UNITED STATES OF AMERICA
OFFICE OF THRIFT SUPERVISION

In the Matter of	)	A Cease and Desist, Prohibition and Civil Money Penalty Proceeding
	)	Case No. OTS AP 99-5
MATTHEW JAY CARRERO	)	Dated: October 4, 1999
A Former Employee of	)	
Home Savings Bank, F.S.B.	)	OTS Order No. AP 2000-5
Irwindale, California	)	Dated:

DECISION AND ORDERS

I. INTRODUCTION

This is an administrative proceeding pursuant to sections 8(b), 8(e), and 8(i) of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. § 1818(b), (e), and (i), in which the Office of Thrift Supervision (OTS) seeks: to make Respondent Matthew Jay Carrero (Respondent or Carrero) pay restitution in the amount of $19,303.65; to prohibit Respondent from further participation in the banking industry; and to assess civil money penalties in the amount of $15,000 against Respondent. After a careful review of the record, the Director issues this Final Decision and Orders adopting the Recommended Decision of the Administrative Law Judge (ALJ), prohibiting Respondent from further participation in the banking industry, and ordering Respondent to pay restitution and civil money penalties in the above-referenced amounts.

II. STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

Under the FDI Act and OTS's regulations, the ALJ is responsible for conducting adjudicatory proceedings and issuing a recommended decision that is referred to the Director for a final decision. 12 U.S.C. § 1818 (b), (e), and (i); 12 C.F.R. § 509.1, 509.5 and 509.40. OTS and the other federal banking agencies may issue a prohibition order against a savings association or a bank official or employee, or assess restitution or civil money penalties (CMP) based upon the criteria established in the FDI Act.[1] The statutory criteria for the three orders sought by OTS Enforcement Counsel against Respondent – cease and desist with restitution, prohibition, and CMP – are set forth below.

1. Cease and Desist Order with Restitution

Under section 8(b) of the FDI Act, OTS has the authority to issue a cease and desist order (C&D) if an institution or institution-affiliated party engaged in an unsafe or unsound banking practice or violated a law, rule, or regulation. 12 U.S.C. §1818(b). OTS also has the ability to require the institution or institution-affiliated party (respondent) to correct any condition resulting from

[1] OTS is the appropriate federal banking agency to initiate administrative proceedings against any savings association or against institution-affiliated parties of any savings association. 12 U.S.C. § 1813(q)(4). Home Savings Bank, FSB, Irwindale, California (Home) was at all relevant times a federal savings association under 12 U.S.C. § 1462(4) and 12 U.S.C. § 1813(b). Home employed Carrero as an account executive from September 1996 through September 8, 1997, and accordingly Carrero was an "institution-affiliated party" of Home under 12 U.S.C. § 1813(u)(1).

the unsafe or unsound practice or violation of law by ordering the respondent to pay restitution if the respondent was (1) unjustly enriched due to the practice or violation or, (2) if the practice or violation involved a reckless disregard for the law, rule or regulation. 12 U.S.C. § 1818(b)(6)(A).

2. Prohibition Order

Before issuing a prohibition order against a respondent under section 8(e) of the FDI Act, 12 U.S.C. § 1818(e), the Director must make three separate findings as to: (1) the misconduct of the respondent, (2) the effect of such misconduct, and (3) the culpability of the respondent. First, the specified types of misconduct include a violation of a law or regulation, an unsafe or unsound banking practice, or a breach of a fiduciary duty. Second, the effects of such misconduct must be a financial loss or damage to the institution, harm to the depositors, or financial gain or other benefit to respondent by reason of the violation, practice, or breach. Third, the respondent's violation, practice, or breach must meet the statutory criteria for culpability, i.e., respondent's misconduct must involve either personal dishonesty or demonstrate a willful or continuing disregard for the institution's safety or soundness. 12 U.S.C. § 1818(e)(1)(A)-(C).

3. Civil Money Penalty Order

The Director must make two findings in order to assess a second tier[2] CMP: (1) that the respondent engaged in specified misconduct, including a violation of a law or regulation, recklessly engaged in an unsafe or unsound practice, or breached a fiduciary duty and (2) that the conduct is either part of a specified pattern of misconduct, caused or is likely to cause more than a minimal loss to the institution, or resulted in pecuniary gain or other benefit to respondent. 12 U.S.C. §1818(i)(2)(B).

An enforcement proceeding is initiated by the OTS Director's issuance of a notice of charges (notice) that is served on the respondent. 12 C.F.R. § 509.18. The respondent must file an answer to the charges within 20 days after the notice is served on the respondent. 12 C.F.R. § 509.19(a). In addition, the respondent in a CMP proceeding must file a request for a hearing within 20 days of service of the notice. Id. The respondent's failure to file an answer to the notice constitutes a waiver of the respondent's right to contest the allegations in the notice, and a final order may be entered unless good cause is shown for failure to file a timely answer.[3] 12 C.F.R. § 509.19(c)(1). In addition, if the

[2] CMPs are assessed pursuant to 12 U.S.C. § 1818(i)(2) in three successive tiers of forfeitures; the higher the tier, the greater the forfeiture and the stricter the statutory criteria. Under a second tier CMP, a respondent may be assessed penalties of up to $25,000 for each day he violates a law, rule or regulation, recklessly engages in an unsafe or unsound banking practice, or breaches a fiduciary duty.§1818(i)(2)(B).

[3] Enforcement's Counsel's Motion for a Default and the ALJ's Recommended Decision on the Motion for a Default generally precede the issuance of a final order.

respondent fails to request a hearing for a CMP proceeding, the CMP assessment becomes final and unappealable. 12 C.F.R. § 509.19(c)(2).

B. Procedural History

1. The Charges

On October 4, 1999, OTS issued a Notice of Charges And Hearing For An Order To Cease And Desist For Affirmative Relief, Notice Of Intention To Prohibit, And To Assess Civil Money Penalties against Carrero (collectively, the Notice). The Notice alleges that Carrero misappropriated monies from customers' accounts when he was an account executive at Home Savings Bank, F.S.B., Irwindale, California (Home) [4] from September 1996 to September 1997.

The Notice alleges that Carrero opened at least four Personal Line Plus Accounts, which were lines of credit, in the names of three Home customers without their consent or knowledge (two accounts were opened in one customer's name), and that Carrero converted the proceeds of the loans for his own benefit. On November 19, 1997, Respondent executed a handwritten statement acknowledging that he had taken the money from the above-referenced accounts without the customers' consent. *See* Exhibit A to the Notice. As a result of the misappropriation, Home incurred losses of $19,303.65.

[4] On or about October 3, 1998, Washington Mutual Bank, FA, Stockton, California acquired Home. *See* Notice at 2.

2. The Default

On October 28, 1999, OTS personally served the Notice on Respondent. *See* Exhibit 1 to OTS's Motion for Entry of and Order of Default. Carrero failed to file an answer to the Notice and failed to request a hearing for the CMP proceeding within the required 20-day period. 12 U.S.C. § 509.19(a).

Following Enforcement Counsel's motion for entry of a default order, on January 11, 2000, the ALJ issued a Show Cause Order ("On Motion for Entry of Order of Default") to determine whether good cause existed for Carrero's default.[5] The ALJ required personal service of the Show Cause Order on Respondent and directed Respondent Carrero to respond within 20 days of service. The record reflects that Respondent was personally served on January 23, 2000. *See* Proof of Service attached to the letter from Suzanne Elkins to Voncille Manning dated January 26, 2000. Respondent filed an "Objection And Response To Office of Thrift Supervision's Request To Show Cause Order" dated January 23, 2000.

In his response, Carrero objected to the entry of a default and the issuance of a recommended decision against him. Respondent invoked his Fifth

[5] The ALJ subsequently noted in his March 31, 2000, Recommended Decision that the Uniform Rules (of Practice and Procedure applicable generally to adjudicatory proceedings – *See* 12 C.F.R. Part 509) were intended to be common among the federal banking agencies. Recommended Decision, FN 1. However, OTS's rules on default differ from the other agencies in that there is no requirement in OTS's rules to find that the respondent failed to answer the charges without good cause. The ALJ commented that the omission of a requirement to make a "good cause" finding appeared to be an inadvertent oversight and accordingly, the ALJ issued a Show Cause Order.

Amendment right against self-incrimination, claimed he was not personally served the Show Cause Order as required by the ALJ, and requested that he be relieved of answering the charges until any "potential" criminal matters are resolved. The ALJ found that Carrero's response did not constitute "good cause" and issued a Recommended Decision (R.D.) on March 31, 2000 adopting as his findings and recommendations the allegations set forth in the Notice. In the R.D. the ALJ also granted Enforcement Counsel's Motion for a Default.[6]

3. The Order to Reopen the Record

By Order No. AP 2000-4, dated July 31, 2000, the OTS Director ordered the administrative record in this proceeding reopened for the sole purpose of allowing Carrero, if he so desired, an opportunity to file an affidavit "on the issue of why the prohibition or CMP relief sought against Carrero in the Notice [of Charges] should not be granted by the Director and why Carrero should not be permanently banned from the banking industry . . . ." The Order also provided Enforcement Counsel an opportunity to address the appropriateness of the prohibition and CMP sought against Carrero. The Director suspended the time in which she must issue a final decision pursuant to 12 C.F.R. § 509.40

[6] Under 12 C.F.R. § 509.5(b)(7), only the Director has the power to grant any motion that dismisses the proceeding or results in a final determination. Accordingly, the Director will consider the ALJ's action as a "recommendation" and the Director hereby adopts the ALJ's "recommendation" and grants the Motion for a Default for the reasons stated below.

until 60 days after receipt of Enforcement Counsel's filing or receipt of Enforcement Counsel's intent not to file.[7]

Carrero failed to file an affidavit or otherwise respond to Order No. AP 2000-4. On September 5, 2000, OTS Enforcement Counsel filed an Affidavit and a Memorandum of Law asserting that a permanent prohibition and CMPs are appropriate in this case.[8]

III. DISCUSSION

A. Carrero's Objections and Response to Show Cause Order

In Carrero's Objection and Response to the ALJ's Show Cause Order, he generally asserts that he cannot answer the Notice without violating his Fifth Amendment right against self-incrimination. He fails to provide any further explanation and he does not address any of the allegations in the Notice. Respondent does not assert in his objection that he is a defendant in a criminal proceeding or that he is currently the target of a criminal investigation. Moreover, even if Respondent were under criminal investigation, courts have

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[7] The Order permitted Enforcement Counsel to file a responsive affidavit within fifteen days after Carrero submitted a supplemental filing or within fifteen days after the latest date Carrero could have made a supplemental filing.

[8] With respect to the prohibition issue, Enforcement Counsel's September 5, 2000 Memorandum of Law states that although the Director has discretion to issue a limited ban, the Director should not do so in this particular case. Enforcement Counsel asserts that all the criteria for a prohibition are met here, that Carrero only partially admitted his theft, and that he failed to reimburse the institution for losses or return stolen documents. With respect to the CMP, Enforcement Counsel argues that the assessment is less than the amount Carrero stole, is appropriate, and will serve to punish Carrero and deter others. Suzanne Elkins, OTS Special Counsel, signed the Affidavit.

held that a civil hearing may proceed at the same time as a parallel criminal proceeding even if the respondent's Fifth Amendment privilege is at issue:

> Not only is it permissible to conduct a civil proceeding at the same time as a related criminal proceeding, even if that necessitates invocation of the Fifth Amendment privilege, but it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil proceeding.

Keating v. OTS, 45 F.3d 322, 326 (9th Cir. 1995), citing Baxter v. Palmigiano, 425 U.S. 308, 318 (1976).[9]

In the instant case, although Carrero does not assert that he is a defendant in a criminal action or that he is the target of a criminal investigation, by invoking his Fifth Amendment right against self-incrimination, Carrero implies the possibility of his becoming a criminal defendant. Under Keating, however, even if Respondent were currently engaged in a criminal proceeding against him, an ALJ would have the authority to conduct an administrative proceeding at the same time and consider that Respondent's invocation of the Fifth Amendment may suggest that the evidence is unfavorable to him. Accordingly, Carrero's mere invocation of his Fifth Amendment right against self-incrimination in the present context does not constitute good cause for his failure to answer the Notice. His request to be permitted to answer the charges at some indefinite

[9] When a party has relevant evidence within his control that he fails to produce, the failure gives rise to an "adverse inference" that the evidence is unfavorable to him. *See generally* Cousin v. OTS, 73 F.3d 1242, 1248 (2nd Cir. 1996), citing OTS v. Lopez, 960 F.2d 958, 965 (11th Cir. 1992) (adverse inference may be drawn from failure to testify on own behalf).

time in the future when "any potential criminal matters are resolved" (Respondent's January 23, 2000 "Objection and Response") is unreasonable and unsupported by the law.

Respondent also asserts that he was not personally served the Show Cause Order, but provides no details as to how or when he was served. As noted above, the administrative record reflects that Carrero was personally served on January 23, 2000. *See* Proof of Service attached to the letter from Suzanne Elkins to Voncille Manning dated January 26, 2000. Moreover, even if the Show Cause Order was not personally served, the fact that Carrero filed an objection and response to the Show Cause Order demonstrates that Carrero obviously received a copy of the Order. Carrero's January 23, 2000 objection and response timely was filed within the 20 days required by the Order. Therefore, even if Respondent's claim of no personal service were true, he suffered no harm.

B. Findings

Because Carrero's default by failing to answer the charges constitutes a waiver of his right to appear and contest the allegations in the Notice, the ALJ may take those allegations as established and file with the Director a recommended decision containing the findings in the Notice. 12 C.F.R. § 509.19(c)(1). In the instant case, as stated previously, the ALJ issued a Recommended Decision on March 31, 2000 adopting as his findings and

recommendations the allegations set forth in the Notice. According to the Notice, Carrero, as an account executive for Home, opened four lines of credit accounts in customers' names without their consent or knowledge, and then used the monies for his own benefit which resulted in loss to Home. These actions meet the requirements for a C&D order, a CMP order, and a prohibition order.

Respondent, an institution-affiliated party, breached his fiduciary duty to Home and its customers and engaged in unsafe or unsound banking practices when he fraudulently opened the line of credit accounts. When Carrero drew down on the lines of credit and converted the proceeds of the loans for his own benefit, he caused both a loss to the institution and a gain to himself. Finally, Respondent's actions demonstrate personal dishonesty and evidence a pattern of behavior in that on four occasions he did what he was not authorized to do, namely, open accounts in the names of others without their knowledge or consent. Despite having three opportunities – the latest of which was the Director's reopening of the record – Respondent Carrero failed at any point in this proceeding to submit mitigating documentation in his favor.

IV. CONCLUSION

For all of the above reasons, the Director adopts the ALJ's findings in the Recommended Decision and issues an order directing Respondent to cease and desist from further violations and to pay restitution to Home's successor in interest as described below in the amount of $19,303.65. In addition, the

Director issues an order prohibiting Respondent from further participation in any manner in the banking industry as described below, and an order imposing a civil money penalty against Respondent in the amount of $15,000. 12 U.S.C. § 1818(b), (e) and (i).

Cease and Desist Order with Restitution

The Director of the Office of Thrift Supervision (Director), pursuant to 12 U.S.C. § 1818(b)(6) of the Federal Deposit Insurance Act, as amended (Act), hereby:

ORDERS, that Matthew Jay Carrero (Carrero) pay restitution in the amount of $19,303.65 to Washington Mutual Bank, F.A., Stockton, California, successor in interest to Home Savings Bank, F.S.B.

FURTHER ORDERED, that Carrero send the restitution payment to Washington Mutual Bank, F.A., Stockton, California in care of: Richard Drake, Corporate Fraud Division, Washington Mutual Bank, 17877 Von Karman Avenue, Irvine, California 92614.

FURTHER ORDERED, that Carrero must send a copy of his check or other form of payment of restitution to the Office of Thrift Supervision, c/o Suzanne Elkins, Special Counsel, Office of Thrift Supervision-West Region, Bentell Executive Center, 1551 North Tustin Avenue, Suite 1050, Santa Ana, California 92705-8635, facsimile number (714) 796-4709 or 4710.

FURTHER ORDERED, that the entire amount of the obligation is due and payable 30 days after service on Carrero.

So Ordered, this 13th day of October, 2000

/s/

Ellen Seidman, Director
Office of Thrift Supervision

Prohibition Order

The Director of the Office of Thrift Supervision (Director), pursuant to 12 U.S.C. § 1818(e) of the Federal Deposit Insurance Act, as amended (Act), issues a final Order of Prohibition against Matthew Jay Carrero (Carrero).

IT IS HEREBY ORDERED, THAT:

(a) Carrero is prohibited from continuing or commencing to hold any office or participating in any manner in the conduct of the affairs of any institution or agency specified in 12 U.S.C. § 1818(e)(7)(A) of the Act.

(b) Carrero is prohibited from soliciting, procuring, transferring, attempting to transfer, voting, or attempting to vote any proxy, or voting for a director or acting as an institution-affiliated party as defined in section 3(u) of the Act (12 U.S.C. § 1813(u)), such as an officer, director, or employee.

(c) This Order, and each provision hereof, remains fully effective and enforceable until expressly stayed, modified, terminated or suspended in writing by the Director. This Order becomes effective at the expiration of thirty days after service is made.

So Ordered, this 13th day of October, 2000.

/s/

Ellen Seidman, Director
Office of Thrift Supervision

Civil Money Penalty Order

The Director of the Office of Thrift Supervision (Director), pursuant to 12 U.S.C. § 1818(i) of the Federal Deposit Insurance Act, as amended (Act), hereby:

ORDERS Matthew Jay Carrero (Carrero) to pay civil money penalties in the amount of $15,000.00 to the Treasurer of the United States. Since Carrero failed to request a hearing in a civil money penalty proceeding within the period of time allowed, the assessment constitutes a final and unappealable order under 12 U.S.C. § 1818(i)(2)(E)(ii) and 12 C.F.R. § 509.19(c)(2).

THEREFORE, IT IS FURTHER ORDERED, THAT:

(a) Carrero must make a certified check or bank draft payable to the "Treasurer of the United States" in the amount of $15,000 within 20 days of the issuance of this Order.

(b) The certified check or bank draft must be sent with a copy of this Order to the following address: Controller's Division, Office of Thrift Supervision, 1700 G Street, N.W., Washington, DC 20552.

(c) Carrero must include a cover letter with the certified check or bank draft sent to the Office of Thrift Supervision at the above-referenced address which must contain the following information: (1) the complete name of the institution, Washington Mutual Bank, F.A., Stockton, California, successor in interest to Home Savings

Bank, F.S.B., Irwindale, California and (2) the case number, OTS No: AP 99-5.

(d) Carrero must send a copy of his certified check or bank draft and a copy of the above-referenced cover letter to Suzanne Elkins, Special Counsel, Office of Thrift Supervision-West Region, Bentell Executive Center, 1551 North Tustin Avenue, Suite 1050, Santa Ana, CA 92705-8635, facsimile number (714) 796-4709 or 4710.

(e) Carrero must promptly respond to any request from the Office of Thrift Supervision for any other documents that the Office of Thrift Supervision reasonably requests to demonstrate compliance with this Order.

(f) This Order becomes effective on the date it is issued.

So Ordered, this 13th day of October, 2000.

/s/

Ellen Seidman, Director
Office of Thrift Supervision

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October 2000, a copy of the foregoing OTS Order No. AP-2000-5 was served by:

UNITED STATES REGISTERED/CERTIFIED MAIL, AND RETURN RECEIPT REQUESTED ON:

Matthew Jay Carrero
30749 Camrose Drive
Cathedral City, California 92234-2509

FIRST CLASS MAIL

Matthew Jay Carrero
30749 Camrose Drive
Cathedral City, California 92234-2509

James A. Hendriksen, Esquire
Enforcement and Litigation Division
Office of Thrift Supervision
1 Montgomery Street, Suite 400
San Francisco, California
94104-4533

Suzanne Elkins, Esquire
Enforcement and Litigation Division
Office of Thrift Supervision
1551 North Tustin Avenue, Suite 1050
Santa Ana, California 92705-8635

Ms. Victoria L. Penley, Esq.
74-133 El Paseo, Suite B
Palm Desert, California 92260

Sincerely,

/s/

Mary H. Gottlieb
Alternate Secretary for Adjudicatory Proceedings