached it to the minutes.

(75) The April 2010 Memorandum included a one-page materiality analysis of loans to finance OREO sales less than $750,000 but determined not to review those loans for proper accounting treatment. In addition, the memorandum stated that the Bank would increase its threshold and would only review loans to finance OREO sales greater than $1 million. The April 2010 Memorandum did not document a reason for the change, nor did the Bank conduct an analysis of the potential impact increasing the threshold would have on the Bank's Call Reports.

(76) The May 4, 2010 L&D Committee minutes stated that Respondent Ortega represented to the L&D Committee, which consisted of the Board members, that the Bank would review all loans to finance the sale of OREO greater than $750,000. This statement contradicts the April 2010 Memorandum.

(77) The April 2010 Memorandum indicated that the Bank would conduct present value calculations using a Bank-prepared Market Rate Matrix that established (without justification) interest rates to finance the sale of OREO. The Market Rate Matrix established a fixed interest rate of 4.25 percent for one-year loans escalating to 7.0 percent for loans with terms greater than ten years.

(78) The Bank submitted the April 2010 Memorandum to the OCC. In 2010, the OCC closed the MRA from the 2009 ROE based, in part, on the memorandum.

(79) Even after submitting this memorandum to the Board and OCC, Respondents continued to originate, approve, and/or ratify loans to finance OREO with interest rates below those required by the Bank's Market Rate Matrix. In addition, the Bank did not discount any loans to finance OREO that had interest rates below the Bank's Market Rate Matrix.

(80) In the 2011 ROE, the OCC issued a new MRA to the Bank and cited a violation of 12 U.S.C. § 161 for the Bank's failure to record discounts on loans to finance OREO sales with below-market interest rates in accordance with GAAP and the BAAS.

(81) As documented in the 2011 ROE, the Bank financed approximately $309 million of OREO with below-market interest rates without recording any discounts.

(82) In the 2011 ROE, the OCC notified the Bank that the OCC had calculated a $14.3 million discount using a 5.5 percent market rate on a sample of eight loans with an aggregate

principal balance of approximately $93 million. The $14.3 million discount calculated by examiners included a $12.5 million discount on a $54 million loan to Company A.

(83) In the 2011 ROE, the OCC required the Bank to engage an accounting firm, record discounts on the Bank's entire loan portfolio of former OREO properties, and incorporate the discounts (losses) on that portfolio into the December 31, 2011 Call Report.

(84) In response to the directive in the 2011 ROE, the Bank only recorded approximately $4 million in discounts in its December 31, 2011 Call Report.

(85) The Bank's $4 million in discounts were inadequate because:

(a) The Bank did not record the $12.5 million discount on a $54 million loan to Company A even though it had a 3.25 percent interest rate. Instead:

i. The Bank convinced Company A to pay a higher interest rate, even though Company A had no obligation to do so, in exchange for the Bank agreeing to fund a $2.75 million interest reserve for Company A;

ii. Accordingly, Respondent Ortega caused the Bank to violate the 2011 Consent Order, which required the Bank to establish and adhere to procedures prohibiting the capitalization of interest;

iii. Additionally, around the same time that Company A agreed to restructure its loans, the Bank provided Company A with approximately $6 million in new loans;

(b) The Bank used a 5 percent market rate even though the Bank's Market Rate Matrix in the April 2010 Memorandum suggested that 7 percent constituted market rate for most of the loans because of the loan's lengthy terms, including the $54 million loan to Company A that had a 25-year term; and

(c) The Bank did not review its OREO financing prior to January 1, 2010, despite the Bank financing nearly $100 million of OREO loans with below-market interest rates loans prior to January 1, 2010.

(86) Respondents never caused the Bank to correct the improper accounting practices described in this Article. Therefore, the Bank's capital continued to be overstated until the Bank closed in September 2013.

(87) As a result of the accounting practices described within this Article and together with the accounting practices described in Article III and Article V, Respondents caused, brought about, and/or participated in the Bank filing materially inaccurate Call Reports beginning with the quarter ending June 30, 2009, and continuing through the Call Report for the quarter ending June 30, 2013.

(88) The foregoing accounting practices, and Respondents' failure to correct them, masked the Bank's true financial condition and prevented the Bank's regulators and depositors from determining whether the Bank had adequate capital to safeguard deposits.

ARTICLE V

RESPONDENTS ENGAGED IN UNSAFE OR UNSOUND PRACTICES, BREACHED THEIR FIDUCIARY DUTY, AND VIOLATED 12 U.S.C. § 161 AND FINAL ORDERS BY CAUSING THE BANK TO ACCRUE INTEREST ON NONACCRUAL LOANS

(89) This Article repeats and realleges all previous Articles in this Notice.

(90) As described herein, Respondents engaged in unsafe or unsound practices, breached their fiduciary duty of care, violated 12 U.S.C. § 161, and violated final cease-and-desist orders. Beginning as early as 2007 and continuing until March 31, 2013, Respondents

caused the Bank to artificially inflate earnings and capital by improperly accruing interest on nonaccrual loans using cash basis accounting without documented justification as required by the Call Report Instructions.

(91) At all times relevant to this Notice, the Call Report Instructions required that, when doubt exists as to the collectability of the remaining recorded investment in an asset in nonaccrual status, banks must apply any payments received to reduce the recorded investment in the asset. The Call Report Instructions permitted banks to treat cash payments received as interest income on a cash basis as long as the bank determined that the remaining recorded asset is fully collectible. A bank's determination as to the ultimate collectability must be supported by a "current, well-documented credit evaluation of the borrower's financial condition and prospects for repayment."

(92) At all times relevant to this Notice, the BAAS provided that banks should not use cash basis accounting when doubt exists about the ultimate collectability of the loan and that collateral values, by themselves, are not sufficient to eliminate the issue of ultimate collectability.

(93) In 2007, the Bank switched accounting systems. The Bank requested that the vendor create a custom program to change the system's default settings so that the Bank would automatically accrue interest on all nonaccrual loans using cash basis accounting.

(94) Between 2006 and 2012, the OCC repeatedly directed the Bank to improve its recognition and treatment of nonaccrual loans. For example:

(a) In the 2006 ROE, the OCC issued an MRA requiring the Bank to improve its risk rating methodology, in part, to improve its recognition of nonaccrual loans;

(b) In the 2008 ROE, the OCC issued a new credit administration MRA criticizing the Bank's accounting for nonaccrual loans and noting that the Bank failed to comply with nonaccrual guidelines;

(c) In the 2009 ROE, 2010 ROE, 2011 ROE, and 2012 ROE, the OCC issued repeat credit administration MRAs, which again required the Bank to improve its compliance with nonaccrual guidelines;

(d) The 2009 MOU required the Bank to establish and adhere to procedures for the identification of, and accounting for, nonaccrual loans consistent with the requirements contained in the Call Report Instructions and immediately reverse or charge off all interest that was accrued contrary to the Call Report Instructions; and

(e) The 2011 Consent Order required the Bank to establish and adhere to procedures for the identification of, and accounting for, nonaccrual loans consistent with the requirements contained in the Call Report Instructions and immediately reverse or charge off all interest that was accrued contrary to the Call Report Instructions.

(95) Respondents failed to ensure that the Bank was complying with OCC directives and enforcement actions described in Paragraph (94).

(96) The Chief Audit Officer initially expressed concerns with the Bank's improper accounting for nonaccrual loans in a February 27, 2009 email to the Bank's MOU Committee, of which Respondents were members. The Chief Audit Officer suggested that the Bank change its policy for cash basis nonaccrual loans to conform with the BAAS.

(97) On or around June 30, 2009, in connection with the Bank's quarterly review of nonaccrual loans required under the 2009 MOU, the Chief Audit Officer wrote a memorandum to the then-President/CEO stating that the Bank was improperly accruing interest on nonaccrual loans on a cash basis without documenting justification for doing so as required by the Call Report Instructions.

(98) Although this memorandum was attached to the back of the August 11, 2009 L&D Committee minutes, the meeting minutes do not indicate that Respondents brought this issue to the Board's attention.

(99) Two of the Outside Directors testified to the OCC that they would have expected Respondents to verbally inform them that the Bank was not following the Call Report Instructions during the meeting due to the importance of such an issue.

(100) The 2012 Consent Order again required the Bank to establish and adhere to procedures for the identification of, and accounting for, nonaccrual loans consistent with the Call Report Instructions and immediately reverse or charge off all interest that was accrued contrary to the Call Report Instructions.

(101) Respondent Ortega failed to ensure that the Bank was complying with the requirements of the 2012 Consent Order.

(102) At the Consent Order Compliance Committee meeting on December 17, 2012, the Chief Audit Officer presented his findings related to the Bank's quarterly audit of nonaccrual loans as required under the 2012 Consent Order. The Chief Audit Officer notified the Board that the Bank was improperly accruing interest on nonaccrual loans on a cash basis without justification. The Chief Credit Officer represented to the Board that the Bank was modifying its

Credit Review template to include justification for using cash basis accounting on all of its nonaccrual loans. Respondent Ortega attended this meeting.

(103) Respondent Ortega failed to ensure that the Bank implemented the use of the modified Credit Review template described in Paragraph (102), and the Bank continued to accrue interest on nonaccrual loans without justification until approximately March 2013.

(104) In or around March 2013, OCC examiners learned that the Bank's practice was to accrue interest on all nonaccrual loans and required the Bank to refile its Call Reports.

(105) Pursuant to OCC instructions, the Bank corrected its improper accounting practices and refiled its Call Reports for December 31, 2011, December 31, 2012, and March 31, 2013, reducing the Bank's capital by approximately $14.8 million in total.

(106) Respondents never caused the Bank to correct the improper accounting practices described in this Article. Therefore, the Bank's capital continued to be overstated until April 2013.

(107) As a result of the accounting practices described within this Article and together with the accounting practices described in Article III and Article IV, Respondents caused, brought about, and/or participated in the Bank filing materially inaccurate Call Reports beginning with the quarter ending June 30, 2009, and continuing through the Call Report for the quarter ending June 30, 2013.

(108) The foregoing accounting practices, and Respondents' failure to correct them, masked the Bank's true financial condition and prevented the Bank's regulators and depositors from determining whether the Bank had adequate capital to safeguard deposits.

ARTICLE VI

RESPONDENT ROGERS BREACHED HIS FIDUCIARY DUTY OF LOYALTY BY PROVIDING PREFERENTIAL TREATMENT TO A MEMBER OF HIS IMMEDIATE FAMILY

(109) This Article repeats and realleges all previous Articles in this Notice.

(110) As described herein, Respondent Rogers breached his fiduciary duty of loyalty. Respondent Rogers provided preferential treatment to Person W, a member of his immediate family, by arranging a series of transactions involving loans to finance OREO sales that provided direct financial benefit to Person W and released his personal liability on loans to the Bank, thus causing harm to the Bank.

(111) Person W owned 100 percent of Company W, a homebuilding company that had loans from the Bank and Bank A.

(112) Person W personally guaranteed Company W's loans to the Bank.

(113) Person W personally guaranteed Company W's loans to Bank A.

(114) On February 9, 2009, Person W's attorney sent Person W an email with a plan for him to work with the banks to release his personal liability on loans to the Bank and Bank A, while maintaining ownership of Company W's assets. The email provided:

> I strongly urge you to consider that option – of working with the Banks to ensure swift foreclosure and an agreement between you and them to market the assets – and possible marketing agreements with [Bank A] and [the Bank] so that you may maintain control of [Company W's] assets, *maximize your chance of eliminating your personal liability to [Bank A] and [the Bank]*, and end your payment of personal assets into [Company W's] coffers. *Remember*, *you could even have an arrangement with the banks to repurchase the assets in another corporation after foreclosure* (or, with greater risk, at the foreclosure) in order to market them. [Emphasis added.]

(115) On February 11, 2009, Person W forwarded this email to Respondent Rogers.

(116) Person W was the 100 percent owner of Company X, Company Y, and Company Z. Person W formed the companies solely to obtain Bank loans to purchase the foreclosed assets described herein.

(117) In or around April 2009, Respondent Rogers arranged for the Bank to foreclose on certain loans to Company W, pay the outstanding property taxes, and then issue a new loan in the amount of approximately $3.2 million to Company X to repurchase the foreclosed assets from the Bank.

(118) The $3.2 million loan to Company X included $100,000 in new monies, but the Bank did not require any equity contribution from Person W.

(119) The Bank did not require Person W to personally guarantee the loans to Company X, which violated the Bank's Real Estate Loan Policy.

(120) The Bank incurred a $432,000 loss on September 25, 2012 on the loans to Company X, and the DIF incurred an $88,946 loss.

(121) In or around January 2010, Respondent Rogers arranged for the Bank to foreclose on certain loans to Company W and then issue new loans in the amount of approximately $441,000 to Company Y to repurchase the foreclosed assets from the Bank.

(122) The Bank did not require Person W to personally guarantee the loans to Company Y, which violated the Bank's Real Estate Loan Policy.

(123) The DIF incurred a $170,979 loss on the loans to Company Y.

(124) In or around January 2010, Respondent Rogers arranged for the Bank to issue a loan in the amount of approximately $1.3 million to Company W to enable Company W to purchase two delinquent promissory notes it owed to Bank A that Person W personally guaranteed.

(125) In or around January 2010, Respondent Rogers arranged for the Bank to foreclose on the $1.3 million loan to Company W and then issue a new loan in the amount of approximately $1.2 million to Company Z to repurchase the foreclosed assets from the Bank.

(126) The Bank did not require Person W to personally guarantee the loans to Company Z, which violated the Bank's Real Estate Loan Policy.

(127) Although Respondent Rogers abstained or did not vote to approve the loans to Company X, Company Y, and Company Z, he failed to disclose to the L&D Committee the plan to arrange the loans to Company X, Company Y, and Company Z. Consequently, the loans to Company X, Company Y, and Company Z resulted in the Bank releasing Person W's personal guarantees on loans the individual had previously guaranteed with respect to Company W.

(128) Person W was not identified as an immediate family member of Respondent Rogers in the relevant L&D Committee loan packages. Instead, they were identified only as a "prominent homebuilder and financier."

(129) Respondent Ortega testified to the OCC that the Bank had no rational reason for issuing the loan to Company X and that it was foreseeable at the time of loan origination that the Bank would incur a loss on the loan to Company X.

ARTICLE VII

LEGAL BASES FOR REQUESTED RELIEF

(130) This Article repeats and realleges all previous Articles in this Notice.

(131) By reason of Respondents' misconduct as described in Articles III through V, the OCC seeks a prohibition order against each Respondent pursuant to 12 U.S.C. § 1818(e) on the following grounds:

(a) Respondents engaged in unsafe or unsound practices, breached their fiduciary duty of care, violated the law, including 12 U.S.C. § 161, and, as described in Article IV and Article V, violated final cease-and-desist orders;

(b) By reason of Respondents' misconduct, the Bank suffered or was likely to suffer financial loss or other damage and the interests of the Bank's depositors have been or could have been prejudiced; and

(c) Respondents' misconduct involved personal dishonesty on their part and/or demonstrated a willful and/or continuing disregard by Respondents for the safety and soundness of the Bank.

(132) By reason of Respondent Rogers's misconduct as described in Article VI, the OCC seeks a prohibition order against Respondent Rogers pursuant to 12 U.S.C. § 1818(e) on the following additional grounds:

(a) Respondent Rogers breached his fiduciary duty of loyalty;

(b) By reason of Respondents Rogers's misconduct, the Bank suffered or was likely to suffer financial loss or other damage; and

(c) Respondents Rogers's breach involved personal dishonesty on his part and/or demonstrated a willful and/or continuing disregard for the safety and soundness of the Bank.

(133) By reason of Respondents' misconduct as described in Articles III through V, the OCC seeks imposition of a civil money penalty against each Respondent pursuant to 12 U.S.C. § 1818(i)(2)(A) because Respondents violated the law, including 12 U.S.C. § 161.

(134) By reason of Respondents' misconduct as described in Articles IV through V, the OCC seeks imposition of a civil money penalty against each Respondent pursuant to 12 U.S.C. § 1818(i)(2)(A) because Respondents violated final cease-and-desist orders.

(135) By reason of Respondents' misconduct as described in Articles III through V, the OCC seeks imposition of a civil money penalty against each Respondent pursuant to 12 U.S.C. § 1818(i)(2)(B) on the following grounds:

(a) Respondents recklessly engaged in unsafe or unsound practices, breached their fiduciary duty of care, violated the law, including 12 U.S.C. § 161, and, as described in Article IV and Article V, violated final cease-and-desist orders; and

(b) Respondents' violations, practices, and/or breaches were part of a pattern of misconduct and caused more than a minimal loss to the Bank.

(136) By reason of Respondent Rogers's misconduct as described in Article VI, the OCC seeks imposition of a civil money penalty against Respondent Rogers pursuant to 12 U.S.C. § 1818(i)(2)(B) on the following grounds:

(a) Respondent Rogers breached his fiduciary duty of loyalty to the Bank; and

(b) Respondents Rogers's breach was part of a pattern of misconduct and caused more than a minimal loss to the Bank.

ANSWER AND OPPORTUNITY FOR HEARING

Respondents are directed to file a written Answer to this Notice within twenty (20) days from the date of service of this Notice in accordance with 12 C.F.R. § 19.19(a) and (b). The original and one copy of any Answer shall be filed with the Office of Financial Institution Adjudication, 3501 North Fairfax Drive, Suite D8115A, Arlington, VA 22226-3500. Respondents are encouraged to file any Answer electronically with the Office of Financial

Institution Adjudication at ofia@fdic.gov. A copy of any Answer shall also be filed with the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219, hearingclerk@occ.treas.gov, and with the attorney whose name appears on the accompanying certificate of service. **Failure to Answer within this time period shall constitute a waiver of the right to appear and contest the allegations contained in this Notice, and shall, upon the OCC's motion, cause the Administrative Law Judge or the Comptroller to find the facts in this Notice to be as alleged, upon which an appropriate order may be issued.**

Respondents are also directed to file a written request for a hearing before the Comptroller, along with the written Answer, concerning the Civil Money Penalty assessments contained in this Notice within twenty (20) days after the date of service of this Notice, in accordance with 12 U.S.C. § 1818(i) and 12 C.F.R. § 19.19(a) and (b). The original and one copy of any request shall be filed, along with the written Answer, with the Office of Financial Institution Adjudication, 3501 North Fairfax Drive, Suite D8115A, Arlington, VA 22226-3500. Respondents are encouraged to file any request electronically with the Office of Financial Institution Adjudication at ofia@fdic.gov. A copy of any request, along with the written Answer, shall also be served on the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, Washington, D.C. 20219, hearingclerk@occ.treas.gov, and with the attorney whose name appears on the accompanying certificate of service. **Failure to request a hearing within this time period shall cause an assessment to constitute a final and unappealable order for a civil money penalty pursuant to 12 U.S.C. § 1818(i).**

PRAYER FOR RELIEF

The OCC prays for relief in the form of the issuance of Orders of Prohibition pursuant to 12 U.S.C. § 1818(e) against each Respondent and Orders of Assessment of a Civil Money Penalty against each Respondent in the amount of two hundred fifty thousand dollars ($250,000) pursuant to 12 U.S.C. § 1818(i).

Witness, my hand on behalf of the OCC, given at Washington, DC this 25th day of September, 2017.

/s/
____
Michael R. Brickman
Deputy Comptroller for Special Supervision