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

IN THE MATTER OF	)	
Paul Lowder	)	OCC-AA-EC-93-73 OCC-AA-EC-93-74
Former Director, Agent, and institution-affiliated party, First National Bank in Kaufman Kaufman, Texas	)	

DECISION OF THE COMPTROLLER OF THE CURRENCY

This matter is before the Comptroller of the Currency on a motion for entry of default in civil money penalty and cease and desist proceedings. Upon consideration of the pleadings, the recommended decision of the Administrative Law Judge ("ALJ"), and the entire record, I conclude that while entry of a final, unappealable default order pursuant to 12 C.F.R. § 19.19(c)(2) is appropriate, a final default judgment is not possible until the Comptroller has before him sufficient information for ascertaining the appropriate sums for a civil money penalty and restitution.

I. PROCEDURAL HISTORY

On May 12, 1993, the Office of the Comptroller of the Currency ("OCC") issued a Notice of Charges ("C&D Notice") and a Notice of Assessment of a Civil Money Penalty ("Assessment Notice") against Respondent, a former director, agent, and

institution-affiliated party, of the First National Bank in Kaufman, Kaufman, Texas ("Bank"). The Notices alleged that Respondent had caused, brought about, participated in, counseled or aided and abetted: (1) payment of dividends out of the Bank's capital in excess of the statutory authority and in violation of 12 U.S.C. §§ 56, 60 and 161; and (2) extensions of credit by the Bank in excess of fifteen percent of the Bank's unimpaired capital and unimpaired surplus in violation of 12 U.S.C. § 84 and 12 C.F.R. § 32.5.

Respondent failed either to request a hearing or to file an answer with respect to the matters alleged in the Notices. On July 28, 1993, counsel for the OCC's Enforcement and Compliance Division ("Enforcement Counsel") moved for entry of default against Respondent. Respondent filed no reply to the default motion. On August 27, 1993, the Administrative Law Judge ("ALJ") before whom the proceeding was pending, ordered Respondent to show cause why the motion for default should not be granted. Respondent did not reply to the ALJ's order. On November 5, 1993, the ALJ granted Enforcement Counsel's Motion for Entry of an Order on Default pursuant to OCC Practice Rule 19.19 (12 C.F.R. § 19.19).

II. FACTUAL SUMMARY

According to the allegation contained in the Notices, between 1987 and 1989, the Bank purchased notes with a face value of approximated $7.5 million from a brokerage firm, NPCA, Inc., which was owned by Bank insiders. Notices at p. 2. NPCA

purchased the notes that it sold to the Bank for approximately 75% of their face value and sold them to the Bank at face value. Id. at 3. The Notices allege that the difference between the price that the brokerage firm paid for the loans and the amount the Bank paid for them represents the brokerage firm's commission. Id. The Notices also allege that the amount of this commission, which totaled over 22% of the purchase price, was excessive in light of the fact that the brokerage firm received commissions of only 1 to 2.5% from two other banks. Id. at 5.[1] The Notice also alleges that Respondent received $559,699 of these excessive commissions.

Based on the above stated allegations, the Notice of Charges requests that Respondent be ordered to make restitution to the Federal Deposit Insurance Corporation as receiver for the Bank in the amount of $559,699, and the Notice of Assessment requests that a civil money penalty be issued against Respondent in the amount of $15,000. Notice of Charges at p. 6.

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[1]Approximately 90% of NPCA's sales during the period in question were to FNB Kaufman. In 1988, however, two other banks purchased loans from NPCA. Notices at p. 3. The price paid by these other banks was between 15.95% and 18.79% more than the brokerage firm had paid for them. Id. at pp. 4-5. The brokerage firm, however, subsequently purchased certain repossessed assets and charged-off loans from one of the banks and paid down the balances on several problem loans of the other. Id. Based on these subsequent transactions, the Notice concludes that the actual commission paid to the brokerage firm was between 1.41% and 2.49%. Id. at p. 5. From these figures, the Notice further concludes that the maximum reasonable commission for the loans that the Bank purchased was 3% of the purchase price of the notes and that the remaining $1.2 million in commissions that the Bank paid constitutes loss.

III. DISCUSSION

1. Entry of Default Judgment is Appropriate.

Failure to file an answer constitutes a waiver of Respondent's right to appear and contest the allegations in a notice. 12 C.F.R. § 19.19(c)(1). Moreover, pursuant to 12 U.S.C. § 1818(b)(1), a party who fails to appear shall be deemed to have consented to the issuance of a cease and desist order. Respondent neither requested a hearing nor filed an answer. For this reason, the Comptroller concludes that entry of default judgment is appropriate in this case.

Also, failure to oppose a motion is deemed to be consent to the entry of an order. 12 C.F.R. § 19.23(d)(2). Respondent did not oppose Enforcement Counsel's motion for entry of default. Consequently, Respondent is deemed to have consented to the entry of default judgement.

Finally, Respondent failed to respond to the ALJ's order to show cause why Enforcement Counsel's motion for entry of default judgment should not be granted. The Comptroller concludes that entry of default judgment is appropriate for this reason as well.

2. A Final Order Cannot Be Issued Until the Measure of Recovery Can Be Ascertained.

Even in a case where, as here, entry of default is appropriate, a final default judgment is not possible against a party in default until the measure of recovery has been

ascertained. Pope v. United States, 323 U.S. 1, 12 (1944); Dundee Cement Co. v. Howard Pipe & Concrete Products, Inc., 722 F.2d 1319, 1323 (7th Cir. 1983); Flaks v. Koegel, 504 F.2d 702, 707 (2d Cir. 1974); Geddes v. United Financial Group, 559 F.2d 557, 560 (9th Cir. 1977).

The ALJ recomended a civil money penalty and restitution in the case of the cease and desist action in the amounts sought in the Notices.[2] The restitution amount is based upon the conclusion that the commissions that the Bank paid to NPCA (and NPCA passed along to Respondent) was excessive. The conclusion was based upon commissions that NPCA received from two other banks. These commissions were adjusted to take into account NPCA's subsequent purchase of certain repossessed assets and charged-off loans from one of the banks and payments to reduce the balances on several problem loans of the other. However, the Comptroller has concluded that it also would be helpful to have information regarding the commissions that similarly situated banks pay for loans from brokerage firms generally.

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[2]The Comptroller notes that although the OCC's Rules of Practice and Procedure require the ALJ to file a recommended decision "containing the findings and the relief sought in the notice" either in the event that respondent fails to file an answer or fails to appear at hearing (12 C.F.R. §§ 19.19(c)(1), 19.21). The term "relief" as it is used in these rules, however, refers only to the nature of the relief, in this case restitution in the cease and desist action and assessment of a civil money penalty. The term "relief" does not refer to the amount of the restitution or the civil money penalty. The ALJ must make a recommendation as to these amounts on the basis of the evidence submitted by the parties and any statutory factors that may be at issue.

Additionally, in issuing a civil money penalty, the Comptroller must "properly consider the evidence in relation to the appropriate statutory factors," Dazzio v. F.D.I.C., 970 F.2d 71, 77 (5th Cir. 1992), even in the event of a default judgment. Oberstar v. F.D.I.C., 987 F.2d 494, 505 (8th Cir. 1993). Thus, in assessing a civil money penalty the Comptroller must take into account the appropriateness of the penalty with respect to: (1) the size of financial resources and good faith of the person charged; (2) the gravity of the violation; (3) the history of previous violations; and (4) such other matters as justice may require. 12 U.S.C.A. § 1818(i)(2)(G) (West 1989).

The record as it currently stands does not contain sufficient information upon which the Comptroller may assess these statutory factors.[3]

For these reasons, the Comptroller hereby orders the parties to submit to the hearing clerk information regarding the measure of recovery sought with respect to both the cease and desist action and the civil money penalty assessment as follows:

(1) Enforcement Counsel shall file its submission within 14 days of the date of issuance of this order;

(2) Respondent shall file its submission and any response to Enforcement Counsel's submission within 14 days of

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[3]This situation ordinarily would cause the Comptroller to remand the case to the ALJ for additional proceedings to determine the appropriate measure of damages. Under the circumstances of this case, however, the Comptroller has decided to seek additional information directly from the parties.

the date upon which Enforcement Counsel's submission is served.

So Ordered, this 23rd day of March, 1994.

EUGENE A. LUDWIG
Comptroller of the Currency