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

In the Matter of	)	
FRANK E. SMITH and MARK A. KIOLBASA	)	
	)	Docket No. 18-036-E-I
Institution-affiliated parties of FARMERS STATE BANK Pine Bluffs, Wyoming, a state member bank	)	

FINAL DECISION

This matter is before the Board of Governors of the Federal Reserve System (the "Board") following the issuance on April 13, 2020, of a Recommended Decision ("R.D.") by Administrative Law Judge ("ALJ") Christopher B. McNeil. ALJ McNeil recommends entry of prohibition orders against Frank E. Smith and Mark A. Kiolbasa ("Respondents") under section 8(e) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1818(e). Upon review of the administrative record, and for the following reasons, the Board issues the attached Orders of Prohibition.

I. PROCEDURAL HISTORY

The Board initiated this proceeding against Respondents on December 11, 2018. *See* Notice of Intent to Prohibit Pursuant to Section 8 of the Federal Deposit Insurance Act, as Amended ("Notice").[1] In the Notice, Enforcement Counsel allege that Respondents engaged in unsafe or unsound practices and breached their fiduciary duties to Central Bank & Trust ("Central")—a state nonmember bank subject to regulatory oversight by the Federal Deposit

[1] The Notice is dated December 11, 2018, and Enforcement Counsel served it on Respondents on December 12, 2018.

Insurance Corporation ("FDIC")—and/or to state member bank Farmers State Bank ("Farmers").[2] Notice ¶¶ 25-30. On August 2, 2019, Enforcement Counsel moved for summary disposition and sought a recommendation from the ALJ that the Board issue final prohibition orders against Respondents.

On October 24, 2019, ALJ McNeil granted partial summary disposition, finding preponderant and uncontroverted evidence establishing Respondents' misconduct and harm to Central, as alleged in the Notice. Summary Disposition Order at 74-75. The ALJ also determined that the Board has jurisdiction over Respondents and the subject matter of these proceedings. *Id.* at 13-17. Respondents filed a Motion for Interlocutory Review seeking dismissal for lack of jurisdiction, which the Board later denied. Mar. 9, 2020 Order.

The parties presented evidence at a hearing held on December 3, 2019 on the limited remaining issues: (1) the nature and extent of harm to Farmers and allocation of harm as between Respondents and Farmers' board members; and (2) Respondents' allegation that certain of Central's documents were exchanged at the request of the Federal Reserve, which they asserted as a defense with respect to culpability. *See* Summary Disposition Order at 74-75; Dec. 3, 2019 Hearing Tr. On April 13, 2020, the ALJ issued a Recommended Decision proposing that the Board prohibit Respondents "from further participation in any manner in the conduct of the affairs of any financial institution or organization" as set forth in the Notice. R.D. at 102. In May 2020 Respondents and Enforcement Counsel filed exceptions to the Recommended Decision, and on July 29, 2020, the Secretary of the Board transmitted the record in the case to the Board for final decision. This transmittal was rescinded after Board members received an

[2] Farmers is a subsidiary of Commercial Bancorp ("Commercial"), a registered bank holding company subject to the supervision and regulation of the Board.

improper *ex parte* communication in support of Respondents, and a notice of completed record was reissued on December 4, 2020.

II. FACTS

Respondents are both former employees of Central, a Wyoming state bank whose primary business and key driver of revenue and profits is lending. *See* Jt. Exh. 008 at 199:7-9, 226:11-21; Jt. Exh. 009 at 318:19-20. From approximately 2010 through his departure on or around September 19, 2014, Kiolbasa served as a loan officer and President of Central's Cheyenne branch. Hearing Tr. at 143:7-12; Jt. Exh. 001 (Kiolbasa Answer) ¶ 3; Jt. Exh. 009 at 471:16-472:10. In 2014, Kiolbasa maintained a loan portfolio worth $17.5 million; at the time, Central's assets totaled $160 million. Jt. Exh. 020 at 4. From approximately 2008 through his departure on March 18, 2015, Smith was Central's Chief Financial Officer ("CFO"). Enforcement Counsel's and Respondents' Joint Stipulations ("Jt. Stipulations") ¶ 6. He also acted as the bank's Customer Information Security Officer from at least December 2013 through his last day of employment. Jt. Exh. 008 at 217:11-25; Jt. Exh. 010 at 896:19-25; *see also* Jt. Exh. 063 at 2.

During Respondents' tenure at Central, the bank maintained an Employment Handbook that contained a confidentiality policy requiring the confidential treatment of Central's financial, business, and customer information. FRB Exh. 004 at 5. It also included a privacy policy stating that Central's technological resources, "including but not limited to the information, files and data transmitted by or stored on them, are the sole property of the Bank and are intended for business use. . . . Employees must not send or receive by any manner copyrighted materials, trade secrets, confidential or proprietary information, financial information, or other such information without prior authorization." *Id.* at 15-16. The Employment Handbook set forth an expectation of loyalty to the institution and discouraged "any activity . . . that would require you

to disclose confidential, trade secret information belonging to the Bank" as well as "situations in which . . . personal interests conflict or appear to conflict with the Bank's interest, whether those situations arise because of outside employment or outside activities generally." *Id.* at 5-6, 17. Although the Employment Handbook states that it is not a contract, *id.* at 2, both Kiolbasa and Smith signed acknowledgments of receipt that stated "I understand that it is my responsibility to read and abide by the policies described in the Employee Handbook." Jt. Exh. 013; FRB Exhs. 003, 005.

A. Respondents Plan to Partner With Farmers

In late 2013, Respondents began exploring the opportunity to invest in another bank and created a business plan about their interest in acquiring Farmers, a competitor to Central. Jt. Exh. 010 at 897:1-899:12; Jt. Exh. 006 at 54:17-55:9; R.D. at 67. The business plan contemplated Farmers opening a loan production office ("LPO") in Cheyenne, where Kiolbasa resided and Central had customers, and projected the LPO originating millions of dollars in new loans in its first year. Jt. Exh. 026 at FRB-FARMERS-004245–4248. "In order to entice [Kiolbasa's] existing customers to move," the business plan provided that Farmers would pay for appraisals, title insurance, and filing fees. *Id.* Respondents did not inform Central about their interest in pursuing ownership of another bank. Jt. Exh. 010 at 899:13-20.

While employed at Central, Kiolbasa spoke with several of his existing customers to gauge their interest in investing in Farmers. Jt. Stipulations ¶ 11. In addition, almost a year before his departure from Central, Kiolbasa contemplated reaching out to his current roster of clients to see if they would follow him to another bank. In a November 21, 2013 email to Smith, Kiolbasa expressed concern that "I don't want to be over confident in the amount of loans that I can bring in. . . . I'm curious if we put this together at what time it would be appropriate for me to start talking to my customers. I know the easy answer is as soon as I resign, but my

competitiveness says as soon as we know this [deal] is going to happen. Get some commitments before I depart?" Jt. Exh. 014. In a February 2014 email Kiolbasa informed John Gross, Farmers' then-President and Chairman, of Respondents' desire to "recapitalize the bank with a cash injection, grow the loan portfolio with quality credits, and open a full service branch in Cheyenne as soon as the loan portfolio would allow." Jt. Exh. 021. Kiolbasa conveyed an intent to grow Farmers' loan portfolio by focusing on the customers in the $17.5 million loan portfolio he currently managed at Central. *Id.*; *see also* Jt. Exh. 009 at 520:19-521:12.

The very next month Smith emailed Kiolbasa a draft letter for Mr. Gross, which stated: "We have $7 million dollars [sic] in quality loans that we can bring to Farmers nearly upon closing. These are current loan customers that have been approached and have agreed to move their business upon the transition." Jt. Exh. 022. Although Respondents aver that, as of the drafting of this letter in March 2014, Kiolbasa had not yet approached any of these customers to move their business, Mr. Gross testified that during a June 2014 meeting Respondents affirmed that they had approached customers who agreed to move loans to Farmers once Respondents "transitioned" their employment. *Compare* Respondents' Statement of Disputed Facts ¶ 32 (citing just a handful of customers who directly testified that Kiolbasa did not solicit them before he moved to Farmers), *with* Jt. Exh. 012 at 1506:15-21 (testimony by Mr. Gross). On July 25, 2014, Kiolbasa sent Farmers' board members "a listing of investors and potential customers." Jt. Exh. 035. Under the heading titled "potential loans," Kiolbasa explained that these were "current customers or prospects that I would call on. . . . Bolded names are relationships that have told me they will move if and when I move banks." *Id.* This list contained the customers' names, original loan balances (and sometimes the outstanding loan balance, payments remaining, or loan-to-value ratio), loan type (*e.g.*, term versus revolving line of credit), and in many cases a

description of the collateral. Enforcement Counsel's Motion for Summary Disposition ("Summ. Disp. Mot.") Exh. 035. Respondents did not inform Central that they had shared this information with Farmers because doing so could have jeopardized their employment at Farmers. Jt. Exh. 011 at 977:25-978:5, 980:8-13 (Smith testimony) ("Q. And that's why you didn't tell anyone at [Central] what was going on, because you knew you would be fired if they knew you were disclosing information and trying to improve a competing bank business? A. Yes."); *see also* Jt. Exh. 008 at 282:11-14 (Central's Chairman indicated that Respondents would have been terminated had he been aware of their plans); Jt. Exh. 030 (e-mail from Smith to Kiolbasa warning that the Dropbox program they were using to share documents with Farmers created a local folder with a copy of the exchanged documents, and that he had therefore deleted it from his work computer because "I don't want to get caught with our pants down on this").

B. Kiolbasa Takes Central's Customers to Farmers

On September 11, 2014, Kiolbasa tendered his resignation at Central, which became effective on Friday, September 19, 2014. Jt. Stipulations ¶ 15. On September 12, 2014, Smith executed a letter of intent regarding Respondents' proposal to purchase an interest in Farmers' parent company. Jt. Exh. 040; Jt. Exh. 011 at 1004:13-25. That same day Kiolbasa emailed Mr. Gross about Farmers' lending limit, stating "I am going to try to have several loan requests ready to go the first week I'm there." Jt. Exh. 094. He began working at Farmers as a loan officer on September 22, 2014.[3] Jt. Stipulations ¶ 16. Kiolbasa took several Central forms with him to Farmers, without Central's authorization. These included: (1) a debt service to credit ratio form; (2) a commercial risk rating form; (3) an agricultural risk rating form; and (4) a real estate valuation form. Jt. Exh. 009 at 603:17-604:14.

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[3] As of June 5, 2015, Kiolbasa began serving as Executive Vice president of Farmers and as a member of its board of directors. Joint Stipulations ¶ 4.

As early as two and a half weeks after Kiolbasa departed Central and continuing for months, numerous Central loans that Kiolbasa had previously managed moved to Farmers. *See* Gary M. Schwartz Supp. Expert Report at 4 (Apr. 22, 2019); *id.* at Exhibit D (showing that Farmers paid off Central loans totaling millions of dollars in principal); *see also* Jt. Exh. 008 at 276:16-18 (testimony from Central's Chairman that the first payoffs occurred within three weeks of Kiolbasa's departure). Bypassing the usual preliminary step of a competitor bank (or associated title company) submitting formal, written payoff information requests for these loans, Farmers sent Central checks for exact loan payoff amounts—a situation that was unprecedented for Central and that deprived Central of the opportunity to engage in its typical practice of contacting and attempting to retain these customers. *See* Jt. Exh. 006 at 32:2-10; 60:3-18; Jt. Exh. 009 at 329:2-330:17; Hearing Tr. at 44:17-45:8 (testimony that Central was "negatively impacted" because it was unable to "pursue those customers further and try to keep the business with the bank by offering them a better deal"). The rate at which Central lost loans due to payoffs between October 2014 and January 2015 was abnormally high. *See* Jt. Exh. 008 at 236:8-15.

Smith enabled Farmers' ability to send these payoff checks without going through the typical payoff request process at Central because he directly provided Kiolbasa with the payoff information necessary for the loans of several Central customers. *See* Respondents' Prehearing Statement at 7; Jt. Exh. 011 at 1089:20-1090:3. For example, on November 10, 2014, Kiolbasa emailed Smith's personal email account "need payoffs" on two loans for a specific Central client, to which Smith quickly responded with detailed figures. Jt. Exh. 053; *see also* Jt. Exh. 051 (November 3, 2014 email from Kiolbasa to Smith asking "[c]an you tell me what [one specific customer's] balances were, what the rates were, what his balance is now, and what his

rate is now and how long it is fixed for"). Central's current President testified that Smith's duties as CFO did not encompass payoff requests and that if he were to receive any he should have passed the information along to the loan officer responsible for managing the loan. Hearing Tr. at 36:2-9, 40:14-20. After Central expressed concerns to Smith that several customers had paid off their mortgages and moved them to Farmers, Smith did not tell Central's management of his future plans to join Farmers, his facilitation of some of the payoffs, or "what was going on" with the loan transfers. Jt. Stipulations ¶ 17; Jt. Exh. 011 at 1033:23-1034:3; *see also* Jt. Exh. 046 (Smith emailed Kiolbasa "I guessed you signed the Cashier's checks from [Farmers] that paid off the [Central] loans. . . . Trying to come up with an answer before Carl [Central's former President] gets there today.").

C. Smith Engages in Additional Efforts for Farmers' Benefit

In addition to fulfilling payoff requests, Smith provided Farmers with over a dozen Central forms or documents, all of which were sent from his personal email account and without Central's authorization. *See* Jt. Exh. 011 at 1008:17-1009:4. In fall 2014 Smith sent Farmers employee Michelle Thomas a version of Central's Loan Processing form, Participation Agreement form, and Customer Information Profile form.[4] Jt. Exhs. 042, 049, 052. This latter form had been purchased by Central from a vendor named LaserPro. Jt. Exh. 006 at 56:16-58:5; Jt. Exh. 012 at 1214:19-24. In early December 2014, Smith sent Kiolbasa six documents that Central was required to complete on a quarterly basis. Jt. Exh. 059; Jt. Exh. 011 at 1057:9-15,

[4] Michelle Thomas—who previously worked as an employee for Central—joined Farmers shortly before Kiolbasa, and was dating Smith at the time these emails were exchanged. *See* Jt. Exh. 011 at 1169:1-1170:22; Jt. Exh. 012 at 1240:17-19, 1243:20-1244:3 (noting that Ms. Thomas wed Smith in 2017).

1058:5-21, 1059:3-10. On December 9, 2014, Kiolbasa responded, advising how he had used these exemplars to create similar documents at Farmers.[5] Jt. Exh. 059.

On January 6, 2015, Smith emailed Ms. Thomas a copy of Central's general ledger for its "OREO" (Other Real Estate Owned), which included property addresses and their respective book and appraised values. Jt. Exh. 060. The next day, Smith sent Kiolbasa a copy of Central's Dormant Account Procedures, an internal form developed by Central's staff. Jt. Exh. 061; Jt. Exh. 011 at 1061:7-16; Jt. Exh. 006 at 52:22-53:2, 54:5-55:17. On January 8, 2015, Smith sent three attachments to Ms. Thomas in an email titled "forms we use for balancing pending/holding accounts" and indicated that "[t]hese or something like it WILL be implemented and used every day." Jt. Exh. 062. In February 2015, Smith sent Kiolbasa a series of emails with the following documents, all of which contained Central's financial data: Liquidity Cash Flow Analyses, Public Funds & Repurchase Agreements List, GAP Reports, ALCO Look-back Analysis, and a consultant's review of assumptions Central used to create a financial model.[6] Jt. Exhs. 064-066.

During this timeframe—while Kiolbasa worked at Farmers and Smith continued to work at Central—the two strategized on business opportunities that would benefit themselves or Farmers rather than Central. For example, in October 2014 Kiolbasa emailed Smith about whether it would be prudent for Farmers to match or best one of the Central customer's current loans because he "d[idn't] think they will move without us offering something more." Jt. Exh. 045; Jt. Exh. 011 at 1019:10-1020:25 (Smith testified that "early on [Kiolbasa] ran a couple of deals by me" and acknowledged that, as part of the effort to lure this customer to Farmers, Smith

[5] In November 2014 Kiolbasa similarly requested from Smith a copy of Central's mortgage release form so that it would "save us from recreating the wheel." Jt. Exh. 051.

[6] Smith also admitted to talking from Central an ESA risk assessment form, a fixed asset spreadsheet, and a participation sold agreement. Jt. Exh. 011 at 1072:22-1073:18.

looked up loan information using Central's internal computer system); *see also* Jt. Exh. 048 (October 2014 email from Kiolbasa to Smith exploring loan terms "to see if [a potential customer] would throw those loans our way"). The two also wrote about the potential sale of Oregon Trail Bank; Smith "talked down the idea" to Central's management "as much as [he] could" in case he and Kiolbasa wanted to pursue that purchase themselves. Jt. Exh. 043; Jt. Exh. 011 at 1016:17-1018:12. Finally, while still serving as Central's CFO, Smith supported Farmers by, *inter alia*, assisting with the preparation of regulatory filings and reviewing Farmers' proposals or financials. *E.g.*, Jt. Exhs. 079, 080, 085, 086, 090; Jt. Exh. 011 at 1006:19-1008:8.

D. Smith Departs Central for Farmers

On March 6, 2015, Respondents executed a Stock Purchase Agreement providing for their purchase of an equity interest in Commercial, Farmers' parent company; Smith and Kiolbasa acquired 7.76% and 19.04% ownership interests respectively. Jt. Exh. 067; Schwartz Supp. Expert Report at 9 (noting a $200,000 investment by Smith and a $500,000 investment by Kiolbasa). On March 17, 2015, one of Central's Board members conducted a Google search of Farmers and found the March 12, 2015 Federal Reserve Notice of Change of Control application of Respondents' proposed acquisition. Jt. Exh. 068; Jt. Exh. 009 at 336:22-337:8. On March 18, 2015, Central's management team met with Smith and confronted him about the Farmers transaction. Jt. Exh. 009 at 338:25-339:4, 339:19-340:3. Smith tendered his resignation from Central during that meeting, effective immediately. *Id.*; Jt. Exh. 070. Smith joined Farmers as an employee on April 27, 2015. Jt. Stipulations ¶ 3. Beginning June 5, 2015, Smith became the President and Chief Executive Officer of Farmers and a member of its board of directors. *Id.*

E. Central Takes Legal Action Against Farmers

In September 2016, Central filed a civil lawsuit against Respondents and other Farmers-affiliated defendants asserting a number of claims (the "Central Litigation"). *Cent. Bank & Trust*

v. Smith et al., No. 186-671 (Wyo. 1st Jud. Dist.); Jt. Exh. 072 (complaint). Following pretrial discovery that included at least 19 depositions,[7] three claims went to trial—misappropriation of trade secrets, breach of fiduciary duties, and tortious interference with contract or prospective economic advantage. *Cent. Bank & Trust v. Smith et al.*, No. 186-671; FRB Exh. 006 (jury verdict form). On March 23, 2018, after the court denied a motion for judgment as a matter of law, the jury found both Respondents (and no others) liable for all three claims, awarding Central over a million dollars in damages. Jt. Exh. 102 at 2050:12-17; FRB Exh. 006. In addition, the jury awarded punitive damages after finding Respondents' conduct willful and malicious on the first count and willful and wanton on the latter two counts. FRB Exh. 006 (assessing $25,000 against Kiolbasa and $50,000 against Smith). Once the court entered final judgment, FRB Exh. 008, Respondents appealed the verdict and Central appealed the earlier dismissal of the other Farmers defendants. *See* Respondents' Exceptions at 17-18. While the appeals were pending, the parties entered into a global settlement, after which the trial court vacated its judgment in the Central Litigation just before the ALJ hearing in this matter. *Id.* at 18, 30; Hearing Tr. at 132:19-133:5; *see also* Wyoming Laramie County District Court No. CV-186671 (reflecting entry on the docket of November 20, 2019 vacatur); Wyoming Appellate Court No. S-18-0173 (docket entries showing an initial notification of settlement on June 26, 2019, and a Stipulated Dismissal with Prejudice filed October 31, 2019).[8]

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[7] *See* Jt. Exhs. 105-108, 110-111; Respondents' Exh. 027; ALJ Exhs. 001-019.

[8] Under 12 C.F.R. § 263.36(b)(1), the Board may take official notice of matters "which may be judicially noticed by a United States district court." United States district courts, in turn, may take judicial notice of other courts' dockets. *See, e.g.*, *United States v. Leal*, 921 F.3d 951, 963 n.10 (10th Cir. 2019) ("[A] court may take judicial notice of docket information from another court.") (citation omitted).

III. JURISDICTION

Respondents' first exception arguing that the Board lacks jurisdiction over this matter fails to address the March 9, 2020 Determination on Requests for Interlocutory Appeal, in which the Board determined that it has jurisdiction to issue a prohibition order against Respondents for misconduct that took place at a state nonmember bank. The Board incorporates by reference this Determination and reiterates that section 8(e)(1) of the FDI Act establishes that the Board has jurisdiction to prohibit "*any* institution-affiliated party" ("IAP") who has violated "*any* law or regulation," "engaged or participated in *any* unsafe or unsound practice in connection *with any insured depository institution or business institution*," or "engaged in *any* act . . . which constitutes a breach of such party's fiduciary duty." 12 U.S.C. § 1818(e)(1) (emphases added); *cf. United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 7 (2008) ("Five 'any's' in one sentence and it begins to seem that Congress meant the statute to have expansive reach."). With respect to IAPs subject to Board jurisdiction, the statute's plain language extends jurisdiction over *any* practice or act and does not place a time-bar or restriction on *when* or *where* such practice or act may have occurred. *See Hendrickson v. FDIC*, 113 F.3d 98, 102-03 (7th Cir. 1997) (upholding the FDIC's jurisdiction to prohibit a bank president due to a violation he committed while previously employed as comptroller at a nonbank entity over which the FDIC did not exercise regulatory authority).

Respondents present no new arguments in support of their position. Respondents do not dispute that they are IAPs of Farmers or that the Board has jurisdiction over any of their actions taken while employed by Farmers. *See* Respondents' Exceptions at 21, 29. But they maintain that the FDIC retains jurisdiction over their alleged conduct at Central, and that this jurisdiction is exclusive. *See generally* Respondents' Exceptions at 19-29. Although the FDIC retains jurisdiction over Respondents' conduct pursuant to section 8(i)(3) of the Financial Institutions

Reform, Recovery, and Enforcement Act ("FIRREA"), nothing in that provision vitiates the Board's jurisdiction over its own IAPs as set forth in section 8(e)(1) of the FDI Act. Thus, while the FDIC has exclusive jurisdiction under 12 U.S.C. §§ 1813(q) and 1815 to regulate state nonmember insured *banks*, the statute permits concurrent jurisdiction over *IAPs* who formerly worked at an FDIC-supervised institution and then transitioned to a state member bank. To hold otherwise would lead to the untenable result of requiring reliance on the FDIC to provide for the safety and soundness of a Board-supervised institution that currently employs the IAP.[9]

IV. COLLATERAL ESTOPPEL

The ALJ applied collateral estoppel based on the Central Litigation in finding that Respondents willfully and maliciously misappropriated Central's trade secrets, willfully and wantonly committed tortious interference with Central's contract or prospective economic advantage, and willfully and wantonly breached their fiduciary duties to Central. R.D. at 30 (citing Notice ¶¶ A, B, 22, 25, 28). Respondents object to the ALJ's reliance on collateral estoppel on three grounds. First, they contend that the issues in the present proceeding are not identical to the issues in the Central Litigation. Respondents' Exceptions at 30-31. Second, Respondents contend that the judgment in the Central Litigation lacks preclusive effect because it was vacated pursuant to a settlement agreement, *id.* at 30, 35-37, which was reached while an appeal of the judgment was pending and after the commencement this enforcement action. R.D. at 14, 32. And Respondents claim that the Central Litigation did not provide them with a full and fair opportunity to litigate the issues that the ALJ found to be precluded because they contend that the potential consequences of this proceeding were not foreseeable at the time of the Central Litigation.

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[9] Respondents' reliance on testimony from prior Board General Counsel Scott G. Alvarez is misplaced. That testimony discusses the Board's jurisdiction over specific institutions and in no way comments on IAPs. *See* Respondents' Exceptions at 26-27. Respondents' related assertion that the FDI Act required some form of coordination with the FDIC before Enforcement Counsel could proceed with this action is not supported.

Respondents' Exceptions at 38. Respondents raise only these specific exceptions and do not generally contest the use of collateral estoppel in administrative agency proceedings. *Cf. Chisholm v. Def. Logistics Agency*, 656 F.2d 42, 46 (3d Cir. 1981) ("[T]he same policy reasons which underlie use of collateral estoppel in judicial proceedings are equally applicable when the administrative board acts as an adjudicatory body.").

Before deciding whether collateral estoppel applies to any of the specific issues in this proceeding, we first address Respondents' exceptions concerning vacatur and fairness, which are threshold issues with respect to the applicability of collateral estoppel. We conclude that the vacatur of the Wyoming District Court's decision pursuant to settlement does not terminate its preclusive effect, and that Respondents had a full and fair opportunity to litigate the issues on which Enforcement Counsel sought preclusion.

Consequently, in our discussion of the misconduct and other elements required for prohibition, we consider whether any issue decided in the Central Litigation satisfies a necessary element in the present proceeding and thus estops Respondents from relitigating it. We then address Respondents' remaining contention that the issues in the two actions are not the same, as required for collateral estoppel to apply with respect to a given issue. *See B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 153 (2015) (collateral estoppel bars litigation of identical issues decided in a prior action); *Tozzi v. Moffett*, 430 P.3d 754, 760 (Wyo. 2018) (same).

A. The Preclusive Effect of a Judgment Vacated Due to Settlement

The ALJ determined that there was no controlling case law concerning judgments vacated due to settlement, but found the Sixth Circuit opinion in *Watermark Senior Living Retirement Communities, Inc. v. Morrison Management Specialists, Inc.*, 905 F.3d 421 (6th Cir. 2018), persuasive. *See* R.D. at 34. Based on *Watermark*'s reasoning, the ALJ found that vacatur

of the judgment in the Central Litigation did not remove the preclusive effect of the jury's findings in that action. *Id.* at 36.

In *Watermark*, the Sixth Circuit predicted that the Michigan Supreme Court would give preclusive effect to a state court judgment that had been vacated due to the parties' subsequent settlement. 905 F.3d at 427. *Watermark* cited four grounds for its ruling. First, it noted that at least three other federal circuits have adopted a similar rule. *Id.* (citing *Sentinel Tr. Co. v. Universal Bonding Ins. Co.*, 316 F.3d 213, 218-23 (3d Cir. 2003); *Bates v. Union Oil Co. of California*, 944 F.2d 647, 649-52 (9th Cir. 1991); *Chemetron Corp. v. Bus. Funds, Inc.*, 682 F.2d 1149, 1187-92 (5th Cir. 1982)). Second, it noted that, for purposes of issue preclusion, a "final judgment includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be given preclusive effect." 905 F.3d at 427 (quoting Restatement (Second) of Judgments § 13, cmt. g) (internal quotation marks omitted). In this regard, the court cited to earlier cases in which it had held that a prior adjudication that was not embodied in a final judgment was nonetheless sufficiently firm to be given preclusive effect. *Id.* at 427-28 (citations omitted). The court further explained that allowing a losing party to settle to avoid preclusion would potentially multiply subsequent proceedings, thus increasing the probability of inconsistent decisions and requiring additional expenditures of judicial resources—two results the Michigan Supreme Court had expressly sought to avoid in its prior collateral estoppel jurisprudence. *Id.* at 428 (citing *Monat v. State Farm Ins. Co.*, 677 N.W.2d 843, 851 (2004)). Lastly, the court reasoned that pursuant to equitable considerations of "fairness," a party that elects to forego further review is not similarly situated to a party that won vacatur due to a finding that a ruling was faulty, or who lost the chance to appeal due to factors beyond its control, since "all that fairness requires [is] [o]ne bite at the apple . . . ." 905 F.3d at 428-29

(citations omitted). Relying on *Watermark*, the ALJ found that vacatur of the judgment in the Central Litigation did not deprive the jury's findings of their preclusive effect. R.D. at 36.

Respondents assert that the ALJ's reliance on *Watermark* was misplaced. Respondents' Exceptions at 36. They contend that the ALJ ignored "applicable Wyoming case law and failed to take into consideration the circuit split that exists on this issue in order to properly evaluate and predict how the Tenth Circuit would resolve the issue." *Id.* With respect to the first contention, Respondents claim that the ALJ overlooked a federal court decision from the District of Wyoming, *Estate of Van Dyke by Van Dyke v. Glaxo SmithKline*, No. 05-cv-153-j, 2006 WL 8430904 (D. Wyo. Nov. 1, 2006), and a Tenth Circuit decision, *United States v. Lacey*, 982 F.2d 410, 412 (10th Cir. 1992). Respondents' Exceptions at 36-37. With respect to their contention of a circuit split, Respondents cite the Second Circuit's ruling in *Harris Trust and Saving Bank v. John Hancock Mutual Life Insurance Co.*, 970 F.2d 1138, 1146 (2d. Cir. 1992), as well as *McGoldrick v. Hunt*, 145 F.R.D. 330, 332 (S.D.N.Y. 1993). Respondents' Exceptions at 36-37.

As an initial matter, the Board disagrees with Respondents' contention that the relevant question is how the Tenth Circuit would resolve the issue. Rather, it is necessary to predict how the *Wyoming Supreme Court* would resolve the issue. As the Tenth Circuit itself has explained, it looks to state law to determine the preclusive effect of a state court judgment. *Vanover v. Cook*, 260 F.3d 1182, 1187 (10th Cir. 2001) (citations omitted); *see also Marrese v. Am. Ac. of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985) (state law determines the preclusive effect of a state court judgment). And in the absence of controlling law from the state in question, federal courts, including the Tenth Circuit, will attempt to predict the preclusive effect that the state's supreme court would give to the prior judgment. *See Sierra Club v. Two Elk Generation Partners Ltd. P'ship*, 646 F.3d 1258, 1268 (10th Cir. 2011). When predicting how the Wyoming

Supreme Court would rule, it is appropriate to consider "all resources available [including] decisions of [Wyoming] courts, other state courts and federal courts, in addition to the general weight and trend of authority." *Cornhusker Cas. Co. v. Skaj*, 786 F.3d 842, 852 (10th Cir. 2015) (internal quotation marks and citation omitted).

Based on these considerations, we predict that the Wyoming Supreme Court, like the *Watermark* court, would hold that a jury's verdict on the merits can be given issue-preclusive effect notwithstanding any vacatur of the resulting judgment due to settlement. First, the Wyoming Supreme Court, when confronted with novel questions concerning the preclusive effect of prior judgments, looks to the Restatement (Second) of Judgments for guidance. *See, e.g.*, *Casian v. State ex rel. Wyo. Dep't of Transp.*, 434 P.3d 116, 121 (Wyo. 2019) (following Restatement (Second) of Judgments § 36, cmt. f in determining whether a judgment against one state agency is preclusive against another agency with differing responsibilities); *Carson v. State ex rel. Wyo. Workers. Safety & Comp. Div.*, 322 P.3d 1261, 1269 (Wyo. 2014) (following Restatement (Second) of Judgments § 15 concerning the effect of two prior inconsistent judgments); *Worman v. Carver*, 44 P.3d 82, 89 (Wyo. 2002) (following Restatement (Second) of Judgments § 85 cmt. f, §85 illustration 11 and § 85(2) in determining privity rules for purposes of issue preclusion). Thus, the Board expects that, like the *Watermark* court, the Wyoming Supreme Court would follow the Restatement's rule that a judgment is "final" for purposes of issue preclusion as long as the prior adjudication was "sufficiently firm to be given preclusive effect." Restatement (Second) of Judgments § 13, cmt. g.

Moreover, the policy considerations cited by the Wyoming Supreme Court for applying issue preclusion include conservation of judicial resources, the prevention of inconsistent decisions, and the concept that a party should be limited to one opportunity to try its case on the

merits. *In re Paternity of SDM*, 882 P.2d 1217, 1220-21 (Wyo. 1994) (citations omitted); *accord Dowlin v. Dowlin*, 162 P.3d 1202, 1207 (Wyo. 2007) (explaining judicial disfavor of opportunistic attempts to relitigate matters as the reason for applying collateral estoppel and res judicata) (citations omitted). These reasons are similar to the policy considerations articulated by the Michigan Supreme Court that led the *Watermark* court to predict that Michigan would give preclusive effect to a judgment vacated pursuant to settlement. And like the *Watermark* court, the Wyoming Supreme Court has been guided by the principle that "a losing litigant should not by design get 'two bites at the cherry'" and should thus not be allowed to engage in procedural machinations meant to allow relitigation of an issue. *Dowlin*, 162 P.3d at 1207 (citation omitted). The Board therefore predicts that the Wyoming Supreme Court would take the same position as the *Watermark* court, finding that once a case has proceeded to verdict, the vacatur of the resulting judgment does not deprive the verdict of preclusive effect.

The Board rejects Respondents' exceptions in this regard. Respondents do not cite any controlling cases (or any cases at all) from the Wyoming Supreme Court specific to vacatur and settlement, and do not explain why the cases they cite should be more persuasive than the foregoing authorities suggesting that collateral estoppel should apply. And a review of the federal cases cited by Respondents does not reveal any grounds for finding them more persuasive than the authorities noted above. In addressing a judgment vacated due to settlement, the district court in the unpublished *Estate of Van Dyke* decision did hold, in summary fashion, that "it is clear that a vacated judgment is deprived of its conclusive effect." 2006 WL 8430904, at * 4. But the trial court did not cite any legal authority or otherwise explain its reasons for adopting this standard, much less explain why the Wyoming Supreme Court would be expected to adopt such a rule, and thus we do not find this case persuasive. *Cf. Weiss v. United States*, 787 F.2d

518, 526-27 (10th Cir. 1986) (rejecting a district court's construction of state law that "cite[d] no authority").

The other "Wyoming" case cited by Respondents, *United States v. Lacey*, is not on point for multiple reasons. First, it concerned a prior ruling in a federal criminal case in Kansas, rather than the preclusive effect of a Wyoming state court judgment, and thus did not construe Wyoming law.[10] Second, *Lacey* did not purport to address the preclusive effect of a judgment vacated due to settlement, since the order at issue had been vacated due to a successful reconsideration motion. 982 F.2d at 411. In fact, the language cited by Respondents expressly refers to a "general rule" that *Lacey* applied to the facts before it, as opposed to an absolute rule permitting no exceptions based on particular circumstances. *Id.* (citation omitted); *cf. In re Cont'l Inv. Corp.*, 586 F.2d 241, 245 (1st Cir. 1978) ("The fact that the Court has chosen a general rule rather than an absolute rule means, of course, that there are exceptions."). In this regard, *Watermark* explained that a party that elects to forego further review by settling is not similarly situated to a party that obtained vacatur due to a judicial finding that a prior ruling was faulty, 905 F.3d at 428-29, as was the case in *Lacey*. Additionally, the actual issue that *Lacey* adjudicated concerned res judicata, or claim preclusion, rather than collateral estoppel, or issue preclusion. *Id*. It is solely for issue preclusion that an adjudication need only be "sufficiently firm" in order to qualify as a final judgment. Restatement (Second) of Judgments § 13. This less-strict definition of finality—not at issue in *Lacey*—has been expressly cited as grounds for barring a party from avoiding issue preclusion even if there is no official judgment in existence due to the parties' late settlement. *E.g.*, *Watermark*, 905 F.3d at 427.

[10] Consistent with the fact that *Lacey* was construing federal law, the quoted language in *Lacey* on which Respondents rely came from *Moore's Federal Practice*. 982 F.2d at 411.

Moreover, in the nearly two decades since *Lacey*, the relevant “trend of authority,” *cf. Cornhusker*, 786 F.3d at 852, has shifted, such that more recent decisions take care to distinguish vacatur (or other reason for lack of a formal final judgment) due to the parties’ voluntary settlement. *Watermark*, 905 F.3d at 427; *Sentinel Tr.*, 316 F.3d at 218-23. In fact, *Moore’s*, which was the source of the language in *Lacey* on which respondents rely, now expressly notes the *Watermark* exception for a vacatur resulting from settlement. 18 Moore’s Federal Practice - Civil § 132.03[5][b][i] (“A judgment that has been set aside as a condition of settlement can have issue-preclusive effect on future litigation.”) (citing *Watermark*). *Lacey* thus does not compel a different result than that reached by the ALJ.

Lastly, Respondents do not explain why the mere existence of a circuit split renders the ALJ’s reliance on *Watermark* erroneous. They merely note that the Second Circuit ruled differently than the *Watermark* court in *Harris Trust and Savings Bank*, and also cite to *McGoldrick*, a district court case from the Second Circuit that simply applied *Harris Trust*. 145 F.R.D. at 332. But they make no attempt to explain why *Harris Trust* is more persuasive than *Watermark* or reflects the weight or trend of authority. In fact, as noted above, *Harris Trust* appears to be a minority position; *Watermark* identified three other circuits that have also found that the lack of a judgment due to settlement following adjudication on the merits does not deprive the prior adjudication of preclusive effect, and *Hudson Insurance Company v. City of Chicago Heights,* 48 F.3d 234, 238 (7th Cir. 1995), represents a similar ruling from an additional circuit. Even within the Second Circuit, the continued validity of *Harris* has been called into question in light of subsequent developments in the jurisprudence that have restricted parties’ ability to manipulate the effect of prior rulings in various contexts by means of settlement. *See Artmatic USA Cosmetics v. Maybelline Co.*, 906 F. Supp. 850, 854 (E.D.N.Y. 1995) (citations

omitted). Given the "general weight and trend of authority," *Cornhusker*, 786 F.3d at 852, and Respondents' failure to even attempt to explain why *Harris*' reasoning is more persuasive than that of five other circuit courts, we find no error in the ALJ's reliance on *Watermark*. Accordingly, we reject Respondents' contention that vacatur of the judgment in the Central Litigation due to their settlement makes collateral estoppel inapplicable to this proceeding.

B. A Full and Fair Opportunity to Litigate

Respondents claim that they did not have a full and fair opportunity in the Central Litigation to litigate the issues that the ALJ found to be subject to collateral estoppel. Respondents' Exceptions at 38. Specifically, they contend that issue preclusion does not apply unless the "potential results of the second action" and "the role of the issue in the second action [were] foreseeable in the first action." *Id.* (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979); *Butler v. Pollard*, 800 F.2d 223, 225 (10th Cir. 1986); *The Evergreens v. Nunan*, 141 F.2d 927, 929 (2d Cir. 1944)). They assert that "the removal of a bank officer is an extraordinary remedy and is not comparable to the monetary damages at issue in the Central Litigation," and they thus "could not have anticipated that they would be barred from their chosen profession when they were defending against claims seeking solely money damages." Respondents' Exceptions at 38 (citing *In re Seidman*, 37 F.3d 911, 929 (3d Cir. 1994)). They also claim that there have been no prior proceedings "in which a bank executive was prohibited from banking based on the facts presented here or even facts which might be similar," and that "it is fair to assume" they would have pursued a different litigation or settlement strategy in the Central Litigation had they known their livelihoods were at stake. *Id.* at 38-39. The Board does not find these arguments persuasive because the record shows that Respondents vigorously litigated in the Central Litigation.

As a preliminary matter, Respondents again cite no Wyoming cases (or even federal cases applying Wyoming law) on this issue. It is not clear that the Wyoming Supreme Court would impose a foreseeability requirement in order for collateral estoppel to apply. The only allusion to such a requirement appears to be dicta from a case that listed lack of foreseeability as a *possible* exception to the application of collateral estoppel. *Elliott v. State*, 247 P.3d 501, 503 (Wyo. 2011) (quoting Restatement (Second) of Judgments § 28) (listing potential exceptions to the application of collateral estoppel without any analysis because the court found that other, more basic prerequisites to application of the doctrine had not been met).

Assuming for the sake of argument that *Elliott* represents endorsement of a foreseeability exception to collateral estoppel by the Wyoming Supreme Court, the comments to the Restatement section it quotes indicate that the exception would not apply here. Specifically, the comments indicate that this exception applies only if the issue's relevance to a subsequent action was not foreseeable at the time of the first action "*and* if that lack of foreseeability may have contributed to the losing party's failure to litigate the issue fully." Restatement (Second) of Judgments § 28 cmt. i (emphasis added). Such instances are "rare," and include an intervening change of governing law or subsequent acquisition of property affected by the earlier judgment as examples. *Id.* No such circumstance is present here.

The federal cases cited by Respondents do not appear to vary from the Restatement's formulation of the scope and application of the foreseeability exception, making the exception relevant only in connection with any demonstrated failure to vigorously defend in the first action due to unforeseen circumstances such as an intervening change in the law.[11] In *Parklane*

[11] Like *Elliott*, *Butler*, a Tenth Circuit case cited by Respondents, makes only a passing reference to a foreseeability requirement. In that case the focus was on the collateral estoppel effect of a jury's damages ruling on a judge's subsequent equitable ruling in the *same case*, and therefore foreseeability was not a contested issue. 800 F.2d at 224.

Hosiery, the Supreme Court explained that "[i]f a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable." 439 U.S. at 330; *see also The Evergreens*, 141 F.2d at 929 (noting that "[t]he stake in the first suit may have been too small to justify great trouble and expense in its prosecution or defense"). *The Evergreens* also aligns with the proposition that the foreseeability exception to collateral estoppel might apply when a change in the law renders an issue considered relatively unimportant in the first suit (and thus not strenuously contested) more important in the second suit. *Id.* ("*Were the law to be recast*, it would . . . be a pertinent inquiry whether the conclusiveness . . . of facts decided in the first [suit] might not properly be limited to future controversies which could be thought reasonably in prospect when the first suit was tried.") (emphasis added). These cases thus appear to track the Restatement's formulation that foreseeability of an issue's relevance to a subsequent action only matters if the stakes of the first suit alone might not have provided sufficient incentive to "defend vigorously," for example, because it concerned small or nominal damages or an issue considered trivial under prior law.

Based on the foregoing, we determine that even if Wyoming law were to consider lack of foreseeability as a possible exception to the application of collateral estoppel in certain circumstances, Respondents cannot plead it as a bar to collateral estoppel on the present record. While Respondents contend that the stakes are great in this action, they have not shown that the hazards in the first action—where judgment was entered against each of them for over $1,000,000—were "small or nominal."[12] *Parklane Hosiery Co.*, 439 U.S. at 330. Their own diligent litigation in the first action belies any such claim; Respondents vigorously litigated the

[12] Respondents Smith and Kiolbasa were ultimately held liable for $1,180,000 and $1,043,000 respectively, in damages in the Central Litigation. *See* E.C. Exh. 079 at 2 (state court judgment). By comparison, their final salaries at Central had been $130,000 and $120,000, respectively. Jt. Exh. 008 at 224:15-17, 227:13-15.

first action, pursuing their defense through discovery that involved at least 19 depositions, a merits motion, and a full jury trial. *Parklane Hosiery* and the Restatement indicate that foreseeability is not a concern when such active litigation occurred in the first action. *See also*, *e.g.*, *Raytech Corp v. White*, 54 F.3d 187, 196 n.9 (3d Cir. 1995) (rejecting foreseeability argument against collateral estoppel as "the record only serves to belie this position [because the court trying the first suit] itself observed that the parties submitted thousands of pages of documents and deposition transcripts"); *Bowen v. United States*, 570 F.2d 1311, 1322-23 (7th Cir. 1978) (rejecting foreseeability argument because the estopped party "retained counsel and vigorously litigated the issues in the [first] proceeding").

Moreover, by identifying a *change* in the law as a basis for asserting that the relevance of the issue was unforeseen, both the Restatement and *The Evergreens* indicate that the current state of the law puts parties on notice of potential actions against them. A number of courts have reached this conclusion. *See, e.g.*, *In re Bush*, 62 F.3d 1319, 1324 (11th Cir. 1995) (defendant in fraud action "could have reasonably foreseen" that judgment in a fraud action would later bar discharge of the underlying debt under the bankruptcy code's fraud exception to discharge); *Nationwide Mut. Ins. Co. v. Clinkscales*, No. 87-1522, 1987 WL 38796, at *1-2 (4th Cir. Oct. 20, 1987) (Since "Virginia law permits an action for contribution based on . . . a party's contributory negligence," a plaintiff to the first suit who lost due to a successful contributory negligence defense "should have foreseen the possibility of an action for contribution."). Respondents cite no unforeseen change in the law that caught them by surprise. Section 1818(e) expressly states that acts such as breach of a fiduciary duty and harm to a financial institution, which were matters expressly litigated in the Central Litigation, can be the basis for a prohibition action. 12 U.S.C. § 1818(e)(1)(A)(iii), -(B)(i). Thus the possibility that jury findings on breach of duties

or damages might be relevant to a subsequent removal action was reasonably foreseeable at the time of the Central Litigation.[13]

Respondents' remaining contentions on this issue are unpersuasive. While Respondents refer to removal as an "extraordinary remedy" that they could not anticipate, Respondents' Exceptions at 38, the opinion they cite actually describes removal under section 1818 as an "extraordinary power." *Seidman*, 37 F.3d at 929. That opinion makes clear that Congress, in enacting section 1818(e), required proof of additional elements in order to exercise this power—it did *not* comment on the likelihood of an agency invoking the power once the statutory elements had been met. *Id.* at 929. The formal codification of these elements, as explained above, instead serves to undermine Respondents' claim that they could not reasonably foresee the relevance of issues in the Central Litigation to this action. And Respondents' claim that there have been no prior prohibition proceedings based on similar facts is also unpersuasive. First, Respondents do not claim (nor could they claim), that no other proceedings have been brought seeking prohibition on the basis of the same legal elements as in this action. Second, as a factual matter, their contention that similar acts have not served as the basis for a prohibition order is simply inaccurate; bank officials have previously been subject to prohibition orders on the basis of having removed confidential customer loan data from a financial institution. *See, e.g.*, *In re Boutilier*, E.A. No. 2003-19, 2003 WL 21206982 (O.C.C. Apr. 4, 2003); *In re Smith*, E.A. No. 2003-20, 2003 WL 21206981 (O.C.C. Apr. 4, 2003).

Consequently, we adopt the ALJ's holding that Respondents' vigorous pursuit of their defense in the Central litigation, and the existence of 12 U.S.C. § 1818(e) in its present form at

[13] The record also shows that Respondents were well aware that their profession and participation in the profession was subject to a system of federal regulatory oversight. By way of example, Respondents understood that they had to obtain the Board's approval in order become officers of Farmers. *See* Respondents' Exceptions at 10-11.

the time of that action, preclude them from asserting lack of foreseeability as a bar to collateral estoppel in this action. *See* R.D. at 31. We will therefore consider the potential applicability of collateral estoppel to any issues relevant to this action when analyzing each element below.

V. STATUTORY ANALYSIS

The FDI Act sets forth the substantive basis upon which the Board may prohibit an IAP from further participation in banking. To issue such an order pursuant to section 1818(e)(1), the Board must make each of the following three findings: "(1) There must be a specified type of misconduct—violation of law, unsafe or unsound practice, or breach of fiduciary duty; (2) The misconduct must have a prescribed effect—financial gain to the respondent or financial harm or other damage to the institution; and (3) The misconduct must involve culpability of a certain degree—personal dishonesty or willful or continuing disregard for the safety or soundness of the institution." *In re Vasa*, 81 Fed. Res. Bull. 1171, 1995 WL 736814, at *1-2 (Dec. 1995). "Stated more succinctly, the Board must prove (1) an improper act, (2) that had an impermissible effect, and (3) was accompanied by a culpable state of mind." *Michael v. FDIC*, 687 F.3d 337, 349 (7th Cir. 2012).

A. Misconduct

Respondents' misconduct can broadly be summarized as falling into one of the following two categories: (1) usurping Central's customers or business opportunities for Respondents' own benefit; and (2) taking or sharing Central's information or that of its customers without authorization. Both satisfy the misconduct element under 12 U.S.C. § 1818(e).

1. <u>Respondents Engaged in Multiple Breaches of Their Fiduciary Duty</u>

a) Respondents' Fiduciary Duties Owed to Central

The misconduct element of section 1818(e) may be satisfied by a determination that an IAP "committed or engaged in any act, omission, or practice which constitutes a breach of such

party's fiduciary duty." 12 U.S.C. § 1818(e)(1)(A)(iii). Officers and directors of depository institutions have a "strict fiduciary duty" to act in the institution's best interests. *In re Leuthe*, FDIC Nos. 95-15e and 95-16k, 1998 WL 438324, at *41 (Feb. 13, 1998), *recommendation for prohibition order adopted*, 1998 WL 438323 (June 26, 1998). "In general corporate matters, the Supreme Court has held [that] when Directors and officers place their personal interests above those of the corporation or utilize corporate resources for personal gain, they have committed a serious breach of their common law fiduciary duty. The standards are even higher in banking, where the officers and Directors are charged with looking after other people's money." *Id.* (citing, *inter alia*, *Pepper v. Litton*, 308 U.S. 295, 311 (1939)).

Bank officers and directors have two overarching fiduciary duties: the duty of care and the duty of loyalty. *In re Ellsworth*, OCC Nos. AA-EC-11-41 and AA-EC-11-42, 2013 WL 3963708, at *34 (June 25, 2013). The duty of loyalty requires fiduciaries to "put the interests of the bank before their own, and not use their positions at the bank for their own personal gain." *Id.* at *35 (citing *Seidman v. OTS*, 37 F.3d 911, 933-34 (3d Cir. 1994)). "Self-dealing, conflicts of interest, or even divided loyalties are inconsistent with fiduciary responsibilities." *Michael*, 687 F.3d at 351 (quotation omitted) (upholding prohibition order assessment of civil monetary penalties under 12 U.S.C. § 1818). "A crucial component of the duty of loyalty is the duty of candor, which requires that corporate fiduciaries disclose all material information relevant to corporate decisions from which they may derive a personal benefit." *In re Ellsworth*, 2013 WL 3963708, at *35 (citations omitted). Omissions are sufficient to trigger a violation of this duty. *De La Fuente II v. FDIC*, 332 F.3d 1208, 1222 (9th Cir. 2003) ("It is well established that a person can breach a fiduciary duty by failing to disclose material information, even if not asked . . . .").

The ALJ described the fiduciary duties owed by Respondents and concluded that they had been breached. When taking exception to this determination, Respondents did not refute that they were fiduciaries.[14] The Board agrees that the misconduct element is satisfied by Respondents' breach of fiduciary duties.

b) Respondents are Collaterally Estopped from Denying a Breach of Fiduciary Duty

As with federal law, Wyoming state law imposes the duties of care and loyalty on corporate officers. *See, e.g.*, *Squaw Mountain Cattle Co. v. Bowen*, 804 P.2d 1292, 1296 (Wyo. 1991) ("Corporate officers and directors have a fundamental duty of loyalty and fiduciary responsibility to their corporation."); Wyo. Stat. Ann. § 17-16-842(a) ("An officer when performing in such capacity, has the duty to act: (i) In good faith; (ii) With the care that a person in a like position would reasonably exercise under similar circumstances; and (iii) In a manner the officer reasonably believes to be in or at least not opposed to the best interests of the corporation."); *see also Acorn v. Moncecchi*, 386 P.3d 739, 751 (Wyo. 2016) ("The fiduciary duties owed to an LLC by its manager require the manager to act carefully and disinterestedly.") (citing Wyo. Stat. Ann. § 17-29-409). Wyoming's fiduciary duties also incorporate a duty of candor. Wyo. Stat. Ann. § 17-16-842(b) ("The duty of an officer includes the obligation" to inform a superior officer or board of directors "about the affairs of the corporation known to the officer, within the scope of the officer's functions, and known to the officer to be material" and "of any actual or probable . . . material breach of duty to the corporation . . . .").

[14] Even if contested by Respondents, the Board would conclude that both Respondents served as fiduciaries. As Central's CFO, Joint Stipulations ¶ 6, Smith clearly owed fiduciary duties to Central. We find persuasive the trial court's determination in the Central Litigation that, when serving as a branch President, Kiolbasa "reported directly to the Central Bank & Trust officers" and therefore "voluntarily assumed his position as a fiduciary of Central." *Cent. Bank & Trust*, 2017 WL 10717313, at *8 (citing *Bear Peak Res., LLC v. Peak Powder River Res., LLC*, 403 P.3d 1033, 1055 (Wyo. 2017)).

The jury in the Central Litigation unequivocally found that both Kiolbasa and Smith breached their fiduciary duties to Central and assessed damages on that basis above and beyond damages awarded due to Respondents' misappropriation of trade secrets. FRB Exh. 006; FRB Exh. 010 (Instruction No. 27). This judgment was based on a "Breach of Fiduciary Duty" jury instruction:

> To establish this claim, [Central] must prove the following two elements: 1) Defendant Smith and/or Defendant Kiolbasa breached their fiduciary duty to [Central]; and 2) The breach by either or both Defendants caused Plaintiff to suffer damages. The duties that Defendant Smith and Defendant Kiolbasa, as corporate officers and directors, owed to [Central] included a duty of loyalty and candor to their corporation.

FRB. Exh. 010 (Instruction No. 27); *see also Gowdy v. Cook*, 455 P.3d 1201, 1208 (Wyo. 2020) (to establish claim for breach of fiduciary duties, a plaintiff must prove the existence of a duty, breach of the duty, and resulting damages) (citations omitted). This articulation of Respondents' fiduciary duty is comparable to the standards set forth under federal banking law[15] and sufficiently demonstrates that a breach of fiduciary duty under Wyoming law suffices to establish a breach of fiduciary duty under section 1818(e). Respondents are therefore collaterally estopped from arguing that they did not breach their fiduciary duties to Central and that the misconduct element has not been established.

c) The Record Independently Supports a Finding that Respondents Breached Their Duty of Loyalty

Even if collateral estoppel was unavailable, we find based on substantial evidence in the record presented that Respondents breached their fiduciary duty of loyalty owed to Central in multiple ways. First, although Respondents claim that they did not solicit Central's customers to

[15] The expectations of banks' fiduciaries are even higher than those of fiduciaries in other corporations, since bank officials are charged with looking after others' money. *In re Leuthe*, 1998 WL 438324, at *41 (citing, *inter alia*, *Pepper v. Litton*, 308 U.S. 295, 311 (1939)). Thus, a general finding of breach of fiduciary duties, as occurred in the Central litigation, is more than sufficient to estop Respondents from relitigating the issue.

move their business to Farmers while Respondents were still employed at Central, Respondents' Exceptions at 51-52, the exhibits presented belie this argument. As described above, Respondents contemplated approaching customers "as soon as we know this [deal with Farmers] is going to happen," rather than waiting until they resigned from Central. And Farmers' former President testified that Respondents represented to him in June 2014 that they had approached customers who were ready to move their loans upon Respondents' move to Farmers.[16] Moreover, Farmers executed payoffs for some of Kiolbasa's Central customers within approximately two and a half weeks of his arrival, consistent with the foregoing evidence indicating that Respondents had approached customers about moving their loans prior to his departure. Such solicitation of customers prior to departure does not fall within the bounds of Respondents' right to prepare to compete. *See* Restatement (Third) of Agency § 8.04, cmt. c ("An agent who plans to compete is free to make extramural arrangements for setting up a new business, such as incorporating a new firm and arranging for space and equipment. On the other hand, an agent or employee is not free, while still employed, to commence doing business as a competitor or to solicit customers away from the principal.").

Second, Smith's endeavors to steer business opportunities to Farmers while still serving as Central's CFO constituted a breach of his fiduciary duty of loyalty. Using his personal email account, he surreptitiously provided payoff information to Kiolbasa without notifying the loan officer who managed the customer relationship. This act prevented Central from trying to maintain the loan at the bank. And despite knowing that Central's management was investigating the sudden loan transfers to Farmers, Smith said nothing about his role or

[16] The former President did not testify that *all* customers who moved their loans were approached during this timeframe. Accordingly, testimony by *some* customers that they were not approached during this timeframe does not refute his testimony.

knowledge of this activity.[17] The evidence also shows that Smith provided advice to Kiolbasa about the terms of loans Respondents hoped would move to or be created at Farmers, and other helpful information such as the appraised value of associated collateral. Particularly egregious were Smith's efforts to divert Central from pursuing a purchase of Oregon Trail Bank so that he could preserve the opportunity for Respondents. At no point did Smith share with Central that he might personally benefit if Central declined this purchase.

Third, both Respondents breached their duty of loyalty by taking Central's confidential information without authorization. *See Carpenter v. United States*, 484 U.S. 19, 27 (1987) ("[E]ven in the absence of a written contract, an employee has a fiduciary obligation to protect confidential information obtained during the course of his employment."). As noted by the Restatement, while an employee may prepare to compete, he cannot use the employer's "confidential information." Restatement (Third) of Agency § 8.04, cmt. b. The confidential information Respondents inappropriately shared with Farmers included nonpublic information about Central's customers such as the outstanding loan balance, payments remaining, and loan-to-value ratio. Summ. Disp. Mot. Jt. Exh. 035; *see also Lamorte Burns & Co. v. Walters*, 167 N.J. 285, 301 (2001) (customer list that included some information that went beyond matters of public record was confidential); *NCH Corp. v. Broyles*, 749 F.2d 247, 254 (5th Cir. 1985) (a salesman's book with data on each customer that the employer took efforts to maintain was confidential information and salesman breached his fiduciary duty by using this information after leaving employment).

[17] We do not reach the question of whether customers authorized Kiolbasa to receive the payoff information, as Respondents contend. Respondents' Exceptions at 46-47. As discussed above, a breach arose due to the manner in which Smith executed the payoffs and hid them from others at Central.

In addition to customer information, Kiolbasa took four Central forms with him to Farmers without Central's authorization. Smith sent over a dozen Central forms or documents. The record demonstrates that these actions benefited Respondents because Farmers, in which they became shareholders, was able to use Central's information as samples, thus saving Farmers from dedicating time or resources to create, purchase, or locate exemplars through contractors or other appropriate channels. *See, e.g.*, Jt. Exh. 059; Jt. Exh. 012 at 1215:2-21 (Ms. Thomas testified that she sought a particular form from Smith "[b]ecause [she] wanted one that was in compliance, and we could use it for Farmers," and she "then used it as a template to generate [her] own document that was in compliance.").

Respondents argue that "many" of these documents were not confidential.[18] *See* Respondents' Exceptions at 44-46. With respect to the various forms and procedures taken without permission, Respondents posit that they were not confidential because they "contained a restatement of information required by banking regulators" or were created by using "forms from other banks as examples." *Id.* at 44. "Although viewed in isolation much of this information could be discovered by competitors contacting . . . industry sources," this does not render forms or checklists non-confidential. *Cont'l Grp., Inc. v. KW Prop. Mgmt., LLC*, 622 F. Supp. 2d 1357, 1367, 1374-75 (S.D. Fla. 2009) (finding improper dissemination of "forms, processes, methodologies, and procedures" that were "created and refined over the years" by the prior employer), *disagreed with on other grounds by Brown Jordan Int'l, Inc. v. Carmicle*, 846 F.3d 1167, 1174 (11th Cir. 2017). "[T]he work and labor expended by [a business] in compiling the information, . . . plus [the business's] judgment as to the inclusion of the selected information,

[18] This analysis does not turn on whether the documents taken or shared by Respondents were Central's trade secrets. *Cf. United States v. Mahaffy*, 693 F.3d 113, 135 (2d Cir. 2012) ("Information may qualify as confidential under *Carpenter* even if it does not constitute a trade secret.").

raises the level of the information to valuable confidential business information in their final compiled form." *Id.* at 1375. Testimony from Central's Chairman reflects that it "[t]akes a great deal of time to create forms," which must typically also go through a legal review. Jt. Exh. 008 at 202:4-8.

If the forms improperly taken by Respondents contained information that was so readily obtainable from public sources, then there would not have been a need for Respondents to secretly and under the cover of personal email addresses acquire them from Central in the first place. The fact that they did so surreptitiously indicates that they were aware that Central would not have ordinarily disclosed them, and therefore they were under a duty not to do so themselves. *See* Restatement (Third) of Agency § 8.05 cmt. c (duty not to disclose applies to "confidential information" that "the principal would not wish to be revealed or used"). Moreover, at least one of the forms sent by Smith had been purchased by Central from a third-party vendor. Even if aspects of the forms and documents are publicly available, the manner in which they were taken and the reason why Respondents took them—for their own personal benefit and in aid of Central's direct competitor—constitutes a breach of fiduciary duty. *Cf. Hecny Transp., Inc. v. Chu*, 430 F.3d 402, 405 (7th Cir. 2005) ("An assertion of trade secret in a customer list does not wipe out claims of theft, fraud, and breach of the duty of loyalty that would be sound even if the customer list were a public record.").

Smith is additionally culpable for breaching his duty of loyalty by sharing information in January 2015 that contained book values for dozens of properties, Jt. Exh. 060, and in February 2015 that contained detailed financial figures and analyses specific to Central, Jt. Exhs. 064-066—information that is clearly confidential. He defends against the February disclosures by arguing that they were exchanged pursuant to a request from James Echtermeyer, a Federal

Reserve Bank staff member. *See* Respondents' Exceptions at 47-48, 70 (discussing Respondents' Exception No. 8). There is no documentary evidence that Smith transmitted the documents to Kiolbasa because of a request from the Federal Reserve. To the contrary, the existence of such a request is conspicuously absent from any of the transmittal emails. Smith sent the documents from his personal email with no explanation or, in the case of the ALCO Look-back Analysis, with language that could be construed as sending yet another exemplar to Kiolbasa. *See* Jt. Exhs. 064-065 (no explanatory language); Jt. Exh. 066 ("Here is what we [Central] do for the lookback.").

Furthermore, the Board gives "special deference" to the ALJ's credibility determination that the veracity of Smith's testimony on this matter was questionable. R.D. at 91-93; *In re Interamericas Investments Ltd.*, 82 Fed. Res. Bull. 609, 1996 WL 324186, at *10 (June 1996); *In re Fonkenell*, 87 Fed. Res. Bull. 359, 2001 WL 568704, at *2 (May 2001) ("[B]ecause the ALJ has had an opportunity to hear the evidence directly and assess the credibility of witnesses, agencies generally defer an ALJ's credibility assessment unless the evidence clearly warrants rejection of that assessment."). The ALJ instead credited Mr. Echtermeyer's unequivocal denial that he ever sought this information from Smith. R.D. at 97-100. The ALJ also found that deposition testimony from retired Federal Reserve Bank applications department employee James Clark "credibly established that it would be unusual for Federal Reserve application reviewers to make the kind of requests for Central's documents that Mr. Smith has said was the case." *Id.* at 97; *see also* Douglas L. Gray Expert Report Regarding Respondent Frank E. Smith, at 32 (Apr. 1, 2019) ("[I]t would not be in accordance with Federal Reserve examination

practices for an examiner to make such a request, particularly seeking confidential information of a bank, Central, not supervised by the Federal Reserve.").[19]

Beyond the conflicting testimony between Respondents and those witnesses, Respondents point only to a contrived inconsistency in Mr. Echtermeyer's statements. *See* Respondents' Exceptions at 70-71. Respondents' assertion that Mr. Echtermeyer had some touchpoints with their Farmers application despite "testif[ying] that as Farmers' CPC [Central Point of Contact], he had no involvement with respect to the Applications," *id.*, is a mischaracterization of his testimony. When asked whether, as a CPC, he had "any *responsibility* with respect to either change in bank control or a FIRREA application," Mr. Echtermeyer answered in the negative. Hearing Tr. at 183:14-17 (emphasis added). Declining responsibility over authorization of Respondents' application is distinct from saying that he had zero involvement, and is not inconsistent with testimony he provided on direct examination that he was asked to review the application and provide feedback to the responsible Federal Reserve personnel if he had any concerns or objections to the filing. *Id.* at 186:4-11.

The bulk of the evidence related to Respondents' Exception No. 8 is testimonial in nature and the limited documentary evidence provides no support for Respondents' assertions. The evidence presented does not warrant rejection of the ALJ's credibility determination. As a result, the Board upholds the ALJ's finding that the Federal Reserve did not request the Central documents that Smith sent to Kiolbasa in February 2015.

We conclude that Respondents engaged in multiple breaches of their fiduciary duties, any one of which is sufficient to constitute misconduct under section 1818(e).

[19] The Board notes Respondents' Exception No. 9, which argues that the ALJ erred in relying on improper legal conclusions contained in Mr. Gray's expert reports. Respondents' Exceptions at 72. Save for the referenced opinion above—which is a proper opinion about common Federal Reserve examination practices and not a legal conclusion—the Board does not rely on Mr. Gray's expert reports, and therefore this Exception is moot.

2. Respondents Participated in Unsafe and Unsound Practices

The misconduct element of section 1818(e) may also be satisfied by a determination that an IAP "engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution." 12 U.S.C. § 1818(e)(1)(A)(ii). "[T]he same act may be both an unsafe or unsound practice and a breach of fiduciary duty." *Michael*, 687 F.3d at 351. The ALJ held that Respondents engaged in unsafe or unsound practices by, *inter alia*, willfully misappropriating Central's trade secrets and interfering with its contracts or prospective economic advantage to Central's detriment, and breaching their fiduciary duties to Central. R.D. at 36.

Respondents contend that only conduct that both has a "reasonably direct effect on an association's financial soundness" and "places an abnormal risk of financial loss or damage on a banking institution" is unsafe or unsound. Respondents' Exceptions at 40 (quotations omitted). They thus object to the ALJ's holding that an unsafe or unsound practice encompasses "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." *Id.* at 39 (citing R.D. at 26).

Respondents argue that the ALJ failed to cite Board or Tenth Circuit rulings adopting such a construction. Respondents' Exceptions at 39. And while the ALJ cited a ruling by the Comptroller of the Currency rejecting the construction Respondents favor, *see In re Adams*, OCC No. AA-EC-11-50, 2014 WL 8735096, at *3 (Sept. 13, 2014), Respondents contend that the ALJ cited no similar ruling by the Board. Respondents' Exceptions at 39 (citations omitted). Although not clearly articulated, Respondents appear to claim that the ALJ's standard improperly fails to consider the affected bank's "financial stability." *See id.* at 32-33 (arguing

that "the risk must subject the bank to 'a serious threat of financial stability'" and that "no evidence of either bank's financial stability was presented at the Central Litigation") (citations omitted).

Respondents thus urge the Board to adopt the precedent of *Gulf Federal Savings & Loan Ass'n v. Federal Home Loan Bank Board*, 651 F.2d 259 (5th Cir. 1981), and related cases. Respondents' Exceptions at 40. *Gulf Federal* concerned a savings and loan association that overcharged borrowers by calculating the interest due on loans under a method that was inconsistent with the method specified in the loan documents. *Id.* at 261-62. Only one borrower noticed the discrepancy, none threatened to sue, and after the association made an effort to redraft its loan agreements to conform to its computation methodology, most signed or indicated a willingness to sign the amended loan documents. *Id.* at 262. When the Federal Home Loan Bank Board ("FHLBB") learned of the matter, it determined that the association had engaged in an unsafe or unsound practice and issued a cease-and-desist order directing it to reimburse borrowers. *Id.* at 262-63. The Fifth Circuit held that the FHLBB lacked cease-and-desist authority in these circumstances, limiting the term "unsafe or unsound practice" only to practices "that threaten the financial integrity of the association." *Id.* at 267.

The Third Circuit, relying primarily on *Gulf Federal*, subsequently held that to be unsafe and unsound, an act must be imprudent *and* also "pose an abnormal risk to the financial stability of the banking institution." *Seidman*, 37 F.3d at 928. *Seidman* ruled that a financial institution's issuance of a potentially illegal $375,000 loan commitment—which subjected it to the risk of having to choose between breaching a binding agreement, compensating the borrower for any subsequent increase in interest rate, or violating the law—was not an unsafe and unsound act. *Id.* at 929. Specifically, *Seidman* held that although issuance of the commitment was "imprudent,"

the commitment did not "pose[] such an abnormal risk that [the institution's] financial stability was threatened." *Id.*

Respondents' objection—and the cases on which it relies—does not comport with prior Board precedents and is not well-taken. The ALJ applied longstanding Board precedent by holding that Respondents' actions were unsafe or unsound because they deviated from generally accepted standards of prudent operation and constituted practices that, if continued, would create an abnormal risk or financial loss or damage to Central. These actions included, *inter alia*, interference with Central's normal practice of reaching out to borrowers submitting payoff requests in order to retain their business, and disclosure of Central's proprietary information for the benefit of a competitor. It is not consistent with generally accepted standards of prudent operations for a bank's officers to improperly use the bank's information and conspire to purposely hamper the bank's competitive position. Such actions created an abnormally high risk that Central would lose business—and associated income—to a competitor at a pace and in a manner that would not occur under ordinary circumstances. And the record shows that Central did in fact lose customers and associated income due to Respondents' actions.

a) The ALJ Applied the Correct Standard for Determining if Conduct is Unsafe or Unsound

The Board has previously adopted the construction of "unsafe or unsound" that the ALJ applied. Specifically, the Board has held that an unsafe or unsound practice is "one that is contrary to generally accepted standards of prudent operations, the possible consequence of which, *if continued*, would be abnormal risk or loss or damage to the institution its shareholders, or the insurance fund." *See, e.g.*, *In re Fletcher*, FRB Nos. 17-007-E-I, 17-007-CMP-I, 2018 WL 395574, at *5 (Jan. 4, 2018) (quoting *In re Salmon*, 84 Fed. Res. Bull. 807, 1998 WL 609758, at *3 n.3 (Sept. 1998)) (emphasis in original); *see also In re* ***, FRB No. AA-EC-87-88, 1988

WL 427510, at *8 (Jan. 1, 1988) (same). Applying this standard, the Board has found deviant practices unsafe or unsound if they could be expected to create a risk of harm or damage to a bank, without necessarily attempting to measure their impact on the bank's overall financial stability. *See, e.g.*, *In re* ***, 1988 WL 427510, at *9 (holding that a "check kiting" scheme meant to temporarily disguise overdrafts totaling approximately $190,000 was an unsafe or unsound practice without referencing how the amount related to the bank's overall finances); *In re Brooks*, 79 Fed. Res. Bull. 992, 1993 WL 393489, at *7 (Oct. 1993) (finding that a respondent's actions in connection with $24,150 in wire transfers were unsafe and unsound without discussing their impact on the bank's financial stability).

"Congress did not define unsafe and unsound banking practices." *First Nat'l Bank of Eden, S. D. v. OCC*, 568 F.2d 610, 611 n.2 (8th Cir. 1978). Here, the Board's construction of the statute is both reasonable and supported by the structure of the statute. It is also consistent with the legislative history and policy goals of the statute, and has been adopted by courts and other agencies.

A construction of "unsafe or unsound" conduct that focuses on the nature of the act rather than any "direct effect" of such act on the institution's financial stability is consistent with the structure of section 1818. The section conditions less severe remedies on proof of misconduct, and conditions more severe remedies on proof of *both* misconduct and an effect that is expressly described in the statute, and which is typically less severe than the dire effect implied under the construction of the misconduct prong urged by Respondent. As the Comptroller of the Currency has explained in describing the structure of section 1818:

> The most basic remedies are textually predicated on misconduct, without more. Thus, a cease-and-desist order may be issued when the agency establishes the existence of an unsafe or unsound practice or a violation of law. 12 U.S.C. § 1818(b)(1). Heightened forms of remedy require the agency to establish

> additional elements of proof tied to the "effect" of the misconduct or the "culpability" it reflects. [Thus,] restitution, reimbursement, indemnification, or guarantee against loss require a showing of unjust enrichment (a form of "effect" element) or that the misconduct involved a reckless disregard for the law (a form of "culpability" element). 12 U.S.C. § 1818(b)(6)(A). The severe remedy of prohibition requires the showing of at least one element in each of three tiers of alternative elements: misconduct (unsafe or unsound practice or violation of law, rule, or order, or breach of fiduciary duty); effect (financial gain or other benefit to the respondent or financial loss or other damage to the institution or prejudice to the depositors); and culpability (personal dishonesty or willful and continuing disregard for safety or soundness). 12 U.S.C. § 1818(e)(1). This same pattern is reflected in the escalating tiers of civil money penalties: simple misconduct supports the lowest level of penalty and the higher two penalty tiers require showings of effect or culpability. 12 U.S.C. § 1818(i)(2)(A)-(C).

Adams, 2014 WL 8735096, at *13.

As aptly explained by *Adams*, interpreting "unsafe and unsound" misconduct to also incorporate a particular effect in the form of "a threat to the financial soundness of the institution" conflicts with this structure "by introducing an effects element, textually reserved as a predicate for more severe remedies, into the definition of an element of misconduct." *Id.* at *16. Such a construction would lead to illogical results. Adding such an "elevated 'effects' requirement into the 'misconduct' definition of an unsafe or unsound practice" would require "that a higher degree of effect" be shown to prove misconduct than expressly required to prove an adverse effect for purposes of prohibition. *Id.* Namely, the only effect that Congress *expressly* required for purposes of prohibition was proof of any "financial loss or damage." 12 U.S.C. § 1818(e)(1)(B)(i). The standard urged by Respondents would cause similar conflicts with the express "effects" that Congress required for the imposition of other remedies. As noted by *Adams*:

> The requirements for a Second Tier civil money penalty may be satisfied if the misconduct at issue, *inter alia*, "causes or is likely to cause more than minimal loss" to the institution. 12 U.S.C. § 1818(i)(2)(B)(ii)(II). A temporary cease-and-desist order [requires], *inter alia*, that the misconduct is likely to "weaken the condition of the institution." 12 U.S.C. § 1818(c)(1). In each instance, where the

> remedy sought is predicated on the misconduct element of unsafe or unsound practice, the *Gulf Federal* gloss would impose a steeper effects test at the misconduct tier than the textually specified effects requirements for that remedy.

2014 WL 8735096, at *16.

The Board concurs with this analysis. Where Congress has *expressly* indicated that a specific effect must be shown to warrant a particular remedy, it would be inconsistent with standard canons of statutory construction to hold that proof of a stronger effect is *implicitly* required by other language in the statute. *Cf. Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 526 (1989) (specific provisions that address a particular issue apply over more general provisions); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (otherwise permissible construction of a statute is disfavored if it appears to conflict with policies indicated elsewhere in the statute) (citations omitted).

The Board further finds that its construction of "unsafe and unsound" is supported by the legislative history and the policies underlying the Financial Institutions Supervisory Act of 1966 ["FISA"], P.L. 89-695, 80 Stat. 1028. This construction is a direct quote of the authoritative explanation of "unsafe and unsound" conduct in the legislative history. *See* 112 Cong. Rec. 26474 (1966) (memorandum by John Horne, Chairman of the FHLBB, explaining that unsafe or unsound practices are those practices "contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage"); *see also* 112 Cong. Rec. 24984 (1966) (remarks of Rep. Patman) (Horne Memorandum authoritative in House); *id*. at 26474 (remarks of Sen. Robertson) (Horne Memorandum included in record in Senate).[20]

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[20] Even those courts that favor Respondents' construction recognize the authoritative nature of the Horne Memorandum. *See Gulf Federal*, 651 F.2d at 264 ("The authoritative definition of an unsafe or unsound practice,

The Horne definition contains a number of elements that are inconsistent with a requirement that a particular act directly impact an institution's overall financial stability. Horne's definition does not state that the act itself must directly cause a dire financial consequence; rather, by simply referencing any amount of "loss or damage" or a mere abnormal *risk* of a particular outcome that an act could "possibl[y]" cause *if continued*, it focuses on the nature of the act rather than the express consequences of such act. *Accord Adams*, 2014 WL 8735096, at *16. Moreover, as noted by *Adams*, the Horne definition also treats the mere possibility of a loss to shareholders if an imprudent act is continued as sufficient to render the act unsafe or unsound, and such diminution in share value could occur due to acts that do not necessarily threaten the institution's very stability. *Id.* Finally, the legislative history emphasized that a major policy consideration underlying FISA's provision of new remedies such as cease-and-desist orders was to make it easier for regulators to take prompt corrective action of a preventative nature *before* a practice could cause serious harm to an institution's financial stability. *See, e.g.*, S. Rep. No. 89-1482, at 4-6 (1966). Requiring proof that an act actually had such an effect in order to exercise these remedies would be inconsistent with FISA's aim to prevent such an outcome in the first place.

A final indicator that the Board's construction is reasonable is that multiple courts have adopted the same construction.[21] *See, e.g.*, *Greene County Bank v. FDIC*, 92 F.3d 633, 636 (8th

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adopted in both Houses, was a memorandum submitted by John Horne, then Chairman of the Bank Board."); *see also Seidman*, 37 F.3d at 926-27 (referencing Horne Memorandum).

[21] Other agencies have also adopted this standard. *See generally Adams*, 2014 WL 8735096; *see also In re Candelaria*, FDIC No. 95-62e, 1997 WL 211341, at *4 (Mar. 11, 1997) (rejecting *Seidman*'s construction of "unsafe and unsound"), *aff'd sub nom. Candelaria v. FDIC*, No. 97-9515, 1998 WL 43167 (10th Cir. Feb. 3, 1998); *accord In re Jeffries*, NCUA No. 07-0501-V, 2008 WL 611313, at *2 (Jan. 24, 2008) (adopting Horne definition of unsafe or unsound and describing self-dealing as such an unsafe or unsound practice in categorical terms) (citations omitted).

Cir. 1996) (rejecting the heightened *Seidman* standard requiring proof of an impact on "financial stability" in favor of the same formulation applied by the Board and the ALJ) (citations omitted); *see also Gully v. NCUA*, 341 F.3d 155, 165 (2d Cir. 2003) (adopting Horne definition) (quoting *Doolittle v. NCUA*, 992 F.2d 1531, 1538 (11th Cir. 1993)).[22]

Accordingly, the Board finds that the ALJ correctly held that an unsafe or unsound practice is one that is contrary to generally accepted standards of prudent operations, the possible consequence of which, *if continued*, would be abnormal risk or loss or damage to the institution, its shareholders, or the insurance fund.

b) Respondents Engaged in Unsafe or Unsound Practices

Under the standard discussed above, the jury's findings in the Central litigation collaterally estop Respondents from arguing that they did not commit unsafe or unsound practices. Alternatively, the Board finds, based on substantial evidence in the record, that Respondents engaged in unsafe or unsound practices.

In imposing liability on Respondents, the jury in the Central litigation necessarily found that they had engaged in behavior of a type that deviates from generally accepted standards of prudent operation. On a continuing basis, such behavior would pose an abnormal risk to a bank or its shareholders or be expected to cause harm or damage to the bank or its shareholders.

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[22] Moreover, even courts that have adopted the *Gulf Federal* language when defining unsafe or unsound conduct have in practice held that certain acts are by definition unsafe or unsound without quantifying or otherwise addressing their impact on the affected institution's financial stability. Rather, they may treat an act that *by its very character* would pose an abnormal risk of financial harm or loss to an institution if allowed to continue as unsafe. For example, the Ninth Circuit stated that to be unsafe, an act must both pose an abnormal risk of harm if allowed to continue and also have "a reasonably direct effect on an association's financial soundness." *Hoffman v. FDIC*, 912 F.2d 1172, 1174 (9th Cir. 1990) (quoting *Gulf Federal*). Yet it immediately added that "breaches of fiduciary duty by bank officials are inherently dangerous and cannot be considered safe." *Id.* Similarly, notwithstanding *Gulf Federal*, the Fifth Circuit ruled in a subsequent case that an officer's falsification of bank records to conceal bonus payments that he received was both a breach of fiduciary duty and an unsafe and unsound practice, without referencing the size of the bonuses in question, let alone the bank's overall financial condition. *Jameson v. FDIC*, 931 F.2d 290, 291 (5th Cir. 1991); *see also First Nat'l Bank of Bellaire v. OCC*, 697 F.2d 674, 683, 683 n.10 (5th Cir. 1983) (finding that loan to an insider was an unsafe and unsound practice without assessing the affected bank's finances, because insider abuses had been generally identified as a common cause of bank failures).

Moreover, the jury found that Respondents' behavior did in fact cause financial loss or damage to Central. The jury's verdict with respect to breach of fiduciary duties, misappropriation of Central's trade secrets, and interference with contracts or prospective advantage all required findings of conduct that would be unsafe or unsound.

Fiduciary duties define standards of prudent operations and thus an act in violation of such duties is by its nature imprudent and unsafe. *See FDIC v. Appling*, 992 F.2d 1109, 1113 (10th Cir. 1993) (explaining that bank officials' duties as fiduciaries "requir[e] such care and diligence as an ordinarily prudent man would exercise with reference to the administration and management of such a moneyed institution") (citation omitted); *Hoffman v. FDIC*, 912 F.2d 1172, 1174 (9th Cir. 1990) ("Self-dealing has been identified as an unsafe or unsound practice because of the conflict it creates between the interest of the institution and the interests of an individual. . . . [B]reaches of fiduciary duty by bank officials are inherently dangerous and cannot be considered safe."). Moreover, the jury's verdict is sufficient to establish that Respondents' breach of fiduciary duties, if continued, could result in "loss or damage," since by finding Respondents liable for such breach, the jury necessarily had to find that the breach "caused [Central] to suffer damages." FRB Exh. 010 at 38 (jury instructions); *Gowdy*, 455 P.3d at 1208 (same); *see also* FRB Exh. 006 at 4 (jury verdict awarding $205,000 and $93,000 in damages for breach of fiduciary duties by Respondents Smith and Kiolbasa, respectively).

The jury's verdict concerning misappropriation of trade secrets provides an alternate basis for estopping Respondents from arguing that they did not engage in unsafe or unsound practices. This verdict required a finding of improper acquisition, use, or disclosure of Central's confidential information by Respondents. FRB Exh. 010 at 22 (jury instructions); WY Stat § 40-24-101(a)(ii) (2016). Such misappropriation, violation of legal norms, and improper disclosure

of confidential information are inherently unsafe and unsound practices. *See In re Ashton*, FRB Nos. 16-015-E-I, 16-015-CMP-I, 2017 WL 2334473, at *5, *7 (May 19, 2017) (disclosure of client data that the bank viewed as confidential as part of a price fixing scheme was an unsafe and unsound practice); *cf. In re Allen*, FRB Nos. 18-028-E-I, 18-028-CMP-I, 18-028-B-I, 2020 WL 819238, at *4 (Jan. 30, 2020) (embezzlement was an unsafe or unsound practice).

The jury's determination that Respondents' acts constituted tortious interference with Central's contracts or prospective economic advantage, FRB Exh. 006 at 3, also estops Respondents. The verdict necessarily encompassed a finding that Respondents had intentionally "induc[ed] or caus[ed] a breach or termination of [a contractual] relationship or [prospective economic advantage]." FRB Exh. 010 at 31; *see also Bextel v. Fork Rd. LLC*, 474 P.3d 625, 631 n.4 (Wyo. 2020) (same). The contracts or prospective advantages at issue were for loans. It is axiomatic that "[b]anks make their money by lending," *Travelers Cas. & Sur. Co. of Am. v. Wells Fargo Bank*, 374 F.3d 521, 526 (7th Cir. 2004). Accordingly, when a bank's officers intentionally work to deprive the bank of its borrowers, they are engaging in an imprudent act that, if continued, may pose an abnormal risk. Moreover, the jury's $625,000 damages award for this count established that the bank suffered actual loss as a result of Respondents' actions. FRB Exh. 006 at 3; FRB. Exh. 010 at 31; *see also Bextel*, 474 P.3d at 631 n.4 (same).

Alternatively, substantial evidence in the record independently establishes that Respondents engaged in imprudent behavior that, if continued, could result in abnormal risk or loss or damage to the Central or its shareholders. As described in part V.A.1.c, *supra*, Respondents breached their duty of loyalty to Central through multiple instances of self-dealing. *Cf.* Restatement (Third) of Agency § 8.03 ("An agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship."). They

took Central's forms for use by a competitor bank. They solicited Central's customers to move their business away from Central while still employed there. Smith also interjected himself into the payoff process in a manner that interfered with Central's ability to attempt to retain borrowers who were refinancing their loans with Farmers and compounded the impact of his actions by staying silent when asked about these borrowers. And he acted to deprive Central of a business opportunity that he sought to retain for himself.

These actions involved clear conflicts of interest and largely aimed to deprive Central of borrowers it might have otherwise kept, which, as noted above, is problematic since "[b]anks make their money by lending," *Travelers*, 374 F.3d at 526.[23] These actions were inconsistent with generally accepted standards of prudent operations, and, if continued could possibly pose abnormal risk. *See Hoffman*, 912 F.2d at 1174; *First Nat'l Bank of Lamarque v. Smith*, 610 F.2d 1258, 1265 (5th Cir. 1980) ("[P]roblem banks and insider abuses have been virtually synonomous (sic). Nothing appears more often on the fever charts of sick financial institutions than self-dealing ailments.") (citation omitted). And as Mr. Schwartz explained, the resulting loss of business caused an actual loss to Central. Accordingly, substantial evidence in the record demonstrates that Respondents engaged in unsafe or unsound conduct.

B. Effects

The "effects" prong may be established if, *inter alia*, the IAP "received financial gain or other benefit" as a result of the misconduct, or if the misconduct caused an insured depository institution to suffer "financial loss or other damage." 12 U.S.C. § 1818(e)(1)(B). The Board

[23] Although, for the reasons noted in part V.A.2.b, *supra*, such facts are not necessary to find that Respondents' actions were unsafe or unsound, we note that substantial evidence in the record shows that lending was Central's key line of business, and that Kiolbasa's loan portfolio—which Respondents targeted—represented more than 10% of the bank's assets.

finds that Respondents' misconduct satisfies the impermissible effects requirement under the statute.

1. Respondents Personally Gained Due to their Misconduct

Respondents' misconduct benefited them in multiple ways. The record demonstrates that Farmers benefited as a result of Respondents' actions. Due to their ownership interest in Farmers, Respondents, in turn, also benefited. Enforcement Counsel presented a damages expert, Gary M. Schwartz, who determined that Farmers realized a financial benefit of $1,169,793 from the loans that Respondents moved from Central or generated from preexisting Central customers after Respondents joined Farmers. Schwartz Supp. Expert Report at 5-7. Mr. Schwartz also calculated that Farmers appreciated in value by approximately $1.8 million in 2015 and $2.8 million in 2016 as a result of these loans. *Id.* at 7-9 (noting that Farmers' net loans and leases grew a "remarkable 91%" between September 30, 2014 and December 31, 2016, with "virtually all of the loan growth in 2014 and 2015 . . . related to acquisition of the subject loans, which were former [Central] loans"). The corresponding gains were $142,707 in 2015 and $219,382 in 2016 for Smith, and $356,767 in 2015 and $548,455 in 2016 for Kiolbasa. *Id.* at 10.

The ALJ deemed Mr. Schwartz credible and his valuations helpful. R.D. at 62. Although earlier in the administrative proceeding Respondents disputed "the credibility of Enforcement Counsel's expert," Respondents' Opp. to EC's Mot. for Summ. Disp. at 49, they waived this objection by declining to revive it in their Exceptions to the Recommended Decision. *See* 12 C.F.R. § 263.39(b)(1) ("Failure of a party to file exceptions . . . is deemed a waiver of objection thereto."). In fact, Respondents relied upon Mr. Schwartz's valuations of Farmers' growth in support of their arguments that they did not cause any harm to Farmers. *See* Respondents' Exceptions at 63. By arguing that "the record demonstrates only that the benefits

Farmers realized from Respondents' efforts during this time exceed any alleged loss Farmers incurred in the Central Litigation," Respondents effectively conceded that their actions resulted in a benefit to themselves. *Id.*

The Board finds that the financial gains reaped by Farmers' acquisition of Central loans were due in part to Respondents' misconduct. As noted above, substantial evidence exists that Respondents improperly solicited customers prior to departing Central, which facilitated a faster transfer of loans to Farmers. Had Respondents waited until after departing Central to properly secure Central's customers, Farmers likely would not have begun receiving interest payments on certain loans as early as it did. In addition, Farmers did not have to dedicate money or resources to develop the various forms and processes that Respondents took without authority from Central.

Moreover, quantification of a financial benefit is not required for entry of a prohibition order. *See* 12 U.S.C. § 1818(e)(1)(B) (requiring a showing that the IAP "has received financial gain *or other benefit*" due to the misconduct) (emphasis added). As noted above, Respondents' nondisclosure and surreptitiousness in part served to prevent them from being fired, as demonstrated by testimony from Smith and Central's Chairman.[24] A respondent who committed misconduct in part to avoid losing his job has gained a benefit that would support an order of prohibition. *See Hendrickson*, 113 F.3d at 103. Respondents also relied upon premature solicitation of customers in order to promote themselves to Farmers' Board and ultimately obtain their approval to consummate Respondents' deal with Farmers. And Smith took steps to deprive

[24] The fact that Central in fact promptly asked Smith to resign upon learning of his pending position at Farmers further indicates that any disclosure to Central of Respondents' actions, which went far beyond preparing to compete or seeking employment with Farmers, would have led to Respondents' immediate termination.

Central of business opportunities in order to preserve these potential opportunities for himself or Farmers.

We conclude that Respondents received multiple benefits as a result of their misconduct, each of which independently satisfies the "effects" element.

2. Respondents' Misconduct Harmed Central

Respondents are collaterally estopped from arguing that their misconduct harmed Central, and alternatively, substantial evidence exists in the record that Respondents' misconduct did harm Central. With respect to collateral estoppel, the jury's findings in the Central Litigation that Respondents had committed tortious interference with contractual relationships and breached fiduciary duties necessarily encompassed a finding that their actions had caused Central to suffer damages. *See* FRB Exh. 010 at 20, 30 (jury instructions); *see also Gowdy*, 455 P.3d at 1208 (to establish claim for breach of fiduciary duties, a plaintiff must prove damages resulting from the breach) (citations omitted); *Gore v. Sherard*, 50 P.3d 705, 710 (Wyo. 2002) (an element of tortious interference is "resultant damage to the party whose relationship or expectancy has been disrupted") (citing *Fremont Homes, Inc. v. Elmer*, 974 P.2d 952, 955 n.1 (Wyo. 1999)). They are therefore estopped from arguing that their actions did not harm Central.[25]

Alternatively, substantial evidence in the record demonstrates that Respondents' actions harmed Central. Mr. Schwartz calculated that Central suffered a net loan loss of $820,939 due to lost lending opportunities and early payoffs for loans that transferred from Central to Farmers. Schwartz Supp. Expert Report at 10-11. Even if this full amount resulted from a combination of both proper and improper conduct by Respondents, the Board finds that at least some of it is

[25] Although Respondents assert in conclusory terms that the Central Litigation jury "did not decide any" of the three elements required for prohibition, Respondents' Exceptions at 31, they provide no argument for why the jury's determination did not incorporate a finding of harm to Central. For the reasons just stated, the determination necessarily encompassed a finding of harm.

attributable to Respondents' misconduct due to prematurely soliciting Central's customers and failing to handle payoff requests according to normal procedures. Central also lost out on potential business opportunities and faced unfair competition due to Farmers' acquisition of confidential and proprietary forms and analyses through Respondents' misconduct.

We note that the financial loss to Central need not be substantial, nor quantifiable, in order to merit a prohibition order. *Proffitt v. FDIC*, 200 F.3d 855, 864 (D.C. Cir. 2000) (explaining that FIRREA removed the "substantial" financial loss qualifier so as to "allow an agency to proceed with such an enforcement action whenever the institution has suffered *any* financial loss and has been harmed") (emphasis added) (quoting H.R. Rep. No. 101-54, at 392 (1989)); *see also Pharaon v. Bd. of Governors of Fed. Res. Sys.*, 135 F.3d 148, 157 (D.C. Cir. 1998) ("According to Pharaon, [section 1818(e)(1)](B) requires the Board to demonstrate the exact amount of harm caused by Pharaon's participation in [the] scheme. The plain language of the statute provides to the contrary, however."). Elsewhere, Respondents merely restate that their conduct was permissible and argue that Central did not suffer any reputational harm, but fail to argue that Central did not suffer any financial harm as a result of their actions. *See* Respondents' Exceptions at 58-61. The Board finds that Respondents' misconduct resulted in financial loss or other damage to Central, and that this loss provides a secondary basis upon which the "effects" element has been satisfied.[26]

[26] We make affirmative findings of fact, as set forth above, that preponderant evidence demonstrates that Respondents' misconduct caused harm to Central and resulted in a financial benefit to Respondents, and reach the legal conclusion that the requirements of section 1818(e)(1)(B) are satisfied. Because we conclude that the "effects" element set forth in section 1818(e)(1)(B) has been established by two separate, independent bases, we need not reach the issue of harm to Farmers caused by Respondents' misconduct.

C. Culpability

Respondents' misconduct demonstrates the requisite amount of culpability, which may be shown by evidence of "personal dishonesty" or a "willful or continuing disregard by such party for the safety and soundness of such insured depository institution or business institution." 12 U.S.C. § 1818(e)(1)(C). Both standards are met here.

1. Personal Dishonesty

The Board has previously held that personal dishonesty encompasses a "broad[]" range of conduct, "including [a] 'disposition to lie, cheat, or defraud; untrustworthiness; lack of integrity'; 'misrepresentation of facts and deliberate deception by pretense and stealth', [or] 'want of fairness and straight forwardness.'" *In re* ***, 1988 WL 427510, at *9 (citations omitted); *see also Van Dyke v. Bd. of Governors of the Fed. Res. Sys*., 876 F.2d 1377, 1379 (8th Cir. 1989) (upholding the Board's determination that the IAP's check-kiting activity satisfied the culpability element because it "involved fraud and a lack of integrity"). "The personal dishonesty element of § 1818(e) is satisfied when a person disguises wrongdoing from the institution's board and regulators or fails to disclose material information." *Dodge v. OCC*, 744 F.3d 148, 159-60 (D.C. Cir. 2014) (citations omitted); *see also In re Watkins, Sr.*, FDIC Nos. 17-0154e, 17-0155k, 2019 WL 6700075, at *8 (Oct. 15, 2019) ("Misleading, or withholding material information from, either the Bank or the Bank's directors is evidence of personal dishonesty.") (citations omitted).

The Board finds ample support in the record of Respondents' personal dishonesty. Respondents coordinated their efforts to transfer forms, analyses, and other information from Central for use by Farmers, without informing anyone at Central or obtaining authorization for the transfers. Substantial evidence shows that Respondents solicited customers prior to their departure for Farmers, all while keeping Central in the dark for fear of being terminated. In addition, not only did Smith aid Kiolbasa's efforts to effect immediate payoffs of Central loans

(thereby precluding Central from attempting to retain the customer's business), but he hid his involvement once Central's directors began investigating the situation. Smith also diverted business opportunities from Central, going so far as to "talk[] down the idea" of a bank purchase to Central's management so that he might personally benefit by taking advantage of the opportunity himself.

Respondents' exceptions regarding this element do not disturb our finding. Respondents merely restate their arguments that the activity in which they engaged did not constitute misconduct, and therefore they did not act with personal dishonesty. *See* Respondents' Exceptions at 67-68. As discussed in detail above, the Board rejects the notion that Respondents did not engage in misconduct.

2. Respondents Acted with Willful or Continuing Disregard for Central's Safety and Soundness

"'Willful disregard' has been defined as deliberate conduct which exposed the bank to 'abnormal risk of loss or harm contrary to prudent banking practices.'" *Grubb v. FDIC*, 34 F.3d 956, 961-62 (10th Cir. 1994) (quoting *Van Dyke*, 876 F.2d at 1380). "An officer acts 'willfully' when he is aware of his conduct; 'willfulness' does not require a showing that Respondent was aware of the law." *In re Watkins, Sr.*, 2019 WL 6700075, at *8. "Continuing disregard" is conduct which has been "voluntarily engaged in over a period of time with heedless indifference to the prospective consequences." *Grubb*, 34 F.3d at 962 (quotation omitted); *see also Kim v. OTS*, 40 F.3d 1050, 1054 (9th Cir. 1994) (continuing disregard is a mental state "akin to recklessness") (quotation omitted).

As previously discussed in Part V.A.2, *supra*, Respondents' actions were in contravention of generally accepted standards of prudent banking operation and, on a continuing basis, threatened abnormal risk or financial loss or damage Central. Respondents are collaterally

estopped from arguing that these actions were not willful within the meaning of section 1818, due to the jury's findings in the Central litigation. The jury's verdict that Respondents' conduct with regard to their breach of fiduciary duties and tortious interference with contract or prospective advantage was willful and wanton necessarily required a finding that such conduct was intentional. *See* FRB Exh. 010 at 31, 40 (jury instructions); *see also Weaver v. Mitchell*, 715 P.2d 1361, 1370 (Wyo. 1986) ("Willful and wanton misconduct is the *intentional* doing of an act, or an *intentional* failure to do an act. . . .") (emphases in original). Such intentional conduct meets the standard for willfulness under section 1818. *See In re Magee*, 78 Fed. Res. Bull. 968, 1992 WL 384045, at *8 (Dec. 1, 1992) (citation omitted).

Alternatively, the Board finds that substantial evidence in the record supports the conclusion that Respondents acted in a manner that was contrary to Central's safety and soundness. Respondents deliberately and over a period of time misappropriated Central's trade secrets. Even if the information did not constitute trade secrets, Respondents intentionally usurped confidential materials that served to benefit themselves and Farmers—a direct competitor of Central. The evidence also shows that Respondents purposefully solicited Central's customers prior to leaving Central's employment. Because loss of customers and assets affects an institution's bottom line, these efforts implicated Central's safety and soundness. Respondents once again take exception to any finding of culpability by simply restating that they did not engage in any misconduct—an argument that is not compelling. *See* Respondents' Exceptions at 68-69. We find that Respondents' misconduct constituted "willful disregard" under section 1818(e)'s culpability element.

VI. CONCLUSION

After a thorough review of the record in this proceeding, and for the reasons set forth above, the Board concludes that an Order of Prohibition is warranted against both Respondents.

The Board therefore affirms the Recommended Decision of the ALJ as modified herein. In accordance with the factual findings in Parts II and IV-V, *supra*, and legal conclusions in Parts III-V, *supra*, the Board adopts the ALJ's findings and conclusions with modifications and to the extent consistent with this Decision[27] and issues the attached Orders implementing its Decision.

By Order of the Board of Governors, this 24th day of March, 2021.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

/s/
Ann E. Misback
Secretary of the Board

[27] Except as stated on page 35, *supra*, to the extent any findings or conclusions made by the ALJ rely on Mr. Gray's reports, the Board adopts such findings and conclusions based on the evidence and the alternate reasons referenced herein.