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

IN THE MATTER OF MICHAEL A. O'CONNELL Former President and Director Metropolitan National Bank McAllen, Texas	AA-EC-92-21

DECISION OF THE COMPTROLLER OF THE CURRENCY

I. SUMMARY

The Comptroller of the Currency, pursuant to 12 U.S.C. § 1818(b)(1), imposes an Order to Cease and Desist on Michael A. O'Connell (Respondent), former president and director of Metropolitan National Bank, McAllen, Texas (Bank). This Order stems from findings of fact and conclusions of law demonstrating that Respondent committed an unsafe or unsound practice by pledging the security of a Bank customer without permission in order to carry on unauthorized trading on margin, thereby incurring substantial losses and causing the Bank's insolvency. The Comptroller, finding that Respondent was unjustly enriched and acted in reckless disregard for the law within the meaning of 12 U.S.C. § 1818(b)(6)(A)(i) and (ii), orders Respondent to reimburse the Federal Deposit Insurance Corporation, Receiver for the Bank, in the amount of $219,108.88.

II. PROCEDURAL HISTORY

On January 21, 1992, the Office of the Comptroller of the Currency (OCC) issued a Notice of Charges against Respondent

alleging that "[c]ontrary to safe and sound banking practices and in breach of his fiduciary duties as an officer and director of the Bank, Respondent caused, brought about, participated in, counseled or aided or abetted the Bank in pledging the security of a Bank customer as collateral in order to speculate in the price fluctuations of United States Treasury Bonds." Notice, Article II, ¶ 1. The Notice set a hearing to determine whether an Order to Cease and Desist should be issued requiring Respondent to reimburse the Federal Deposit Insurance Corporation, as receiver, for the Bank's losses in the amount of $219,000, pursuant to 12 U.S.C. §§ 1818(b)(1) and 1818(b)(6).

Respondent filed an answer, and a hearing was held before Administrative Law Judge Walter J. Alprin (ALJ) in Corpus Christi, Texas, on September 29 and 30, 1992. The OCC was represented by its Enforcement and Compliance Division (E&C), and Respondent was represented by counsel. Following the hearing, briefs and reply briefs were filed, and on February 2, 1993, the ALJ issued a recommended decision. Both parties then filed exceptions, and the case was submitted to the Comptroller on March 9, 1993.[1]

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[1]On January 21, 1992, the OCC also issued a Notice of Intention to Prohibit Further Participation Against Respondent, AA-EC-92-22. This Notice and the Notice in AA-EC-92-21 were consolidated for purposes of the hearing, and the ALJ's recommended decision addresses the charges in both Notices. Following the issuance of the ALJ's recommended decision, the proceeding in AA-EC-92-22 was referred for final decision to the Board of Governors of the Federal Reserve System, as required by 12 U.S.C. § 1818(e)(4).

III. STATUTORY BACKGROUND

Authority to Issue the Final Decision

The statute under which this proceeding was brought and OCC's Rules of Practice and Procedure provide that the proceeding is governed by the Administrative Procedure Act (APA), 5 U.S.C. §§ 554-557. See 12 U.S.C. § 1818(h)(1) and 12 C.F.R. § 19.5(a), respectively.

The APA, 5 U.S.C. § 557(b), provides that when an agency reviews an ALJ's recommended decision, the agency has all the powers it would have in making the decision in the first instance. The agency may review the evidence de novo, make its own findings of fact, and substitute its judgement on law and policy for those of the ALJ. Edles and Nelson, Federal Regulatory Process: Agency Practices and Procedures 167 (2d ed. 1992 Supp.). The OCC's rules allow the Comptroller to limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties. 12 C.F.R. § 19.40(c)(1).

The APA also provides that the proponent of an order (in this case, the OCC) has the burden of proof. 5 U.S.C. § 556(d). Section 556(d) goes on to state that a "sanction may not be imposed or . . . an order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative and substantial evidence." In Steadman v. SEC, 450 U.S. 91, 102 (1981), the Supreme Court held that the standard of proof

applicable to adjudications brought under the APA, specifically, §§ 556 and 557, is the preponderance of the evidence standard.

Authority to Issue a Cease and Desist Order

Under relevant portions of 12 U.S.C. § 1818(b), the OCC is authorized to issue an order to cease and desist if it can establish that an institution-affiliated party (IAP)[2] is engaging or has engaged in an unsafe or unsound practice in conducting the business of the Bank, or is violating or has violated a law, rule, or regulation. Upon a finding that any violation or unsafe or unsound practice specified in the notice of charges has been established, the OCC may issue an order to cease and desist from any such violation or practice and may require the IAP "to take affirmative action to correct the conditions resulting from any such violation or practice." 12 U.S.C. § 1818(b)(1). Among other things, the OCC may require that the IAP make restitution or reimbursement if the IAP was unjustly enriched in connection with the violation or practice or if the violation or practice involved a reckless disregard for the law or any applicable regulations. 12 U.S.C. § 1818(b)(6).

IV. THE ALJ'S RECOMMENDED DECISION

Findings of Fact

The ALJ made 34 findings of fact, which are summarized

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[2]The term "institution-affiliated party" includes any director, officer, or employee of an insured depository institution. 12 U.S.C. § 1813(u).

selectively below for the convenience of the reader.[3]

In 1989, the Bank entered into a Depository Contract with the City of Pharr, Texas, to provide various depository and funds management services. (FF #2)[4] The Depository Contract did not grant the Bank or Respondent the authority to participate in a trading program on behalf of or as agent for the City of Pharr, and the Bank's board of directors never authorized Respondent to engage in margin trading on behalf of the Bank. (FF #6) Nevertheless, Respondent contacted Wayne Moran, a broker, stating that the Bank was interested in opening a margin trading account. (FF #3) Respondent represented that the Bank was the City of Pharr's agent and that he had the authority to engage and was interested in actively trading the market in U.S. 30-year bonds on a day trade basis. (FF #3) To open a margin trading account, Respondent completed a Corporate Authorization to Trade Form (CAT Form) and identified the Bank as the corporation that owned the account. (FF #8, #9) The margin trading account, as opened by Respondent on April 30, 1990, was styled "Metropolitan National Bank, Agent for Pharr." (FF #11) In addition to the CAT Form, Respondent executed a Customer/Margin Agreement, which provided

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[3] For the sake of brevity, this summary abbreviates some of the ALJ's Findings of Fact and omits others as not essential to an understanding of the case. The full text of the ALJ's Findings of Fact is set forth in pp. 2-16 of the recommended decision and, as noted infra, it is this text that the Comptroller adopts as his own.

[4] In this Decision, "FF" refers to Finding of Fact; "RD" to the ALJ's recommended decision; and "TR" to the hearing transcript.

that Respondent and/or the Bank would maintain securities or other property in the account as collateral. (FF #10) Respondent directed that a $435,000 U.S. Treasury Note owned by the City of Pharr be used as collateral to secure trades in the account. (FF #20 and 21).

Because Respondent had failed to submit documentation evidencing that he was the agent for the City of Pharr or was authorized by the Bank to open the Account, the brokerage firm requested the same in June 1990. (FF #12) At a meeting between Respondent and brokerage firm personnel on June 18, 1990, Respondent filled out and executed a modified CAT form designating Respondent as the officer authorized to trade on behalf of the Bank. (FF #14) The date given in the modified CAT form for the Bank board meeting at which the resolution to execute the form was supposedly unanimously approved was April 17, 1990. However, the corporate resolution approved by the board on that date does not authorize Respondent to establish a trading account, but only authorizes Respondent "to transact for funds on accounts held at other banks." (FF #15)

At the same meeting, the Customer/Margin Agreement was modified to make the name on the account "Metropolitan National Bank (2)." Respondent signed the modified Customer/Margin Agreement (FF #16), and backdated the document to reflect the date of April 27, 1990. (FF #18) Respondent later admitted to the Bank's board that he changed the name on the margin account to avoid having to disclose his trading activities to the City of

Pharr. (FF #19)

Between approximately May 11, 1990, and September 19, 1990, there were more than 200 trades in 30 year Treasury bonds on a day trade basis, and all trades were made on Respondent's instructions. (FF #22) By June 6, 1990, losses in the margin trading account amounted to $76,438, but Respondent wanted to continue trading in the hope of recouping the loss because he was negotiating with potential purchasers of the Bank. (FF #25) On August 1, 1990, Respondent ordered the sale of the City of Pharr's Treasury Note to cover the loses. (FF #27) As the date of the final sale of the Bank approached, he continued to trade and incurred total losses of $219,108.88. (FF #28, #29)

On September 21, 1990, Respondent told the Bank's board that he had traded in the bond market and had pledged the City of Pharr's Treasury Note as collateral. Prior to Respondent's disclosure, the board had no knowledge of his trading activities. (FF #30) The board suspended Respondent and made up the trading loss to the City of Pharr. (FF #31, #34) As a result of the loss incurred by Respondent's trading, the potential purchasers of the Bank declined to infuse $1 million in capital and the sale was not consummated. (FF #32) The loss of $219,000 reduced the Bank's capital and caused the Bank's subsequent insolvency. (FF #33)

ALJ's Discussion and Conclusions of Law

In a discussion following the findings of fact, the ALJ

noted that Respondent's defense is predicated on the alleged lack of credibility of the brokers through whom Respondent conducted his trading. In the ALJ's view, the brokers' credibility and other issues raised by Respondent, such as whether the forms registering the margin account used the Taxpayer Identification Number of the Bank or of the City of Pharr, are "not relevant to the fact that O'Connell directed margin trading from that account supported by Pharr's Note as collateral." RD 17. Moreover, "whether, as inferred without evidence, the brokers took advantage by inducing and overcharging Respondent on the trades is not relevant to the fact that Respondent, with knowledge of increasing losses, continued to and continuously traded the margin account for months secured by the collateral of Pharr's Note without authority, even after the Note had been sold to satisfy losses." Id. The ALJ also noted that "Respondent was not called to the stand and did not deny any of the otherwise proven relevant testimony." Id.

With respect to the statutory criteria in 12 U.S.C. § 1818(b)(1) for issuing a cease and desist order, the ALJ found that Respondent was an "institution-affiliated party" and that he had engaged in unsafe or unsound practices within the meaning of 12 U.S.C. § 1818(b)(1). RD 25-26; 18-19. Conclusions of Law #1, #2 and #3.

With respect to the statutory criteria in 12 U.S.C. § 1818(b)(6) for requiring Respondent to make restitution to correct the conditions resulting from an unsafe or unsound

practice, the ALJ concluded (1) that Respondent was "unjustly enriched" in that he was not held financially accountable for the $219,000 loss, and (2) that Respondent's conduct constituted a "reckless disregard for the law". RD at 26-27; Conclusions of Law #11, #12 and #14.

Accordingly, the ALJ recommended the issuance of an Order to Cease and Desist requiring Respondent to cease and desist from engaging in unsafe and unsound banking practices and make restitution to the FDIC, as receiver for the Bank, in the amount of $219,108.88. RD 30-32.

V. COMPTROLLER'S DECISION

Respondent's Exceptions

The OCC's Rules of Practice and Procedure, 12 C.F.R. § 19.39(c)(2), provide:

> All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the administrative law judge's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

Respondent's exceptions fail to meet this standard in that they do not designate "specific parts of the administrative law judge's recommendations to which exception is taken." Rather than focus on individual findings of fact or other specific aspects of the ALJ's recommended decision, Respondent argues that he should be given a "full rehearing on all issues" because the ALJ denied him a full and fair cross-examination of OCC's

witnesses. Respondent notes 11 such instances, many of which involve the ALJ's refusal to permit him to cross-examine beyond the scope of the direct or about documents not listed on Respondent's exhibit list. For ten of the 11 instances, Respondent cites the same reason for believing that the ALJ's ruling limiting cross-examination was incorrect:

> If Respondent were not permitted to cross-examine hostile witnesses outside of the scope of their direct examination, the OCC could call witnesses for the purpose of eliciting damaging testimony concerning a single point and avoid the introduction of testimony favorable to the Respondent by asserting that those areas were "outside of the scope of the direct examination." Furthermore, it is impossible to anticipate in advance each and every potential exhibit that could become necessary for the cross-examination of the OCC's witnesses in order to list same on one's proposed exhibit list. By prohibiting the use of such documents for the impeachment of adverse witnesses, Respondent is being denied a full and fair hearing on the issues raised by the OCC's charges in the above-styled and numbered causes.

Although Respondent's exceptions are not strictly in accord with the format required by 12 C.F.R. 19.39(c)(2), the Comptroller has reviewed each exception. In the Comptroller's view, the ALJ did not abuse his discretion or the authority conferred upon him by the APA and the OCC Rules of Practice and Procedure, 12 C.F.R. § 19.5(b), by insisting that the cross-examination be reasonably within the scope of the direct or otherwise relevant. The Federal Rules of Evidence endorse limiting cross-examination to the subject matter of the direct. Fed. R. Evid. 611(b). Moreover, OCC's rules contemplate that evidence be relevant. 12 C.F.R. § 19.36(a).

The ALJ was also correct in overruling attempts by

Respondent's counsel to introduce exhibits not on Respondent's exhibit list. OCC's rules, 12 C.F.R. § 19.32, require each party to serve on every other party no later than 14 days before the hearing a list of exhibits to be introduced and a copy of each; further, no exhibit may be introduced at the hearing that has not been listed except for good cause shown. As the ALJ explained, the rule is designed to prevent one party from "ambushing" the other at trial with an unexpected exhibit. TR. 159, 163-164.

Accordingly, the Comptroller rejects Respondent's exceptions ## 2-11. With regard to Respondent's exception # 1, in which Respondent contends he was prohibited from eliciting character and reputation evidence concerning Respondent during cross-examination of an OCC witness, the Comptroller finds that the ALJ acted within his discretion by rephrasing and narrowing the Respondent's question to assure its relevancy to the proceeding. TR 45-48.

Respondent's Request for a New Hearing

Respondent's request for a new hearing is denied. In the Comptroller's view, Respondent received a full and fair hearing. The ALJ explained most of his rulings limiting Respondent's cross-examination. TR 59, 62, 159, 164, 179, 220. A review of the ALJ's rulings shows that most were made on the grounds of relevance rather than on a crabbed insistence that the cross-examination be confined closely to the scope of the direct. Moreover, the Comptroller notes that the ALJ on two occasions

found sufficient good cause to admit Respondent's evidence over E&C's objections that the documents were not on Respondent's exhibit list. TR 385-386, 393. In general, the Comptroller cannot say that the ALJ's rulings exceeded the discretion traditionally accorded the trial judge[5] or that the hearing was not conducted "so as to provide a fair and expeditious presentation of the relevant disputed issues," as required by OCC's rules. 12 C.F.R. § 19.35(a)(1).

The record shows that Respondent elected to present his case more through cross-examination of E&C's witnesses than by direct testimony of his own witnesses, although the latter course, including calling E&C's witnesses as his own, was open to him. Respondent called only one witness, Joseph Moran, whose testimony Respondent subsequently denounced.[6] Beyond this, the Comptroller concurs with the ALJ that much of what Respondent attempted to show was not truly relevant to whether Respondent participated in unauthorized trading using a customer's security without permission. RD 16-17. It is undeniable that Respondent did so participate, even though the Morans may, as Respondent suggests, have been willing accomplices for their own financial gain. Moreover, whether Respondent was trading on behalf of the

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[5] McCormick on Evidence § 24 (4th ed. 1992).

[6] Respondent's Post-Hearing Brief 5 and 12, proposed finding of fact # 35. See also TR 385, where Respondent asks the ALJ to "admonish" witness Joseph Moran "concerning the obligations and implications of the oath he has taken as well as to the possible penalties for perjury or for false swearing."

Bank or or as agent for the City of Pharr, he did not have authority from either to trade on margin with the City's security as collateral. Accordingly, the Comptroller affirms the ALJ's conclusion that E&C supported the charges by a preponderance of the relevant credible evidence. RD 17.

E&C's Exceptions

E&C excepted to a portion of Finding of Fact #2 listing Dr. Ramiro Casso among the persons who attended a meeting at the Bank in April 1990. E&C asserts that Dr. Castro did not attend this meeting. The testimony of Dr. Castro and Wayne Moran confirms this, TR 23, 244, respectively, and the Comptroller adopts this modification to Finding of Fact #2.

With this one modification, the Comptroller adopts in their entirety the Findings of Fact as set out in the ALJ's recommended decision. RD 2-16.

Appropriate Remedy

Respondent did not specifically except to the ALJ's recommendation that a cease and desist order be issued directing Respondent to make restitution in the amount of $219,108.88. RD 30; Conclusions of Law #11, 12 and 14. Nor do Respondent's exceptions specifically question the Comptroller's authority to order restitution. Nevertheless, the Comptroller has carefully reviewed the ALJ's analysis on this point (RD 26-27) and, finding it to be a correct, adopts it and the ALJ's Conclusions of Law as

his own.[7]

Accordingly, the Comptroller, in the attached Order, directs Respondent to cease and desist from unsafe or unsound practices and to pay the Federal Deposit Insurance Corporation, as receiver for the Bank, the sum of $219,108.88.

Respondent's request for oral argument is denied.

6/4/93
Date

Eugene A. Ludwig
Comptroller of the Currency

[7] Specifically, Respondent is an "institution-affiliated party" who engaged in an "unsafe or unsound practice" within the meaning of 12 U.S.C. 1818(b)(1) by opening a margin account without authority, causing a customer's asset to be pledged as security without approval, and directing more than 200 trades resulting in substantial losses. The Comptroller may order restitution because Respondent was "unjustly enriched" as described in 12 U.S.C. § 1818(b)(6)(A)(i) in that he did not reimburse the Bank for the losses incurred in his unauthorized trading. See Akin v. OTS, 950 F. 2d 1180, 1184 (5th Cir. 1992) (party was "unjustly enriched" because he failed to make promised capital contribution to savings and loan association); del Junco v. Conover, 682 F.2d 1338, 1343 (9th Cir. 1982) (Comptroller can order directors to indemnify the bank for losses on overline loans and reimburse the bank's related expenses). Alternatively, the Comptroller may order restitution because Respondent acted in "reckless disregard for the law" within the meaning of 12 U.S.C. § 1818(b)(6)(A)(ii).

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

IN THE MATTER OF	)	
	)	
MICHAEL A. O'CONNELL	)	
Former President and Director	)	AA-EC-92-21
Metropolitan National Bank	)	
McAllen, Texas	)	

ORDER TO CEASE AND DESIST

On January 21, 1992, the Office of the Comptroller of the Currency issued a Notice of Charges under 12 U.S.C. § 1818(b) against Michael A. O'Connell (Respondent), former President and Director of Metropolitan National Bank, McAllen, Texas (Bank). An administrative hearing on this matter was held in Corpus Christi, Texas, on September 29 and 30, 1992, before Administrative Law Judge Walter J. Alprin.

Based upon the record of the hearing and the recommended decision of the Administrative Law Judge, the Comptroller finds that Respondent has committed unsafe and unsound practices as described in the Notice of Charges.

NOW, THEREFORE, pursuant to the authority vested in the Comptroller by 12 U.S.C. § 1818(b), and for the reasons set forth in the accompanying decision, the Comptroller hereby orders that:

ARTICLE I

Respondent shall cease and desist from engaging in 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 two hundred and nineteen thousand one hundred eight dollars and eighty-eight cents ($219,108.88).

ARTICLE III

(1) If, at any time, the Comptroller deems it appropriate in fulfilling the responsibilities placed upon him by the several laws of the United States of America to undertake any action affecting the 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.

IT IS SO ORDERED, this 4th day of June, 1993.

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)	AA-EC-92-21
MICHAEL A. O'CONNELL)	AA-EC-92-22
FORMER PRESIDENT AND DIRECTOR)	
METROPOLITAN NATIONAL BANK)	
MCALLEN, TEXAS)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION

(Issued February 2, 1993)

APPEARANCES:

On behalf of the Office of the Comptroller of the Currency:

JAVIER A. MAYMIR, Esq.
DANIEL P. STIPANO, Esq.
MARTHA A. PAMPEL, Esq.
Washington, D.C.

On behalf of the Respondent:

CHRISTOPHER L. MILNER, Esq.
Dallas, Texas

Before:

WALTER J. ALPRIN
Administrative Law Judge
Office of Financial Institution Adjudication
Washington, D.C.

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I. STATEMENT OF THE CASE

On January 21, 1992, the Office of the Comptroller of the Currency (OCC) issued a Notice of Charges and a Notice of Intention to Prohibit Further Participation (Notices), against Michael A. O'Connell (Respondent), former President and Director of Metropolitan National Bank, McAllen, Texas (Bank). The Notices allege engaging in unsafe and unsound banking practices, breaches of fiduciary duty, personal dishonesty, and wilful and continued disregard for the safety and soundness of the Bank, resulting in damage and financial loss to the Bank, and financial gain to Respondent, all relating to Respondent's actions in unauthorized pledging the security of a Bank customer, the City of Pharr, Texas (Pharr), as collateral for unauthorized active trading of United States Treasury Bonds which resulted in a loss to the Bank. Respondent answered the charges.[1] Hearing was held in Corpus Christi, Texas, on September 29 and 30, 1992, and briefs and reply briefs were thereafter filed by December 21, 1992.

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[1] Notice of Assessment of Civil Money Penalties, in the sum of $100,000, was issued contemporaneously, and Respondent requested a hearing and filed an answer. On May 28, 1992, OCC's uncontested oral motion to sever and abate that proceeding was granted. See, Report of Telephonic Conference and Order Severing Notice of Assessment of Civil Money Penalty, issued by the undersigned on that date. Counsel for OCC is required to advise the undersigned and Respondent, within sixty days of the date hereof, of the status of that proceeding.

On the basis of hearing and observing the witnesses and considering the testimony, exhibits, briefs and reply briefs herein, the undersigned makes the following findings of fact and conclusions of law and issues this recommended decision.

II. FINDINGS OF FACT

A. Jurisdiction

1. At all times relevant to these proceedings the Bank was a national banking association, chartered and examined by the OCC pursuant to the National Bank Act of 1864, 12 U.S.C. §§ 27 and 481, and was an insured bank within the meaning of 12 U.S. § 1818(E)(1). (Stipulated Fact 1.) Respondent was at all relevant times an officer and director of the Bank, and an institution-affiliated party.

B. Establishing City of Pharr Account

2. On November 14, 1989, the Bank entered into a Depository Contract with Pharr, to provide various depository and funds management services. (Stipulated Facts 5 and 6; Stipulated Exhs. 1A and 1B). In April of 1990, at Respondent's request, a meeting was held at the Bank which included Respondent, Ernesto Ayala (Ayala), Pharr's Finance Director, Doctor Ramiro Casso (Casso), a medical doctor and outside Director since 1975, and Messrs Wayne and Joseph Moran, stock brokers employed in Austin, Texas by Spelman & Co., Inc. (Spelman). (Stipulated Facts 4 and 5; W. Moran TR. 243; J. Moran TR 368.) The purpose of the meeting was to discuss the extension of Pharr's account into a margin account,

i.e. leveraging and increasing the amount of trading capital by borrowing up to 90 per cent of the collateral from the broker. (W. Moran TR 244; OCC Exh. 26, p. 2.) During the meeting, Casso (Casso) inquired regarding the purchase of a United States Treasury Note for Pharr's account. (Casso TR 23; OCC Exh. 26,p.2.)

3. After the meeting, Respondent contacted Wayne Moran and stated that the Bank was interested in opening a margin trading account. (W. Moran TR 244, 291; OCC Exh. 26, pp. 2 and 17.) To the contrary, Pharr was not interested in trading due to the possibility of incurring losses. (Casso TR 23 and 24; OCC Exh. 26, p. 2.) Respondent, however, represented to the Brokers that the Bank was Pharr's agent and that he had the authority to engage and was interested in actively trading the market in United States thirty year bonds on a day trade basis. (OCC Exh. 26, p. 2.) Respondent, purportedly on behalf of the Bank, supposedly agreed to guarantee Pharr a return of 9 per cent while engaging in the trading program, the Bank taking all profits over the 9 per cent return and also assuming all the trading risks. (W. Moran TR 291; J. Moran TR 375; OCC Exh. 26, p. 2.)

4. The Bank's Board of Directors did not authorize Respondent to engage in any trading activities (Casso TR 38; OCC Exhs. 30 and 31)[2] other than those "on behalf of Metropolitan National Bank, which must be in compliance with the asset/liability management policy." (Re Exh. 13, p. 2.) The Bank's financial records,

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[2] Contrary to the Transcript Index, which is hereby ordered corrected, OCC Exhibits 30 and 31 were identified and admitted into evidence. See Transcript Pages 37 and 236.

including the Bank's required quarterly Call Reports, do not indicate the existence of any type of trading account or trading activity on behalf of the Bank. (Casso TR 91; Peterson TR 338-340, 353; OCC Exh. 33.) Specifically, referring to the Bank's Call Report as of June 30, 1990, if the Bank were engaged in any trading activity on its own behalf it would have been required to provide a positive or negative entry on the following line items:

> Income Statement (page 2), Line Item 1(e) Balance Sheet (page 8), Line Item 5 Statement of Resources and Liabilities (page 27), Line Entitled "Assets held in trading accounts"

(Peterson TR 338-340; OCC Exh. 33.) All three of these Call Report line items contain an entry of "zero", indicating that the Bank was not trading on its own behalf. (Peterson TR 338-340.) Respondent attested to the accuracy of the Bank's Call Report. (Peterson TR 337.) The daily reports submitted by the Bank to the OCC also do not indicate the existence of any type of trading account or trading activity on behalf of the Bank. (Peterson TR 361.)

6. The Depository Contract between the Bank and Pharr did not grant the Bank or Respondent the authority to participate in a trading program on behalf of or as agent for Pharr. (Stipulated Exh. 1A.) Respondent was authorized "to sign all agreements, indentures, mortgages, deeds, conveyances, transfers, certificates, declaration receipts, discharges, release satisfactions, settlements, petitions, schedules, accounts, affidavits, bonds, undertaking proxies and other instruments or documents .. on behalf of Metropolitan National Bank. To also ... purchase and sell

securities on behalf of Metropolitan National Bank, which must be in compliance with the asset/liability management policy." (Respondent's Exh. 3, second page, emphasis added.) The Bank's board of directors never authorized Respondent to engage in margin trading on behalf of the Bank. (Casso TR 34, 38, and 41; OCC Exh. 30.)

7. The Bank's capital was not considered to be at a safe and sound level nor was it safe or sound for a Bank with approximately $400,000 of primary capital to maintain a trading account. (Peterson TR 341.)

B. Establishing Margin Trading Account

8. In order to open the trading account Respondent was required by the rules of Broadcourt Capital Corporation (BCC), a guaranteed wholly-owned subsidiary of Merrill Lynch & Co. which provided security clearing services for Spelman (Stipulated Fact 3), to complete a Corporate Authorization to Trade Form (CAT Form), and either a Cash Accounting Agreement, or, if the trading was to be on margin, a Customer/Margin Agreement. (Heldring TR 102, 110, 112; W. Moran TR 245-6; OCC Exhs. 22 and 7.) Respondent executed these forms in April, 1990, before the account was opened. (OCC Exhs. 2 and 7; W. Moran TR 308-9.)

9. The CAT Form required specification of those officers who were authorized by the Bank's Board of Directors to open an account at BCC for the purchase and sale of securities, and that the authority of the named officers was from a resolution approved by the unanimous vote of the Bank's board of directors. Reference to

the authority of the named officers[3] to instruct the Brokers to trade, borrow money from the Brokers, secure payment with property of the Bank, and bind and obligate the Bank by entering into contracts with the Brokers, was required. (OCC Exhs. 7 and 8; Heldring TR 102, 104 and 105.) The CAT Form also provided that the Brokers were authorized to receive stock, bonds, options, or securities from any Bank officer as collateral on the account of the Bank. (J. Moran TR 370; OCC Exhs. 7 and 8.) Respondent identified the Bank as the corporation which owned the margin trading account, (OCC Exhs. 7 and 8; Heldring TR 102 and 104), signed the CAT Form and acknowledged receipt of a copy. (OCC Exh. 7.)

10. In addition to the CAT Form, Respondent executed a Customer/Margin Agreement (OCC Exh. 2; Heldring TR 110 and 112; W. Moran TR 245 and 246), which agreed to the opening of a margin trading account and established the rules and regulations governing the transactions between BCC, Spelman and the owner of the account, Respondent and/or the Bank. (Heldring TR 112.) The Customer/Margin Agreement provided that Respondent and/or the Bank would maintain securities or other property in the margin trading account as collateral against which it could be charged to satisfy any monthly debit/loss balances. (OCC Exhs. 2 and 3; Heldring TR 113 and 229.) It also provided that BCC would hold a lien on certain Bank property for the purpose of discharging all indebtedness on the

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[3] The original CAT form executed by O'Connell failed to identify any particular officer. (OCC Ex. 7.)

margin trading account and authorized BCC to sell all securities or property in the margin account without prior notice, and that Respondent and/or the Bank was liable for the payment of any debit balance in the margin trading account. (OCC Exhs. 2 and 3; Heldring TR 113 and 229-30.) Respondent signed the Customer/Margin Agreement and acknowledged receipt of a copy of the Agreement. (OCC Exh. 2.)

11. The margin trading account styled "Metropolitan National Bank, Agent for Pharr" with the account number 23D-11075, was opened by Respondent on April 30, 1990. (Heldring TR 156, 227; W. Moran TR 245.) (Heldring TR 156, 227.) This was a high risk, speculative margin account (W. Moran TR 245; OCC Exh. 25), while up to this time the Bank historically invested only in long term securities of excellent quality. (Casso TR 40-41; OCC Exh. 25, p. 1.)

D. <u>Trading Form Modifications</u>

12. Respondent failed to submit documentation evidencing that he was the agent for Pharr or was authorized by the Bank to open the account. (W. Moran TR 251; OCC Exh. 25, p. 4; OCC Exh. 26, pp. 19-20.) Spelman was concerned that Pharr was not aware of Respondent's trading activities (Casso TR 26; OCC Exh. 26, p. 7), and by letter dated June 13, 1990, Spelman's compliance office directed that documentation be obtained from Respondent in order to further clarify the ownership of the account. (Heldring TR 115 and 176; OCC Exh. 9.)

13. Wayne Moran asked Respondent for the contract which evidenced the Bank's authority to act as Pharr's agent (OCC Exh. 25, p. 4; OCC Exh. 26, pp. 18 and 19), and on June 18, 1990, met with Respondent at the Bank to re-execute the CAT Form and the Customer/Margin Agreement. (Casso TR 26; W. Moran TR 251-252; OCC Exh. 25, p. 4, and OCC Exh. 26, pp. 7 and 18.)

14. A modified CAT Form was executed which designated Respondent as the officer authorized to trade on behalf of the Bank and as the officer empowered with all the duties, responsibilities, and limits as directed by the CAT Form (Heldring TR 118 and 119; W. Moran TR 253; OCC Exh. 8.) The limits were one million dollars to four million dollars, based on the value of the Note as the underlying collateral. (Heldring TR 119; OCC Exh. 8.) The modified CAT Form was filled out and executed at the Bank by Respondent, who also acknowledged receipt of a copy. (W. Moran TR 253; OCC Exh. 8.)

15. The date given in the modified CAT Form for the Bank Board meeting in which the resolution to execute the form was supposedly unanimously approved was April 17, 1990. (Heldring TR 119; W. Moran TR 253; OCC Exh. 8.) At the meeting of June 18, 1990, Respondent asked his secretary get the corporate minute book so that he could determine the date on which the board of directors specifically authorized him to trade. (OCC Exh. 26, pp. 7 and 8; W. Moran TR 253.) The Corporate Resolution passed by the Bank's Board of Directors on April 17, 1990, does not authorize Respondent

to establish a trading account, but only authorized Respondent to transact for funds on accounts held at other banks. (Casso TR 36-37; OCC Exh. 10.)

16. Spelman also directed a modification of the Customer/Margin Agreement (Heldring TR 129; OCC Exh. 9), and the modified Customer/Margin Agreement was executed during the meeting with Respondent at the Bank on June 18, 1990. (W. Moran TR 253, 254, 310, and 311.) The modified Customer/Margin Agreement provided the new name on the account as "Metropolitan National Bank (2)". (Heldring TR 130; W. Moran TR 254; OCC Exh. 3.) Respondent signed the modified Customer/Margin Agreement and acknowledged receipt of a copy. (W. Moran TR 254; OCC Exh. 3.)

17. Wayne Moran testified at the hearing that the modified Customer/Margin Agreement was presented to Respondent in blank form and Respondent had his secretary type in the required information. (W. Moran TR 255, 309, and 310.) When Wayne and Joe Moran later discussed this with Heldring by telephone, according to the transcript of that conversation, Joe Moran stated that when the document changing the name of the account to delete "Agent for the City of Pharr" was reviewed at their offices it was noted that the Taxpayer Identification Number was still that of the City of Pharr, rather than that of the Bank,

> and since it was a trouble to go down there and have all this stuff change. (Sic.) We didn't want to go back down and tell him that there was a mistake and all this. So we had a W-9 file from his original accounts set up back in 1989 and he told us to use that one.

John (Heldring): So he knew that you were putting it under the Bank's I.D. number?

Joe (Moran): Oh Yea. That's right.

(OCC Exh. 26, p.18-19.)

18. Although the modified Customer/Margin Agreement was executed during the meeting of June 18, 1990, Respondent backdated the document to reflect the date of April 27, 1990. (W. Moran TR 254; OCC Exh. 3.) The original Customer/Margin Agreement was also executed and dated April 27, 1990. (OCC Exh. 2.)

19. By letter dated June 18, 1990, Respondent authorized the change in the name of account 23D-11075 from "Metropolitan National Bank, Agent for the City of Pharr" to "Metropolitan National Bank (2)". (Stipulated Fact #18; Heldring TR 132; OCC Exh. 25, p. 4; OCC Exh. 26, p. 7.) Respondent's letter of June 18, 1990, does not claim that any of the trades to that time were improperly authorized. (Heldring TR 181 and 228.) Respondent assured the Brokers on various occasions that their books and records were maintained properly. (OCC Exh. 26, p. 4) Respondent later admitted to the Bank's Board of Directors that the reason he changed the name on the margin account was to avoid having to disclose the trading activities to Pharr. (Casso TR 26)

E. Trading and Losses

20. On April 30, 1990, the Bank had wire transferred $400,000 to BCC's account at Northern International Bank, New York, New York, where they were deposited in account 23D-11075. (Stipulated Fact 7; Stipulated Exhs. 2A and 2B.) On the same day Pharr

purchased a $435,000 United States Treasury Note (Note) with a yield of 8.7% to maturity on May 15, 1991. The purchase price of the Note was $398,156.20. (Stipulated Fact #8; Stipulated Exh. 3; W. Moran TR 247; OCC Exh. 25, p. 2.) The Note was purchased using the $400,000 the Bank had previously wire transferred and which had been deposited into account 23D-11075. (Stipulated Fact #8; Heldring TR 230 and 231; W. Moran TR 247.) The Note, and the excess funds of $1,843.80, remained in the margin account, number 23D-11075. (Stipulated Exh. 9; W. Moran TR 247-248.)

21. Respondent knew at the time the margin trading account was established that he was required to secure any trades with collateral (W. Moran TR 327-328; Heldring TR 113, 229; OCC Exhs. 2 and 3), and he directed that Pharr's Note be used as collateral. (Casso TR 25; W. Moran TR 327-328; OCC Exh. 26, pp. 2 and 21.)

22. Between approximately May 11, 1990, and September 19, 1990, there were over two hundred (200) trades in thirty year United States Treasury bonds made on a day trade basis through the trading accounts. (Stipulated Fact #11; W. Moran TR 249-50, 269.) Respondent specifically authorized day trading on margin (W. Moran TR 295), and all trades were made with Respondent's express authority and at his instructions. (OCC Exh. 20.) Each trade was evidenced by a confirmation slip provided by Spelman (Stipulated Fact #12; Stipulated Exh. 6), and trade confirmation slips were sent to Respondent at the Bank for each transaction.

(OCC Exh. 6.) BCC also provided monthly account statements containing a complete listing of the trades conducted for the month and showing Respondent's balance. (Stipulated Exhs. 8-10.)

23. Respondent directed each transaction by giving his orders to Wayne Moran. (W. Moran TR 249; OCC Exh. 25; OCC Exh. 26.) Prior to opening the margin trading account, Respondent repeatedly represented that he understood trading in the 30 year bond market. (W. Moran TR 279-284.) Respondent agreed to the transfer of all profits or losses to account 23D-11052 at the close of trading each day, where profits would earn interest. (OCC Exh. 25, p. 6; OCC Exh. 26, p. 17.)

24. Respondent was notified on a regular basis concerning the losses in the margin trading account. (W. Moran TR 256.) On May 25, 1990, Respondent had a conversation with Wayne Moran regarding losses in the margin trading account of approximately $35,468.91.[4] Respondent wanted to continue trading. (W. Moran TR 260, 270; Stipulated Exh. 9; OCC Exh. 25, p. 2.) Moreover, on May 31, 1990, during a discussion with Wayne Moran, Respondent reasserted that he was not overly concerned with the loss in the trading account. (OCC Exh. 25, p. 3.)

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[4] O'Connell later told the Bank's Board of Directors that he had not authorized the original transactions but was assured that if he continued to trade he could make up his losses. This testimony was disputed by Wayne Moran. O'Connell's allegation is not credited, as it is not believable that an individual of O'Connell's financial sophistication would fail to take some corrective action when advised of the allegedly unauthorized trading.

25. On June 6, 1990, Wayne Moran notified Respondent that there was a loss in the margin trading account of $76,438.41. Respondent wanted to continue to trade to recoup the loss in the account, indicating that he was anxious to recover the loss in the account because he was negotiating with potential purchasers for the Bank. (W. Moran TR 257-258; OCC Exh. 27.) On June 13, 1990, Respondent and Wayne Moran had another conversation regarding the loss in the account, but Respondent again indicated that he was not concerned about the loss. (OCC Exh. 25, p. 3.) On June 15, 1990, Wayne Moran had another discussion with Respondent concerning the loss in the margin trading account. (OCC Exh. 25, p. 4.) Respondent was still not concerned about the loss and indicated his intent to continue trading. (OCC Exh. 25, p. 4.) On June 27, 1990, Respondent indicated that he was trying to sell the Bank and wanted to recover the losses in the trading account before the sale of the Bank. (W. Moran TR 270-271; OCC Exh. 25, p. 5.) The closing loss in account 23D-11075 on June 29, 1990, was $108,286.94. (W. Moran TR 261; Stipulated Exh. 9.)

26. On July 24, 1990, Respondent stated that he was becoming more concerned about the loss in the account, that he thought he could still recover the loss but that time was running out prior to the sale of the Bank, and that he intended to continue trading until he recovered the loss. (OCC Exh. 25, p. 6; OCC Exh. 26, p. 6)

27. The original and modified Customer/Margin Agreements provided that BCC had the authority to sell the security in the margin trading account without prior notice (Heldring TR 113 and 230; OCC Exh. 3), but it was on Respondent's instruction that the Note was sold to cover losses in the margin trading account. (W. Moran TR 262, 271; Heldring TR 231; OCC Exh. 25, p. 6; Casso TR 95; OCC Exh. 26, p. 23), and on August 1, 1990, the Note was sold for $408,693.55. (W. Moran TR 261-262; Stipulated Fact #20; Stip. Exh. 13.) The proceeds from the sale of the Note were used to offset the loss in account 23D-11075 and the remainder of the proceeds were transferred to account 23D-11052 to earn interest. (W. Moran TR 262 and 263; Heldring TR 231; OCC Exh. 25, p. 6; OCC Exh. 26, p. 17; Stipulated Exhs. 8 and 9.) On August 30, 1990, Respondent stated that he had to recover the entire loss in the trading accounts before the new owners assumed control of the Bank. (OCC Exh. 25, p. 7.)

28. Respondent was concerned that the loss in the trading accounts would have an adverse affect on the sale of the Bank, and he began trading more frequently as the losses increased and as the date of the final sale of the Bank approached. (W. Moran TR 269; OCC Exh. 26, pp. 3-4, 11)

29. Respondent's total losses in the various trading accounts was $219,108.88. (Stipulated Fact #21; Casso TR 30; Peterson TR 342, 362; Stip. Exh. 14.)

F. Respondent's Admission to the Bank

30. On September 21, 1990, Respondent told the Bank's board of directors that he had traded in the bond market and had pledged Pharr's Note as collateral (Casso TR 22, 25; OCC Exh. 26, pp. 3-4), admitting his activities because increasing losses in the trading account had reached the point where there was no hope of recouping the losses. (Casso TR 27.) His explanation was that "a few days" after the conference at which Ayala, for Pharr, disclaimed interest in margin trading, Respondent

> began receiving some trading slips from the office of Mr. Moran from Spelman and Company that showed some losses, whereupon he called Mr. Moran and said, What is going on?
>
> And then Mr. Moran told him, Look, we are trading, but we will get over that; we will recoup those losses. And Mr. O'Connell told them, Well, why are you trading? And then Mr. Moran said, Well, you authorized us to. You signed the authorization for us to do this.
>
> And Mr. O'Connell then told us that he didn't know what he had signed and that he had, sort of, a serious lapse in judgment or something like that but that Mr. Moran was very persuasive and persuaded him to continue the trading so that those losses could be recouped and, in fact, to make a profit from these operations.
>
> Q. Just to clarify, Dr. Casso, did Mr. O'Connell indicate what the collateral was for these trades?
>
> A. Yes.
>
> Q. And what was that collateral?
>
> A. Well, the US Treasury note that the City of Pharr had purchased.

(Casso TR 24-25.)

Prior to Respondent's disclosure, the board of directors had no knowledge of the trading activities. (Casso TR 28, 74; OCC Exh. 26, p. 7.)

31. On September 24, 1990, the Board suspended Respondent, notified Spelman to cease all future trading activities (Casso TR 29-30), and notified the OCC. (Casso TR 29.) The Bank made up the trading loss, and paid Pharr $435,000, which would have been the full value of the Note at maturity. (Casso TR 31.)

G. Financial and Other Loss to Bank; Gain to Respondent

32. As a result of the loss incurred due to Respondent's trading activities, the potential buyers chose not to infuse the Bank with one million dollars of capital. (Casso TR 34, 87, and 88; Peterson TR 342, 364.) Without the infusion of capital, the sale of the Bank was not finalized. (Peterson TR 357-360.)

33. The Bank was not insolvent prior to the date when Respondent established the margin trading account. (Peterson TR 360.) The Bank was also not insolvent prior to September 21, 1990, the date of the Board meeting where Respondent disclosed the trading activity. (Casso TR 54.) The loss of $219,000 reduced the Bank's capital and caused the Bank's subsequent insolvency. (Peterson TR 342.)

34. It was the Bank, and not Respondent, which made up the loss to Pharr occasioned by the trading losses.

III. DISCUSSION

A. Credibility

Respondent's defense is predicated on the alleged lack of credibility of brokers Wayne and Joe Moran, as indicated by alleged internal inconsistencies in their testimony and documents supported

by their testimony. Without determining credibility, these concerns are without relevance. Whether the forms of reregistering the margin account contained the Taxpayer's Identification Number of the Bank or of Pharr is not relevant to the fact that O'Connell directed margin trading from that account supported by Pharr's Note as collateral. Whether the initial trades were at Respondent's direction and with his knowledge is not relevant to the fact that Respondent, with knowledge of increasing losses, continued trading and continuously traded the margin account for months secured by the collateral of Pharr's Note without authority, even after the Note had been sold to satisfy losses. Whether, as inferred without evidence, the brokers took advantage by inducing and overcharging Respondent on the trades is not relevant to the fact that Respondent, with knowledge of increasing losses, continued to and continuously traded the margin account for months secured by the collateral of Pharr's Note without authority, even after the Note had been sold to satisfy losses.

In addition to the lack of relevance of these questions, the Respondent was not called to the stand and did not deny any of the otherwise proven relevant testimony. On the basis of the record the OCC has supported the charges by a preponderance of the relevant credible evidence.

B. Removal and Prohibition

1. Overview

Banking regulatory agencies are authorized by 12 U.S.C. § 1818(e)(1) to remove officers and directors of an insured bank and to prohibit their future participation in the affairs of a federally insured financial institution whenever an officer or director has:

> (1) violated the law, engaged or participated in an unsafe or unsound banking practice or breached his fiduciary duties as a director or officer with respect to that bank;
>
> and
>
> (2) the bank has suffered financial loss or other damage or the interests of the bank's depositors have been or could be prejudiced or the director or officer has received financial gain from the misconduct;
>
> and
>
> (3) the misconduct evidences personal dishonesty on the part of the director or officer or demonstrates a willful or continuing disregard for the safety and soundness of the bank. (Emphasis added.)

One of the alternative criteria in each of the three required categories listed above must be proven.

2. First Criteria: Unsafe or Unsound Banking Practice or Breach of Fiduciary Duty

Respondent's actions constituted both unsafe and unsound practices, and a breach of his fiduciary duty. With neither authority nor express permission, Respondent caused the security owned by Pharr, a Bank customer, to be pledged as security for the margin trading account. Respondent also executed all the forms

necessary to open a margin trading account and actively engaged in an unauthorized scheme of trading which involved more than 200 trades of 30 year United States Treasury Bonds. Respondent initiated, controlled and directed each and every trade. All the trades were evidenced by both a confirmation slip and monthly account statements which were delivered to Respondent at the Bank. Respondent repeatedly misrepresented his authority to the Brokers and misled them to believe that he was authorized to act as agent for Pharr and to trade on behalf of the Bank. Subsequently, Respondent also directed the sale of the Note in order to satisfy the outstanding amount of the loss in the margin trading account.

Congress empowered the banking regulatory agencies, including OCC, to take strong corrective action with respect to banking practices which are "unsafe or unsound," or breaches of fiduciary duty. Although the statute itself does not define "unsafe or unsound" banking practices, the legislative history provides the necessary guidance. In the enactment of the statute as part of the Financial Institutions Supervisory Act of 1966, John Horne, then Chairman of the Federal Home Loan Bank Board (FHLBB), gave the following definition of "unsafe or unsound" practices, favorably cited by both Houses of Congress:

> Generally speaking, an "unsafe or unsound" banking practice embraces any action or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds.

See 112 Cong. Rec. S26,474 (1966) (FHLBB Memorandum by Chairman Horne inserted into the record with unanimous consent by Senator Robertson); 126 Cong. Rec. H24, 984 (1966) (FHLBB Memorandum by Chairman Horne cited with approval by Representative Patman.) For an example of a recent adoption of this definition, see Hoffman v. Federal Deposit Insurance Corporation, 912 F.2d 1172, 1174, citing Gulf Federal Savings and Loan Association v. Federal Home Loan Bank Board, 651 F.2d 259, 264 (5th Cir. 1981), cert. denied, 458 U.S. 1121 (1982.)

As interpreted by the courts, the bank regulatory agencies have broad authority to define "unsafe and unsound." It was held in Groos National Bank v. Comptroller of the Currency, 573 F.2d 889, 897 (5th Cir. 1978), that "[t]he phrase 'unsafe or unsound banking practice' is widely used in the regulatory statutes and case law, and one of the purposes of the banking acts is clearly to commit the progressive definition and eradication of such practices to the expertise of the appropriate regulatory agencies." Accord Independent Bankers Association v. Heimann, 613 F.2d 1164, 1168-69 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980) ("the Comptroller's discretionary authority to define and eliminate 'unsafe or unsound' conduct is to be liberally construed").

In First National Bank of Eden v. Comptroller of the Currency, 568 F.2d 610 (8th Cir. 1978), the court interpreted unsafe or unsound banking practices as those which "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." (Emphasis added.) Id. at 611, n. 2; see also, Northwest National Bank v. Office of the Comptroller of the Currency, 917 F.2d 1111, 1115 (8th Cir. 1990).

The fiduciary duties of officers and directors of federally chartered institutions are determined by federal common law. City Federal Savings and Loan Ass'n. v. Crowley, 393 F. Supp. 644, 654-55. (E.D. Wisc. 1975). Because of the importance of the banking system, "officers and directors of banking corporations generally owe a greater duty than other corporate officers and directors." Gadd v. Pearson, 351 F. Supp. 895, 903 (M.D. Fla. 1972.) Directors "must keep in mind that a national bank is not a private corporation in which stockholders alone are interested. It is a quasi governmental agency (Farmers & Mechanics National Bank v. Dearing, 91 U.S. 29, 23 L. Ed. 196), and one of its principal purposes among others is to hold and safekeep the money of its depositors." Atherton v. Anderson, 99 F.2d 883, 888 (6th Cir. 1938).

The courts defer to the experience and expertise of the Federal banking agencies to determine what constitutes a breach of fiduciary duty, Brickner v. Federal Deposit Insurance Corporation, 747 F.2d 1198, 1202 (8th Cir. 1984), and recognize that any breach by an officer or director of his fiduciary duty is "inherently dangerous and cannot be considered safe." Hoffman v. Federal Deposit Insurance Corporation, infra at 1174 (citing First National Bank of LaMarque, 610 F.2d at 1265; Independent Bankers Association, 613 F.2d at 1168).

As the senior executive officer and member of the Bank's Board of Directors, Respondent had a fiduciary responsibility to supervise every aspect of the Bank's affairs and to ensure that the Bank was operating in compliance with all applicable laws, rules, and regulations and in accordance with safe and sound banking practices. Respondent's unauthorized speculative trading, whether on his own behalf, on behalf of the Bank, or on behalf of the Bank customer, was conduct contrary to the standards of prudent banking which exposed the Bank, the shareholders and the insurance fund to an abnormal risk of loss.

In addition, throughout the period of Respondent's unauthorized trading, the Bank was severely undercapitalized and near insolvency. Respondent and the Bank's Board of Directors were attempting to sell the Bank and infuse urgently needed capital. The Bank had found a group of potential investors who were willing to inject one million dollars. However, after Respondent admitted his unauthorized trading activities and the resulting losses, the investors decided against any further injections of capital and the Bank was subsequently declared insolvent.

In Hoffman v. Federal Deposit Insurance Corporation, infra, the court ordered restitution pursuant to 12 U.S.C. § 1818(b)(1) from the bank president who had received monies from the bank board to buy out his employment contract because the bank was near insolvency. The court reasoned that restitution was appropriate based on the unsafe and unsound banking practices evidenced by the fact that, "during a time when Hoffman and [the bank's] board knew

that they were supposed to be acting as caretakers of a bank that was rapidly declining, they decided to divert some of its assets in a way that could not help but cause detriment to the shareholders and other creditors of the bank." Id. at 1174.[5] In similar fashion, Respondent knew that the Bank was "rapidly declining" and he also diverted the Bank's assets, without the authority of the Bank, by engaging in margin trading. Respondent's unauthorized trading is clearly an unsafe and unsound practice. Thus, the Respondent here also breached his fiduciary duty by not protecting the assets nor furthering the best interests of the Bank.

3. Second Criteria

a. Damage or Financial Loss to the Bank and Financial Gain to Respondent

As a result of Respondent's unauthorized trading, there were losses of over $219,000 which was deducted from the value of the security owned by Pharr. The Bank reimbursed Pharr in the amount of the $435,000 Note and booked the $219,108.88 loss, although none of the trading was authorized by the Bank. Thus, Respondent was never required to pay for the losses, resulting in an unwarranted financial gain. In addition, due to Respondent's unauthorized activities and resulting losses, the Bank lost its potential investors along with the infusion of one million dollars of capital. Respondent's unauthorized trading and subsequent losses were a contributing factor to the insolvency of the Bank.

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[5]The court concluded by stating, "The idea that bleeding an afflicted bank is beneficial to it is an attempt to resurrect at law a practice which the medical profession has happily abandoned." Id. at 1176.

4. Third Criteria

a. Personal Dishonesty

Respondent exhibited personal dishonesty in conducting active trading using the security of a Bank customer without obtaining the authority of either the bank customer or the Bank. Respondent misrepresented his authority and caused the Brokers to believe that he was authorized as agent for Pharr to pledge the Note as collateral and he was also authorized by the Bank's Board of Directors to trade on behalf of the Bank. Respondent knew that Pharr did not wish to engage in authorize either active trading or trading on margin, and he knew of the Bank's delicate financial condition with the impending sale to the investors. Respondent admitted to the Bank's Board of Directors that his reason for changing the name on the account was to avoid disclosing his unauthorized trading to Pharr.

b. Wilful or Continuous Disregard of Safety and Soundness

The "willful," and the "continuing" disregard for the safety and soundness of the bank constitute two separate and alternative factors in considering removal and prohibition, and a showing of either is sufficient. As ruled in Brickner v. Federal Deposit Insurance Corporation, 747 F.2d 1198, 1202-1203 (8th Cir. 1984):

> "[W]illful disregard" and "continuing disregard" present two distinct, alternative standards for removal. The use of the disjunctive "or" between the words "willful" and "continuing" in the statute reveals a clear intent to make either one an offense.

The decision further held that the "continuing disregard" standard does not require proof to the same degree as willful disregard, and that the "continuing disregard" standard refers to "a mental state short of 'willfulness' and akin to 'recklessness'." Id., at 1203.

The facts cited above on the issues of engaging in unsafe or unsound practices, or breaching fiduciary duty, fully support a finding that such actions were also both wilful and continuing disregard for safety or soundness. Furthermore, although Respondent knew of the mounting losses as evidenced by repeated conversations with the Brokers and the monthly account statements, he continued trading for a period of five months with continued disregard for the safety and soundness of the Bank.

c. Respondent's Financial Gain

Respondent's unsafe and unsound practices and breaches of fiduciary duty resulted in a loss of over $219,000 which was absorbed entirely by the Bank. Though there is no indication that had there been profits on the trading he would have claimed them as personal income, Respondent received a financial gain since he was trading entirely without the authority of Pharr or the Bank, but was never held accountable for the trading losses.

C. Cease and Desist/Restitution

1. Overview

The banking regulatory agencies, including OCC, are authorized to issue an order to cease and desist where (1) the Respondent is engaging or has engaged in an unsafe or unsound practice in conducting the business of the Bank, or, (2) is violating or has

violated a law, rule, or regulation, or a formal written agreement entered into with the agency or any condition imposed in writing by the appropriate agency. 12 U.S.C. § 1818(b)(1) (emphasis added).

The cease and desist order may further require the Respondent to take some or all of specified affirmative actions to correct the conditions resulting from any such violation or practice where the Respondent either was unjustly enriched in connection with the violation or practice, or if the violation or practice involved a reckless disregard for the law or applicable regulations. 12 U.S.C. § 1818(b)(6).

2. Unsafe or Unsound Practices

A discussion of this issue has already been set forth above as to orders of suspension of prohibition, and is included here by reference, in regard to orders to cease and desist orders, and to make restitution.

3. Unjust Enrichment/Reckless Disregard

Respondent was unjustly enriched in that, whether his unauthorized trading was purportedly on behalf of the Bank of the Bank customers, he was not held financially accountable for the amount of the $219,000 loss. A Respondent who had not received any direct personal benefit was nonetheless found to have been unjustly enriched because he was able to retain capital which he was obligated but failed to contribute to the bank. It was held that:

> Neither of OTS's arguments dovetails neatly into a pattern of transfer of a benefit and restitution of that benefit from a party wrongfully retaining it. However, we do not accept that § 1818(b)(6)(A)(i) requires a precision fit into black letter contract

> law....The statute suggests that unjust enrichment has a broader connotation than in traditional contract law. [Footnote omitted].

Akin v. Office of Thrift Supervision, 950 F.2d 1180, 1184 (5th Cir. 1992). As a result, Respondent was required to reimburse the sum of $19 million.

In another proceeding, the court ordered the directors to indemnify the bank and make restitution of the bank's collection expenses and attorneys' fees paid on behalf of the directors, as these constituted "conditions resulting" from the violation. del Junco v. Conover, Comptroller of the Currency, 682 F.2d 1338, 1343 (9th Cir. 1982), cert. denied, 459 U.S. 1146 (1983),

In the proceeding at hand, the loss to the Bank was a "condition resulting" from Respondent's unsafe and unsound practice. Respondent's activities constitute an unsafe and unsound practice, and involved a reckless disregard for the law. By engaging in unauthorized margin trading using as collateral the Note without the authority of Pharr, Respondent not only failed to adhere to prudent banking standards but acted in such a disregard of the consequences of his actions as can only be considered reckless.

V. CONCLUSIONS OF LAW

1. At all times relevant herein the Office of the Comptroller of the Currency was authorized to regulate the affairs of the Bank and issue orders relating to Respondent as an institution-affiliated party.

2. The Respondent's conduct constituted unsafe banking practices.

3. The Respondent's conduct constituted unsound banking practices.

4. The Respondent's conduct constituted a breach of fiduciary duty.

5. The Respondent's conduct constituted personal dishonesty.

6. The Respondent's conduct constituted a wilful disregard of the safety and soundness of a jurisdictional financial institution.

7. The Respondent's conduct constituted a continuing disregard of the safety and soundness of a jurisdictional financial institution.

8. The Respondent's conduct resulted in damage to a jurisdictional financial institution.

9. The Respondent's conduct resulted in financial loss to a jurisdictional financial institution.

10. The Respondent's conduct resulted in his financial gain.

11. The Respondent's conduct resulted in his unjust enrichment.

12. The Respondent's conduct constituted a reckless disregard for the law.

13. The Office of the Comptroller of the Currency has established by a preponderance of the evidence that Respondent has engaged or participated in unsafe, and in unsound banking practices, and breached his fiduciary duties as a director and officer with respect to that bank; that the bank has suffered

financial loss, and other damage, and Respondent has received financial gain from the misconduct; and, that the Respondent's misconduct evidences personal dishonesty, and demonstrates a willful, and a continuing disregard for the safety and soundness of the bank, so that issuance of an order to cease and desist is warranted.

14. The Office of the Comptroller of the Currency has established by a preponderance of the evidence that in connection with the practices by which issuance of an order to cease and desist, Respondent engaged in unsafe and unsound banking practices which involve a reckless disregard for the law and by which Respondent was unjustly enriched, so that issuance of an order to cease and desist and to make restitution is warranted.

15. The Office of the Comptroller of the Currency has established by a preponderance of the evidence that Respondent engaged in unsafe and unsound banking practices and a breach of his fiduciary duties as bank director and officer, that the bank has suffered financial loss or other damage and that the interests of the bank's depositors have been prejudiced and that the Respondent has received financial gain from the misconduct, and that the misconduct demonstrates a willful and a continuing disregard for the safety and soundness of the bank, so that an order of removal and prohibition is warranted.

VI. RECOMMENDED DECISION

It is the undersigned's Recommended Decision that as a result of the above practices and conduct of the Respondent as an institution-affiliated-party, the Respondent shall be removed from and prohibited from future participation in the affairs of a federally insured financial institution, shall cease and desist from the actions cited herein, and shall reimburse the sum of $219,108.88.

In furtherance of this Recommended Decision it is recommended that Orders in the form of the Proposed Orders attached hereto and forming a part hereof shall be issued.

Walter J. Alprin
Administrative Law Judge
Office of Financial Institution
Adjudication

PROPOSED ORDER TO CEASE AND DESIST AND MAKE RESTITUTION

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

IN THE MATTER OF	)	**AA-EC-92-21**
MICHAEL A. O'CONNELL	)	**AA-EC-92-22**
FORMER PRESIDENT AND DIRECTOR	)	
METROPOLITAN NATIONAL BANK	)	
MCALLEN, TEXAS	)	

ORDER TO CEASE AND DESIST AND MAKE RESTITUTION

The Comptroller of the Currency of the United States of America (Comptroller) initiated cease and desist proceedings against Michael A. Respondent (Respondent), former President and Director of Metropolitan National Bank, McAllen, Texas (Bank). After an investigation and a hearing on this matter held in Corpus Christi, Texas, on September 29 and 30, 1992, the Comptroller finds that Respondent has engaged in unsafe and unsound banking practices, and breached his fiduciary duty as an institution-affiliated party, as a result of which the bank has suffered financial loss or other damage and the rights of its depositors have been prejudiced and that Respondent has received financial gain from the misconduct, and that the misconduct demonstrates a willful and continuing disregard for the safety and soundness of the bank, all within the meaning of the Federal Deposit Insurance

Act, 12 U.S.C. § 1818 (as amended), so that the entry of an order to cease and desist such activities, and to make restitution, shall be entered.

NOW THEREFORE, IT IS HEREBY ORDERED, That said Respondent shall cease and desist from engaging in unsafe and unsound banking practices, and from violation of fiduciary duties as a bank officer and director; and further,

THAT said Respondent shall make restitution to the Federal Deposit Insurance Corporation, as receiver for the Bank, in the amount of $219,108.88; and further

THAT pursuant to 12 U.S.C. § 1818(b)(2), this Order shall become effective at the expiration of thirty (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 action of the Office of the Comptroller of the Currency (OCC) or a reviewing court; and further

THAT 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 district 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 the noncompliance continues.

IT IS SO ORDERED, this _____ day of _____, 1993.

_____
Comptroller of the Currency

PROPOSED ORDER OF PROHIBITION

UNITED STATES OF AMERICA
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
WASHINGTON, D.C.

IN THE MATTER OF	)	AA-EC-92-21
MICHAEL A. O'CONNELL	)	AA-EC-92-22
FORMER PRESIDENT AND DIRECTOR	)	
METROPOLITAN NATIONAL BANK	)	
MCALLEN, TEXAS	)	

ORDER OF PROHIBITION

The Office of the Comptroller of the Currency) initiated proceedings to remove and prohibit Michael A. O'Connell (Respondent), former President and Director of Metropolitan National Ban,. McAllen, Texas (Bank) from current and future participation in the affairs of a federally insured financial institution pursuant 12 U.S.C. § 1818(e). After an investigation and a hearing on this matter held in Corpus Christi, Texas, on September 29 and 30, 1992, the Office of the Comptroller of the Currency found that Respondent engaged in unsafe and unsound banking practices and breached his fiduciary duties as an officer and director of the Bank, and that the bank has suffered financial loss and other damage and the interests of the bank's depositors have been or could be prejudiced and that the Respondent received financial gain from the misconduct, and that the misconduct evidences personal dishonesty on the part of the Respondent and demonstrates a willful and continuing disregard for the safety and soundness of the Bank. Upon review, the Board of Governors of the

Federal Reserve System is of the opinion that a final Order of Prohibition should issue against said Respondent.

NOW, THEREFORE, IT IS HEREBY ORDERED, pursuant to 12 U.S.C. § 1818(e) of the Federal Deposit Insurance Act, as amended, that:

1. In the absence of prior written approval by the Board, and by any other Federal financial institution regulatory agency where necessary pursuant to 12 U.S.C. § 1818(e)(7)(B) of the Federal Deposit Insurance Act, the Respondent is hereby prohibited:

(a) from participating in the conduct of the affairs of any bank holding company, any insured depository institution or any other institution specified in 12 U.S.C. § 1818(e)(7)(A);

(b) from soliciting, procuring, transferring, attempting to transfer, voting or attempting to vote any proxy, consent, or authorization with respect to any voting rights in any institution described in 12 U.S.C. § 1818(e)(7)(A);

(c) from violating any voting agreement previously approved by the appropriate Federal banking agency; or

(d) from voting for a director, or from serving or acting as an institution-affiliated party as defined in section 3(u) of the Act (12 U.S.C. § 1813(u)) such as an officer, director, or employee.

2. This Order, and each provision hereof, is and shall become effective immediately upon service, and shall remain fully effective and enforceable until expressly stayed, modified,

terminated or suspended in writing by the Comptroller of the Currency or the appropriate court.

By Order of the Board of Governors of the Federal Reserve System, this ___ day of_____, 1993.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

_____