FEDERAL DEPOSIT INSURANCE CORPORATION

WASHINGTON, D.C.

| | |
|---|---|
| In the Matter of:<br><br>DAVID KENNELLY, individually and as an institution-affiliated party of<br><br>BANK OF CLARK COUNTY (IN RECEIVERSHIP)<br>VANCOUVER, WASHINGTON<br><br>(INSURED STATE NONMEMBER BANK) | NOTICE OF INTENTION TO PROHIBIT FROM FURTHER PARTICIPATION<br><br>FDIC-10-416e |

The Federal Deposit Insurance Corporation ("FDIC"), has determined that David S. Kennelly ("Respondent"), individually, and as an institution-affiliated party of Bank of Clark County, Vancouver, Washington ("BoCC" or the "Bank"), 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 BoCC; that BoCC has suffered financial losses or other damage, that the interests of BoCC's depositors have been 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 BoCC.

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).

The FDIC hereby issues this NOTICE OF INTENTION TO PROHIBIT FROM FURTHER PARTICIPATION ("NOTICE TO PROHIBIT") and this NOTICE OF HEARING pursuant to section 8(e) of the Act, 12 U.S.C. §1818(e) and Part 308 of the FDIC's Rules of Practice and Procedure, 12 U.S.C. Part 308, and alleges as follows:

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times pertinent to this proceeding, BoCC was a corporation existing and doing business under the laws of the State of Washington, having its principal place of business at Vancouver, Washington.

2. BoCC was chartered by the Washington Department of Financial Institutions ("DFI") and insured by the FDIC, effective upon opening on February 8, 1999.

3. On January 16, 2009, the DFI closed the Bank and appointed the FDIC as Receiver.

4. BoCC was, at all times pertinent to this proceeding, an insured State nonmember bank, as defined in section 3(e) of the Act, 12 U.S.C. § 1813(e), and as such is 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 is subject to the laws of the States of Washington.

5. Respondent began his employment at BoCC as Chief Lending Officer in 2004. At all times pertinent to the charges herein, Respondent was employed by BoCC as Chief Lending Officer and Executive Vice President. As Chief Lending Officer, Respondent was responsible for grading the internal risk rating of the loans in the Bank's Acquisition and Development ("A&D") Portfolio as well as calculating the required Allowance for Loan and

Lease Losses ("ALLL"). Respondent was terminated from his position at BoCC on November 21, 2008.

6. At all times pertinent to the charges herein, Respondent was an "institution-affiliated party" of BoCC 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).

7. The FDIC has jurisdiction over BoCC, Respondent and the subject matter of this proceeding.

Misconduct at BoCC

8. Respondent engaged in a scheme to conceal material facts from Bank examiners. Respondent's actions resulted in violations of law and represent unsafe or unsound banking practices and breaches of fiduciary duty in connection with BoCC. As a result of Respondent's actions, the Bank suffered financial loss or other damage and the interests of the Bank's depositors were prejudiced. Respondent's actions demonstrate personal dishonesty and a knowing disregard for the safety and soundness of the Bank.

9. On February 11, 2010, Respondent was charged with one count felony scheme to conceal material fact in violation of Title 18, United States Code, Section 1001(a)(1).

10. On February 19, 2010, Respondent entered into a plea agreement with the United States Attorney for the Western District of Washington ("Plea Agreement"). Respondent pled guilty to one charge of scheme to conceal material facts in violation of Title 18, United States Code, Section 1001(a)(1) and agreed to the facts as represented herein.

11. As part of the Plea Agreement, Respondent agreed "not to become or continue serving as an officer, director, employee, or institution-affiliated party as defined in 12 U.S.C. Section 1813(u), the Federal Deposit Insurance Act (as amended), or 12 U.S.C. Section 1786(r),

the Federal Credit Union Act (as amended), or participate in any manner in the conduct of the affairs of any institution or agency specified in 12 U.S.C. Section 1818(e)(7)(A), without the prior approval of the appropriate federal financial institution regulatory agency as defined in 12 U.S.C. Section 1818(e)(7)(D)."

12. Pursuant to the Plea Agreement, Respondent further agreed "to execute the necessary documents to stipulate and consent to the issuance by the FDIC of an order of removal from office and/or prohibition from further participation, as appropriate." As a result of Respondent's failure to provide the FDIC with an executed stipulation and consent to the issuance of an order of prohibition, this action is required.

*The Scheme to Conceal*

13. Among other services, BoCC loaned money to real estate developers in order to facilitate their construction of housing subdivisions and condominiums and received secured interests in the subdivisions and condominiums. These loans made up BoCC's A&D Portfolio.

14. Due to the deteriorating value of the real estate securing the loans, by the spring of 2008, Respondent and other members of the Bank's management became concerned that Bank examiners would realize the magnitude of impaired loans in the A&D Portfolio during an upcoming Safety and Soundness Examination, would adversely classify loans and would require a significant increase in the Bank's ALLL and a corresponding decrease in the Bank's capital.

15. On September 12, 2008, BoCC received notice that the date of the next Safety and Soundness Examination had moved from January 2009 to November 3, 2008. Upon receiving this notice, Respondent discussed with the Bank's Senior Vice President/Real Estate Manager that the real estate market had deteriorated and that BoCC's appraisals of secured property were outdated.

16. At the request of Respondent, updated appraisals were ordered for approximately 23 loans in the A&D portfolio between September 9, 2008 and October 9, 2008. Most of the appraisals were ordered after Respondent learned that the date of the next Safety and Soundness Examination had been moved to November 3, 2008.

17. Between October 14, 2008 and October 30, 2008, BoCC received the updated and unfavorable appraisals, which reflected significant deterioration in collateral value.

18. Respondent and another Bank officer devised a plan to conceal the true financial condition of the Bank by withholding updated appraisals from Bank examiners during the November 3, 2008 Safety and Soundness Examination.

19. Respondent informed the Bank's Vice President/Review Appraiser that there were several appraisals that he "did not want to see the light of day." During subsequent meetings in Respondent's office, these two individuals and an assistant reviewed the incoming appraisals and Respondent identified the appraisals that he planned to conceal from bank examiners. They created a spreadsheet detailing the updated appraisal values and whether they would be shared with examiners. The appraisals they intended to conceal were not highlighted; those they did not intend to conceal were highlighted. Respondent stated during conversations with the Bank's Vice President/Review Appraiser that the Bank would not "technically have in-house" those appraisals that were not highlighted. BoCC used iCore as its electronic record keeping system. From these conversations, the assistant understood that she should not have the appraisals that were not highlighted scanned into the iCore system.

20. Respondent informed the Bank's Real Estate Group Vice President/ Loan Officer that the recently ordered appraisals were not to be placed in the loan files until after the November 3, 2008 Safety and Soundness Examination was completed. After another Loan

Assistant inquired further, Respondent informed her that the newly received appraisals were not to be scanned into BoCC's iCore system until after the examination was completed.

21. The week prior to the Safety and Soundness Examination, the BoCC Real Estate Group held its bi-monthly meeting. After the meeting, Respondent met with the three employees at the Bank he anticipated would have the most contact with Bank examiners. Respondent told these employees that they were to be in "deposition mode" when examiners asked for files. Respondent gave the list of highlighted and non-highlighted appraisals to one of the employees, who copied it and distributed it to the others, explaining that the non-highlighted appraisals were to be concealed from Bank examiners. Respondent informed them that if Bank examiners asked about the non-highlighted appraisals, the employees should tell them that updated appraisals had been ordered, but as far as they knew, had not been received. After Respondent left the meeting, the employees became confused as to whether they were supposed to conceal the highlighted or non-highlighted appraisals. One of the employees placed a call to Respondent, who confirmed that they were to conceal the non-highlighted appraisals.

22. The Bank's Vice President/Review Appraiser placed the appraisals Respondent intended to conceal in a basket under his desk in anticipation of the November 3, 2008 Safety and Soundness examination.

23. On November 3, 2008, the first day of the Safety and Soundness Examination, Respondent sent an email to BoCC staff alerting them to be in "deposition mode."

*The Hidden Appraisals*

24. On November 3, 2008, the Washington DFI conducted a Safety and Soundness Examination of BoCC. An FDIC examiner was onsite for a visitation and observed the DFI examination.

25. Updated appraisals related to the impaired loans were intentionally withheld from the iCore imaging process and kept under the desk of the Bank's Vice President/Review Appraiser.

26. During an initial interview with Bank examiners on November 3, 2008, Respondent falsely assured examiners that all current loan documentation and information had been scanned into the iCore system. In discussing the appraisal of an impaired loan, Respondent told a Bank examiner that the Bank had relied on the valuation provided by the broker and falsely stated that the Bank did not have a current appraisal.

27. On November 17, 2008, the FDIC received an anonymous telephone call alerting the FDIC that BoCC management had withheld from Bank examiners several real estate appraisals.

28. On November 17, 2008, after Respondent learned that the FDIC had received information that BoCC employees concealed appraisals during the examination, Respondent directed the Bank's Vice President/Review Appraiser to leave the BoCC premises.

29. On November 17, 2008, when examiners requested three or four appraisals that the informant had mentioned, Respondent falsely informed them that he did not think that BoCC possessed the appraisals in question. Within 20 minutes, he produced all of the requested appraisals.

30. Respondent subsequently instructed the Bank's Vice President/Review Appraiser to put a false "spin" on their conduct by asserting that the reason the appraisals had not been disclosed to Bank examiners was that the appraisals had only recently been received by BoCC and BoCC personnel were too busy to scan them.

31. The Bank's Vice President/Review Appraiser gave Bank examiners the

spreadsheet that Respondent originally created for the purpose of deceiving the examiners.

32. Washington DFI and FDIC examiners returned to BoCC on November 18, 2008. The examiners were provided a total of 11 appraisals that had not been provided during their original loan review. The information contained in the appraisals indicated a significant deterioration in collateral values.

*The Bank's Investigation*

33. Upon learning of the hidden appraisals, the Bank conducted its own investigation. The Board of Directors of the Bank and its holding company, Clark County Bankcorporation (the "Holding Company"), directed its corporate counsel, the law firm of Gerrish McCreary Smith ("Gerrish"), to conduct an investigation into allegations raised by DFI and FDIC examiners that Bank personnel intentionally withheld appraisal information regarding the value of real estate collateral securing loans on the Bank's books.

34. On November 25, 2008, the Board of Directors met in executive session and authorized the Gerrish firm to unfettered access to all bank records and personnel for the purpose of the investigation.

35. After a series of witness interviews taken over multiple days at the Bank, the Gerrish firm produced a lengthy Investigative Report dated December 2008.

36. The Bank paid the Gerrish firm for legal fees and costs for the months of November and December 2008, including fees associated with the Bank's investigation into the scheme to conceal. The invoices submitted by the Gerrish firm for this time period include fees charged to the Bank for preparation and participation in interviews of Bank personnel and review of files and emails in furtherance of the investigation, as well as drafting, revising and issuing the Investigative Report.

*The Bank Fails*

37. The deterioration in collateral values reflected on the 11 appraisals withheld from Bank examiners at the November 3, 2008 examination resulted in the following:

(a) The Bank's losses increased by approximately $13 million;

(b) To be adequately capitalized, the Bank would need to increase the ALLL by $16.7 million rather than the $3.5 million it previously had estimated;

(c) The Bank was undercapitalized.

38. The Bank was able to continue borrowing from the Seattle Federal Home Loan Bank ("FHLB") only until December 2008.

39. The increase in ALLL and the categorization of the Bank as "Undercapitalized" negatively impacted the Bank's capital, creating liquidity pressures due to the Bank's inability to renew brokered deposits or borrow additional money from the FHLB.

40. On January 16, 2009, the DFI declared BoCC insolvent and appointed the FDIC as Receiver, resulting in a loss to the FDIC in excess of $42 million.

**GROUNDS FOR SECTION 8(e) PROHIBITION ORDER**

41. As a result of Respondent's foregoing acts, omissions and/or practices, Respondent has engaged and/or participated in violations of law in connection with BoCC.

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

43. As a result of Respondent's foregoing acts, omissions and/or practices, Respondent breached his fiduciary duty as an officer of BoCC.

44. By reason of the violations of law, unsafe or unsound banking practices and/or breaches of his fiduciary duties specified in paragraphs 1 through 40, the Bank suffered financial loss or other damage and the interests of the Bank's depositors were prejudiced.

45. The violations of law, unsafe and unsound banking practices or the breaches of his fiduciary duty of Respondent as set forth in paragraphs 1 through 40 demonstrate a willful or continuing disregard for the safety or soundness of BoCC and/or evidence Respondent's personal dishonesty.

**NOTICE OF HEARING**

IT IS FURTHER ORDERED, that, if Respondent requests a hearing with respect to the charges alleged in this NOTICE TO PROHIBIT, the hearing shall commence sixty (60) days from the date of receipt of this NOTICE TO PROHIBIT at Portland, Oregon, 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 whether a permanent order should be issued to prohibit 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).

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 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 10th day of June, 2011.

/s/
Serena L. Owens
Associate Director
Division of Risk Management Supervision