

subject of Respondent's Notice no longer exists. Continuance of Respondent's appeal would be a waste of time and administrative resources since no action by the OCC can provide Respondent with the remedy he seeks.

Respondent argues that his appeal is not moot because he claims that the OCC acted in bad faith to eliminate his grounds for appealing the disapproval of his Notice. First, Respondent claims that the OCC closed the Bank for the purpose of mooting his appeal. He supports this allegation by arguing that the OCC had no legitimate reason to close the Bank. He also claims that a bank examiner told him that the OCC was going to close the Bank and that nothing could be done to prevent the closing. These arguments, however, are wholly unsupported by any affidavits or other documentary evidence. In fact, they are contradicted by a press release attached to E&C's motion stating that the Bank was closed because it was engaged in unsafe and unsound practices and was incurring significant losses.

Respondent also argues that his appeal falls under an exception to the general rule for moot claims. In certain cases, courts will not dismiss a claim that might otherwise be moot if the claimant can demonstrate that the litigated action will probably arise again in the future and will again evade review. To fit within this exception, the action must be too short in duration "to be fully litigated prior to its cessation or expiration," and there must be a "reasonable expectation that the same complaining party . . . [will] be subjected to the same action again." Weinstein v. Bradford, 423 U.S. 147, 149 (1975). Arguing that his appeal is covered by this exception, Respondent points to the fact that the Bank's closure occurred before his appeal could be decided. He further supports this claim with the assertion that he plans in the future to file one or more Change in Bank Control Notices for one or more different banks.

These arguments have no merit. There is no way of knowing with reasonable certainty that Respondent will file another notice with the OCC. Respondent argues that he plans to make such filings in the future, but aside from this assertion, offers no other evidence that he will indeed do so. In the Matter of Janet F. Acker, 1995 OCC Enf. Dec. LEXIS 114 (October 18, 1995) (Applicant's assertions that she "might" file change of control notice in the future were too uncertain to fall within the exception to the general rule for moot claims). Moreover, even if we assume that Respondent will file a notice in the future, there is no reason to believe that the OCC's consideration of the notice will be foreshortened by closure of the bank he seeks to acquire. Gulf Oil Co. v. Brock, 778 F.2d 834, 839 (D.C. Cir. 1985) (the fact that litigation of an issue was foreshortened by intervening circumstances did not necessarily mean that future attempts to litigate the issue would be unsuccessful). Thus, the probability that the action in this appeal will evade review in the future is remote and speculative.

Finally, Respondent argues that dismissal of his appeal will unduly prejudice any future notices he might file with the OCC. He claims that the OCC will look upon the disapproval of his Notice as a negative factor when making determinations on future notices. These concerns, however, are unwarranted because the dismissal of Respondent's appeal removes all legal and precedential force held by the disapproval. Gulf Oil, 778 F.2d at 838 (the agency's initial decision was rendered "without force or effect" when the appeal of that decision was found to be moot). Furthermore, to ensure that the OCC does not improperly consider the disapproval of Respondent's Notice in future deliberations, the Comptroller adopts E&C's recommendation to vacate the disapproval. "Thus, neither the disapproval nor the facts giving rise to it will be considered in any future filing" by Respondent. Acker, 1995 OCC Enf. Dec. LEXIS 114. Vacatur of the disapproval should allay any fears Respondent may have that dismissal of his

appeal will prejudice him before the OCC. See id. (“Vacating the OCC's disapproval of Applicant's notice assures that the record is wiped clean”).

Now, therefore, it is ORDERED that this proceeding is dismissed and that the OCC's disapproval of Respondent's Notice is vacated.

IT IS SO ORDERED this 25th of July, 2001.

John D. Hawke, Jr.
Comptroller of the Currency