FEDERAL DEPOSIT INSURANCE CORPORATION

WASHINGTON, D.C.

In the Matter of	)	
FRONTIER STATE BANK OKLAHOMA CITY, OKLAHOMA	)	**DECISION AND ORDER DENYING REQUEST FOR STAY**
(Insured State Nonmember Bank**)**	)	
	)	FDIC-07-288b

This matter is before the Executive Secretary of the Federal Deposit Insurance Corporation ("FDIC") pursuant to 12 C.F.R. § 308.102(b)(2)(iii). Frontier State Bank, Oklahoma City, Oklahoma ("Frontier" or "Bank"), by letter dated May 6, 2011 ("Stay Request"), has requested a stay pending appeal to the U.S. Court of Appeals for the Tenth Circuit of the Decision and Order to Cease and Desist issued by the FDIC Board of Directors ("Board") on April 12, 2011 ("Decision and Order"), pursuant to section 8(b) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1818(b).

The Decision and Order adopted in full the November 18, 2010, Recommended Decision issued by Administrative Law Judge C. Richard Miserendino following a five-day evidentiary hearing ("Recommended Decision"). The 74-page Recommended Decision included extensive findings of fact with well-documented citations to testimonial and documentary evidence in the record. After carefully reviewing the Recommended Decision and the underlying record, the Board, in its Decision and Order, agreed that Frontier, "by act or omission, engaged in unsafe or unsound banking practices" when operating its leverage strategy investment program ("Leverage Strategy"). Decision and Order at 2. The Board ordered Frontier to cease and desist from engaging in seventeen enumerated unsafe or unsound banking practices and to implement a

corrective action plan. Pursuant to 12 U.S.C. § 1818(b)(2), the Decision and Order will become effective on May 13, 2011, thirty days after it was served on the Bank. In its Stay Request, Frontier noted that it intends to appeal the Decision and Order to the Tenth Circuit Court of Appeals pursuant to 12 U.S.C. § 1818(h)(20). Stay Request at 2.

A stay pending judicial review is an extraordinary action committed to the discretion of the FDIC. The FDIC will enter a stay pending judicial review only if the requestor demonstrates that each of the following four conditions are met: (1) that the petitioner is likely to prevail on the merits of the appeal; (2) that the petitioner will suffer irreparable harm in the absence of a stay; (3) that other interested persons will suffer no harm if a stay is granted; and (4) that a stay will not harm the public interest. *See, e.g., In the Matter of Roque de la Fuente*, 2003 WL 21233537, at *1 (FDIC); *In the Matter of Ronald Grubb*, 1992 WL 813234, at *1 (FDIC).[1] The Tenth Circuit applies the same standard to evaluate whether to grant a stay of an order of an administrative agency. *See Associated Securities Corp. v. SEC*, 283 F.2d 773, 774-75 (10th Cir. 1960); *see also Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (same). Frontier has not satisfied any of these four conditions.

First, Frontier's Stay Request fails to present any factual or legal basis indicating that Frontier is likely to prevail on the merits before the Court of Appeals. Frontier asserts that the Decision and Order is arbitrary and capricious because "[t]he FDIC failed to provide an underlying basis for multiple aspects of its case." Stay Request at 4. This contention amounts to

[1]Frontier's assertion that the FDIC may grant its request for a stay pending appeal "without the Bank making any showing whatsoever" is inaccurate. Stay Request at 2. As demonstrated by the plain language in the applicable sections of the FDI Act and the FDIC's corresponding regulation, commencement of proceedings for judicial review does not operate as a stay of the FDIC's order. 12 U.S.C. § 1818(h)(3); 12 C.F.R. § 308.41. Moreover, the FDIC has consistently held that it will grant a request for a stay only upon finding that the requesting party has satisfied each of the four elements discussed above.

no more than an argument that the evidentiary record was inadequate to support either the determination that Frontier's Leverage Strategy reflected an ongoing pattern of multiple unsafe or unsound banking practices or the remedy chosen by the FDIC. Frontier's argument in this regard is without merit because the Board found sufficient evidence in the record to support findings that the Bank operated its Leverage Strategy in an unsafe and unsound manner.

The courts generally agree that an unsafe and unsound banking practice is "one which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk of loss or damage to an institution, its shareholders, or the agencies administering the insurance funds and that it is a practice which has a reasonably direct effect on an association's financial soundness." *Simpson v. Office of Thrift Supervision*, 29 F.3d 1418, 1425 (9th Cir. 1994); *see also First Nat'l Bank of Eden v. Office of the Comptroller of the Currency*, 568 F.2d 610, 611 (8th Cir. 1978) (unsafe and unsound conduct encompasses practices contrary to accepted standards of prudent operation that might result in abnormal risk or loss to a bank). Because the Decision and Order and the Recommended Decision discuss thoroughly the bases for the determination that Frontier engaged in numerous unsafe and unsound banking practices, we will not repeat that discussion here. *See* Decision and Order at 7-9; Recommended Decision at 21-58. In view of the administrative record in the enforcement proceeding, Frontier would be hard-pressed to demonstrate likely success on the merits.

Second, with respect to irreparable injury, Frontier asserts that, absent a stay, it will suffer "significant financial harm" as well as "reputational damage and potential loss of Bank customers if the Decision and Order became public and enforceable during the pendency of the appeal." Stay Request at 3. As to the purported financial harm, such harm would constitute

economic loss only. But that, as the Board has previously noted, is not a sufficient basis to grant a stay. *See de la Fuente*, 2003 WL 21233537, at *2; *In the Matter of Michael D. Landry and Alton B. Lewis*, 1999 WL 639568, at *2 (FDIC) (economic loss alone, such as loss of livelihood, not adequate to justify a stay); *see also Port City Properties v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1190 (10th Cir. 2008) (economic loss does not satisfy irreparable harm requirement).

Frontier's assertions of reputational damage and potential loss of customers fare no better. These vague and speculative claims are unpersuasive as they fail to demonstrate any injury beyond that which would ordinarily flow from any adverse decision and which, again, is not irreparable harm. *In the Matter of Ronald Grubb*, 1992 WL 813234, at *3; *see also Port City Properties*, 518 F.3d at 1190 (loss of business resulting in monetary damages not irreparable harm).[2]

Finally, the last two factors—harm to other parties and to the public interest—are considered together because they are interrelated. The other parties affected are Frontier's depositors and other customers and the FDIC. The courts generally recognize that, when balancing potential injury to an individual or firm from an order of a financial regulatory agency against harm to the public that could result from activities proscribed by the order, "the necessity of protection to the public far outweighs any personal detriment resulting from the impact of applicable laws." *Associated Securities*, 283 F.2d at 775; *see also Decker v. SEC*, 631 F.2d 1380, 1384 (10th Cir. 1980) (in action for stay of SEC enforcement order, petitioner's potential injury "is not of controlling importance as primary consideration must be given to the statutory intent to protect investors").

[2] The Board has considered and uniformly rejected similar claims of potential reputational harm raised by financial institutions in support of requests for private hearings. Notably, most of the Board's rulings on this issue were issued in the early 1990's during the height of the bank and thrift crisis – and in an economic environment similar to the current one – when reputational issues were of great importance. *See, e.g.*, *In the Matter of the Citizens Bank of Clovis*, 1992 WL 812813 (FDIC).

Notably, because the FDIC is charged with protecting depositors, maintaining confidence in the nation's banking system, and safeguarding the Deposit Insurance Fund ("DIF"), Congress granted the agency broad powers to identify potential risks and enjoin banks from engaging in unsafe and unsound practices. In this case, the Board concluded, after a thorough review of the record, that Frontier's Leverage Strategy "reflected an ongoing pattern of multiple unsafe and unsound practices" that placed the Bank and its depositors at risk and warranted the imposition of a cease and desist order pursuant to section 8(b) of the FDI Act. Decision and Order at 7 -10. Here, the FDIC's statutory mandate to protect depositors and the DIF must be given precedence. Accordingly, the public interest weighs against delayed entry of the cease and desist order.

Based upon a careful review of the Stay Request, the FDIC finds and concludes that Frontier has presented no factual or legal basis upon which the request for a stay pending appellate review could be granted.

ORDER

For the foregoing reasons, it is hereby ORDERED that Frontier's Stay Request is DENIED.

Dated at Washington, D.C. this 11th day of May, 2011.

/s/
Robert E. Feldman
Executive Secretary

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