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

IN THE MATTER OF AUGUSTUS I. CAVALLARI, PARTICIPATING IN THE AFFAIRS OF SUMMIT NATIONAL BANK TORRINGTON, CONNECTICUT (INSOLVENT)	Docket No. OCC-AA-EC-92-115

DECISION AND ORDERS

I. SUMMARY

On June 23, 1992, the Office of the Comptroller of the Currency issued the following three notices to Augustus I. Cavallari ("Respondent"): (1) a Notice of Charges and Hearing for an Order to Cease and Desist, directing affirmative relief in the form of restitution under 12 U.S.C. § 1818(b) ("Notice of Charges"); (2) a Notice of Intention to Prohibit from Further Participation in the Affairs of Federally Insured Depository Institutions under 12 U.S.C. § 1818(e) ("Prohibition Notice")[1]; and (3) a Notice of Assessment of Civil Money Penalties under 12 U.S.C. § 1818(i) ("Notice of Assessment"), hereinafter collectively referred to as "the Notices".[2]

[1]The hearing clerk has forwarded the Recommended Decision of the Administrative Law Judge regarding the Prohibition Notice to the Board of Governors of the Federal Reserve System for decision pursuant to 12 U.S.C. § 1818(e)(4).

[2]Three other individuals (Richard Barbieri, Sr., Vinal S. Duncan and John A. Corpaci) also were named in the Notices but settled with the OCC prior to the hearing.

A hearing was held on the Notices on August 2, 3 and 4, 1993. On March 28, 1994, the Administrative Law Judge ("ALJ") issued his Recommended Decision. In the Recommended Decision, the ALJ concludes that the allegations contained the Notices were proven, but recommends against ordering Respondent to pay restitution. The ALJ also recommends that the amount of the civil money penalty ("CMP") be reduced to $30,000. Both sides have filed exceptions to the Recommended Decision.

For the reasons stated below, the Comptroller hereby orders Respondent to pay restitution in the amount of $554,903, plus interest at the rate of $149.80 per diem from July 20, 1993, until the restitution amount is paid in full, and to pay a civil money penalty in the amount of $83,000.

II. FINDINGS OF FACT

Except as noted below in the Order, the Comptroller adopts the findings of fact contained in the portion of the Recommended Decision entitled "Findings of Preliminary Fact." See Recommended Decision ("RD") at 5-22, ¶¶ 1-62.

A. Summary of Relevant Findings of Fact

The relevant facts may be summarized as follows. On September 22, 1988, Summit National Bank ("Bank") made a $600,000 loan to a corporation (Winthrop Broadcasting Corporation, hereinafter referred to as "Winthrop") which was formed by family and friends of the Bank's president and chief executive officer, Raymond

Cordani; a consultant with the Bank, Richard D. Barbieri, Sr.; and a business partner of Cordani and Barbieri named Vinal Duncan. The loan was secured by a first mortgage on a parcel of real estate that had cost Winthrop $450,000. In addition, the loan was personally guaranteed by all but one of Winthrop's shareholders. The primary source of repayment for the loan was to be the operating revenues of a radio station.

On December 14, 1988, the Bank granted Winthrop an additional unsecured loan of $100,000 which was also personally guaranteed by Winthrop shareholders. This loan was renewed on April 13, 1989 and again on July 12, 1989. In July 1990, Winthrop stopped payment on both its loans at the Bank. At that time, the principal balances of the loans were $564.357.54 and $50,000.

On July 16, 1990, the OCC issued a temporary cease and desist order to the Bank prohibiting it from extending credit to, inter alia, Barbieri, Corpaci, Duncan and their related interests. On April 25, 1991, the Bank consented to a final cease and desist order to the same effect.

In November 1990, Winthrop filed a balance sheet and income statement with the Bank which showed a negative net worth of $1,026,894 and a net loss of $375,093 as of September 30, 1990. On December 5, 1990, the Bank sent a letter to each of the Winthrop guarantors requesting updated financial statements and payment of past due interest of $40,634.89. The Winthrop

guarantors did not comply with the Bank's request, and on January 25, 1991, the Bank retained the legal services of Respondent on the Winthrop matter.

Respondent advised the Bank's president that it would be in the Bank's best interest to exchange the Winthrop shareholders' guarantees for a security agreement to be given by a company owned by Barbieri, Corpaci, and Duncan, known as Comko, Ltd. ("Comko"). This opinion was based on alleged litigation pending against the Winthrop guarantors. The Bank's president approved the exchange.

On February 26, 1991, Respondent obtained a corporate guarantee from Comko in exchange for the release of the Winthrop guarantors. Neither Respondent nor the Bank obtained any financial information on Comko until after release of the Winthrop guarantors. Comko's financial information as of December 31, 1990, showed that it was suffering large losses and was nearly insolvent.

On May 9, 1991, Respondent drafted a modification agreement renewing the Winthrop loans. Winthrop defaulted on the renewal note after making only three interest payments. Moreover, Winthrop was insolvent.

B. Respondent's Exceptions to the Findings of Preliminary Fact

Respondent specifically excepts to the following paragraphs of

the "Findings of Preliminary Fact:" 8, 20, 21, 30, 32, 35, 37, 38, 39-45, 48, 51, and 55.

The exceptions as to paragraph 48 and 51 are well taken. In paragraph 48, the ALJ refers to "Respondent's renewal of the Winthrop Loans," and in paragraph 51, the ALJ states, "Respondent's participation in the renewal of the Winthrop Loans contributed to the postponement of the liquidation of the collateral securing the loans during a period in which the market for the collateral was declining." While renewal of the loans may have been unsafe or unsound, as Respondent points out, it was the Bank and not Respondent that renewed the loans and there is nothing in the record to indicate that Respondent advised the Bank regarding the renewal. In sum, Respondent merely drafted the necessary documents. There is nothing in the record to indicate that Respondent prepared the documents either in breach of his fiduciary duty or in an unsafe or unsound manner. Because Respondent's "participation" in the renewal appears to have been purely ministerial, the Comptroller finds that Respondent is not liable under either 12 U.S.C. § 1818(b) or (i) on account of his actions regarding the loan renewals.

With respect to his exceptions to paragraphs 20, 21 and 45, Respondent argues that he cannot be assessed a civil money penalty based on a violation of the OCC's cease and desist orders to the Bank because, although he was aware of their existence, he did not actually see the orders or have any knowledge of their

contents. The Comptroller addresses this exception at section III. B. 2., infra.

Respondent's exceptions as to paragraphs 8, 30, 32, 35, 37, and 38 of the Preliminary Findings of Fact focus on his objection to the inference that the Bank released the Winthrop guarantors as a result of his advice. While the Comptroller believes that this is a fair inference given the fact that the Bank specifically asked Respondent for his advice on this matter and the Bank's action conformed to that advice, it is the Comptroller's view that it is Respondent's advice to the Bank, rather than how the Bank responded to that advice, which makes him liable under 12 U.S.C. § 1818(b) and (i). Consequently, the implication to which Respondent objects has no bearing upon his liability.

With regard to paragraphs 39-44, Respondent notes that his advice as to the exchange of guarantors was based upon information from Bank personnel. Respondent, however, could not have relied on the Bank's information regarding the financial condition of Comko because the Bank did not have any such information, and any information regarding the involvement of the Winthrop guarantors' in litigation could have been verified by a simple call to the clerk of the court before which the alleged litigation was pending. In sum, the Comptroller concludes that any reliance by Respondent upon information from Bank personnel regarding these issues would have been inadequate and/or unreasonable.

With respect to paragraph 55, Respondent merely appears to be faulting the collection efforts of the Federal Deposit Insurance Corporation ("FDIC") as Receiver. As noted in section III. A. 2., infra, given both Winthrop's and Comko's financial condition, there cannot seriously be any doubt that the FDIC, as the Bank's receiver, has or will sustain a substantial loss on the Winthrop loans.

Respondent also excepts to the admission of certain evidence. As an initial point, it should be noted that in the absence of clear error, the Comptroller is inclined to defer to the ALJ regarding evidentiary matters. In addition, the evidentiary rules that apply to an administrative proceeding must be distinguished from those that apply to a judicial proceeding. Courts have consistently held that the rules of evidence applicable to judicial proceedings do not strictly apply in administrative proceedings in the absence of a statutory requirement. See Opp Cotton Mills v. Administrator, 312 U.S. 126, 155 (1941). The OCC rules of practice and procedure reflect this principle. 12 C.F.R. § 19.36(a)(3) ("Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in [an OCC enforcement action] if such evidence is relevant, material, reliable and not unduly repetitive"). Thus, for example, Respondent's hearsay exception (evidentiary exception #21) would be grounds for striking the offered evidence only if Respondent demonstrated that the evidence was also

irrelevant, immaterial, unreliable or unduly repetitive, which Respondent does not do.

However, Respondent does except to some of the evidence on the grounds of relevance. These exceptions include testimony and exhibits relating to the following: Barbieri, Defabio, Corpaci, Duncan, Diabio, the Penta Group, and Victoria Court. Evidence presented regarding these persons/entities appears to have been provided solely for background purposes and, in any event, was not relied upon in either the portions of the Recommended Decision that the Comptroller adopts or any portion of this Decision as a basis for the conclusions contained therein.[3]

Finally, Respondent excepts to the ALJ's denial of his Jencks Act requests for documents prepared by or used by two OCC witnesses, OCC examiner Tom O'Dea and John Corpaci, in preparation for their testimony. The ALJ understandably expressed dismay that counsel for Respondent did not request the documents prior to the hearing even though he was aware that the witnesses would be called to testify well in advance of the hearing. Hearing Transcript ("TR") at 252. Moreover, the ALJ's refusal to reschedule the remainder of the hearing to accommodate Respondent's belated

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[3]Respondent also excepts to a number of exhibits on the grounds that the exhibits were not "directed to or presented to" him. The record shows that all of the Enforcement Counsels' exhibits were provided to Respondent's counsel prior to Enforcement Counsels' submission of prehearing statements. See list of exhibits contained in the Office of the Comptroller of the Currency's Prehearing Statement. Thus, this exception too is without merit.

request was appropriate under the circumstances. The purpose of the Jencks Act "is to enable defense counsel to use prior statements of a witness for impeachment purposes." United States v. Bostic, 336 F. Supp. 1312, (D.S.C.), aff'd. 473 F.2d 1388 (4th Cir. 1972), cert. denied 411 U.S. 966 (1973). Here, defense counsel made no effort on cross examination to question the witnesses regarding any prior statements nor did he attempt to attack the veracity of the witnesses. Respondent cannot now complain that he has been deprived of due process in light of his failure to take any protective steps when he had ample opportunity to do so prior to the hearing date. Id.

III. DISCUSSION

The Notices are predicated upon Respondent's status as an "institution-affiliated party."

A. Respondent's Status as an Institution-Affiliated Party

The term "institution-affiliated party" is defined at 12 U.S.C. §-1813(u)(4) to include:

> Any independent contractor (including any attorney appraiser, or accountant) who knowingly or recklessly participated in . . . any unsafe or unsound practice--which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, [an] insured depository institution.

1. Knowing or Reckless Participation in Unsafe or Unsound Practices.

Neither the statute nor prior Comptroller decisions define what is meant by the terms "knowingly" or "recklessly." These terms, however, have been variously defined in both tort and criminal

law. Note, "Liability of Attorneys, Accountants, Appraisers and Other Independent Contractors under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989," 42 Hastings L.J. 249, 273 (1990). For purposes of tort law, "[t]he usual meaning assigned to . . . "reckless" . . . is that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." Id.

In interpreting 12 U.S.C. § 1818(b)(6), the Ninth Circuit recently upheld an Office of Thrift Supervision holding that reckless disregard for the law 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." Jess T. Simpson, OTS Order No. AP 92-123 at 20-24 (1992), aff'd sub nom Simpson v. Office of Thrift Supervision, No. 92-70797, 1994 U.S. App. LEXIS 17365, at *20-*21 (9th Cir. July 18, 1994). Other U.S. Circuit Courts have upheld similar definitions of "reckless." The Securities and Exchange Commission has defined the term to include an extreme departure from the standards of ordinary care, beyond simple or inexcusable negligence, which

presents a danger known to the defendant or so obvious that the defendant must have been aware of it. Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033, 1045 (7th Cir. 1977); see also Rolf v. Blyth, Eastman Dillon & Co., Inc., 570 F.2d 38, 46 & n.13 (2d Cir. 1978) (defining recklessness as "[a] refusal to see the obvious, a failure to investigate the doubtful . . . ."). For purposes of withholding income taxes, the Internal Revenue Service finds that recklessness exists if the person clearly ought to have known of a grave risk that withholding taxes were not paid, and if the person was in a position to ascertain very easily. Sawyer v. United States, 831 F.2d 755, 758 (7th Cir. 1987).

Clearly, recklessness is something more than simple carelessness and something less than premeditated malice. Therefore, the Comptroller defines reckless disregard for the law as (1) a violation of law, regulation, or agency order of which the respondent knew or, with ordinary care, should have known, creating (2) a clear definable risk of which the respondent knew, or, with ordinary care, should have known.

Respondent's conduct was clearly reckless. Respondent had actual knowledge that the temporary cease and desist order existed. Respondent's argument that he had no knowledge of the contents of the order is without merit because with ordinary care he could have made himself aware of its contents and learned that the exchange of guarantors would violate it. The second prong of the

test is also satisfied. Exchanging guarantors created the risk that the new guarantors would not be able to pay. From the record, it is clear that Comko could provide little, if any, support for the loan.

The statutes also do not define the phrase "unsafe or unsound practice," thus, leaving determinations as to what constitutes such a practice to be made on a case-by-case basis. The phrase, however, has been held to:

> encompass what may generally be viewed as conduct deemed contrary to accepted standards of banking operation which might result in abnormal risk or loss to a banking institution or shareholder.

First National Bank of Eden v. Comptroller of the Currency, 568 F.2d 610, 611 (8th Cir. 1978); see also Northwest Nat'l Bank v. Office of the Comptroller of the Currency, 917 F.2d 1111, 1115 (8th Cir. 1990). The failure to assess the financial condition of the Winthrop guarantors prior to the exchange of guarantors and the failure to assess the financial condition of Comko or the value of the additional security pledged by Comko prior to the exchange of guarantors was clearly contrary to accepted standards of banking operation and resulted in an abnormal risk of loss to the Bank.

Finally, Respondent, who served as legal counsel for the Bank in matters involving more than half the value of the Bank's outstanding loans, advised the Bank that an exchange of guarantors to the Winthrop loans would be in the best interests

of the Bank.[4] Thereafter, Respondent drafted the releases of the Winthrop guarantors and participated in the preparation of the Comko security agreement. In sum, Respondent clearly "participated in" these unsafe or unsound practices.

2. Likelihood of Loss to the Bank

As reflected in financial statements from 1987 to 1989, the Winthrop guarantors' net worth was in excess of $16,000,000.[5] Winthrop itself had never managed to generate a profit and was insolvent, and thus, had no capacity to service or pay its loans from the Bank. At the time of the exchange, Comko had large operating losses, negative $292,129, and minimal net worth, $24,068. Given this situation, it is considerably more than likely that the Bank would sustain more than a minimal financial loss as a result of the exchange of guarantors. As of July 19, 1993, the FDIC had not received any recoveries on the Winthrop loans and did not expect to receive any such recoveries in the future.

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[4]As the ALJ noted, despite the volume and proportion of loans with which Respondent was involved, Respondent considered himself a "transaction attorney," serving the Bank in disparate transactions involving collections, debt workouts, and closing on certain loans. RD 27. The Comptroller concurs in the ALJ's conclusion that "[t]here is no distinction stated in the statute, nor is there one logically drawn, for an attorney involved in individual transactions as opposed to an internal "house," or a "regulatory" attorney." RD 27.

[5]The Winthrop guarantors were uncooperative in aiding the Bank's efforts to obtain more current financial information. TR at 112. It is clear that the Winthrop guarantors, in fact, were not subject to the litigation brought by the Bank of Boston on a loan to Victoria Court upon which Respondent based his legal opinion. TR at 160-169. Nor is there any evidence that the Winthrop guarantors' financial strength was otherwise impaired at the time of the exchange.

3. Summary

For these reasons, the Comptroller concludes that Respondent was an "institution-affiliated party" within the meaning of 12 U.S.C. § 1813(u)(4).[6]

B. Liability under 12 U.S.C. § 1818

With regard to an institution-affiliated party, 12 U.S.C. § 1818(b)(1) provides, in pertinent part, as follows:

> If in the opinion of the appropriate Federal banking agency, . . . any institution-affiliated party . . . has engaged . . . in an unsafe or unsound practice in conducting the business of such depository institution, . . . the agency may issue and serve upon . . . such party a notice of charges . . . .

Moreover,

> [I]f upon the record made at [a hearing on a notice of charges] the agency shall find that any . . . unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the . . . institution-affiliated party an order to cease and desist from any such . . . or practice.

Similarly, paragraph 12 U.S.C. § 1818(i)(2)(B) provides, in pertinent part, as follows:

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[6]The ALJ concluded that Respondent breached his fiduciary duty within the meaning of 12 U.S.C. § 1813(u)(4). Respondent argues that Enforcement Counsel failed to establish that Respondent had breached his fiduciary duty to the Bank because Enforcement Counsel failed to establish the standard of care for malpractice in Connecticut where Respondent is licensed to practice law. It is not clear that it would be necessary to establish malpractice in order to demonstrate a breach of fiduciary duty under 12 U.S.C. § 1813(u)(4). See O'Melveny & Myers v. Federal Deposit Insurance Corporation, 62 U.S.L.W. 4487, (6/13/94)(State rather than federal rules of decision govern the tort liability of attorneys who provided services to the bank). Respondent, however, is correct in that there is no evidence in the record regarding the appropriate standard of care. Consequently, the Comptroller does not base his conclusion that Respondent qualifies as an "institution-affiliated party" on breach of fiduciary care.

> [A]ny institution-affiliated party who--
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> > (i)(I) commits any violation described in any clause of subparagraph (A);[7] (II) recklessly engages in an unsafe or unsound practice in conducting the affairs of such insured depository institution;
> >
> > (ii) which . . . practice . . . is likely to cause more than a minimal loss to such depository institution,
>
> shall forfeit and pay a civil penalty of not more than $25,000 for each day during which such . . . practice . . . .

1. Unsafe or Unsound Practices

As noted above, Respondent was retained to provide legal services to the Bank regarding the Winthrop loans. Respondent advised the Bank's president that the exchange would be in the best interest of the Bank. Respondent rendered this advice without assessing either the financial condition of the Winthrop guarantors, the financial condition of Comko or the value of the additional security pledged by Comko prior to the exchange of guarantors. As stated above, the Comptroller has concluded that this action was reckless, unsafe or unsound, and is likely to cause more than a minimal loss to the Bank. For this reason, the Comptroller concludes that enforcement remedies are available against Respondent under both 12 U.S.C. § 1818(b)(1) and 12 U.S.C. § 1818(i)(2)(B).

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[7]Violations described in subparagraph (A) of 12 U.S.C. § 1818(i)(2) include violations of "any final order or temporary order issued pursuant to [12 U.S.C. § 1818(b) or (e)]."

2. Violation of the Temporary Cease and Desist Order

The Office of the Comptroller of the Currency issued a temporary cease and desist order to the Bank on July 16, 1990. Article I of the temporary order prohibited the Bank from granting or making any extension of credit to Barbieri, Corpaci, Barbieri, Jr., or Duncan or their related interests, as defined in 12 C.F.R. § 215.3. On February 26, 1991, the Bank released the Winthrop guarantors from any further obligation on the Winthrop loans in exchange for a guarantee and security interest from Comko which was owned by Barbieri, Corpaci and Duncan. The definition of the term "extension of credit" ordinarily does not include a "guarantee for the protection of a bank of any loan . . . previously acquired by the bank." 12 C.F.R. § 215.3(b)(4) (emphasis added). The exchange of guarantors in this case clearly was not made for the benefit of the Bank. Consequently, the exchange constitutes an "extension of credit" to Comko within the meaning of 12 C.F.R. § 215.3 and a violation of the OCC's outstanding temporary cease and desist order against the Bank. Cf. 12 C.F.R. § 215.3(b)(4).

As noted above, Respondent argues that he cannot be held liable under the temporary order because, although he does not dispute that he knew of its existence, he argues that he was neither a subject thereof nor had he actually seen the order. Respondent's argument is without merit. The Bank hired Respondent to provide legal services regarding the Winthrop loans. Respondent knew of the existence of the order but chose not to review its contents.

Respondent simply cannot escape liability under the order because he chose not to inform himself of its contents. In sum, Respondent chose to ignore the requirements of the order at his peril, and he is hereby held accountable for that choice.

IV. REMEDIES

1. Restitution

An order issued pursuant to 12 U.S.C. § 1818(b)(1) may require the institution-affiliated party "to take affirmative action to correct the conditions resulting from any such . . . practice." 12 U.S.C. § 1818(b)(1). Such affirmative action may include restitution, reimbursement, indemnification, or guarantee against loss where the "practice involved a reckless disregard for," inter alia, a prior agency order. 12 U.S.C. § 1818(b)(6). As explained supra, pages 9-11, Respondent's conduct clearly demonstrated reckless disregard for the temporary cease and desist order.

Having concluded that Respondent was liable under 12 U.S.C. § 1818(b), the ALJ nonetheless recommended against issuance of an order requiring Respondent to make restitution, finding that it was unclear whether the FDIC had been made whole with respect to the Winthrop loans as a result of settlements with Richard D. Barbieri, Sr. and Raymond Cordani. RD 23-25. This, however, does not appear to be the case. The Barbieri settlement clearly provides that all restitution shall be payable to the Office of Thrift Supervision. See Order to Cease and Desist, Order of

Prohibition and Order for Restitution filed 6/22/93 at 4-5. And, while the Cordani settlement includes a restitution payment of $75,000 to the FDIC, it has not been shown whether this payment was applied to losses on the Winthrop loans or the other losses alleged to have been caused by Cordani. See The Comptroller of the Currency's Exceptions to the Recommended Decision and Order of the Administrative Law Judge filed 4/29/94 at 8; see also Stipulation and Consent Order between the OCC and Raymond Cordani filed 6/22/93.[8]

For these reasons, the Comptroller concludes that Respondent should be required to pay restitution in the amount of $554,903 plus interest.

2. Amount of Civil Money Penalty

As noted above, 12 U.S.C. § 1818(i)(2)(B) authorizes the Comptroller to assess up to $25,000 for each day during which an unsafe and unsound practice occurs. The ALJ concluded that the unsafe or unsound practices and violations in which Respondent participated continued for a total of 380 days. Thus, 12 U.S.C. § 1818(i)(2)(B) authorizes the Comptroller to assess a CMP of up to $9,500,000. However, with respect to any penalty to be assessed under 12 U.S.C. § 1818(i)(2)(B), the Comptroller takes into consideration the following factors in determining the

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[8]Neither the OCC nor Respondent offered any evidence at the hearing concerning these settlements. The ALJ decided, sua sponte, to take official notice of the settlements after the hearing and briefing period.

appropriateness of the penalty --

(a) the size of financial resources and good faith of . . . the person charged;

(b) the gravity of the violation;

(c) the history of previous violations; and

(d) such other factors as justice may require.

12 U.S.C. § 1818(i)(2)(G).

(a) Respondent's Financial Resources and Good Faith

Having concluded that Respondent engaged in unsafe or unsound practices and violated both the temporary and final cease and desist orders, the ALJ recommends a CMP of a lesser amount than sought in the Notice of Assessment. This recommendation is based solely upon Respondent's limited adjusted gross income without consideration of his substantially greater net worth. This was error.

(i) Respondent's Financial Resources

Respondent submitted personal financial statements on February 6, 1990, that show a net worth of between $1.1 and $1.3 million.[9] OCC Exhs. 119 and 120. Respondent's federal income tax return for 1991 showed gross income of approximately $76,000 and adjusted gross income of $68,000. OCC Exh. 123. In addition, Respondent has a professional liability insurance policy from CNA Insurance Company ("CNA") which covers malpractice claims up to

[9]Respondent submitted financial statements to two different banks on February 6, 1990. OCC Exhibits ("OCC Exhs.") 119 and 120. The statements listed different amounts of assets, liabilities, and net worth. Id.

$500,000[10] that would appear to cover restitution and/or CMPs ordered against Respondent. OCC Exh. 124, at 1, 3, 13-14.[11]

On the basis of this evidence the Comptroller concludes that Respondent's financial resources support a determination that a $83,000 CMP is appropriate.

(ii) Respondent's Lack of Good Faith

The ALJ concluded that the testimony given and documentary evidence admitted did not support a finding that Respondent acted in good faith. The Comptroller concurs in this conclusion. Consequently, the Comptroller concludes that this factor does not support further mitigation of the amount of the CMP to be assessed against Respondent. The extent to which lack of good faith would increase the penalty has already been calculated into the amount.

(b) Gravity of the Violation

The ALJ also concluded that Respondent's unsafe and unsound practices contributed, if not fully caused, a loss to the Bank of at least $554,903.83. The Comptroller concurs in this conclusion. Consequently, the Comptroller concludes that this factor does not support further mitigation of the amount of the

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[10]The policy also allows for a separate and additional $500,000 for costs associated with defending such claims.

[11]On June 23, 1992, the OCC filed a claim against Respondent. OCC Exh. 124, at 15-17. Respondent provided notice to CNA of the OCC's claim on December 3, 1992.

CMP to be assessed against Respondent. The extent to which lack of good faith would increase the penalty has already been calculated into the amount.

(c) Additional Factors

In evaluating the appropriate CMP amount, the ALJ assumed that Respondent's future income would decline as a result of this action. This consideration was neither argued by Respondent nor supported by evidence in the record; consequently, the Comptroller concludes that the ALJ should not have taken this into consideration in determining the appropriate CMP amount.[12]

However, an additional factor requires reducing the CMP from the original $250,000 assessed. The CMP Notice assessed the original penalty based on two acts, the exchange of guarantors and participation in the renewal of the loans. The Comptroller assesses a penalty based on only one act, the exchange of guarantors. Because no specific amount was attributed to each act, it is assumed that the acts weighed equally in the original assessment. Therefore, because Respondent did not participate in the renewal of the loans, the CMP should be halved from the original amount.

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[12]Moreover, if the Comptroller were to take this factor into consideration, then all CMP assessments would have to be reduced inasmuch as they all generate adverse publicity against all respondents. In this regard, there is nothing to distinguish Respondent from all other individuals against whom CMPs are assessed.

In addition, it was alleged that Respondent's participation in the exchange of guarantors made a CMP appropriate under each of three theories: unsafe or unsound practice, violation of agency order, and breach of fiduciary duty. One of these three theories (breach of fiduciary duty) was not proved. Again, because no specific amount was attributed to each theory, it is assumed that each theory weighed equally in the original assessment. Therefore, because only two of the three theories were proved, a CMP of two-thirds of the original assessment for exchange of guarantors is appropriate.

In sum, the original assessment for the exchange of guarantors is deemed to be $250,000/2, or $125,000. The appropriate assessment for a CMP under two theories is $125,000 x 2/3, or $83,000.

(d) Conclusion

For the forgoing reasons, the Comptroller concludes that Respondent should be assessed a CMP in the amount of $83,000.

ORDER

Based upon the entire record of the proceeding, the Recommended Decision of the ALJ, the submissions of the parties, the facts found and reasons set forth in the accompanying Final Decision, and after consideration of factors in aggravation and mitigation of the conduct of Respondent Augustus I. Cavallari, the Comptroller, pursuant to his authority under 12 U.S.C. § 1818, makes the following Findings, Conclusions and Order.

1. On June 23, 1992, the OCC issued a Notice of Charges and Hearing for an Order to Cease and Desist, directing affirmative relief in the form of restitution under 12 U.S.C. § 1818(b); a Notice of Intention to Prohibit from Further Participation in the Affairs of Federally Insured Depository Institutions under 12 U.S.C. § 1818(e); and (3) a Notice of Assessment of Civil Money Penalties against Respondent, Augustus I. Cavallari, Jr., former legal counsel and institution-affiliated party of the Bank.

2. On August 2, 3 and 4, 1993, a hearing was held on the Notices in Hartford, Connecticut, giving all parties the opportunity to be heard.

3. The Comptroller adopts the Findings of Preliminary Fact as found by the ALJ in the Recommended Decision, with the following exceptions:

a. Finding Number 46 is amended to read: "On May 9, 1991, Respondent drafted documents concerning the renewal of the $100,000 unsecured loan to Winthrop, which was then five months past due, and the $600,000 loan to Winthrop, which was then 312 days past due, into a single note with a five-year maturity (the "Renewal Note"). (Jt. Stip. 104; OCC exh. 69; O'Dea TR 177-183; OCC Exh. 75, pp. 2-3, 5-6.)"

b. Finding Number 48 is amended to read: "The Bank's renewal of the Winthrop loans was completed without obtaining any new financial information on Winthrop. (OCC Exh. 43; OCC Exh. 127, pp. 115-164.) The Bank's renewal of the Winthrop Loans was not approved by Summit's Loan Committee or the Board of

Directors. (O'Dea TR 182-183.)"

c. Finding Number 51 is amended to read: "The Bank's renewal of the Winthrop Loans contributed to the postponement of the liquidation of collateral securing such loans during a period in which the market for that collateral was declining, and made the unencumbered assets of Winthrop available to other creditors. (OCC Exh. 69; O'Dea Tr 82, 187-188; Corpaci TR 417-419.)"

4. The Comptroller adopts the Conclusions of Law as determined by the ALJ in the Recommended Decision, with the following exceptions and additions:

a. Conclusions Number 10 is amended to read: "Respondent's participation in the exchange of guarantees for Comko was an unsafe or unsound practice, and involved a reckless disregard for the law, applicable regulations, and prior order of the Office of the Comptroller of the Currency, for purposes of 12 U.S.C. § 1818(b)(1), (b)(6)."

b. Conclusion Number 11 is amended to read: "Respondent's participation in the exchange of guarantees for Comko was a violation of a temporary order, a recklessly unsafe or unsound practice, and caused Summit more than a minimal loss, for purposes of 12 U.S.C. § 1818(i)(2)(A), (i)(2)(B)."

c. Because it relates solely to the Prohibition action, Conclusion Number 12 is deleted. A new Conclusion Number 12 is added to read: "Respondent did not participate in the renewal of the Winthrop Loans, as that term is defined for purposes of 12 U.S.C. § 1813(u)."

d. Conclusion Number 13 is amended to read:

"Respondent violated 12 U.S.C. § 1818(b), and is subject to the imposition of an order to cease and desist from unsafe or unsound practices and violation of final Orders issued. There is insufficient evidence to establish that Summit has been made whole by restitution agreements entered into with other Respondents."

e. Because it relates solely to the Prohibition action, Conclusion Number 14 is deleted.

5. Respondent is hereby **ORDERED** to comply with the following Order to Cease and Desist:

ARTICLE I

Respondent shall cease and desist from engaging in such violations and unsafe or unsound banking practices.

ARTICLE II

Respondent shall immediately make restitution to the Federal Deposit Insurance Corporation, as receiver for the Bank, in the amount of five hundred fifty-four thousand nine hundred three dollars and eighty-three cents ($554,903.83), plus a per diem interest charge of one hundred forty-nine dollars and eighty cents ($149.80), which shall run from July 20, 1993 until the restitution amount is paid in full.

ARTICLE III

(1) If, at any time, the Comptroller deems it appropriate in fulfilling the responsibilities placed on him by the several laws of the United States of America to undertake any other action affecting Respondent, nothing in this Order shall in any way

inhibit, estop, bar or otherwise prevent the Comptroller from so doing.

(2) Pursuant to 12 U.S.C. § 1818(b)(2), this Order shall become effective at the expiration of 30 days after the service of the Order upon Respondent and shall remain effective and enforceable except to such extent as it is stayed, modified, terminated, or set aside by the Comptroller or a reviewing court.

(3) Pursuant to 12 U.S.C. § 1818(i)(1) and (2), in order to effect compliance with this Order, the OCC has the authority to seek a court order requiring compliance and/or assess Respondent a civil money penalty not to exceed five thousand dollars ($5,000) for each day during which noncompliance continues.

6. Respondent Augustus I. Cavallari, Jr. is hereby **ORDERED**, pursuant to 12 U.S.C. § 1818(i)(2)(b), to pay a civil money penalty in the amount of eighty-three thousand dollars ($83,000).

7. Respondent shall make full compliance with the Order to Cease and Desist, and full payment of the penalties assessed herein, within sixty days after the effective date or the date of service of this Order, whichever is later. Remittance of civil money penalties shall be payable to the Treasurer of the United States and delivered to:

Hearing Clerk
Office of the Chief Counsel
Office of the Comptroller of the Currency
Washington, DC 20219

8. This Order shall be and is effective immediately upon service and shall remain effective and enforceable except to such extent as it is stayed, modified, terminated, or set aside by

action of the Comptroller or a reviewing court, in accordance with any applicable statute or regulation.

9. Respondent is hereby notified that he has the right to appeal this Decision and Order to the U.S. Court of Appeals within 30 days after the date of service of this Decision and Order. 12 U.S.C. § 1818(h).

SO ORDERED this 28th day of July, 1994.

EUGENE A. LUDWIG
Comptroller of the Currency

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

IN THE MATTER OF AUGUSTUS I. CAVALLARI, PARTICIPATING IN THE AFFAIRS OF SUMMIT NATIONAL BANK TORRINGTON, CONNECTICUT (INSOLVENT)	Docket No. OCC-AA-EC-92-115

NOTICE OF TECHNICAL CORRECTIONS

The Comptroller makes the following technical corrections to the Decision and Order issued on August 1, 1994.

1. The sentence that begins on the bottom of page 2 and carries over to page 3 ("On September 22, 1988, . . .") is revised to read as follows:

> On September 22, 1988, Summit National Bank ("Bank") made a $600,000 loan to a corporation (Winthrop Broadcasting Corporation, hereinafter referred to as "Winthrop") which was formed by family and friends of John Corpaci, Richard D. Barbieri, Sr., and Vinal Duncan.

See Recommended Decision at p. 8, #12.

2. The sentence that begins on the bottom of page 12 and carries over to page 13 ("Finally, Respondent, who served . . .") is revised to read as follows:

> Finally, Respondent, who served as legal counsel for the Bank for loans representing approximately half of Summit's capital base, advised the Bank that an exchange of

guarantors to the Winthrop loans would be in the best interests of the Bank.

See Recommended Decision at p. 7, #7.

SO ORDERED this 21st day of August, 1994.

EUGENE A. LUDWIG
Comptroller of the Currency