UNITED STATES OF AMERICA
Before the
OFFICE OF THRIFT SUPERVISION

In the Matter of JESS T. SIMPSON, Former President and Chairman of the Board of Directors Cascade Savings Bank Everett, Washington	Re: OTS AP 91-6 Dated: February 12, 1991 OTS Order No. AP 92-123 Dated: November 18, 1992

DECISION AND ORDER

TABLE OF CONTENTS

DECISION

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

This case presents self-interested conduct that breached fundamental fiduciary duties of loyalty and care, thereby undermining an institution's safety and soundness and increasing the potential exposure of the Federal deposit insurance funds. Respondent Jess T. Simpson ("Simpson" or "Respondent") was, at all times relevant to this Decision and Order, the President and Chairman of the Board of Directors of Cascade Savings Bank of Everett, Washington ("Cascade" or "Association"). The record conclusively demonstrates Simpson's deliberate manipulation of Cascade for his personal benefit in defiance of his fiduciary responsibilities to the Association.

First, by directing payments in excess of $500,000 to himself and others at Cascade under the Association's profit-sharing plan, Simpson drained the Association of these funds even though he knew that it was undercapitalized and would be required to take substantial write-downs on certain assets. Second, Simpson caused Cascade to make a risky loan, demonstrably unsafe and unsound from its inception, as the quid pro quo for the borrower's agreement to purchase Simpson's own luxury boat. Finally, Simpson used Cascade and its employees to generate profits for another company he owned, thereby usurping business opportunities that he should have made available to Cascade as well as taking unlawful advantage of his position with the Association.

The conduct amply justifies the issuance of a cease and desist order against Respondent. The other issues presented concern the appropriate remedies for Simpson's unlawful conduct.

To issue a cease and desist order requiring restitution under 12 U.S.C. § 1818(b)(6)(A), the Office of Thrift Supervision ("OTS") must find that a respondent has been "unjustly enriched" in connection with a violation or practice, or has committed a violation or practice involving "reckless disregard" for the law, any applicable regulation, or a prior agency order. The Director of the OTS ("Director") concludes that the Respondent is liable for restitution under this standard. With respect to the profit-sharing distribution, the Director finds that the Administrative Law Judge ("ALJ") improperly construed the two statutory bases for restitution. The Order accompanying this Decision increases the aggregate amount of the restitution from the ALJ's recommended amount of $594,946 to $1,009,446. The restitution reflects the full amount of the improper profit-sharing distribution ($529,500); Cascade's losses on the unsafe and unsound loan made in return for the sale of Simpson's boat ($318,424); and insurance commissions received by Simpson between 1981 and 1990 ($161,522).

This Decision also addresses the amount of the civil money penalty ("CMP") that may be imposed on the Respondent. The Director concludes that the record in this case is inadequate to support the imposition of CMPs and, accordingly, declines to impose the CMPs recommended by the ALJ.

The remedies imposed by today's Order include: a cease and desist order directing Respondent to make restitution in the total amount of $1,009,446 to Cascade; and a prohibition order precluding the Respondent from participation in the conduct of the affairs of Cascade and any institution or entity listed in 12 U.S.C. § 1818(e)(7)(A).

II. BACKGROUND

A. Summary of the Administrative Proceedings

On February 12, 1991, the OTS Office of Enforcement ("Enforcement") issued a Notice of Charges and Hearing for an Order to Cease and Desist and to Direct Restitution and Other Affirmative Corrective Relief, Notice of Intention to Prohibit, and Notice of Assessment of Civil Money Penalty (the "Notice"). The Notice alleges that Simpson engaged in numerous unsafe and unsound practices, violated regulations and statutes, and violated his fiduciary duties to Cascade. The Notice seeks an order to cease and desist and directing restitution, an order of prohibition, and civil money penalties.[1] On February 12, 1991, the Director also issued a Temporary Order to Cease and Desist. In compliance with this Temporary Order, Simpson posted approximately $950,000 as security for any restitution that he might be required to pay.

Simpson timely filed an answer to the Notice. A hearing was conducted on August 26-31, 1991 in Seattle, Washington.[2] Opening briefs and proposed findings of fact and conclusions of law were filed by the parties under 12 C.F.R. § 509.27 (1991). The parties also filed reply briefs.

The ALJ's Recommended Decision, including Findings of Fact and Conclusions of Law (the "Recommended Decision"), and Recommended Order were served on the parties on December 23, 1991. Respondent filed exceptions to the Recommended Decision on January 21, 1992. Enforcement filed exceptions to the Recommended Decision on January 23, 1992.[3] On March 16, 1992, the parties were notified that the Recommended Decision had been submitted for the Director's review and final determination. 12 C.F.R. § 509.32(b)(1991). The Director has entered Orders extending the time for issuance of the

---

1. See 12 U.S.C. §§ 1818(b)(cease and desist authority), 1818(e)(removal and prohibition authority), and 1818(i)(civil money penalty authority).

2. The hearing on the civil money penalty assessment was consolidated with the hearing on the underlying charges contained in the Notice.

3. On January 27, 1992, Enforcement requested expedited review of the Recommended Decision and issuance of a Final Decision and Order by February 28, 1992. The Director denied this request on February 24, 1992.

Final Decision until November 18, 1992.[4]

B. Summary of the Facts

At all times pertinent to this proceeding, Cascade was a state-chartered federally-insured mutual savings and loan association.[5] Simpson served as President and Chairman of the Board of Directors throughout the relevant period.[6] The factual bases for the conclusions reached and the remedies imposed by the Director are next described.[7]

1. Profit-Sharing Distribution

In 1989, Cascade's profit-sharing plan provided for the distribution of one-half of annual pre-tax net profits in excess of $2 million to participating managers and officers. Distributions under the plan were determined by the Board of Directors' Compensation Committee, which consisted of Simpson and two other

---

4. See OTS Order No. AP 92-59 (June 12, 1992); OTS Order No. AP 92-73 (July 28, 1992); OTS Order No. AP 92-99 (September 18, 1992); Order No. AP 92-102 (October 2, 1992); Order No. AP 92-108 (October 9, 1992); Order No. AP 92-113 (October 23, 1992); and Order No. AP 92-120 (November 6, 1992).

5. On September 16, 1992, Cascade converted from a mutual to a stock institution.

6. Simpson resigned as an officer and director of Cascade on March 13, 1990.

7. The Notice recited an additional basis for the proceeding, Cascade's payment of educational expenses incurred by Simpson's family members. This charge was resolved prior to the hearing.

directors. In past years, distributions under the plan had been made at year end. The Compensation Committee reported scheduled profit-sharing distributions to the full Board of Directors at a regularly scheduled board meeting on December 12, 1989.

Cascade's internal profit projections dated December 12, 1989, indicated that Cascade would earn $4.14 million in pre-tax profits for 1989. If that projection had been accurate, then $1.07 million would have available under the distribution formula.

On November 22, 1989, however, the OTS had informed Simpson that Cascade had overvalued its excess loan servicing account by approximately $1 million. This adjustment was not reflected in the December 12, 1989 profit projections.

Within a matter of days after the December 12, 1989 Board meeting, on December 15 and 20, 1989, Cascade's auditor, KPMG Peat Marwick ("Peat Marwick") also notified Cascade and Simpson that significant adjustments to the value of Cascade's excess loan servicing would be required. Preliminarily, Peat Marwick indicated that this asset was overvalued by $2.5 million ($780,000 for loans generated in 1989, and $1.7 million for loans generated in prior years). Peat Marwick also indicated that adjustments to other assets would be required. Although specific numbers were not provided, the auditor stated that these additional adjustments would also be substantial. It was clear at that time that the auditor's recommended adjustments would bring the 1989 profits under the $2 million profit-sharing threshold.[8]

On December 28, 1989, the OTS issued a directive requiring Cascade to record an adjustment of $1 million to the excess loan servicing account to reflect loans recorded since June 1989. The OTS directive also ordered Cascade to review accounting for other excess loan servicing. Cascade received this directive on December 29, 1989.

On that same day, despite the foregoing notices of substantial write-downs to the value of assets that would reduce the projected net profits below the $2 million profit-sharing threshold, Simpson directed a profit-sharing distribution of $529,500; he personally received $105,000 of this distribution.

Cascade's audited financial statements for the year ended December 31, 1989, made available in April 1990, ultimately showed net profits before taxes for 1989 of $918,667. The audited financial statements included write downs of $1.25 million for excess loan servicing, $135,000 for loan origination fees, and $125,000 for purchased servicing. The audited statements also reflected the creation of $325,000 in specific loan loss reserves and $550,000 in general loan loss reserves. Thus, for 1989,

---

8. Additionally, Peat Marwick had previously recommended that Cascade establish general loan loss reserves. (Cascade had classified assets and was required by 12 C.F.R. § 563.160(d) to create a general loan loss reserve.) Cascade, however, had not created such a reserve by year's end.

Cascade in fact had not met the $2 million threshold,[9] and the profit-sharing distribution was insupportable.

This distribution was also made at a time when Simpson knew that Cascade had insufficient capital. The OTS had notified Cascade and Simpson on several occasions in October and November 1989 that the Association was not meeting its capital requirements, specifically the risk-based capital requirement.[10] As a result, Cascade was required to submit a capital plan to OTS. By the time of the hearing in this case, Cascade had not remedied its capital deficiency and continued to operate under an approved capital plan. Simpson's conduct in authorizing the profit-sharing distribution in the face of all of this information reflected a sacrifice of his duties of loyalty and care to Cascade in favor of a single-minded orientation to his own self-interest.

---

9. To compare fairly the audited financial statement's figure of net profits before taxes ($918,667) with Cascade's internal $4.14 million pre-tax net profit projection, the profit-sharing distribution ($529,500) and a separate pool of bonus funds ($205,500) must be added to the $918,667. The total ($918,667 + $529,500 + $205,500 =$1.65 million) does not meet the $2 million threshold level that triggered profit-sharing.

10. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989)("FIRREA") contained new minimum capital requirements. An interim final regulation implementing these requirements became effective on December 7, 1989. Regulatory Capital, 54 Fed. Reg. 46845 (November 6, 1989).

2. Previs Loan

Simpson also caused Cascade to approve an unsafe and unsound loan to Randy Previs ("Previs"), one that had been rejected by over twenty other lending sources. Simpson provided the loan in exchange for Previs' purchase of Simpson's yacht. Simpson also received a loan procurement fee from Previs in making this loan. In involving himself in the initiation and approval of this loan, Simpson violated his fiduciary duties of loyalty and due care by placing his self-interest before the interests of the Association, which caused Cascade to suffer a substantial loss.

In 1975, Previs purchased the Valley View Ranch, a 66-acre parcel of land located in Thorp, Washington. Previs filed for bankruptcy in February, 1980, and wanted to obtain financing to buy back the Ranch.

In 1981, Previs sought a real estate loan from Cascade. He was in bankruptcy and had a credit record that noted the bankruptcy, an adverse judgment for $60,000, and other items reflecting a poor credit history. At the time Previs applied to Cascade, over twenty other lenders had turned down his application. The security property was located outside of Cascade's usual lending area and was non-revenue producing rural land on which Cascade typically did not extend credit.

Previs occasionally bought large pleasure boats to refurbish and resell at a profit. At the suggestion of a yacht broker, Previs contacted Simpson. Simpson agreed that Cascade would make the real estate loan, if Previs agreed to purchase Simpson's yacht. Thereafter, Previs applied to Cascade for the loan on the Ranch. The loan was processed on an expedited basis, approved by a three-member loan committee including Simpson, and ratified by Cascade's Board of Directors. On April 29, 1981, a 90-day loan for $258,000 was issued to the Katie Previs Land Co., with Randy Previs and his wife Katie Previs signing as principals.

Although Cascade's Board of Directors ratified the initial loan (and subsequent refinancings, discussed below), Simpson never informed the Board of certain material information about the loans, including the facts that Previs was in bankruptcy, that Simpson was negotiating the sale of his yacht to Previs, and that Simpson subsequently sold the yacht to Previs in July 1981 in return for initiating and recommending the approval of the real estate loan.

On June 19, 1981, Cascade refinanced the loan. As a part of this refinancing, Previs received an additional $50,000. From this amount, Previs used $20,000 to pay Simpson's commission to the yacht broker, and $30,000 to pay for materials to renovate the yacht. On July 1, 1981, the Previs Equipment Company, with Randy and Katie Previs signing as principals, contracted to purchase the yacht from Simpson in return for a $180,000 note. Within 6 months, Previs had renovated the yacht, sold it at a profit, and repaid the note to Simpson.

Previs' real estate loan was refinanced by Cascade again on April 20, 1982. Despite his payments to Simpson, Previs never made any payments on the loans to Cascade. Cascade filed a lawsuit to foreclose on the property on January 25, 1983. The total loss suffered by Cascade when the Ranch was finally sold was $318,424.[11]

3. Insurance Operations

Between 1981 and 1990, Cascade provided lists of new mortgage borrowers to Family Life Insurance Company ("FLI"), a company in which Simpson had no interest. FLI then attempted to sell mortgage life insurance to these borrowers. FLI split its commissions on the sale of this insurance on a 50-50 basis with Insurance Commerce Inc. ("ICI"), a company controlled by Simpson. In exchange, ICI was to collect the premiums on the policies for FLI. In fact, ICI had no employees and it was Cascade employees who collected insurance premium payments along with the borrowers' monthly mortgage payments, and remitted the premium payment to FLI. During 1981-90, ICI received a total of $156,586 in commissions from FLI for these services by Cascade employees.

11. The amount outstanding on the note when foreclosure proceedings began was $538,424. Government Exhibit ("GX") 17. After foreclosure, Cascade ultimately sold the property on September 27, 1988 for $210,000. GX 22. The difference is $328,424. For the reasons described in Section IV.A.2., however, the Director has reduced this amount by $10,000 to $318,424.

From 1988 through 1990, Cascade paid premiums to Worthington Insurance Company on various business policies insuring Cascade. Pursuant to an agreement with Worthington, ICI received commissions of at least $4,936 on these policies because ICI, acting through Simpson, sent this business to Worthington.[12]

ICI held appropriate licenses but performed no function other than to receive commissions from FLI and Worthington. It did not pay Cascade for the services of Cascade's employees.

At all relevant times, Cascade was not legally prevented from forming a subsidiary to perform the functions performed by ICI. Based on the income derived by ICI, such a subsidiary would have been profitable. The role Simpson engineered for his companies at the expense of Cascade's business opportunities constituted another breach of Simpson's fiduciary duty of loyalty.

C. <u>The ALJ's Recommended Decision</u>

The ALJ determined that the release of the $529,500 in profit-sharing to Cascade management was an unsafe or unsound practice; and that Simpson's authorization of the payment of $105,000 to himself breached his fiduciary duty to Cascade, was in

---

12. Additionally, ICI was entitled to receive commissions when it generated orders for insurance coverage from Worthington. Cascade employees referred potential customers by directly filing referral lists with Worthington. The record, however, does not show whether commissions were generated from these referrals.

reckless disregard of safe and sound banking practices, and unjustly enriched Simpson by $105,000. Accordingly, the ALJ recommended a cease and desist order directing restitution of $105,000 under 12 U.S.C. § 1818(b). The ALJ found that the $424,500 payment to other managers did not meet the reckless disregard standard under the statutory restitution provision, 12 U.S.C. § 1818(b)(6)(A), and he did not recommend restitution of this amount. Additionally, the ALJ found that Simpson's conduct satisfied the requirements for issuance of an order of prohibition under 12 U.S.C. § 1818(e), and recommended that the Director impose a prohibition order against Simpson. The ALJ also recommended a Tier Three CMP of $105,000 under 12 U.S.C. § 1818(i) in connection with the profit-sharing distribution.

The ALJ further determined that Simpson received a loan procurement fee in connection with the Previs loan, contrary to 12 C.F.R. § 563.40. The ALJ also found that Simpson breached his fiduciary duty and engaged in unsafe and unsound practices by approving a risky loan when he stood to gain financially, and by failing to inform the Board of Directors of all material facts associated with the loan. For these violations, the ALJ recommended a cease and desist order directing restitution of $328,424. The ALJ again recommended an order of prohibition against Simpson under 12 U.S.C. § 1818(e).

The ALJ found that Simpson violated his fiduciary duty to Cascade by permitting ICI's uncompensated use of Cascade's employees during Cascade's work hours. He also found that Simpson violated 12 C.F.R. § 563.33(b), which prohibits savings associations from permitting salaried employees or officers to work during office hours for other affiliated entities without compensation from that entity. The ALJ further determined that Simpson's operation of ICI for personal benefit while Cascade could have formed a similar organization was, in addition to a violation of his fiduciary duty, a conflict of interest, an unsafe or unsound practice, and a usurpation of Cascade's corporate opportunities. For these violations, the ALJ recommended an order to cease and desist directing restitution of $161,522; an order of prohibition against Simpson; and CMPs of $13,013.[13]

III. ISSUES FOR DECISION

This proceeding presents two main issues: (1) What standards are appropriate to determine whether Respondent was "unjustly enriched" or acted with "reckless disregard" for the law, applicable regulations, or prior OTS orders for the purposes of ordering restitution under 12 U.S.C. § 1818(b); and (2) May the Director order civil money penalties under 12 U.S.C. 1818(i)

13. Enforcement introduced evidence that ICI, controlled by Simpson, received over $24,500 in 1989 and 1990. GX-40, 41. The ALJ estimated that $13,013 of the $24,500 was received after August 9, 1989.

In addition to the CMPs ordered as a result of the profit-sharing agreement ($105,000) and the ICI transactions ($13,013), the ALJ included in the CMP $20,000 which represented the cost of investigation by the United States Government.

against the Respondent when neither Enforcement nor the ALJ specifically addressed the statutory mitigating factors that the Director is required to consider?

IV. DISCUSSION[14]

A. Standards Governing Restitution

Under 12 U.S.C. § 1818(b)(1), the OTS may issue a cease and desist order if an institution-affiliated party[15] has engaged in proscribed activities including: engaging in an unsafe or unsound practice in conducting the business of the association;[16] or violating a law, rule or regulation, or conditions imposed in writing or written agreements with the agency. The OTS may require the institution-affiliated party to cease and desist from the

---

14. Exceptions that are not specifically addressed in this Decision are denied.

In his exceptions, Respondent attempted to incorporate by reference arguments made in prior pleadings. Respondent's failure to clearly identify issues for review constitutes a waiver of objection under 12 C.F.R. § 509.29(b) (1991). Objections contained in these general exceptions, therefore, are deemed waived.

15. Simpson, as President and Chairman of Cascade's Board of Directors, is an institution-affiliated party under 12 U.S.C. § 1813(u).

16. Unsafe and unsound practices, for the purposes of the issuance of a cease and desist order, involve conduct that is contrary to generally accepted standards of prudent operation of a financial institution, the possible consequence of which, if continued, may be abnormal risk, or loss or damage to an institution, its shareholders, or the Federal deposit insurance funds. See In the Matter of Neil M. Bush, Final Decision and Order, OTS Order No. AP 91-16, at 30-31 (April 18, 1991).

violation or practice and to take affirmative action to correct the conditions resulting from the violation or practice. 12 U.S.C § 1818(b)(1) and (6). The OTS may order an institution-affilated party to make restitution or provide reimbursement, indemnification, or guarantee against loss, if certain standards, discussed below, are met. 12 U.S.C. § 1818(b)(6)(A). The OTS may also take such other action as it determines to be appropriate. 12 U.S.C. § 1818(b)(6)(F).

To support an order requiring restitution under 12 U.S.C. § 1818(b)(6)(A), Enforcement must demonstrate: (1) that the Respondent was unjustly enriched in connection with the violation or practice with respect to which the cease and desist order is issued; or (2) that the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency. While the ALJ made findings with respect to each of these elements, he did not define the terms "unjust enrichment" and "reckless disregard."

"Unjust enrichment" and "reckless disregard" are not defined in the statute. Recent case law, however, establishes that the term "unjust enrichment" should be construed broadly to occur when a respondent gains "a significant personal benefit" through unlawful means. Akin v. Office of Thrift Supervision, 950 F.2d 1180 (5th Cir. 1992) (Respondent received significant personal benefit by retaining and disposing of funds that he would otherwise be required to contribute to the association under a net worth maintenance agreement; this personal benefit was sufficient to support a conclusion that he was unjustly enriched).

The alternative standard for directing restitution, "reckless disregard," has not been addressed in agency decisions or case law interpreting 12 U.S.C. § 1818(b)(6). However, case law under other federal statutory schemes is instructive on the meaning of "reckless." In reviewing an action under Rule 10b-5, the United States Court of Appeals for the Seventh Circuit defined recklessness as "'an extreme departure from the standards of ordinary care, and which presents a danger . . . that is either known to the defendant or that is so obvious that the actor must have been aware of it.'" Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033, 1045 (7th Cir. 1977), cert. denied 434 U.S. 875, 54 L.Ed.2d 155, 98 S.Ct. 225 (1977), quoting Franke v. Midwestern Oklahoma Development Authority, 428 F.Supp. 719 (W.D. Okla. 1976), vacated on other grounds, 619 F.2d 856 (10th Cir. 1980).[17] The Seventh Circuit explained:

Indeed, the Franke definition of recklessness should be

---

17. The standard of recklessness articulated by the Seventh Circuit has been followed by the majority of the circuits. See Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1569 n.8 (9th Cir. 1990), cert. denied, U.S. , 111 S.Ct. 1621, 113 L.Ed.2d 719 (1991); Hackbart v. Holmes, 675 F.2d 1114, 1118 (10th Cir. 1982); SEC v. Carriba Air, Inc., 681 F.2d 1318, 1324 (11th Cir. 1982); Broad v Rockwell Int'l Corp., 642 F.2d 929, 961-62 (5th Cir. 1981), cert. denied, 454 U.S. 965, 102 S.Ct. 506, 70 L.Ed.2d 380 (1981); McLean v. Alexander, 599 F.2d 1190, 1197-98 (3rd Cir. 1979); Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1025 (6th Cir. 1979); Cook v Avien, Inc., 573 F.2d 685, 692 (1st Cir. 1978); Rolf v. Blyth, Eastmann Dillon & Co., 570 F.2d 38, 46-47 (2d Cir. 1978), cert. denied, 439 U.S. 1039, 99 S.Ct 642, 58 L.Ed.2d 698 (1978

> viewed as the functional equivalent of intent. . . . Under this definition, the danger of misleading . . . must be actually known or so obvious that any reasonable man would be legally bound as knowing, and the omission must derive from something more egregious than even "white heart/empty head" good faith. While this definition might not be the conceptual equivalent of intent as a matter of general philosophy, it does serve as a proper legal functional equivalent for intent, because it measures conduct against an external standard which, under the circumstances of a given case results in the conclusion that the reckless man should bear the risk of his omission. . . . When measured against this external standard, it may be said that such a reckless man has "use[d] or employ[ed] [a] deceptive device" within Section 10(b) [of the Securities Exchange Act of 1934]. Sundstrand, 553 F.2d at 1045 (citations and footnotes omitted).

A similar approach has been followed in reading a recklessness standard into § 6672 of the Internal Revenue Code, which holds corporate officials liable for "willfully" failing to collect or pay taxes. In Sawyer v. United States, 831 F.2d 755 (7th Cir. 1987), the court said:

> A person acts willfully under § 6672 if his "conduct denotes intentional, knowing and voluntary acts. It may also indicate a reckless disregard for obvious or known risk." . . . Recklessness in this context is established if the corporate officer "(1) clearly ought to have known that (2) there was a grave risk that withholding taxes were not being paid and if (3) he was in a position to find out for certain very easily." 831 F.2d at 758 (citations omitted; emphasis in original).

The predecessor of the OTS ruled that "willful disregard" exists when an individual:

> a) purposely (as opposed to accidentally) commits an act and that act evidences neglect or lack of thoughtful attention to the institution's safety or soundness, or b) acts with plain indifference to the institution's safety and soundness. . . . [T]he only requirement is that the individual acted intentionally in committing the acts which constitute the violation and was aware of or knew what he was doing.

In the Matter of M, FHLBB Res. 89-537 at 51 (March 6, 1989). See also In the Matter of O'Keeffe, OTS Final Decision and Order, OTS Order No. 90-60, at 28-29 (April 26, 1990).

Accordingly, for the purposes of 12 U.S.C. § 1818(b)(6)(A), the Director concludes that reckless disregard for the law, applicable regulations, or an agency order exists when: (1) the party acts with clear neglect for, or plain indifference to, the requirements of the law, applicable regulations or agency orders of which the party was, or with reasonable diligence should have been, aware; and (2) the risk of loss or harm or other damage from the conduct is such that the party knows it, or is so obvious that the party should have been aware of it.

In light of these standards, as well as well-established principles relating to unsafe and unsound practices and breach of fiduciary duty, the Director next analyzes each of the counts against Simpson.

1. Profit-Sharing

Before the Director may reach the issue of restitution, he must conclude that an unsafe or unsound practice has occurred or a violation was committed. In the case of the profit-sharing plan, it is clear that Simpson breached his fiduciary duties and engaged in unsafe and unsound practices.

As a director and officer of Cascade, Simpson owed a fiduciary duty of loyalty to the institution. This duty requires directors and officers to administer the affairs of the institution with candor, personal honesty and integrity. They are prohibited from advancing their own personal or business interests, or those of others at the expense of the institution. In the Matter of Neil M. Bush, at 13-14. Under this fiduciary duty, directors and officers have a fundamental obligation "to avoid placing themselves in a position that creates, or that leads to or could lead to, a conflict of interest or appearance of a conflict of interest." Id. at 10-11; see 12 C.F.R. § 571.7(b). A director who may experience a direct or indirect benefit is required to abstain from participating in the matter in which he has a conflicting interest and from voting on the matter. In the Matter of Neil M. Bush, at 20, 21.

Simpson violated his duty of loyalty by promoting his own interest as the major beneficiary under the profit-sharing plan ahead of the interest of the Association. Initially, Simpson directly and substantially participated in profit-sharing deliberations. He was one of three members of the Board of Directors' Compensation Committee that set the amount of the distributions to participants in the plan, including a $105,000 distribution to Simpson. As noted above, his duty of loyalty to the Association demanded that he abstain from participation in all profit-sharing discussions in which he had an interest. Moreover, Simpson advanced his own self-interest by authorizing the release of profit-sharing payments, including his $105,000 payment. This action was detrimental to the Association's interest because it resulted in a substantial distribution of assets that was not required under the profit-sharing plan,[18] and because the payments impaired Cascade's ability to comply with regulatory capital requirements.[19] The Director concludes that these actions constitute violations of Simpson's fiduciary duty of loyalty as defined in 12 C.F.R. § 571.7. His conduct also caused undue risk of loss to the institution and the insurance fund by improperly reducing the earnings of a capitally deficient institution and, thus, constitutes an unsafe and unsound practice that is sufficient to support a cease and desist order. See 12 C.F.R. § 571.7(b); In the Matter of Neil M. Bush, at 31-32.

In addition to the fiduciary duty of loyalty, directors of savings associations owe a fiduciary duty of care to the institution. The Supreme Court has defined that duty as:

---

18. Respondent repeatedly asserts that the profit-sharing payment was a legitimate expense that could not be avoided by Cascade. A copy of the profit-sharing plan, if the plan was reduced to writing, was not placed into evidence. The parties, however, do not dispute the basic requirements of the plan including the $2 million profit-sharing threshold. Based on the description of the plan in the record, the audited financial statement, and the facts summarized above relating to Cascade's financial condition, the Director concludes that there was no obligation under the plan to make any profit-sharing payments.

19. Simpson argues that approval of the profit-sharing distribution is unrelated to Cascade's capital position and its safety and soundness because the plan was based on profit and not capital. This argument is mistaken. Absent the distribution, Cascade's net profits would have increased the amount of Cascade's retained earnings and reduced Cascade's capital deficiency, thereby advancing its safety and soundness.

> [T]hat [degree of care] which ordinarily prudent and diligent men would exercise under similar circumstances, and in determining that, the restrictions of the statute and the usage of business should be taken into account.

Briggs v Spaulding, 141 U.S. 132 (1891). This duty requires directors to act diligently, prudently, honestly, and carefully to ensure their institution's compliance with state and Federal banking laws and regulations.[20] In the Matter of M, at 41-42. The director's duty of care includes: selecting, monitoring and evaluating competent management; establishing business strategies and policies; monitoring and assessing the program of business operations; establishing and monitoring adherence to policies and procedures required by statute, regulations and principles of safety and soundness; and making business decisions on the basis of fully informed and meaningful deliberations. Directors are also responsible for ensuring management's prompt response to and compliance with the supervisory directives of regulators.[21]

---

20. The performance of a director's responsibilities is fundamental to the safety and soundness of a Federally insured depository institution and the protection of the Federal insurance funds. Accordingly, OTS, as a Federal regulator obligated to protect the insurance funds, will not recognize state law that purports to limit the duties or liabilities of thrift directors. See In the Matter of Bush at 12-13.

21. See e.g., Corsicana National Bank v. Johnson, 251 U.S. 68 (1919) (approval and institution of loan policies and procedures); Bowerman v. Hamner, 250 U.S. 504, 513 (1919) (attendance at board of director meetings); Briggs, 141 U.S. at 162 (supervision of management); Brickner v. FDIC, 747 F.2d 1198, 1202 (8th Cir. 1984) (heeding the admonitions and warnings of supervisory authorities); FDIC v. Mason, 115 F.2d 548 (3rd Cir. 1940) (adherence to normal and prudent standards in the banking community); Atherton v. Anderson, 99 F.2d 883 (6th Cir. 1938) (supervision of management, selection of members of executive and loan committees, maintenance of an impartial and objective audit system, performance of periodic examinations of the institution, and review of loans,

Officers are responsible for the day to day management of the institution. As a result, an "inside" director, such as Simpson, generally has greater knowledge of, and direct responsibility for, the management of the institution. Officers are responsible for implementing the policies and business objectives set by the board and for running the day to day operations of the institution consistent with those policies and objectives and in compliance with the applicable laws, rules and regulations and the principles of safety and soundness. The officers must provide directors with timely and ample information so that directors may discharge their responsibilities.

Simpson's actions with respect to the profit-sharing distribution were also contrary to accepted standards of prudent operation of a financial institution, and violated his duty of

---

(Footnote 21 continued from previous page)
delinquencies, large lines of credit and problems loans); Goess v. Ehret, 85 F.2d 109 (2d Cir. 1936) (review of financial reports); and White v. Thomas, 37 F.2d 452, 454 (9th Cir. 1930) (general knowledge of the manner in which the thrift business is conducted).

The regulatory agencies and others have produced guides that provide useful advice on ways directors can fulfill their duties to the institutions they serve. These include: OTS Statement Concerning the Responsibilities of Directors and Officers of Insured Depository Institutions (November 16, 1992); OTS Regulatory Handbook on Thrift Activities, Section 140 (1990); OTS Director Information Guidelines (1989); Pocket Guide for Directors (FDIC, 1988); The Director's Handbook (OCC, 1987). See also, The Director's Guide: Role and Responsibilities of a Savings Institution Director (FHLB-SF, 1988).

care to Cascade. Simpson made the profit-sharing distribution in the face of persistent warnings from Cascade's auditor and its regulator that substantial asset write-downs would be required, and despite admonitions that Cascade needed to enlarge its capital to comply with the statutory and regulatory minimum capital requirements under FIRREA. As a result, Cascade was exposed to excessive risk of loss or damage. Moreover, the profit-sharing distribution damaged the Association by substantially compromising its ability to comply with regulatory requirements. The Director concludes that Simpson's conduct violated his duty of care and constituted an unsafe and unsound practice.

Accordingly, the Director concludes that the requirements for the issuance of a cease and desist order under 12 U.S.C. § 1818(b) are met here. Restitution is appropriate if the requirements of 12 U.S.C. § 1818(b)(6) are also met.

The ALJ determined, and the Director agrees, that the $105,000 distribution to Simpson was made with reckless disregard for the law.[22] Simpson was plainly indifferent to the warnings of OTS and Cascade's auditor, and the size of the distribution and the thinness of Cascade's capital position persuade the Director that Simpson must have known that any distribution would damage the institution's capital position.

---

22. In addition, Simpson was clearly unjustly enriched in the amount of $105,000.

The ALJ also determined that the profit-sharing payment of $424,500 to Cascade managers other than Simpson was an unsafe and unsound practice but was not made in reckless disregard for the law. The ALJ found that the payment represented a proper balancing between Cascade's management needs and Cascade's capital needs. Recommended Decision at 26. Enforcement excepts to this finding.

The Director disagrees with the ALJ's conclusion that the $424,500 profit-sharing distribution to the other managers was not in reckless disregard for the law. Simpson's actions on this score reflect the same plain indifference to the warnings of OTS and Cascade's auditor that his acceptance of the $105,000 distribution does. Simpson was aware that Cascade was capital deficient. He also knew that Cascade was subject to substantial write downs of several assets that would reduce pre-tax net profits below the $2 million profit-sharing threshold.[23] That the

---

23. These adjustments included $1 million in write downs ordered by the OTS (reflecting excess loan servicing recorded since June 6, 1989) and additional adjustments necessary to reflect excess loan servicing recorded prior to that date. Peat Marwick had estimated that the total write down of this asset was nearly $2.5 million. The ALJ found that "Simpson believed that if the loan servicing were to be re-evaluated, then all aspects of the loan servicing should be re-evaluated, which would result in an offset to the write down envisioned by Peat Marwick." Recommended Decision at 24. This finding does not affect the determination that the distribution was made with reckless disregard. Simpson was aware that the OTS and Peat Marwick believed that this write down and other substantial adjustments (e.g., the creation of general and specific loan loss reserves) were necessary. Under these circumstances, Simpson should not have acted on the self-serving assumption that his belief would ultimately prevail over the position of the regulator and of Cascade's auditor. Rather, Simpson should have delayed the distribution and resolved

release of the profit-sharing payments would have a significant harmful effect on Cascade's ability to meet the capital requirements in OTS regulations was so obvious that Simpson must have or should have known of it, and he ignored this information in favor of an immediate profit-sharing distribution to others as well as to himself. Under these circumstances, the Director concludes that the profit-sharing payments were authorized by Simpson in reckless disregard for the law and that restitution is appropriate under 12 U.S.C. § 1818(b)(6)(A)(ii).[24] The Order entered today directs Simpson to make restitution of $529,500, the full amount of the profit-sharing distribution.[25]

2. Previs loan

In connection with the Previs loan, Simpson received a loan

(Footnote 23 continued from previous page)
the issues with the OTS and Peat Marwick, rather than take an unreasonable risk that profits over $2 million would be generated.

24. Even if the Director agreed with the ALJ's conclusion that the distribution to other managers was not made in reckless disregard for the law or the regulations, restitution of the full amount of the distribution could still be ordered based on the alternative basis of unjust enrichment.

25. FIRREA's restitution provisions do not limit restitution to the amount of an individual's personal gain, but rather are intended to recover the full amount of loss resulting from misconduct that produces a benefit for the wrongdoer. See H.R. Rep. No. 101-54(I) 101st Cong. 1st Sess. 392 (1989). Accordingly, the measure of recovery that may be ordered under the statute based upon either reckless disregard for law and applicable regulations or unjust enrichment is the amount of the loss to the association caused by the violation, or unsafe or unsound practice or breach, and is not limited to the amount of benefit to the respondent. The FDIC has reached a similar conclusion in In the Matter of Palmer, et al., FDIC-90-156 c&b, (Sept. 17, 1991).

procurement fee in violation of 12 C.F.R. § 563.40.[26]

Additionally, Simpson's involvement in the approval of the Previs loan constituted a breach of his fiduciary duty of loyalty, as defined in 12 C.F.R. § 571.7. As explained above, directors and officers of an association have a duty of loyalty to the association that they serve. The duty of loyalty demands that a director abstain from participating or voting on matters in which he or she has a conflict of interest. The duty of loyalty also requires the corporate fiduciary to disclose all material nonprivileged information relevant to a corporate decision from which he or she may derive a personal benefit. In the Matter of Neil M. Bush at 17 and 21.

26. Respondent argues that the Previs boat sale was an arms' length transaction for full value and, therefore, does not violate 12 C.F.R. § 563.40. Section (a) of this regulation bars affiliated persons from receiving any fee or other compensation --earned or unearned--in connection with the procurement of a loan. Section 563.40(b) extends additional prohibitions contained in the Real Estate Settlement Procedures Act of 1974 ("RESPA") to associations and affiliated persons with respect to loans on real property.

Respondent argues that he may rely on the exceptions that apply to RESPA coverage, including an exception for transactions involving bona fide compensation for goods or facilities actually furnished. Section 563.40(b) of the regulations incorporates only the prohibitions contained in RESPA. Section 563.40(b) was not intended to limit the unqualified language of section 563.40(a). Section 563.40 applies to the Respondent's situation. United States v. Grissom, 814 F.2d 577, 579-80 (10th Cir. 1987). Independently of this analysis, Respondent breached his fiduciary duties of loyalty, candor and care by using the Previs loan application as a opportunity to secure the sale of his personal property while withholding key information from the directors, resulting in an unsound loan and a substantial loss to the institution.

Simpson caused Cascade to approve a loan in which he stood to gain personally through the sale of his yacht. Rather than abstain from any involvement with the loan, Simpson actively sought its approval through such actions as sitting on the three-member loan committee that approved the loan. This self-dealing constitutes a clear conflict of interest and a violation of his duty of loyalty. Simpson also failed to disclose material information to the Board including his interest in the loan and information regarding Previs' bankruptcy. This lack of disclosure violated his obligation of candor, a further violation of his duty as a fiduciary. Based on the above, the Director concludes that Simpson's participation in this matter was a breach of his fiduciary duty to Cascade, as defined in 12 C.F.R. § 571.7, and was an unsafe and unsound practice.

Further, Simpson violated his duty of care. Simpson supported and approved the Previs loan despite his knowledge that Previs was in bankruptcy. Information such as an adverse judgment of $60,000 and other evidence of poor credit history were contained in credit reports obtained by Cascade and available to Simpson. The facts that the property securing the loan was located beyond Cascade's usual lending area and was non-revenue producing rural property on which Cascade did not typically extend credit were, similarly, readily ascertainable. Because of these facts, Simpson exposed Cascade to an abnormal risk of loss or harm from the loan and an unsafe and unsound practice, thereby breaching his duty of care. The Director concludes that this unsafe and unsound practice and fiduciary breach are sufficient to support the issuance of a cease and desist order.

Restitution is required in the case of this unsafe and unsound practice and unlawful act, on two alternative grounds. First, Simpson acted purposefully to ensure the approval of a high-risk loan in order to facilitate another transaction in which he had a personal interest. This is the clearest form of disregard of, and indifference to, the standards that govern a director's conduct. In light of his own conflict of interest and his knowledge of Previs' dubious financial position, Simpson knew or should have known that his actions exposed the Association to an abnormal risk of harm or loss from the loan. The Director concludes that Simpson's participation in the Previs loan demonstrated reckless disregard for the law and the applicable regulations at 12 C.F.R. § 563.40. Accordingly, the Respondent is required to make restitution under 12 U.S.C. § 1818(b)(6)(A)(ii).

The Director also concludes that Simpson was unjustly enriched through his actions in the Previs transaction.[27] Simpson received a benefit in connection with the initial financing because he was able to sell his yacht as a direct result of Cascade's origination of the loan. Simpson also received financial enrichment in connection with Previs' refinancing of the loan. His obligation to pay a yacht brokerage fee of $20,000 was

27. The ALJ made no finding with regard to unjust enrichment.

satisfied as a result of this refinancing. Accordingly, the Director finds that Simpson was unjustly enriched and that the requirements for ordering restitution under 12 U.S.C. §1818(b)(6)(A)(i) also are met by the initial Previs loan and by the refinancing.

The ALJ required Simpson to make restitution of Cascade's loss in the amount of $328,424. This amount was based on the amount outstanding on the note when foreclosure proceedings on the Previs property began ($538,424),[28] less the amount received when the property was subsequently sold ($210,000).

Respondent argues that this calculation does not reflect accurately the loss to Cascade. Respondent points out that the ALJ's restitution computation does not take into account an agreement to sell the property to Dr. and Mrs. Larry Bundy for a purchase price of $350,000. The Bundy sale was not consummated,

---

28. This information was contained in GX 17, a recapitulation of the loan. The recapitulation summarizes voluminous loan documents to which Simpson was provided access. Simpson argues that the recapitulation is unreliable hearsay and is inadmissible.

The recapitulation is relevant and material to the issue of restitution, is not repetitious of other evidence, and is therefore admissible in OTS proceedings. 5 U.S.C. 556(d) and 12 C.F.R. § 509.24. While the OTS is not confined to the formal rules of evidence, it is instructive to note that the recapitulation is admissible in Federal court under Fed. R. Evid. 1006. That rule provides that contents of voluminous writings which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation, provided that the underlying information is available for examination and copying.

however, and the ALJ correctly excluded it from the calculation.[29]

Simpson also argues that a down payment ($10,000) and loan extension fee ($10,000) paid by the Bundys should be deducted from the amount of the restitution. The ALJ declined to do so. The loan extension fee was not deducted because it represents the value of services rendered by Cascade in connection with the unconsummated transaction. The down payment, if retained by Cascade, may be considered an offset. Enforcement did not present any information refuting the evidence that Cascade received the down payment in connection with this sale, or indicating that

29. Respondent also argued that the calculation does not reflect accurately the loss to Cascade because it:

-Includes loan fees and related charges of $43,092 that were not "out-of-pocket" losses to Cascade. These fees and charges represent the value of services rendered by Cascade in connection with the loans. To fully indemnify Cascade for the loss on the Previs loan, such services should be included in the restitution amount.

-Includes the payment of interest on the loan after the date of default. Although generally accepted accounting principles (GAAP) do not permit Cascade to recognize income from loans that are in default, GAAP has no bearing on the debtor's obligation to pay, or the association's right to receive such payments. Cascade may not book as income interest that is not paid on a loan in default, but that does not affect its legal entitlement to the interest payment.

-Compound interest. Each time the Previs loan was renewed, interest and loan fees were capitalized resulting in the compounding of interest. Simpson argues that compound interest is not permitted under Washington law, absent an express contract. Stauffel v. Northwestern Mutual Life, 184 Wn. 431, 436, 51 P.2d 390, 392 (1935). The cited case does not preclude the payment of compounded interest as restitution, but merely reflects the Washington courts' reluctance to create an obligation to require the payment of compound interest where a note or contract merely provides for the annual payment of interest.

Cascade did not retain the down payment. Accordingly, the restitution ordered is reduced by the $10,000 down payment to $318,424.

3. Insurance Operations

In connection with the insurance operations, the Director finds that Simpson: (1) usurped Cascade's corporate opportunities, see 12 C.F.R. § 571.9; (2) utilized Cascade employees during business hours in violation of 12 C.F.R. § 563.33; and (3) engaged in a conflict of interest which constituted a breach of his fiduciary duty of loyalty[30] and an inherently unsafe and unsound practice (see 12 C.F.R. § 571.7). The requirements for a cease and desist order therefore are met.

Between 1981 and 1990, Simpson received a substantial monetary benefit, in the amount of $161,522, from his conduct in connection with ICI that was in violation of his regulatory and fiduciary duties--a benefit that could have inured to Cascade through its formation of a service corporation. The Director concludes that Simpson was unjustly enriched in connection with this violation and practice. The Director finds that restitution is appropriate under 12 U.S.C. § 1818(b)(6)(A)(i).

30. The fiduciary duty of loyalty is discussed above. Simpson's advancement of ICI's interest at the expense of Cascade's is an unambiguous breach of this duty.

Further, the Director concludes that Simpson's insurance operations meet the reckless disregard standard. He acted purposefully, not accidentally, in conducting these operations with Cascade employees continuously over ten years, which is evidence of clear neglect of OTS regulations and Simpson's fiduciary duty of loyalty. The use of a thrift institution's employees in a business that is run by a director but generates no income for the thrift (and yet for which the thrift pays its employees) presents a danger so obvious that Simpson should have or must have known of it. Simpson's receipt of payments from Worthington in exchange for sending Cascade's business to Worthington was clearly in dereliction of his duty and posed an obvious risk of loss to Cascade. Accordingly, the Director finds that Simpson's insurance business was conducted in reckless disregard for the law and the applicable regulations, and that restitution may be ordered under 12 U.S.C. § 1818(b)(6)(A)(ii).

Simpson, accordingly, is directed to make restitution in the amount of $161,522.

B. Removal and Prohibition Authority

This proceeding involves conduct occurring before and after the enactment of FIRREA. The ALJ erroneously applied the legal standards of the post-FIRREA removal and prohibition statute to all conduct.[31]

The Director finds, however, that the ALJ's error was immaterial since one of the transactions, the profit-sharing distribution, occurred after the effective date of FIRREA and was governed exclusively by the post-FIRREA statute. The Director concludes that the ALJ properly determined that this transaction supported the issuance of an order of prohibition.[32]

---

31. Compare 12 U.S.C. § 1818(e) (Supp. II 1990) with 12 U.S.C. § 1464(d)(4) (1988). FIRREA's changes to the legal standards governing the issuance of removal and prohibition orders do not apply to pre-FIRREA conduct. However, FIRREA's expanded remedies (i.e., industry-wide prohibition) may be imposed for pre-FIRREA conduct. In the Matter of O'Keeffe at 13-15.

32. With regard to this transaction, Simpson breached his fiduciary duties and engaged in an unsafe and unsound practice by directing the distribution; caused a financial loss of $529,500 to Cascade and a financial gain of $105,000 to himself; and was personally dishonest and demonstrated willful disregard for the safety or soundness of the institution. See 12 U.S.C. § 1818(e) (Supp. II 1990).

The Previs transaction occurred prior to the enactment of FIRREA. With regard to this transaction, Simpson violated OTS regulations, breached his fiduciary duties, and engaged in an unsafe and unsound practice; caused a substantial financial loss of $318,424 to Cascade and a financial gain of $20,000 to himself; and was personally dishonest and demonstrated willful and continuing disregard for the safety and soundness of the institution. Accordingly, the Director concludes that Simpson's participation in the Previs loan supports an order of prohibition under the requirements set forth in 12 U.S.C. § 1464(d)(4)(1988).

The insurance operations occurred before and after the enactment of FIRREA. With regard to these operations, Simpson violated OTS regulations, breached his fiduciary duties and engaged in an unsafe and unsound practice; caused a substantial loss of $161,522 to Cascade and a financial gain of $161,522 to himself; and was personally dishonest and demonstrated willful and continuing disregard for the safety and soundness of the institution. Accordingly, the Director also concludes that Simpson's participation in the insurance operations supports an order of prohibition under 12 U.S.C. § 1818(e)(Supp. II 1990) and

The ALJ recommended that Simpson be prohibited "from participation in the affairs of Cascade or other Federally regulated banking or savings institution." Under 12 U.S.C § 1818(e)(7), Simpson may be prohibited from participation in many additional institutions and entities. Today's decision prohibits Simpson from participation in the full array of institutions and entities specified under 12 U.S.C. § 1818(e)(7)(A).

C. Civil Money Penalty Analysis

1. Standards Governing the Imposition of CMPs

The Federal Deposit Insurance Act, as amended by FIRREA, employs a three-tiered approach to the assessment of CMPs. 12 U.S.C. § 1818(i)(2). The statute provides for maximum daily CMPs of up to $5,000, $25,000 or $1 million per day, based on the type of conduct involved and the nature and consequences of the violations.

In this proceeding, Enforcement sought a tier-three CMP against the Respondent under 12 U.S.C. §1818(i)(2)(C). This statute authorizes the imposition of CMPs of up to $1 million per day if the Respondent: (1) knowingly commits any violation of a law or regulation, engages in an unsafe or unsound practice, or

---

(Footnote 32 continued from previous page)
12 U.S.C. § 1464(d)(4)(A)(1988).

breaches any fiduciary duty; and (2) knowingly or recklessly causes a substantial loss to the association or a substantial pecuniary gain or other benefit to the institution-affiliated party by reason of the violation, practice or breach.

In determining the amount of the CMP imposed, the agency is required to take into account: (1) the size of the financial resources and good faith of the insured depository institution or other person charged; (2) the gravity of the violations; (3) the history of previous violations; and (4) such other matters as justice may require. 12 U.S.C. § 1818(i)(2)(G).

2. Review of the Recommended CMP Amount

An agency record for CMPs must "evince a thorough evaluation of all factors which under the statute must enter into a penalty . . . ." Bullion v. FDIC, 881 F.2d 1368, 1379 (5th Cir. 1989).[33] The civil money penalty provisions of the FDIA specifically require consideration of four enumerated mitigating factors, including the size of financial resources of Respondent. 12

33. Bullion was decided under the pre-FIRREA CMP provisions at 12 U.S.C. § 1828(j)(4) (1982) which required consideration of the same statutory mitigating factors at issue here. In Bullion, the court found that, with respect to one of the three respondents, the FDIC "did not deal adequately with the statutory factor of ability to pay." Bullion, 881 F.2d at 1379. On appeal following a second FDIC decision on remand, the court found that the FDIC failed to meet its burden of going forward with evidence on the statutory mitigating factor of ability to pay, and again remanded the decision for further proceedings. Dazzio v. FDIC, 970 F.2d 71 (5th Cir. 1992).

U.S.C. § 1818(i)(2)(G). The factual record in this proceeding has not been sufficiently developed to permit the Director, on review, to determine whether Respondent's financial resources permit the amount of the CMP recommended by the ALJ.

Enforcement has the burden of producing evidence on financial resources, although it need not bear "full responsibility for proving the financial condition" of the respondent, Stanley v. Board of Governors of the Federal Reserve System, 940 F.2d 267, 274 (7th Cir. 1991). The record before the Director is, however, devoid of evidence concerning Simpson's financial resources. Thus, the Director cannot ascertain how substantial an impact the recommended CMP of $138,013 would have on him.[34] Accordingly, the Notice of Assessment is dismissed by the Order accompanying this Decision.

V. CONCLUSION

For the reasons set forth herein, the Director concludes that

---

34. Enforcement did not propose, and the ALJ did not recommend, findings of fact regarding Simpson's financial resources, and the record does not contain financial statements for Respondent. The record does refer to one significant asset owned by the Respondent. In connection with the Temporary Cease and Desist Order, Simpson posted approximately $950,000 as security. The Director notes that neither Enforcement nor the ALJ made any attempt to tie this asset to the mitigating factors. Moreover, this amount was posted as security for any restitution that Simpson might be required to pay. Because the amount of the restitution ordered today exceeds the available security, the information on this asset provides little assistance in the determination of the ability to pay a substantial civil money penalty.

the following remedies are appropriate: a cease and desist order directing Respondent to make restitution in the total amount of $1,009,446 to Cascade; and a prohibition order precluding the Respondent from participation in the conduct of the affairs of Cascade and any institution or entity listed in 12 U.S.C. § 1818(e)(7)(A). The Director further concludes that the failure of Enforcement to provide evidence of all mitigating factors governing the imposition of CMPs requires the dismissal of the CMP assessment sought in the Notice.

ORDER

Upon consideration of the entire record in this matter, including the Recommended Decision of the Administrative Law Judge and the Exceptions to the Recommended Decision filed by both parties, and for the reasons set forth in the above Decision:

The Director of the OTS, pursuant to his authority under 12 U.S.C. § 1818(b) and 12 U.S.C. § 1464(d)(2)(1982) finds that: Jess T. Simpson, in his former capacity as President and Chairman of the Board of Cascade Savings Bank of Everett, Washington, violated OTS regulations including 12 C.F.R. §§ 563.33 and 563.40, and engaged in unsafe or unsound practices and breaches of his fiduciary duty, including those defined in 12 C.F.R. §§ 571.7 and 571.9, in conducting the business of Cascade. The Respondent was unjustly enriched in connection with these violations and practices, and the violations and practices involved reckless disregard for the law and applicable regulations. Accordingly, grounds exist under 12 U.S.C. § 1818(b) to issue a cease and desist order requiring affirmative action to correct or remedy conditions resulting from these violations and practices.

The Director, pursuant to his authority under 12 U.S.C. § 1818(e), finds that: Simpson, in his capacity specified above, after August 9, 1989, violated OTS regulations including 12 C.F.R. § 563.33, engaged and participated in unsafe and unsound practices in connection with Cascade, and committed and engaged in acts, omissions and practices that constitute breaches of his fiduciary duties to Cascade, including those defined in 12 C.F.R. §§ 571.7 and 571.9. By reason of these violations, practices and breaches Cascade has suffered financial loss and Simpson has received a financial gain and other benefit. The violations, practices and breaches involved personal dishonesty on the part of Simpson and demonstrated willful and continuing disregard for the safety and soundness of Cascade. Accordingly, grounds exist under 12 U.S.C. § 1818(e) to issue an order prohibiting Simpson from further participation in the conduct of the affairs of Cascade and other institutions and entities listed at 12 U.S.C. § 1818(e)(7).

The Director, pursuant to his authority under 12 U.S.C. § 1464(d)(4)(A)(1982), finds that: Simpson, in his capacity specified above, prior to August 9, 1989, violated OTS regulations including 12 C.F.R. §§ 563.33 and 563.40, engaged and participated in unsafe and unsound practices in connection with Cascade, and committed and engaged in acts, omissions and practices that constitute breaches of his fiduciary duties to Cascade, including those defined in 12 C.F.R. §§ 571.7 and 571.9. By reason of these violations, practices and breaches Cascade has suffered substantial financial loss and Simpson has received a financial gain. The violations, practices and breaches involved personal dishonesty on the part of Simpson and willful and continuing disregard for the safety and soundness of Cascade. Accordingly, grounds exist under 12 U.S.C. § 1464(d)(4)(A)(1982) to issue an order prohibiting Simpson from further participation in the conduct of the affairs of Cascade and other institutions and entities listed at 12 U.S.C. § 1818(e)(7).

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Respondent, Jess T. Simpson, shall cease and desist from engaging in any act, omission, or practice involving: unsafe or unsound practices; breaches of fiduciary duty as described in 12 C.F.R. §§ 571.7 and 571.9 or successor statutes and regulations, and as established by common law; and violations of 12 C.F.R. §§ 563.33 and 563.40;

2. Within ten (10) business days after the effective date of this Order, Respondent shall pay restitution to Cascade Savings Bank in the amount of One Million Nine Thousand Four Hundred and Forty Six Dollars ($1,009,446), which amount represents restitution, reimbursement, indemnification, or guarantee against loss necessary to correct the conditions resulting from Simpson's violations and practices. Restitution must be paid in cash, unless payment in another form is approved by the Assistant Regional Director of the Office of Thrift Supervision, Seattle Area Office.

3. Respondent's failure to pay the full amount of the restitution ordered under paragraph 2 will result in the application of the security posted under the temporary cease and desist order issued February 12, 1991, to the extent necessary to

satisfy the restitution order.

4. Simpson is prohibited from further participation, in any manner, in the conduct of the affairs of Cascade or any of its subsidiaries pursuant to 12 U.S.C. § 1818(e);

5. While this Order is in effect, Simpson may not continue or commence to hold any office in, or participate in any manner in the conduct of the affairs of, any institution or entity listed in 12 U.S.C. § 1818(e)(7)(A);

6. Conduct prohibited by this Order includes the conduct specified under 12 U.S.C. § 1818(e)(6);

7. This Order is subject to the provisions of 12 U.S.C. § 1818(j).

8. To the extent that the Notice of Assessment dated February 12, 1991 assesses civil money penalties, the Notice is dismissed; and

9. The provisions of this Order are effective upon the expiration of thirty (30) days after service of this Order upon Simpson and shall remain effective and enforceable, except to the extent that, and until such time as, any provisions of this Order

shall have been stayed, modified, terminated, or set aside by the Director or a reviewing court, or in accordance with 12 U.S.C. § 1818(e)(7)(B).

THE OFFICE OF THRIFT SUPERVISION

Dated: 11/18/92

By: /s/
Timothy Ryan
Director