

FEDERAL DEPOSIT INSURANCE CORPORATION

WASHINGTON, D.C.

_____))
In the Matter of))
KENNETH D. WAITE, individually,))
and as an institution-affiliated))
party of))
BANK OF THE WEST))
SAN FRANCISCO, CALIFORNIA))
[Formerly COMMERCIAL FEDERAL BANK))
OMAHA, NEBRASKA]))
And))
FARMERS TRUST & SAVINGS BANK))
EARLING, IOWA))
(INSURED STATE NONMEMBER BANKS)))
_____))

NOTICE OF INTENTION TO PROHIBIT FROM FURTHER PARTICIPATION, NOTICE OF ASSESSMENT OF CIVIL MONEY PENALTY, FINDINGS OF FACT AND CONCLUSIONS OF LAW, ORDER TO PAY, AND NOTICE OF HEARING

FDIC-09-396e
FDIC-09-397k

The Federal Deposit Insurance Corporation ("FDIC"), has determined that Kenneth D. Waite ("Respondent"), individually, and as an institution-affiliated party of Bank of the West, San Francisco, California ("BoW"), and Farmers Trust & Savings Bank ("FTSB"), Earling, Iowa, has directly or indirectly participated or engaged in unsafe or unsound banking practices, and/or acts, omissions, or practices which constitute breaches of his fiduciary duty as an officer of BoW and FTSB; that BoW and FTSB have suffered financial losses or other damage, that the interests of BoW's and FTSB's depositors have been or could be prejudiced; and that such practices, and/or breaches of fiduciary duty demonstrate Respondent's personal dishonesty and/or his willful and/or continuing disregard for the safety or soundness of BoW and FTSB.

Further, the FDIC has determined that Respondent's reckless

unsafe or unsound practices and/or breaches of his fiduciary duty were part of a pattern of misconduct and/or caused more than a minimal loss to BoW and FTSB.

The FDIC, therefore, institutes this proceeding for the purpose of determining whether an appropriate order should be issued against the Respondent under the provisions of section 8(e) of the Federal Deposit Insurance Act ("Act"), 12 U.S.C. § 1818(e)(1), prohibiting the Respondent from further participation in the conduct of the affairs of any insured depository institution or organization listed in section 8(e)(7)(A) of the Act, 12 U.S.C. § 1818(e)(7)(A), without the prior written approval of the FDIC and such other appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the Act, 12 U.S.C. § 1818(e)(7)(D).

Further, the FDIC institutes this proceeding for the assessment of civil money penalties pursuant to the provisions of section 8(i)(2)(B) of the Act, 12 U.S.C. § 1818(i)(2)(B).

The FDIC hereby issues this NOTICE OF INTENTION TO PROHIBIT FROM FURTHER PARTICIPATION ("NOTICE TO PROHIBIT") pursuant to section 8(e) of the Act, 12 U.S.C. §1818(e), and this NOTICE OF ASSESSMENT OF CIVIL MONEY PENALTY, FINDINGS OF FACT AND CONCLUSIONS OF LAW, ORDER TO PAY, and NOTICE OF HEARING ("NOTICE OF ASSESSMENT") pursuant to section 8(i) of the Act, 12 U.S.C. § 1818(i), and Part 308 of the FDIC's Rules of Practice and Procedure, 12 C.F.R. Part 308, and alleges as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times pertinent to this proceeding, BoW was a corporation existing and doing business under the laws of the State of California, having its principal place of business in San Francisco, California, and FTSB was a corporation existing and doing business under the laws of the State of Iowa, having its principal place of business in Earling, Iowa.

2. BoW and FTSB have been, at all times pertinent to this proceeding, insured State nonmember banks, as defined in section 3(e) of the Act, 12 U.S.C. § 1813(e), and as such are subject to the Act, 12 U.S.C. §§ 1811-1834a, and the Rules and Regulations of the FDIC, 12 C.F.R. Chapter III, and are subject to the laws of the States of California and Iowa, respectively.

MISCONDUCT AT BANK OF THE WEST

3. At all times pertinent to the charges herein, Respondent was employed by Commercial Federal Bank ("CommFed") and BoW as a Business Development Officer. Respondent became an officer of BoW when BoW completed its acquisition of CommFed in December 2005. Respondent resigned from his position at BoW on August 21, 2006.

4. At all times pertinent to the charges herein, the Respondent was an "institution-affiliated party" of CommFed and BoW (collectively "BoW") as that term is defined in section 3(u) of the Act, 12 U.S.C. § 1813(u), and for purposes of sections 8(e), 12 U.S.C. § 1818(e).

5. The FDIC has jurisdiction over BoW, Respondent and the subject matter of this proceeding.

6. Respondent has engaged and/or participated in unsafe or

unsound banking practices in connection with BoW and breached his fiduciary duty to BoW by failing to properly monitor the financial condition of borrowers Ed, Ryan and Tina Sullivan ("Sullivans"), by failing to properly monitor the Sullivans' collateral, by transferring without authorization over \$4 million from the accounts of other borrowers into the accounts of the Sullivans ("Sullivans' Accounts"), and by repaying the unauthorized draws from the Sullivans' Accounts causing BoW a financial loss of \$3.3 million.

The Sullivans' Loans

7. Ed Sullivan was a customer of CommFed since 1989. Respondent always had responsibility for the Ed Sullivan loans from 1989 until 2006.

8. By 2006, Ryan Sullivan, Ed Sullivan's son, and Tina Sullivan, Ed Sullivan's daughter-in-law, were joint obligors on the loans ("Sullivans' Loans").

9. As of April 21, 2006, the Sullivans' Loans consisted of a cattle line of credit with a principal balance of \$8,850,000, a crop line of credit with a principal balance of \$850,000 and a real estate term loan with a principal balance of \$582,724. The cattle and crop lines matured on April 15, 2006.

Failure to Monitor the Financial Condition and Cattle Collateral

10. Prior to April 2006, the financial statements the Sullivans submitted to CommFed were prepared by Waite. The 2005 financial statement reflected a net worth of \$4,131,415, including 9,065 head of cattle held for sale and a net worth of \$3,654,590 for 2004, including 9,850 head of cattle held for

sale.

11. On or around April 17, 2006, the Sullivans submitted a financial statement to BoW that showed a negative net worth of (\$1,508,250). Among the assets listed in the schedules to the financial statement were 5,157 head of cattle held for sale. Waite was not involved in the preparation of this financial statement.

12. Although Respondent visited with the Sullivans on a regular basis and performed quarterly cattle inspections to verify the cattle collateral for the Sullivans' Loans, he failed to adequately monitor and notify BoW of the Sullivans' declining financial position and the thousands of missing heads of cattle collateral.

The Unauthorized Transfers

13. BoW discovered that from October 2004 to November 2005, Respondent had transferred funds without authorization from the accounts of other BoW customers into the Sullivans' Accounts.

Robert Sullivan

14. Between October 12, 2004 and July 28, 2005, Respondent transferred without authorization a total of \$1,170,000 from the accounts of Robert Sullivan, Ed Sullivan's brother, to the Sullivans' Accounts.

15. Between December 31, 2004 and November 17, 2005, Respondent transferred without authorization a total of \$1,170,000 from the Sullivans' Accounts back to Robert Sullivan's accounts. In addition, during the same time frame, Respondent transferred without authorization an additional \$20,687.65 from

the Sullivans' Accounts to Robert Sullivan's accounts as accrued interest.

Tom Sullivan

16. Between October 20, 2004 and November 10, 2004, Respondent transferred without authorization a total of \$700,000 from the accounts of Tom Sullivan, Ed Sullivan's other brother, to the Sullivans' Accounts.

17. Between March 22, 2005 and April 20, 2005, Respondent transferred without authorization a total of \$700,000 from the Sullivans' Accounts back to Tom Sullivan's accounts. In addition, during the same time frame, Respondent transferred without authorization an additional \$20,486.00 from the Sullivans' Accounts to Tom Sullivan's accounts as accrued interest.

Robert Katzenberger

18. Between November 18, 2004 and January 13, 2005, Respondent transferred without authorization a total of \$650,000 from the accounts of Robert Katzenberger to the Sullivans' Accounts.

19. Between December 20, 2004 and February 4, 2005, Respondent transferred without authorization a total of \$650,000 from the Sullivans' accounts back to Robert Katzenberger's accounts. In addition, during the same time frame, Respondent transferred without authorization an additional \$4,648.26 from the Sullivans' accounts to Robert Katzenberger's accounts as accrued interest.

Bart Falkena

20. Between November 23, 2004 and October 11, 2005, Respondent transferred without authorization a total of \$870,000 from the accounts of Bart Falkena to the Sullivans' Accounts.

21. Between December 31, 2004 and October 18, 2005, Respondent transferred without authorization a total of \$870,000 from the Sullivans' Accounts back to Bart Falkena's accounts. In addition, during the same time frame, Respondent transferred without authorization an additional \$12,186.00 from the Sullivans' Accounts to Bart Falkena's accounts as accrued interest.

Gary Joe Hall

22. On January 14, 2005, Respondent transferred without authorization \$275,000 from the accounts of Gary Joe Hall to the Sullivans' accounts.

23. Between January 19, 2005 and March 15, 2005, Respondent transferred without authorization a total of \$275,000 from the Sullivans' Accounts back to Gary Joe Hall's accounts. In addition, on March 15, 2005, Respondent transferred without authorization an additional \$2,641.24 from the Sullivans' Accounts to Gary Joe Hall's accounts as accrued interest.

John Reisz / Crossroads Cattle

24. Between October 27, 2004 and November 10, 2004, Respondent transferred without authorization \$550,000 from the accounts of John Reisz, ("Reisz"), owner and operator of Crossroads Cattle Company to the Sullivans' Accounts.

25. On March 15, 2005, Respondent transferred without

authorization a total of \$550,000 from the Sullivans' Accounts back to Reisz's accounts. In addition, on that date, Respondent transferred without authorization an additional \$15,605.00 from the Sullivans' Accounts to Reisz's accounts as accrued interest.

26. Respondent transferred the aggregate sum of \$4,215,000 from the accounts of the foregoing customers into the Sullivans' Accounts.

27. Respondent's failure to adequately monitor and notify BoW of the Sullivans' declining financial condition constitutes an unsafe and unsound banking practice or is an act, omission or practice which constitutes a breach of Respondent's fiduciary duty.

28. Respondent's failure to adequately monitor the number of heads of cattle held for sale which were part of the collateral for the Sullivans' Loans is an unsafe and unsound banking practice or is an act, omission or practice which constitutes a breach of Respondent's fiduciary duty.

29. Respondent's unauthorized transfer of \$4,215,000 from the accounts of other bank customers into the Sullivans' Accounts in excess of the approved loan amounts is an unsafe and unsound banking practice or is an act, omission or practice which is a breach of Respondent's fiduciary duty.

30. Respondent's unauthorized transfer of \$4,215,000 plus interest from the Sullivans' Accounts back to the accounts of the other bank customers is an unsafe and unsound banking practice or is an act, omission or practice which is a breach of Respondent's fiduciary duty.

31. Respondent's unsafe and unsound banking practices or his acts, omissions or practices which is a breach of Respondent's fiduciary duty misrepresented the true financial condition of the Sullivans' Loans and caused a \$3,300,000 loss on the Sullivans' Loans at BoW. In addition, Respondent's unsafe and unsound banking practices and the breach of his fiduciary duties have or could have prejudiced the interests of the depositors of BoW.

32. Respondent's unsafe and unsound banking practices involved personal dishonesty and demonstrated a willful and continuing disregard for the safety and soundness of BoW.

MISCONDUCT AT FARMERS TRUST & SAVINGS BANK

33. At all times pertinent to the charges herein, Respondent was employed by FTSB as Vice President. After he resigned from BoW on August 21, 2006, Respondent started working at FTSB on August 31, 2006. Some of Respondent's customers at BoW followed him to FTSB; one such customer was Reisz.

34. At all times pertinent to the charges herein, the Respondent was an "institution-affiliated party" of FTSB as that term is defined in section 3(u) of the Act, 12 U.S.C. § 1813(u), and for purposes of sections 8(e), 12 U.S.C. § 1818(e).

35. The FDIC has jurisdiction over FTSB, Respondent and the subject matter of this proceeding.

36. Reisz's business custom fed cattle for third parties and could feed a limited number of its own cattle. FTSB lent Reisz funds for the cattle feeding operation. Reisz had several outstanding loans with FTSB, each secured by different heads of

cattle. Respondent was the FTSB officer responsible for the Reisz loans.

37. On January 27, 2009, Respondent informed FTSB that Crossroads Cattle Company had submitted a profit and loss statement that reflected losses of approximately \$240,000. On February 3, 2009, Respondent provided FTSB with an unsigned financial statement for Reisz that showed a cattle collateral deficiency and a net worth of \$125,865, when a November 30, 2008 financial statement showed a net worth of \$890,055. FTSB also discovered that Reisz was feeding more of his own cattle than custom feeding cattle for others in violation of the terms of the loans.

38. During the month of February 2009, Respondent and FTSB conducted several cattle inspections at Reisz's facilities. The inspections showed that FTSB's cattle collateral was 220 cows and 1,360 head of cattle less than it should have been for the outstanding notes. In addition, Reisz admitted to FTSB that he used proceeds of the cattle sales to make improvements on his property of approximately \$210,000.

39. Respondent admitted to FTSB that since the fall of 2008 proceeds of cattle sales were applied to notes due, not to the notes secured by the sold cattle. This allowed notes that should have been in default not to appear delinquent.

40. FTSB's review of Reisz's business and personal accounts showed that from August 2008 through February 11, 2009, over \$3.5 million had been deposited from cattle sales, but only over \$2.4 million had been applied to the outstanding notes. The account

review also showed over \$250,000 in repairs, capital purchases and improvements in violation of the loan agreement.

41. Respondent admitted he allowed Reisz to apply proceeds of cattle sales to non-corresponding notes, constituting an unsafe and unsound banking practice or an act, omission or practice which constitutes a breach of Respondent's fiduciary duty.

42. Respondent's unsafe and unsound banking practice and his breach of his fiduciary duties to FTSB allowed Reisz to misrepresent his true financial condition and caused a financial loss to FTSB. As of July 29, 2009, FTSB has charged-off over \$873,000 from the Reisz loans. In addition, Respondent's unsafe and unsound banking practices and the breach of his fiduciary duties have or could have prejudiced the interests of the depositors of FTSB.

43. Respondent's unsafe and unsound banking practices and his acts, omissions or practices is a breach of Respondent's fiduciary duty involved personal dishonesty and demonstrated a willful and continuing disregard for the safety and soundness of FTSB.

GROUND FOR SECTION 8(e) PROHIBITION ORDER

44. As a result of the Respondent's foregoing acts, omissions and/or practices, the Respondent has engaged and/or participated in unsafe or unsound banking practices in connection with BoW and FTSB.

45. As a result of the Respondent's foregoing acts, omissions and/or practices, the Respondent has breached his

fiduciary duties as an officer of BoW and FTSB.

46. By reason of the unsafe or unsound banking practices or breaches of his fiduciary duties specified in paragraphs 10 through 32, Respondent caused BoW a loss of \$3.3 million.

47. By reason of the unsafe or unsound banking practices or breaches of his fiduciary duties specified in paragraphs 36 through 43, Respondent caused FTSB a loss of over \$873,000.

48. The unsafe and unsound banking practices or the breaches of the Respondent's fiduciary duties as set forth in paragraphs 10 through 32 and 36 through 43 demonstrate a willful or continuing disregard for the safety or soundness of BoW and FTSB, respectively, and/or evidence the Respondent's personal dishonesty.

Grounds for Section 8(i)(2) Second Tier Civil Money Penalty

49. As a result of the foregoing facts and conclusions, the FDIC concludes that Respondent recklessly engaged in unsafe or unsound practices in conducting the affairs of BoW and FTSB.

50. Further, as a result of the foregoing facts and conclusions, the FDIC concludes that Respondent breached his fiduciary duty to BoW and FTSB.

51. Further, as a result of the foregoing facts and conclusions, the FDIC concludes that Respondent's reckless unsafe or unsound practices and/or breaches of fiduciary duties to the Banks were part of a pattern of misconduct.

52. Further, as a result of the foregoing facts and conclusions, the FDIC concludes that Respondent's reckless unsafe or unsound practices and/or breaches of fiduciary duties to the

Banks caused more than a minimal loss to the Banks.

ORDER TO PAY

By reason of the reckless unsafe or unsound practices and/or breaches of fiduciary duty set forth in the NOTICE OF ASSESSMENT, the FDIC has concluded that a civil money penalty should be assessed against the Respondent pursuant to section 8(i)(2) of the Act, 12 U.S.C. § 1818(i)(2). After taking into account the appropriateness of the penalties with respect to the size of financial resources and the good faith of the Respondent, the gravity of the reckless unsafe or unsound practices and/or breaches of fiduciary duty, and such other matters as justice may require, it is:

ORDERED, that by reason of the reckless unsafe or unsound practices and/or breaches of fiduciary duty set forth in paragraphs 3 through 52 hereof, a penalty of \$75,000 be, and hereby is, assessed against Respondent Kenneth Waite pursuant to section 8(i)(2) of the Act, 12 U.S.C. § 1818(i)(2);

FURTHER ORDERED, that the effective date of this ORDER TO PAY be, and hereby is, stayed with respect to the Respondent until 20 days after the date of receipt of the NOTICE OF ASSESSMENT by the Respondent, during which time the Respondent may file an answer and request a hearing pursuant to section 8(i)(2)(H) of the Act, 12 U.S.C. § 1818(i)(2)(H), and section 308.19 of the FDIC Rules of Practice and Procedure, 12 C.F.R. § 308.19.

If the Respondent fails to file a request for a hearing within 20 days of receipt of this NOTICE OF ASSESSMENT, the

penalty assessed against the Respondent, pursuant to this ORDER TO PAY, will be final and shall be paid within 60 days after the date of receipt of this NOTICE OF ASSESSMENT.

NOTICE OF HEARING

IT IS FURTHER ORDERED, that, if Respondent requests a hearing with respect to the charges alleged in this NOTICE OF ASSESSMENT and NOTICE TO PROHIBIT, the hearing shall commence sixty (60) days from the date of receipt of this NOTICE OF ASSESSMENT and NOTICE TO PROHIBIT at Council Bluffs, Iowa, or at such other date or place upon which the parties to this proceeding and the Administrative Law Judge may agree. The purpose of the hearing will be for the taking of evidence on the charges, findings and conclusions stated herein in order to determine: (1) whether a permanent order should be issued to prohibit the Respondent from further participation in the conduct of the affairs of any insured depository institution or organization enumerated in section 8(e)(7)(A) of the Act, 12 U.S.C. § 1818(e)(7)(A), without the prior permission of the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the Act, 12 U.S.C. § 1818(e)(7)(D); and (2) whether the FDIC's ORDER TO PAY should be sustained.

The hearing will be public, and in all respects conducted in accordance with the provisions of the Act, 12 U.S.C. §§ 1811-1834a, the Administrative Procedure Act, 5 U.S.C. §§ 551-559, and the FDIC Rules of Practice and Procedure, 12 C.F.R. Part 308. The hearing will be held before an Administrative Law Judge to be

appointed by the Office of Financial Institution Adjudication pursuant to 5 U.S.C. § 3105. The exact time and precise location of the hearing will be determined by the Administrative Law Judge.

In the event Respondent requests a hearing, Respondent is hereby directed to file an answer to this NOTICE TO PROHIBIT and NOTICE OF ASSESSMENT within 20 days from the date of service as provided by section 308.19 of the FDIC Rules of Practice and Procedure, 12 C.F.R. § 308.19.

An original and one copy of the answer, any such request for a hearing, and all other documents in this proceeding must be filed in writing with the Office of Financial Institution Adjudication, 3501 N. Fairfax Drive, Suite VS-D8116, Arlington, Virginia, 22226-3500, pursuant to section 308.10 of the FDIC Rules of Practice and Procedure, 12 C.F.R. § 308.10. Also, copies of all papers filed in this proceeding shall be served upon the Office of the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429; A. T. Dill, III, Assistant General Counsel, Legal Division, Enforcement Section, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429; and upon Joseph J. Sano, Regional Counsel, San Francisco Regional Office, Federal Deposit Insurance Corporation, 25 Jessie Street at Ecker Square, Suite 1400, San Francisco, California 94105.

Pursuant to delegated authority.

Dated at Washington, D.C., this 6th day of October, 2009.

_____/s/_____
Serena L. Owens
Associate Director
Division of Supervision and
Consumer Protection