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

IN THE MATTER OF	)	
	)	**RECOMMENDED**
Carlos Loumiet, Esq.	)	**DECISION**
Former Counsel to	)	
Hamilton Bank, N.A. (Closed)	)	OCC-AA-EC-06-102
Miami, Florida	)	

ANN Z. COOK, Administrative Law Judge

The Office of the Comptroller of the Currency ("OCC") issued a Notice of Charges for an Order to Cease and Desist and Notice of Assessment of Civil Money Penalty ("Notice") against Respondent Carlos Loumiet, Esq. ("Mr. Loumiet" or "Respondent") on November 6, 2006. The matter is brought pursuant to sections 8(b) and 8(i) of the Federal Deposit Insurance Act, 12 U.S.C. § 1818(b) and (i) and seeks a final order barring Respondent from providing legal or consulting services to any insured depository institution and assessing a civil money penalty in the amount of $250,000.

The matter was tried before me in Miami, Florida from October 9, 2007 to October 25, 2007, with each side represented by counsel. Based on the entire record and my observation of the evidence, I find and recommend the following.

INTRODUCTION

Mr. Loumiet is a partner in the law firm of Hunton & Williams LLP in Miami, Florida. Before joining Hunton and at all times relevant to this proceeding he was a principal shareholder in the law firm of Greenberg Traurig, PA. ("Greenberg") and was well respected in the legal community. At Greenberg he chaired the banking and international law departments and worked in the firm's main office in Miami.

Greenberg was retained by Hamilton Bank, NA. ("Hamilton" or "the Bank") to conduct an internal after-the-fact investigation of certain transactions that OCC examiners questioned and viewed as possibly unlawful. The Bank's outside auditors, Deloitte & Touche LLP ("Deloitte") had requested the investigation in order to determine the appropriate accounting treatment for the transactions before resuming an on-going audit. Neither Greenberg nor Mr. Loumiet had any involvement with the transactions themselves.

The investigation, conducted by a team of Greenberg lawyers, resulted in the issuance of two reports by Greenberg, on both of which Respondent Loumiet was the primary author. The reports concluded that the evidence was insufficient to find that management had engaged in unlawful transactions – conclusions which would later prove incorrect as three Bank officers were some time later criminally convicted and imprisoned after the Bank was closed by the Comptroller of the Currency as a result of significant illegal losses deceptively hidden by management.

As a result of Greenberg's inaccurate findings, the OCC sought penalties against the Greenberg, Respondent Loumiet, and another shareholder, Robert Grossman. Both Greenberg and Mr. Grossman settled with the OCC agreeing to pay civil money penalties. Respondent Loumiet, however, disputed the agency's allegations, and the OCC issued the Notice commencing this proceeding. Respondent denies any wrongdoing and argues that OCC has attempted to shift blame for its inaction.

BACKGROUND

Hamilton specialized in financing trade flows between domestic and international companies with a particular emphasis on trade with and between South America, Central America, the Caribbean and the United States.

In the summer of 1998, the Bank held Russian-based loans that had declined in value as conditions in Russia grew more unsettled. On September 9, 1998, the OCC directed the Bank to downgrade the Russian loans and establish a 25 percent reserve which would have resulted in an immediately reportable loss of $3,125,000.

At about this time, Bank officers asked Jose Echevarria, who headed the Deloitte audit team, what the accounting treatment would be if the Bank sold the Russian loans and purchased perpetual notes to match long term trust preferred liabilities it anticipated issuing. Mr. Echevarria advised them that recognition of loss on bad loans could not be deferred by exchanging them for good loans.

In September and October 1998, the Bank sold approximately $20 million in Russian syndicated loans at face value and purchased at face value approximately $94 million of various bearer notes, promissory notes and similar assets. The par values of the loans sold by the Bank exceeded their market values, and the par values of the perpetual notes and debt securities purchased exceeded their market values.

The Bank accounted for the purchases and sales as separate, independent transactions and reported no losses. That treatment hid a significant loss on the trades and resulted in a substantial overstatement of capital.

The assets were purchased as investments underwritten as loans ("IULs") which are below investment grade debt securities, traded on lightly traded secondary markets, and issued largely by unfamiliar entities in emerging markets. Regulators allowed banks to purchase them under lending authority after underwriting them as if they were loans. Banks in Southern Florida then commonly carried IULs at par value as loans held to maturity.

During a 1999 examination, the OCC questioned whether the sales and purchases were connected since the Bank had paid more than necessary for the assets and it was unlikely the Russian loans could have been sold at face value absent a commitment to buy the new assets at above market price. Hamilton objected but the OCC insisted that the assets be written down to market value. The Bank complied under protest resulting in a $7.7 million charge against income.

The examiners suspected the Bank had engaged in an adjusted price trade – that is an exchange or swap in which a debt asset is sold at a price above market value, with the corresponding purchase of another debt asset, often trading at a discount, at a price above its market value. While not necessarily improper or illegal, adjusted price trades become unlawful if used to improperly conceal a known loss.

In April 2000, the OCC obtained documents from the counterparties which showed they understood the purchases and sales were linked and considered the transactions to be an exchange or swap. The OCC surmised that senior Bank officers had not been truthful in their representations.

Shortly thereafter the OCC issued a temporary cease and desist order directing the Bank to take action in response to a series of operating deficiencies and not to engage in swaps or exchanges that hid losses. The OCC also required Hamilton to refile its call reports to include a pre-tax loss of $ 24.6 million. The Bank did so under protest and appealed.

The OCC provided copies of the counterparty documents to Hamilton and insisted they be made available to the Bank's auditors. After reviewing them and having been advised that OCC examiners believed adjusted price trades had occurred, Deloitte determined that, in accordance with Generally Accepted Auditing Standards, it required an independent investigation of the facts to determine the appropriate accounting treatment and whether or not restatement of reports filed in 1998 was required.

In early August, the Bank's audit committee acted on Deloitte's request by hiring Greenberg to perform the investigation. Lawyers at Greenberg previously had done various legal work for the Bank and Mr. Grossman served as the Bank's SEC counsel.

Greenberg was not the Bank's outside regulatory counsel and the Bank was not a major client.

Deloitte wanted an attorney-led investigation to determine the facts and circumstances of the trades. Specifically Deloitte's request was for an investigation to "(1) review the Bank's understanding and involvement with respect to the structure and pricing of the transactions it entered into and (2) determine whether any oral or written misrepresentations had been made to Deloitte & Touche in the course of conducting the audits of the Bank's financial statements." Joint Exhibit 6 pages 4-5.

Deloitte made it clear that serious consequences would ensue if the investigation found those involved had misrepresented the transaction. It suspended all auditing functions for the duration of the investigation, making it important to expeditiously complete the investigation so financial reports could be timely filed.

Mr. Grossman initially headed the Greenberg investigative team, which interviewed Bank personnel and examined Bank records and the documents OCC had obtained from the counterparties. Mr. Loumiet played a minor role until drafting of the report was underway. He became the principal author of the report issued November 15, 2000.

The November report was the collaborative effort of Mr. Loumiet, Mr. Grossman and two associates. Drafts were reviewed by and comments received from Deloitte, the audit committee and the Bank's outside regulatory counsel Richard Alexander of the Arnold & Porter law firm.

The report, 23 pages with 81 pages of attachments, found no agreement in the legal sense conditioning the sale of the Russian loans on the purchases. Its conclusion rested on the absence of any physical agreement and the Bank officers' representations that it historically acquired, disposed of carried and held to maturity its loans at face value and, therefore, had no reason to consider market pricing.

Although the counterparties understood the trades were linked, the report found no evidence that the Bank was aware of their understanding or had seen the documents evidencing it. The report also found no convincing evidence that management had intentionally misled Deloitte or the audit committee about the trades.

Based on the report, the audit committee and Deloitte concluded there was sufficient information indicating the sales would not have occurred without the purchase and that they should be accounted for as an exchange or swap. The committee recommended the Bank restate its previously filed financial statements and Deloitte resumed auditing since the investigation had found no evidence of misrepresentation by management.

The OCC continued to view the transactions as unlawful adjusted price trades. At a meeting on November 29, 2000, the OCC so advised the audit committee, Deloitte, Greenberg and the Bank's regulatory counsel, and also disclosed that it had interviewed the counterparties.

In a letter dated January 17, 2001, OCC further disclosed that it had taken a sworn statement from Ian Tweedley, a counterparty, who directly contradicted the representations of Bank management and asserted the Bank had knowingly and intentionally engaged in the exchanges. This statement also directly contradicted representations formerly made to Greenberg by counsel for Mr. Tweedley.

At a February meeting, portions of Mr. Tweedley's deposition were read to Greenberg, Deloitte and others, but they were not allowed to copy or read it in full. The OCC also raised six "red flags," factors the OCC believed indicated that Hamilton management had engaged in unlawful adjusted price trades.

To address the concerns raised by this information, Mr. Loumiet, now heading the Greenberg team, attempted unsuccessfully to interview Mr. Tweedley and his counsel.

He also questioned the Bank officer most involved in the trades, John Jacobs, who continued to adhere to his earlier statements. Mr. Jacobs willingly signed a statement under oath refuting that of Mr. Tweedley and withstood a second more strenuous interrogation by a trio of attorneys.

On March 14, 2001, the Greenberg team, primarily Mr. Loumiet, produced a 15 page supplemental report. The report highlighted the conflicting assertions, analyzed the responses given by Bank management to the Tweedley statement, and addressed the six "red flags" raised by the OCC. Though faulting how Bank management had handled certain aspects of the transactions, it concluded there was insufficient evidence to find management had intentionally engaged in an exchange or intentionally misled the Bank's auditors.

The OCC's investigation into Hamilton continued, and on January 11, 2002, after determining that the Bank had been operating in an unsafe and unsound manner, the OCC closed Hamilton and appointed the FDIC as receiver. On June 22, 2004, Chairman and CEO Eduardo Masferrer, President Juan Carlos Bernace, and Mr. Jacobs were all criminally indicted on charges relating to the fraudulent adjusted price trades. All were subsequently convicted of criminal counts relating to the trades and their concealment. The OCC also brought charges against the three officers and additionally the Bank's general counsel, resulting in orders prohibiting them from participating in the banking industry.

INSTITUTION-AFFILIATED PARTY

The agency seeks a civil monetary penalty of $250,000 and a cease and desist order barring Respondent from providing legal or consulting services to any insured depository institution. These sanctions may be imposed on an individual only if he or she is an institution-affiliated party ("IAP"), a status usually achieved by employment with a bank or an ownership interest in one. Alternatively, an independent contractor such as an attorney, may be deemed an IAP when the criteria set by 12 U.S.C. § 1813 (u)(4) is met by a preponderance of the evidence.

That section provides:

> Any independent contractor (including any attorney, appraiser or accountant) who knowingly or recklessly participates in –
>
> (A) any violation of law or regulation;
> (B) any breach of fiduciary duty; or
> (C) any unsafe or unsound practice,
>
> which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution.

12 U.S.C. § 1813(u)(4).

As in other provisions of the FDI Act, a three-pong analysis is used, namely: 1) there must be a specified degree of **intent** – knowing or reckless participation; 2) there must be a specified type of **misconduct** – violation of law or regulation, breach of fiduciary duty, or unsafe or unsound practice; and 3) the misconduct must have a prescribed **effect** – more than minimal financial loss or other significant adverse effect on the institution. Each of the three elements must be established or jurisdiction over the respondent is lacking.

For ease of analysis, the elements are considered in slightly different order.

MISCONDUCT

The misconduct prong enumerates three different acts that may be used to substantiate IAP status and the Notice alleges that Mr. Loumiet's conduct satisfies all three.

VIOLATION OF LAW OR REGULATION

OCC alleges at paragraph 60 of the Notice as follows:

> Respondent Loumiet violated a law, rule, or regulation in connection with the investigation and reports concerning the adjusted price trades. These violations include, without limitation, Respondent Loumiet's violation of Rules 4-1.7 and 4-1.10 of the Florida Rules of Professional Conduct, which proscribed Respondent Loumiet's conflicts of interest in his representation of the Bank.

The Notice injects the word "rule" where it does not exist in the statute. The statute requires a showing of a "violation of law or regulation." A rule is neither a law nor regulation and violation of a rule is simply insufficient.

Enforcement Counsel appear to abandon the argument that Respondent's conduct constitutes an alleged violation of law or regulation, though they do briefly refer to the claim in their initial Brief at 81. Accordingly, the argument warrants some consideration.

The Florida Rules of Professional Conduct (and the Model Rules of Professional Conduct promulgated by the American Bar Association on which the Florida Rules are closely patterned) are not, in my opinion, the type of "law or regulation" contemplated by Section 1813(u)(4)(A). As the preamble to the Florida Rules provides, "[t]he Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." Florida Statutes Annotated Bar Preamble at 2. The Preamble goes on to provide that "[v]iolation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability." F.S.A. Bar Preamble at 3.

Clearly the rules do not purport to represent "law or regulation" and a violation of one would not meet the misconduct test of subparagraph (a).

BREACH OF FIDUCIARY DUTY

The Notice alleges that Respondent Loumiet breached his fiduciary duties of care, loyalty, and candor, and Enforcement Counsel advance many theories on how Respondent's conduct amounts to such breach. Among the theories are that he was bound by certain "standards of care," that he conducted an inadequate investigation, misrepresented material facts and concealed or altered materially relevant documents, and that he had undisclosed conflicts of interest which prevented him from conducting an objective and independent investigation.

Standard of Care

The fiduciary duty provided in subparagraph (b) of section 1813(u)(4) must naturally be that of the profession of the contractor concerned. Auditors, accountants, appraisers, and attorneys are governed by different ethical requirements – arising out of their common law obligations and reflected in the various rules, principles, and standards promulgated by their respective professions. There may be similarities between them but each is distinct.

National Bank Examiner C. Michael Rardin articulated a standard of care for conducting bank related investigations. While learned in the business of banking, he is unqualified to announce "standards" that determine a lawyer's responsibility to a client in the context of a legal function such as an audit-related investigation. Examiner Rardin's expertise does not inform him of the unique considerations and responsibilities in an attorney-client relationship.

Mr. Rardin's standard is objectionable as well for seemingly being of his own design. The standard he described is uncodified, in part unwritten, not previously publicized, and neither adopted by any professional entity nor known to be regularly employed by one.

Nor, as he suggests, are the standards of care and loyalty required of bank directors as published in *The Director's Book* applicable. While the duties articulated there are similar in name, they do not encompass the responsibilities of a lawyer to a client and have no application to non-director attorneys who are retained to provide legal services as independent contractors.

The duty of care applicable to lawyers requires competence and diligence; the duty of loyalty requires protecting client confidences and avoiding conflicting interests; and the duty of candor requires truthfulness and honesty. *See* 2 Restatement of the Law (Third), The Law Governing Lawyers § 16. Allegations that Mr. Loumiet breached these duties are considered in the following two subsections.

Conflicts of Interest

The duty of loyalty obligates the attorney to preserve client confidences and avoid conflicting interests. The Notice alleges that because of his and Greenberg's prior work for the Bank, Mr. Loumiet had conflicts which gave him an incentive not to conclude that adjusted price trades had occurred or Bank officers had lied, not to conduct a thorough and impartial investigation, and not to provide the Bank with a complete and accurate account of the results of its investigation.

During the proceeding, charges were additionally made that because of Mr. Loumiet's personal relationship with the Bank president and because of his and Greenberg's desire for continued Bank business, he was unable to conduct an unbiased investigation. However, the evidence did not support these charges and instead showed that the Bank was not a major client of either Greenberg or Mr. Loumiet, that Mr. Loumiet had no personal relationship with Mr. Masferrer or any Bank officer, and that he was not the Bank's outside counsel, the relationship partner for the Bank's business at Greenberg, or even the engagement partner for the investigation.

The Notice advances the theory that Mr. Loumiet had an incentive not to conclude that the Bank engaged in the adjusted price trades, as such a finding would have exposed a material inaccuracy in the previous financial statements Greenberg helped prepare and file. This is also meritless as the November report provided the basis for the decision in

December 2000 to restate the financial statements and the restatement was underway or completed when the March report was issued.

The Notice also alleges a conflict in Mr. Loumiet having represented the Bank's directors individually in connection with an OCC enforcement action that in part related to the adjusted price trades.

The Bank's general counsel engaged Mr. Loumiet in the summer of 2000 to advise the board of directors regarding their liability under a draft consent order. One provision in the order prohibited adjusted price trades, but there is no evidence that Mr. Loumiet's work touched on that provision. He spent between eight and nine hours on the engagement before the order was signed on September 8, 2000 more than two weeks before he first billed work to the investigation on September 25, 2000.

The OCC ethics expert, Professor Nancy Moore, opined that Mr. Loumiet's work on the engagement created a significant risk that he would be unable to be independent in the investigation. Her opinion rested on her views that in his work on the consent order he had represented the individual directors including Mr. Masferrer, rather than the Board collectively; that he had a significant relationship with the Bank; and that he was obligated to uphold the position of the Bank's holding company that there had been no adjusted price trades. This testimony was logically perplexing,[1] contradicted by the great preponderance of the evidence, and cannot be credited.

There being no overlap between his work on the consent order and the investigation, no significant or personal relationship between him and any Bank officer, no special relationship to the Bank, no confidences of the Bank he was duty bound to protect, Mr. Loumiet's ability to work diligently and impartially on the investigation was not impaired by any conflict arising from his previous work for the Bank.

[1] For example, transcript pages 1759 - 63.

Lastly, the Notice alleges that Greenberg's undertaking to defend the Bank and its senior officers in *Indriksons v. Hamilton Bancorp Inc.* gave Mr. Loumiet an incentive not to conclude in its March report that the Bank had engaged in adjusted price trades or that senior Bank officers had lied about them. The *Indriksons* case was a class action that concerned the same transactions at issue in this proceeding.

The *Indriksons* defense engagement had been obtained without Mr. Loumiet's knowledge or involvement and with the intention of defending on procedural grounds. Greenberg's appearance was entered on February 6, 2001 after the lead attorney completed a conflicts check and consulted Mr. Loumiet about any conflicts with his work. Between February 6 and March 14, there were instances of individual Greenberg attorneys doing work on both engagements. For example, Ryan Reitz assisted Mr. Loumiet in arranging and participating in a phone conversation after he had appeared in the *Indriksons* case, and Mark Shnapp, also of record in *Indriksons*, assisted in the investigation with the interrogation of Mr. Jacobs on February 14. The two Greenberg teams kept one another generally informed of the other's activities, but there was no regular communication and no coordination.

Although the *Indriksons* team informed Bank management that conflicts between the two representations could arise in the future if the procedural defense failed, Mr. Loumiet saw no possible conflicts and therefore could not have discussed them with the audit committee or Deloitte.

Professor Moore and Respondent's expert Professor Alfred Alfieri differed widely on whether an actual conflict of interest existed between the two representations. Professor Moore opined there was a complete conflict because Greenberg was simultaneously defending the integrity of the senior officers in *Indriksons* while charged with independently investigating their credibility in the other engagement. She concluded that once Mr. Loumiet knew his firm had undertaken defense of the Bank officers in *Indriksons*, both common law fiduciary duties and the relevant Florida Rule of Professional Conduct prevented him from continuing with the investigation. She further opined the interaction between the Greenberg attorneys (more expansively interpreted than the evidence supports) constituted “working together” and “significant interaction” exacerbated the conflict.

In my opinion, Mr. Loumiet’s withdrawal from the investigation would have violated his professional responsibility and fiduciary duties of care and loyalty to the audit committee. Abandoning an existing client so a conflicting, potentially more profitable engagement can be undertaken is not an ethical option.

Professor Alfieri acknowledged that between February 5 and March 14 there was a potential conflict between the two engagements. He examined Mr. Loumiet’s fiduciary duties to the audit committee in the context of the lawyering process and the specific functions of a lawyer. Looking at the core functions of lawyering (confidentiality, communication, competence and diligence) he found that none were impaired in the *Indriksons* defense by the investigation and that the interests of clients in the two engagements were “generally aligned.” His opinion was that Mr. Loumiet had no conflict.

I cannot agree. Though interests may have been generally aligned and integrity of the officers not immediately at issue in the *Indriksons* case, the *Indriksons* team needed to preserve the officers’ integrity in case their procedural defense failed. The investigation had to be free to find the officers had misrepresented the trades and the defense team had a strong interest in having no such finding made.

Did the conflict breach Mr. Loumiet’s fiduciary duty? A lawyer must use his best efforts to avoid conflicts, but is not required to be omniscient. Law firms typically represent institutional clients in a variety of matters, and, as here, employ regularized procedures to avoid undertaking engagements that conflict with existing or prior clients’ interests. When the *Indriksons* defense work arose, Mr. Loumiet was diligently fulfilling his duties to the audit committee and reasonably relied on Greenberg’s conflicts procedure to prevent it from undertaking a conflicting representation. Absent some direct evidence showing that the Indriksons defense influenced the March report's conclusions, I cannot find that the conflict created by Greenberg's acceptance of the defense constituted a material breach of Mr. Loumiet's fiduciary duties to the audit committee.

Mr. Loumiet's duty of loyalty was not shown to have been compromised by conflicts of interest that prevented him from exercising independent judgment and fulfilling his responsibilities to the audit committee.

Materially False and Misleading Assertions
And Suppression of Material Evidence

The Notice alleges that Mr. Loumiet breached his fiduciary duties of care and candor by inadequately investigating, basing his conclusions on materially false and misleading assertions, and suppressing material evidence that would have exposed Bank management's misrepresentations.

Enforcement Counsel objects to five sentences in the two reports. Three are alleged to misstate the Bank's practices and camouflage facts that indicated the trades were adjusted price trades. These three statements as they appear in the reports are underlined below:

> Hamilton traditionally carries the loans that it purchases and sells, on its books, at face value, rather than marking them to market. Consequently, in acquiring and disposing of loans Hamilton has not historically faced the necessity of dealing with current market pricing or valuation of those loans, since regardless of that pricing or valuation, those loans will be carried on Hamilton's books, for all purposes, at face value. November report, page 4.

> In September 1998, Hamilton Bank customarily purchased and sold debt assets, including assets similar to those at issue here, at face value, carried them at face value on its books, and held them to maturity. March report, page. 8.

There is no doubt that the reports' intended audience, the audit committee and Deloitte, understood the statements referred to IULs, which were then commonly accounted for by banks as loans held to maturity and carried at face value. Loans and securities intended to be held to maturity are normally accounted for at face value. The Bank had acquired the IULs under lending authority, underwritten them as loans, and designated them as "hold to maturity." Unless reclassified to "available for sale," accounting for the IULs at face value was appropriate.

Deloitte and the audit committee, both intimately familiar with the Bank's practices, accepted the statements without criticism or disagreement when they reviewed drafts of the reports. The lead auditor even commented on one, "[T]he banks mindset was they were buying and selling loans. So rightly or wrongly they never thought of fair values, or seeking fair values, or what was the fair value of the purchases or sales." Joint Exhibit 62.

Because the IULs were acquired and treated as loans, the investigation and reports focused on the lending department and not on the Bank's investment portfolio or investment acquisition process. Rafael Hernandez, a certified public accountant experienced in accounting for banks and audit-related investigations, testified the investigators' approach was correct. The statements objected to by OCC read in the context of the report did not misstate Hamilton's practices or mislead Deloitte or the audit committee

A third sentence faulted by Enforcement Counsel is:

> [We] saw no evidence indicating that Hamilton inquired into or considered the market pricing of any of the assets involved [in the adjusted price trades]. November report, page 21.

It is alleged that Mr. Loumiet either was aware of contradictory evidence or failed to investigate sufficiently to determine the veracity of the statement.

Within the Bank's treasury department's records was a wire advice from Barclays Bank reflecting payment of interest earned on funds deposited in connection with the IUL purchases and captioned "LA Asset Swap." OCC Exhibit 175. Greenberg's investigation did not find it because it concentrated on the Bank's lending department where the IULs were purchased and held. The treasury department had essentially no role in that process. Failure to review largely irrelevant treasury department records, to find the wire advice, and to connect it to the Russian loan transactions is not a material investigative failure.

Enforcement Counsel points to Bloomberg screen printouts with pricing information for two perpetual notes acquired as IULs to show that market prices were in fact considered. Joint Exhibit 57. But because the screens post-date the notes' purchase they could not have played a part in the purchasing decision. The available evidence suggests they were instead obtained for their asset descriptions, not their pricing information.

The last of the allegedly false and misleading statements is:

> Noticeably, what we have not seen is <u>any</u> "evidence" <u>whatsoever</u> from within Hamilton Bank showing any intention within that bank to engage in such a "swap" or "exchange." (Underline in original). March report, page 14.

Here Enforcement Counsel point to a four-page facsimile sent September 21, 1998 from the Bank to West Merchant Bank, one of the counterparties. Joint Exhibit 4. It consisted of:

Page 1 A transmittal page from Hamilton to West Merchant Bank.

Page 2 A one page letter to West Merchant Bank agreeing to sell the City of Moscow loan and declining to buy two perpetual notes.

Page 3 The first of a two page letter to Morgan Grenfell agreeing to buy the same two perpetual notes on the same terms it declined to buy them from West Merchant Bank.

Page 4 The second page of the letter to Morgan Grenfell.

Read together they indicate Morgan Grenfell was to be an intermediary and the two perpetual notes would actually be purchased from West Merchant Bank.

Only pages 2 and 3 were attached as annexes to the November report. Enforcement Counsel maintain Mr. Loumiet intentionally omitted page one to obfuscate that West Merchant Bank was both the buyer and the seller and that the buy and sell were part of the same transaction.

Several considerations detract from that conclusion. First, it is clear from the transmittal line on pages 2 and 3 that they were part of the same four-page transmission. Second, a September 13th transmission annexed to the report shows West Merchant Bank proposed initially to be both the buyer and the seller. Third, the counterparty documents show West Merchant Bank considered the transaction a swap. Fourth, the reports discuss Morgan Grenfell's role. Fifth, Mr. Loumiet did not prepare the annexes; another member of the Greenberg team did. Clearly, without the cover sheet, readers of the report could and did conclude the buy and sell sides were connected. Omission of the cover page was not materially misleading.

At a meeting following up on the November report, Deloitte questioned the missing pages and Greenberg subsequently provided the fourth page. An associate working on the matter with Mr. Loumiet reported that the Bank did not regularly keep the cover page of transmittals and did not produce it although a copy was in the multitude of documents Greenberg collected during the investigation. The evidence does not show that Mr. Loumiet intentionally concealed the cover page.

That five sentences out of two lengthy legal memoranda totaling 40 pages may, when taken out of context, appear in isolation to be inaccurate, does not, under the circumstances, evidence a breach of Respondent's duty of care or candor.

In summary, I find none of the breaches of fiduciary duty alleged in the Notice.

UNSAFE AND UNSOUND PRACTICE

An unsafe and unsound practice is conduct deemed contrary to accepted standards of banking operations which might result in abnormal risk or loss to a bank. *First Nat'l Bank of Eden v. Dep't of the Treasury*, 568 F. 2d 610, 611 n.2 (8th Cir. 1978) (per curiam).

In *Grant Thornton LLP v. OCC*, 514 F. 3d 1328 (D.C. Cir. 2008), the court ruled that "when an accounting firm merely performs an external audit aimed solely at verifying the accuracy of a bank's books, it is not 'participat[ing]' or 'engaging' in 'an unsafe or unsound practice in conducting the business' or 'the affairs' of the bank, as those terms are used in 12 U.S.C. §§ 1813(u)(4)(C), 1818(b)(1), and 1818(i)(2)(B)(i)(II)." *Id* at 2. The court reasoned that "this sort of outside look into a bank's activity is not a 'practice' of a depository institution or bank." *Id.* at 8.

The actions alleged here are very similar to the professional services at issue in *Grant Thornton*. Mr. Loumiet as part of the Greenberg team was engaged to investigate past bank transactions for the purpose of providing information to the outside auditor. The investigation was not part of the regular operations of the Bank. It was unusual.

Mr. Loumiet's role did not include offering advice on whether the Bank should engage in any specific transaction, as did the counsel in *Cavallari v. OCC,* 57 F.3d 137 (2nd Cir. 1995). Nor did he execute a banking transaction as did the counsel *In the Matter of Irwin I. Weitz*, FDIC Enf. Dec. ¶ 5244 who, while acting as the settlement attorney representing a bank, substantially altered a loan transaction at closing causing significant losses in breach of his fiduciary responsibilities.

Contrary to the assertions by Enforcement Counsel, Respondent Loumiet did not conduct the "business" and "affairs" of the Bank by "advising the Bank to retain the dishonest senior officers, and having a 'directive role' in the Bank's decision to retain them." OCC Post-Hearing Supplemental Brief at 6. The record simply does not support this claim – the March report concluded that under a preponderance of evidence standard, Greenberg could not find that management misrepresented the transactions. It acknowledges the possibility that the officers might not be completely truthful, but concluded that insufficient evidence existed to arrive at such a finding.

Under the standard announced in *Grant Thornton*, Mr. Loumiet did not participate in an "unsafe or unsound practice" as he was not conducting the business or the affairs of the Bank.

Having found no misconduct and therefore having failed to establish the first element in the 1813(u)(4) analysis, it is unnecessary to address the remaining two elements. I do so briefly in the interests of completeness.

INTENT

To meet the intent test, misconduct must be engaged in knowingly or recklessly.

The evidence fails to show that Mr. Loumiet knowingly engaged in any of the acts alleged to be misconduct. In reality, he found himself in a very difficult role as part of a team of attorneys investigating an unusual transaction under time pressures and hindered by uncooperative counterparties, and corrupt Bank officials who were very persuasive liars. The fraud was difficult to detect and escaped detection by the Bank's auditors and bank examiners alike.

There is no reliable evidence that either Greenberg or Mr. Loumiet knew the truth and intentionally and purposefully concealed or misrepresented it. Mr. Loumiet is a capable, conscientious and respected attorney known for doing exemplary work. Had he come to know the truth, I believe that he would not have compromised his principles and concealed it.

Recklessness is acting in disregard of and evidencing conscious indifference to a known or obvious risk of substantial harm. *Cavallari*, 57 F.3d at 142. The risk of substantial harm must be known or so obvious that the party should have been aware of it. *Simpson v.* OTS, 39 F. 3d 1418, 1425 (9^{th} Cir. 1994).

The risk that the Bank officers were engaging in fraud so serious that it threatened the Bank's existence was not obvious. It was not suspected by its long time auditors and was not found by bank examiners who were almost continually on the premises.

That a bank examiner would perform the investigation differently, that the reports' findings conflicted with the position of the OCC, and that those findings were later determined to be wrong in criminal proceedings, does not satisfy the requirement that Respondent's actions were reckless under the circumstances.

Congress did not intend for attorneys such as Mr. Loumiet to be sanctioned for their good-faith legal services to a financial institution client. In granting the banking agencies enforcement authority over attorneys, the House Committee on banking noted:

> By specifying 'attorney' in this section, the Committee does not intend to subject attorneys to agency enforcement actions for those good-faith activities falling within the traditional attorney-client relationship. Specifically, providing advice in good faith to a client financial institution, by itself, should not lead to an enforcement action. For example, an attorney who provides legal advice or other legal services in good faith to a financial institution may counsel the institution that a particular course of action is lawfully justifiable, because of unclear law or regulations or because the institution may succeed on a legal challenge to the law or regulation during an administrative or judicial proceeding. That such advice or services may conflict with the position of the Federal banking agency and that a court may determine that position to be wrong would not usually or necessarily show bad faith.

Report of the House Committee on Banking, Finance and Urban Affairs, Financial Institutions Reform, Recovery, and Enforcement Act of 1989, H.R. Rep. No. 101-54(I), 101st Cong, 1st Sess. 467 (1989), reprinted in 1989 U.S.C.C.A.N. 86, 263.

Neither knowledge nor recklessness by Mr. Loumiet is established.

EFFECT

The Notice asserts that Respondent's actions caused, or were likely to cause, more than minimal financial loss or a significant adverse effect on the Bank by causing "(a) the continuation of the material overstatement of the Bank's capital and income, and (b) the Bank's not receiving the services for which it contracted, when it paid Greenberg approximately $210,000 to remain loyal to the Bank, conduct a thorough and impartial investigation, and provide the Bank with a complete and accurate account of the results of the investigation."

The evidence supports neither assertion. There is no doubt that with the facts from the November report before them, the audit committee and Deloitte quickly concluded that the trades should be accounted for as adjusted price trades regardless of the report having found no legal agreement. The restatement of financial reports which the OCC sought was undertaken in December. The promptness of the decision to restate indicates there was little likelihood the findings would have been otherwise construed and there is no evidence that the reporting errors due to prior improper accounting for the adjusted price trades were not remedied

The $210,000 fee paid to Greenberg neither overvalued the services received nor was a loss to the Bank. At a minimum, the reports had value, in that they satisfied the immediate concerns of the external auditors who were able to resume their ongoing audit. The reports were both thorough and timely, and while not perfect, they did not lack professionalism or loyalty as alleged.

The OCC has additionally argued that the reports conclusions exonerated dishonest Bank officers and enabled them to continue in their fraudulent activities. The claim stretches the truth. Greenberg's conclusions, consistent with their assignment, related only to representations made about the adjusted price trades, not to management's general truthfulness. Finding that the evidence was not sufficient to establish they had misrepresented the adjusted price trades cannot be seriously taken as endorsing their honesty. It is not tantamount to concluding they were honest any more than the OCC's 2000 report of examination condoned their remaining in office.

The remarkable but seemingly unquestioned $22.2 million loss suffered by the Bank on the adjusted price trades preceded the Greenberg investigation and cannot be attributed to its failures. Greenberg was not asked to investigate how such a loss was incurred, but it is surprising that none concerned sought a convincing answer as the truth might well have been uncovered in that way.

STATUTE OF LIMITATIONS

Mr. Loumiet contends that the charges in this matter are barred by the statute of limitations found in 28 U.S.C. § 2462, which in pertinent part provides that an action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued.

The parties entered into a tolling agreement on October 5, 2005 and agree that the relevant cut-off date is October 5, 2000, five years preceding the agreement. The first Greenberg report was issued on November 15, 2000. The Notice was issued on November 6, 2006.

Under controlling case law applying section 2462 in banking cases such as this, an agency enforcement action is timely if taken within five years of the occurrence of either the financial loss or adverse effect that satisfies the effect test. *De La Fuente v.*

FDIC, 332 F. 3d 1208, 1219 (9th Cir. 2003); *Proffitt v. FDIC*, 200 F. 3d 855 (D.C. Cir. 2000), *denying rehearing en banc*, 200 F. 3d 855 (D.C. Cir. 2000).

The alleged harm caused by Mr. Loumiet could not have occurred until after issuance of the November report on November 15, 2000. This proceeding is not time-barred.

FINDINGS OF FACTS

JURISDICTION

1. At all times pertinent to this proceeding, Hamilton was a national banking association, chartered and examined by the Comptroller, pursuant to the National Bank Act of 1864, 12 U.S.C. § 1 *et seq.*, and was an "insured depository institution," pursuant to 12 U.S.C. §§ 1813(c)(2) and 1818 (i)(2). Stipulations of Fact (Sept. 19, 2007) ¶¶ 1, 3 (hereinafter cited as "First Stipulations ¶ _").

2. The Bank was an "insured depository institution," pursuant to 12 U.S.C. §§ 1813(c)(2) and 1818(i)(2). First Stipulations ¶ 3

3. The OCC is the "appropriate Federal banking agency" to initiate and maintain an enforcement proceeding against institution-affiliated parties of the bank, pursuant to 12 U.S.C. §§ 1813(q)(1) and 1818. First Stipulations ¶ 4.

4. The parties entered into a one-year tolling agreement on October 5, 2005 and thereafter extended it to and including October 6, 2006. Respondent's Motion for Summary Judgment (July 27, 2007) Appendix, Exhibit. 25.

5. The Notice initiating this proceeding was issued and served on November 6, 2006.

HAMILTON BANK

6. Hamilton specialized in financing trade flows between domestic and international companies with a particular emphasis on trade with and between South America, Central America and the Caribbean and the United States. Joint Exhibit 7 p. 4 (hereinafter "JX p._").

7. The Comptroller of the Currency closed the Bank on January 11, 2002. First Stipulations ¶ 2.

8. After having removed the Bank's senior management from office by closing the Bank, the OCC prohibited them from participation in the banking industry and also barred the Bank's general counsel from representing Banks. Hearing transcript pages 912–13 (Rardin); 1119-20 (Loumiet) (hereinafter cited as "Tr. _").

9. The Bank's senior officers were criminally prosecuted in 2004 and have been adjudged or pled guilty to charges related to the events at issue in this proceeding, sentenced to prison, and ordered to pay restitution. *United States v. Masferrer*, 514 F.3d 1158, 2008 WL 169802 (11th Cir. Jan. 22, 2008); OCC Exhibits 345 - 347 (hereinafter "OX _").

LOUMIET AND GREENBERG TRAURIG LLP

10. Mr. Loumiet is an attorney and has been a partner in the law firm of Hunton & Williams LLP in Miami, Florida since May 1, 2001. Previously, and at all times pertinent to this proceeding, Loumiet was a principal shareholder in Greenberg Traurig LLP ("Greenberg"), practiced in Greenberg's Miami office and chaired Greenberg's banking and international law departments. Answer of Respondent Carlos Loumiet ¶ 4 (hereinafter cited as "Answer ¶ _").

11. Mr. Loumiet graduated from Yale College in 1973 and Yale Law School in 1978 and then worked for a law firm in New York and Paris for three years before moving to Miami. He has served as an adjunct professor at the University of Miami

(1983-87) and Yale Law School (1988-1991) and has been active in civic organizations, particularly those promoting Latino business interests. Tr. 2127-29, 2132-35 (Loumiet).

12. Mr. Loumiet is a member of the New York and Florida State Bars and enjoys a reputation in the South Florida legal community for knowledge, competence, intellect and integrity. Tr. 2132 (Loumiet); Tr. 2679-81 (Martinez); Tr. 2692-95 (Coffey).

13. Mr. Loumiet's practice has been in the area of banking transactions and regulation and international arbitration and transactions. His practice has not included bank operations and management. Tr. 2130-31 (Loumiet).

14. Several Greenberg lawyers did various legal work for Hamilton, but Hamilton was not a major client of the firm or of Mr. Loumiet individually. Tr. 2138-46 (Loumiet); Tr. 2072 (Martinez-Fraga).

15. Mr. Loumiet was never outside general counsel for Hamilton nor was he the relationship partner with respect to Greenberg's legal work for Hamilton. He had no personal or social relationship with Hamilton's officers. Tr. 2141-42, 2147-50, 2173 (Loumiet); Tr. 2052-53, 2068-72 (Martinez-Fraga).

16. At all relevant times, Mr. Loumiet acted within the scope of his duties at Greenberg. Answer ¶ 4.

17. At all pertinent times Richard Alexander of Arnold & Porter was Hamilton's outside regulatory counsel. Tr. 2322-23 (Loumiet).

18. In the summer of 2000, Loumiet was retained to advise the Hamilton board of directors about their potential liability under a draft consent order in which Hamilton agreed to various undertakings and which in part addressed future trades of the type discussed below. The consent order, negotiated between the OCC and the Bank's regulatory counsel, was signed on September 9, 2000 and Loumiet's time on the

assignment was less than 10 hours. Tr. 2162-71 (Loumiet); JX 47 – JX 50; Loumiet Exhibit 615 (hereinafter cited as "LX _").

THE ADJUSTED PRICE TRADES

19. On September 9, 1998, the OCC directed the Bank to downgrade and establish 25% reserves for three Russian loans that would have resulted in a reported loss to the Bank of $3,125.000. Stipulations of Fact (Sept. 28, 2007) ¶ 1 (hereinafter cited as "Second Stipulations ¶ _"). The Bank objected and instead sold its Russian loans. JX 3 p. 6.

20. In September and October 1998, the Bank sold approximately $20 million in Russian syndicated loans at face value and purchased at face value approximately $97 million of various bearer notes, promissory notes and similar assets ("the adjusted price trades"). Second Stipulations ¶ 2-5; JX 6 p. 1.

21. The assets purchased were acquired as investments underwritten as loans ("IULs"). IULs are below investment grade debt securities, traded on lightly traded, often volatile and illiquid secondary markets, which regulators permitted banks to buy after underwriting them as if they were loans. Underwriting was required because of their high credit risk. They were largely issued by unfamiliar borrowing entities in emerging markets and had individualized political and country risks. Tr. 370-76 (Rardin); Tr. 2728-34 (R. Hernandez).

22. At the time, banks in Southern Florida commonly acquired emerging market debt assets as IULs and carried them as loans held to maturity at par value, but as market conditions changed regulators often required they be reclassified as securities, which led to uncertainty and confusion as to how various IULs were to be accounted for. Tr. 370 (Rardin); Tr. 2771-76 (R. Hernandez).

23. The Bank purchased the assets under its lending authority and treated them as loans for purposes of underwriting and credit analysis. Tr. 2555-56 (Loumiet); Tr. 2795 (R. Hernandez); JX 6 pp. 1, 2; LX 86 p. 4.

24. The Bank officers responsible for analyzing and underwriting the IULs represented they had performed customary due diligence and had not been pressured by senior management. Tr. 2205-09. 2564-65 (Loumiet); JX 3 pp. 16-17.

25. The Bank accounted for the purchases and sales as separate, independent transactions and reported no loss on the transactions. That treatment hid a significant loss on the trades and resulted in a substantial overstatement of capital. Second Stipulations ¶ 6; Tr. 1402-03 (Echevarria); JX 6 pp. 1, 6-8; LX 86 p. 2.

26. During a 1999 examination, examiners questioned whether the sales and purchases were connected since the Bank had paid more than necessary for the assets it acquired in the trades and it was unlikely the Russian loans could have been sold at face value absent a commitment to buy the new assets at above market price. JX 6 p. 2; LX 86 pp. 3-4.

27. The Bank countered that the Russian loans were performing and good value, and that it had sold them because of overall weakness in the Russian economy and the departure of the Bank employee experienced in managing a Russian portfolio. It further maintained the assets acquired were quality credits, suitable to the Bank's needs, and in markets, primarily Latin American, with which it was more comfortable. JX 6 p. 2; LX 86 pp. 4-5.

28. The OCC insisted that the purchased assets be written down to market value to accurately portray regulatory capital and that controls be initiated to assure multiple bids were obtained and transactions better documented in future transactions. The bank complied under protest and in December 1999, transferred the purchased assets

to available for sale, causing them to be written down to market value and resulting in a $7.7 million charge against income. Tr. 1291 (Echevarria); JX 6 p. 3.

29. In April 2000, the OCC obtained counterparty documents from West Merchant Bank, Morgan, Grenfell & Co. Ltd. ("Morgan Grenfell") and Standard Bank London Ltd. indicating that in the first of the sale and purchase transactions, the counterparties understood that the purchases and sale were linked and considered the transaction an exchange or swap. The OCC examiners surmised that Bank management had not been truthful. Tr. 221-22, 701, 811-13 (Rardin); JX 6 pp. 3-4.

30. The OCC then imposed a temporary cease and desist order, which Hamilton appealed, and required Hamilton to refile its call reports to include a pre-tax loss of $24.6 million. Tr. 222-24 (Rardin); JX 6 p. 3.

31. As part of the 1999 and 2000 examinations and an ongoing investigation in 2000, ten to twenty OCC examiners were in the Bank regularly and relations between the Bank and the examiners grew increasingly strained. Tr. 651-54, 728, 813 (Rardin); LX 93 p. 7; LX 97.

32. Subsequently the OCC provided Hamilton with the counterparty documents which it had obtained from New York State banking authorities. JX 6 p. 4.

THE DELOITTE & TOUCHE AUDIT

33. Deloitte & Touche ("Deloitte") had been Hamilton's outside auditor for the 12 years from its inception. Since before 2000 through early 2001 Jose Echevarria was the lead client services partner when Allen Nichols succeeded him. Tr.1281, 1327-28 (Echevarria); 2248 (Loumiet); 2761 (R. Hernandez).

34. Mr. Echevarria's extensive and detailed notes now provide the most reliable and in some cases the only relevant evidence given the substantial passage of

years and with them the memories of the people involved. Tr. 1333-34 (Echevarria). *See*, JX 5; JX 6; JX 61; JX 62; JX 63; JX 65; JX 66; JX 74; LX 86; LX 92; LX 724.

35. Hamilton, as directed by the OCC, provided Mr. Echevarria with access to the multiple-boxes of counterparty documents it had received from the OCC. To facilitate the auditor's work, the OCC culled and copied the more relevant documents into one box which it provided to Mr. Echevarria. Tr. 1282-84, 1334-36 (Echevarria); JX 6 p. 4; JX 63.

36. After reviewing the culled documents, Deloitte concluded that they provided insufficient evidence to establish that a swap had taken place, but that they raised that possibility depending on what the Bank's understanding of the transactions actually was. The integrity of the participants in the transactions thus became a consideration. JX 6 p. 4.

37. Based on the culled documents and the concerns expressed by the OCC, Deloitte concluded that before it could determine the appropriate accounting treatment, it needed an independent investigation of all the facts and circumstances surrounding the transactions, including concerns about the integrity of the people involved in them. Under the circumstances, Generally Accepted Auditing Standards dictated such an independent investigation, as well as suspension of all auditing functions until the accounting issue was resolved. Tr. 1285-87, 1434-37 (Echevarria); Tr. 2723-26, 2760 (R. Hernandez); JX 6 p. 4.

38. In early August 2000, Deloitte met with the Hamilton board of directors and its audit committee and requested an independent fact finding investigation be conducted by attorneys, not an accounting firm, and made clear the potentially serious consequences if it were concluded that those involved had misrepresented the transaction. Tr. 1351-54, 1437 (Echevarria); JX 6 p. 4; JX 65.

39. Specifically, Deloitte's request was for an investigation to "(1) review the Bank's understanding and involvement with respect to the structure and pricing of the transactions it entered into and (2) determine whether any oral or written misrepresentations had been made to Deloitte & Touche in the course of conducting the audits of the Bank's financial statements." JX 6 pp. 4-5.

40. The investigation contemplated by Deloitte and the audit committee was limited to the adjusted price trades and management's representations of their intent in undertaking them, and was neither part of the Bank's deposit taking, lending or other core business functions or practices nor an inquiry into the general integrity of its senior officers. JX 3 pp. 2-3; JX 6 pp. 4-5.

THE GREENBERG INVESTIGATION

41. The audit committee hired Greenberg to conduct the investigation. At a September 18, 2000 meeting, Ronald Lacayo, chairman of the audit committee, Mr. Echevarria and Robert Grossman, representing Greenberg discussed the objective of the investigation and targeted it for completion in late October. JX 74.

42. Mr. Grossman, a Greenberg shareholder, was SEC counsel for the Bank and its holding company and was therefore familiar with the Bank's financial statements. Initially he headed the investigation team which included associate Jordan Clark and later associate John Varney. Mr. Loumiet's participation began September 25, 2000 and was limited until he took over the writing of the report in November. Tr. 658 (Rardin); Tr. 2172-75 (Loumiet).

43. Greenberg believed it had been selected to conduct the investigation largely because it was acquainted with the Bank and could "hit the ground running." Tr. 2179 (Loumiet). Because Deloitte's audit had stopped and several financial filing dates were approaching, quick completion of the investigation was of some importance. Tr. 1434-37 (Echevarria); Tr. 2216-17 (Loumiet).

44. Mr. Echevarria had raised the question of Greenberg's independence and suitability to perform the investigation and Mr. Lacayo had replied that the audit committee had considered the issue and was comfortable going forward with Greenberg. Tr. 1438-39 (Echevarria).

45. The Greenberg team obtained documents from the Bank and Deloitte, including all counterparty documents, and interviewed a number of Bank officers and employees, including loan and underwriting officers. They attempted to interview the counterparties, but were able only to speak with a managing director at one counterparty and James Warnot, counsel for another counterparty, who generally corroborated Bank management's version of the transactions. Tr. 667-70 (Rardin); Tr. 2204-05, 2556 (Loumiet); JX 3 pp. 3-4, 10-11, 25; LX 21.

46. Within the Bank loans were originated or purchased, underwritten, overseen and sold in the loan department, whereas securities were purchased, sold and maintained in the Bank's investment portfolio by the treasury department. Tr. 2556 (Loumiet); Tr. 2791-92 (R. Hernandez).

47. Because Greenberg understood the IULs were acquired as loans, it focused its attention on the Bank's lending process rather than how investments were acquired and sold in the treasury department. Tr. 2197-99 (Loumiet); Tr. 2745-46, 2758, 2760, 2795, 2812-13 (R. Hernandez). *See also* Tr. 781-84 (Rardin).

48. Mr. Loumiet took over writing of the report in November after the information gathering part of the investigation was finished, with a commensurate increase in hours billed. Whereas Mr. Grossman spent 13.5, 53.10 and 43.7 hours on the investigation in September – November, Mr. Loumiet's billed 4.9, 5.3, and 62.3 hours. Tr. 2173-75, 2186-89 (Loumiet); LX 294.

49. Mr. Loumiet reviewed some documents and had participated in some interviews, but viewed his role as drafting the report based on the information assembled by the Greenberg team. Tr. 1220-21, 2182-83, 2205-07, 2211-15 (Loumiet).

50. Before the report was finalized, drafts were circulated and comments received from Deloitte, and others well acquainted with the Bank's operations, investments and practices. Tr. 665-66 (Rardin); Tr. 1303-04, 1358-59, 1363-72 (Echevarria); Tr. 2247-55, 2284-85 (Loumiet); JX 62; LX 92.

51. Deloitte could be relied upon to know the Bank's historical practices and identify factual misstatements. Tr. 2199-2204, 2248-49, 2254-56 (Loumiet); Tr. 2762-63, 2813-16 (R. Hernandez).

THE NOVEMBER REPORT AND FOLLOW-UP

52. The report was issued on November 15, 2000 and consisted of 23 pages with 81 pages of attachments. JX 3.

53. Addressing the first of Deloitte's concerns, the report found " no "agreement" in the legal sense conditioning the sale of the Russian loans on the purchase of other assets," while acknowledging that the counterparties had not intended to buy any of the Russian loans unless Hamilton bought sufficient assets for them to realize a profit on the overall transaction. It noted that the choice and amount of assets to purchase was left to Hamilton. JX 3 pp. 16, 22.

54. It's conclusion that there had been no agreement to engage in an exchange rested on the absence of any physical agreement and the Bank officers' representations that it historically acquired, disposed of carried and held to maturity its loans at face value and, therefore, had no reason to consider the market pricing. JX 3 pp. 18-20, 22.

55. The report saw no evidence the Bank had considered or inquired into the market value of any of the assets although quotes of some nature were available, and concluded that not knowing the market value, the Bank officers involved did not know that they were overpaying for the purchased assets. JX 3 pp. 21-22. The magnitude of that loss, $22.2 million, was not addressed.

56. It noted that in August 1998, at about the time the OCC requested a $3 million reserve be taken for certain Russian loans, Bank officers had queried Mr. Echevarria, among other things, about the accounting treatment if Russian loans were sold and a perpetual note was purchased to match long term trust preferred liabilities it anticipated issuing. At that time, Mr. Echevarria advised that recognition of losses on "bad loans" could not be deferred by exchanging them for "good loans" and explained the criteria for determining if an exchange occurred. JX 3 pp. 5-6. The report made no connection between that conversation and the trades at issue.

57. Regarding Deloitte's second concern, the report "found no convincing evidence that anyone at Hamilton had intentionally misled Deloitte & Touche or the audit committee on these matters." It concluded that although the counterparty documents showed the counterparties understood the purchases and sales were conditioned on one another, they were internal documents and there was no evidence that their understanding had been communicated to or was shared by the Bank. JX 3 pp. 10-15, 18-20, 23.

58. On November 28, 2000, Mr. Grossman, Mr. Loumiet and Mr. Varney met with Deloitte to discuss the report and answer questions. Tr. 2285-86 (Loumiet); JX 5.

59. Based on the report, the audit committee concluded that there was sufficient information indicating the sales would not have occurred without the purchases and that they should be accounted for as an exchange or swap. Accordingly, on December 5, 2000, it recommended to the Bank that it restate its previously issued financial statements. Deloitte concurred having concluded the investigation raised no evidence of misrepresentation by management. The audit committee acknowledged the

Bank had overpaid approximately $20 million for the assets purchased. Tr. 1376-78 (Echevarria); JX 6 p. 6; JX 61.

60. The audit committee proposed remedial action short of removal be taken against John Jacobs, the Bank officer most involved in the transactions, since neither the Greenberg report nor the OCC had provided conclusive evidence that he knew the trades were swaps. Mr. Jacobs had recently been removed as CFO and his statements at times had been found inconsistent. JX 5 p. 5; JX 61 p. 2.

61. The OCC continued to view the transactions as linked and made that abundantly clear at a November 29, 2000 meeting with the audit committee, Deloitte, Greenberg (Mr. Grossman and Mr. Loumiet) and Arnold & Porter. The meeting was primarily concerned with determining the amount of the loss on the trades for accounting purposes. At the meeting, OCC disclosed that it had interviewed the counterparties, but the interview notes were privileged and in all likelihood would not be shared. Tr. 1322-23 (Echevarria); JX 6 p. 5; LX 93 p. 5.

62. In a contentious private session with the audit committee, OCC related that it was very concerned with the Bank and its management. However, the only conclusion it said it had reached regarding Bank management was that it "could not strongly endorse it." LX 93 p. 5-6, 8; LX 724.

63. Greenberg and Deloitte had repeatedly asked and continued to ask the OCC for any additional information OCC had that related to the transaction or that might cause Greenberg to change its conclusions and the OCC consistently replied it had nothing more. It was Deloitte and Greenberg's understanding that if OCC obtained information bearing on the accounting for the transactions or the integrity of the Bank officers' representations about them, it would share it. Tr. 1321, 1324-25, 1357-58, 1374-75, 1383-84 (Echevarria); Tr. 2291-93 (Loumiet); JX 3 p. 3; JX 6 p. 5; JX 61 p. 3; JX 74 p. 1; LX 86 p. 6; LX 93 pp. 2, 5; LX 724.

IAN TWEEDLEY'S STATEMENT

64. By letter, dated January 17, 200, addressed to Mr. Loumiet, the OCC advised that it had taken a sworn statement from Ian Tweedley, one of the counterparties, affirming that both parties understood the transactions were exchanges and directly contradicting representations made by Mr. Jacobs and Eduardo Masferrer, Chief Executive Officer and Chairman of the Bank's Board of Directors. It also contradicted earlier statements to Mr. Grossman by counsel for Tweedley's employer, James Warnot. JX 2 pp. 16-19.

65. Mr. Loumiet, now heading the investigation, with Mr. Varney's assistance interviewed Mr. Jacobs, who disputed Tweedley's statements and reaffirmed his story. Based on the interview, they prepared an affidavit which Jacobs willingly signed under oath. Tr. 2304-09 (Loumiet); JX 55.

66. Greenberg repeatedly tried to contact Mr. Warnot, but aside from acknowledging his earlier statements had been in error, he refused any discussion when finally reached. Tr. 2319, 2324, 2329-30 (Loumiet); JX 2 pp. 2, 20-24; OX 340.

67. On February 8, 2001 Deloitte, Greenberg and Arnold & Porter met with the OCC and were read excerpts from Mr. Tweedley's deposition and allowed to take notes, but not to read or obtain copies of it. Tr. 827-30 (Rardin); Tr.1325-27 (Echevarria); Tr. 2308-10 (Loumiet).

68. The OCC also orally advised Greenberg of six "red flags," significant indicators that the Bank must have known it was engaging in a swap or exchange rather than separate sales and purchases. Tr. 2314-17 (Loumiet); JX 2 pp. 7-13. The flags were the Tweedley statement, Echevarria advice to Bank officers that losses could not be deferred by exchanging bad loans for good ones, Mr. Jacobs' inability to explain why Morgan Grenfell became involved in the trades, whether it was Mr. Masferrer who involved Morgan Grenfell, the initial failure to account for a 1999 transaction as an exchange, and the failure to purchase assets at significant and available discounts

69. To test Mr. Jacob's veracity, Mr. Loumiet had him "grilled" on February 14, 2001 by a team consisting of Mr. Grossman, Mr. Alexander, and Mark Schnapp an experienced and respected former criminal prosecutor. After vigorous examination, the interrogators concluded Mr. Jacobs was not lying. Tr. 2319-23 (Loumiet); Tr. 2623-27 (Schnapp): JX 2 p. 4.

70. Mr. Schnapp was counsel of record for the Bank and several Bank officers in a class action suit, filed January 12, 2001, that alleged security law violations arising from the adjusted price trades. Tr. 2627-28 (Schnapp); JX 52; JX 53. Greenberg shareholder Pedro Martinez-Fraga, lead defense counsel in the case, first discussed the case with Bank officers in late January and entered an appearance on February 6, 2001. Previously, he had consulted with Mr. Loumiet about the representation and completed a routine conflicts check. Mr. Martinez-Fraga intended to defend on procedural grounds. *See supra* Findings 106-110, 114.

THE MARCH REPORT

71. The second Greenberg report, dated March 14, 2001, was principally the work of Mr. Loumiet. Tr. 2229 (Loumiet); JX 2. Again, drafts had been circulated and comments received. Tr. 2354-69; LX 108; LX 110.

72. The report first addressed the conflicts between the statements of Mr. Tweedley and those of Mr. Jacobs and Mr. Masferrer and concluded that without the ability to cross-examine or question Mr. Tweedley or even discussing with Mr. Warnot his changed representations, a preponderance of the evidence did not establish wrongdoing by either Bank officer. JX 2 pp. 3-7, 15.

73. The report responded to each of the OCC's six "red flags," and particularly to the sixth, having paid more than necessary for the purchases. Given the absence of a written agreement, the apparent lack of self-dealing or personal gain, and the Bank's inexperienced, uncoordinated, uninformed personnel and procedures at the time,

it concluded, failure to avail itself of the striking discounts available did not necessarily reflect an intentional disguised swap. JX 2 pp. 11-13.

74. While not condoning how the Bank handled the transaction, the report found no convincing evidence that the Bank intentionally engaged in an exchange or swap, or that management intentionally misled Deloitte or the audit committee or otherwise demonstrated a lack of integrity about the matter. JX 2 p. 14.

75. The report's conclusion referred only to management's representations to Deloitte and the audit committee and Deloitte and was based on a preponderance of the available evidence. It did not endorse or otherwise comment on the Bank officers' integrity. JX 2 pp. 14-15.

SUBSEQUENT EVENTS

76. The Bank paid Greenberg approximately $210,000 for the investigation and report. Answer ¶ 65.

77. On April 18, 2001, Deloitte, Mr. Lacayo, Mr. Grossman and Mr. Loumiet discussed the report's findings at length. Mr. Lacayo stated that the audit committee was satisfied that Bank management had been unaware it was participating in a swap. Deloitte concluded it was willing to rely on management's representations and to resume auditing functions. JX 68 p. 2.

78. Senior Bank officers' deceit and lies were not easily detected. Although examiners strongly suspected malfeasance in April 2000 and despite an ongoing investigation and lengthy examinations that placed examiners in the Bank almost continuously, by the end of the year the OCC could say no more than that it did not strongly support Bank management. Tr. 194, 221-24, 651-54, 701, 811-13 (Rardin); LX 724 p. 2; LX 93 p. 8.

79. On June 14, 2001, the 2000 safety and soundness examination report was presented to the Bank. The report assigned the Bank an unsatisfactory composite rating of 4, citing the board and senior management's failure to acknowledge that severe problems existed. Poor risk management practices and Mr. Masferrer's control and influence, it stated, had resulted in a weak institution with serious underlying problems and cast doubt on whether the Bank could be rehabilitated to a satisfactory condition. OCC 172 pp. 9-10.

80. On October 10, 2001, Deloitte advised Hamilton that it was resigning from the engagement due primarily to tension between OCC and the Bank that created an "untenable situation." Tr. 1426-27 (Echevarria); LX 97.

81. Following two detailed letters of complaint to officials at the U.S. Department of the Treasury, Hamilton filed suit against the OCC on December 12, 2001, alleging unlawful discrimination against the Bank's Hispanic-origin owners and officers and its large Hispanic business. Mr. Loumiet, having departed Greenberg and joined Hunton & Williams in April 2001, signed the two letters and was a counsel of record in the suit. LX 122; LX 123; LX 240.

82. On October 31, 2006, Greenberg entered into a settlement agreement and consent order with the OCC, which related to the investigation and reports. Greenberg did not admit or deny liability and agreed to pay a $750,000 civil money penalty. Answer ¶ 33.

EXPERT TESTIMONY

83. C. Michael Rardin, a commissioned National Bank Examiner, who was accepted as an expert in bank examination and the business of banking, including unsafe and unsound practices, but not as to the legal duties or a lawyer, posited a standard of due diligence for conducting a banking investigation. Tr. pp 192, 255, 262-79 (Rardin); OX 169 pp. 10-11.

84. The standard, which is unwritten, neither approved nor adopted by any professional or regulatory organization, and heretofore unpublicized, does not establish a mandatory standard governing a lawyer's conduct of an audit-related investigation such as Greenberg's. *See* Tr. 639-44 (Rardin). Mr. Rardin's opinions regarding how an attorney-led, audit-related investigation must be conducted are rejected.

85. Rafael Hernandez, is a certified public accountant with many years experience as an outside auditor of banks. In addition to having experience with audit-related investigations similar to that requested by Deloitte, he practiced in Southern Florida during the time the APTs occurred and had direct experience accounting for IULs and Latin American debt instruments. He was accepted as an expert in accounting, auditing of banks, banks handling of emerging market assets, and utilizing attorneys in audit-related banking investigations. Tr. 2699-2715, 2719 (R. Hernandez).

86. Mr. Rardin was not presented as being a certified public accountant, having a degree in accounting, having worked as an accountant or having participated in or having direct knowledge of the conduct of an attorney-led, audit-related investigation. Tr. 637-38 (Rardin). For those reasons the opinions of Mr. Hernandez are found more persuasive.

87. OCC presented the expert testimony of Nancy J. Moore, a tenured Professor at Boston University School of Law teaching legal ethics and professional responsibility. She has served as chief reporter for the American Bar Association's Commission on Evaluation of Professional Rules of Conduct, chairs the Multistate Professional Responsibility Test Drafting Committee, served as an advisor to the American Law Institute's Restatement of the Law (Third) Governing Lawyers and twice chaired the Professional Responsibility Section of the Association of American Law Schools. She has testified as an expert on legal ethics in state and/or federal courts, lectured at continuing legal education seminars and professional responsibility conferences and written numerous articles on legal ethics, including many on conflicts of interest. She is a graduate of Columbia Law School and admitted to practice law in

Massachusetts and Pennsylvania. She practiced for one year with a large New York City law firm and two years as a prosecutor in Philadelphia and thereafter has taught. Tr. 1582-92; OX 168 p. 1.

88. Mr. Loumiet presented the expert testimony of Professor Alfred Alfieri, a tenured professor at the University of Miami School of Law and the founding member of its Center for Ethics and Public Service, a broad-based clinical and educational program teaching ethical judgment, professional responsibility and community service. The center also provides in-house professional responsibility programs to law firms, bar associations, federal and state agencies and has won awards from the American Bar Association, the Florida Supreme Court, the Florida Bar and others. Professor Alfieri has authored numerous articles on ethics and professional responsibility, including conflict of interest, and served frequently as a consultant to the Florida Bar discipline counsel as an expert on those topics. He is also admitted to the New York Bar. Tr. 2908-28 (Alfieri); LX 732.

89. Because of his greater direct experience applying ethical standards to actual situations, greater exposure to the internal procedures of law firms and the practical demands and norms of practicing law, greater knowledge and experience with Florida's requirements and practices and because his assessments and opinions were more candid, better reasoned and supported by the evidentiary record, Professor Alfieri's opinions are found more persuasive than Professor Moore's.

FIDUCIARY DUTIES

90. Mr. Loumiet was a fiduciary and owed the Bank's audit committee and board of directors the fiduciary duties of candor, care and loyalty.

91. The Greenberg team had a fiduciary duty to conduct a thorough, independent investigation and not to rely on the representations of the Bank's senior officers.

92. The Rule Regulating the Florida Bar provide guidance on the appropriate criteria by which to evaluate Mr. Loumiet's conduct as he is a member of the Florida Bar and the legal services were provided in Florida.

93. Rule 4-1.7 of the Rules Regulating the Florida Bar provides in pertinent part:

> (a) Representing Adverse Interests. A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:
>
> > (1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and
> > (2) each client consents after consultation.
>
> (b) Duty to Avoid Limitation on Independent Professional Judgment. A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:
>
> > (1) the lawyer reasonably believes the representation will not be adversely affected; and
> > (2) the client consents after consultation.
>
> (c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

94. Professor Moore applied the rule categorically. Once she identified a conflict of interest, her analysis moved to whether it was consentable and if so, whether consent was obtained. Tr. 1598 (Moore).

95. Professor Alfieri applied the rule by considering whether representation was "materially limited" in terms of four core functions: confidentiality, communication, competence and diligence. Tr. 2948 (Alfieri).

96. Rule 4-1.10 of the Rules Regulating the Florida Bar provides in pertinent part:

> (a) Imputed Disqualification of All Lawyers in Firm. While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rule 4-1.7 . . . .
>
> (d) Waiver of Conflict. A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in rule 4-1.7.

97. At the time a waiver was not required to be in writing. However, the Bank's guidelines for outside counsel, given to Mr. Loumiet some years earlier, required written notice of any conflict of interest. Tr. 1650 (Moore); OX 311.

CONFLICTS OF INTEREST

Consent Order and Prior Relationships

98. Mr. Loumiet was retained in the spring of 2000 by the Bank's general counsel to advise the board of directors in regard to their liability under a draft consent order proposed to resolve charges brought by the OCC. Mr. Alexander of Arnold & Porter, the Bank's regulatory counsel, represented the Bank. Tr. 2164-68, 2322-23 (Loumiet); JX 48; JX 49.

99. Mr. Loumiet spent between eight and nine hours on the matter between April and September 8, 2000 when the consent order was signed. Tr. 2170-71 (Loumiet). That work was therefore completed by September 25, 2000 when he joined the on-going investigation.

100. Because the investigative work had already begun, Mr. Loumiet assumed that normal Greenberg procedures had been followed and a conflicts check done by whoever undertook the engagement for Greenberg. Tr. 2176-77 (Loumiet).

101. The evidence does not establish that Mr. Loumiet represented any of the directors individually, that any director understood Mr. Loumiet was representing him or

her, or that Mr. Loumiet believed he was representing a director individually. Tr. 1606-23, 1770-72 (Moore); Tr. 2166-68 (Loumiet); Tr. 2940-42 (Alfieri).

102. There is no evidence that Mr. Loumiet's work on the consent order touched on the portion that concerned adjusted price trades. Tr. 1251-53 (Loumiet); JX 48 pp. 7-11; LX 615 pp. 14-15.

103. Although the Bank had complied with the OCC's temporary cease and desist order, the Bank's holding company resisted similarly restating its financial statements. JX 47 p. 2. There is no evidence that Mr. Loumiet's work on the consent order caused or required him to advocate or refute that position.

104. Professor Moore's opinion that Mr. Loumiet was unable to render an independent judgment because of his social or business relationship with senior Bank officers, his role as engagement or relationship partner for the Bank's business with Greenberg, his history of having brought the Bank's business to Greenberg, and his and his firm's financial interest in continuing that business are not supported by the evidentiary record and are rejected. Tr. 1595, 1632-49 (Moore).

105. Mr. Loumiet did not have a material conflict of interest due to his work on the draft consent order when he joined the ongoing Greenberg investigation.

The Indriksons Class Action

106. On January 12, 2001, a few days before Mr. Loumiet learned of the Tweedley statement, *Indriksons v. Hamilton Bancorp., Inc.*, No. 01-0156-Civ (D. Fla. filed Jan. 12, 2001) a class action suit was filed alleging the Bank, Mr. Masferrer, Mr. Jacobs and another officer had concealed losses, misrepresented profitability and engaged in fraud in connection with the adjusted price trades. JX 52.

107. Without Mr. Loumiet's knowledge or involvement, Mr. Martinez-Fraga, a litigation shareholder at Greenberg, learned of the suit, contacted and met with Bank officers, and obtained the representation. Tr. 2010-13, 2030 (Martinez-Fraga).

108. Mr. Martinez-Fraga and C. Ryan Reetz, another Greenberg shareholder, performed a conflicts check in accordance with the firm's normal pre-engagement practices. Tr. 2016-18, 2058-59, 2073-74 (Martinez-Fraga).

109. Before accepting the representation, Mr. Martinez-Fraga and Mr. Loumiet briefly discussed whether their respective representations would pose any kind of conflict and concurred it would not. Mr. Martinez-Fraga intended to defend the class action on procedural grounds. Tr. 2022-23, 2074 (Martinez-Fraga); Tr. 2379-81 (Loumiet).

110. Mr. Loumiet did not see that Greenberg's dual representation posed any conflict to the exercise of independent judgment in the investigation and therefore would not have discussed it with the audit committee. He understood that if there was a conflict, Greenberg would not undertake the *Indriksons* defense. Tr. 1181, 2378-79 (Loumiet).

111. Mr. Martinez-Fraga and Mr. Reetz discussed with the Bank officers the possibility that a conflict with the Greenberg investigation could develop in the future if the procedural defense were unsuccessful and a substantive one was required. Tr. 2016, 2023-35 (Martinez-Fraga).

112. Based on what Mr. Martinez-Fraga told them, the Bank officers orally waived any conflict between their representation by Greenberg in the investigation and the class action. Tr. at 2026-30 (Martinez-Fraga).

113. The chairman of the audit committee had been among those briefed by Mr. Martinez-Fraga about how conflicts could affect the class action defense. Tr. 1203 (Loumiet); Tr. 2024, 2030-31 (Martinez-Fraga).

114. Greenberg entered its appearance as counsel of record for the respondents in the class action on February 6, 2001 with Martinez-Fraga as lead attorney along with Mr. Reetz and Mr. Schnapp. Mr. Schnapp played no subsequent role in the litigation. Tr. 2020-22, 2060 (Martinez-Fraga); JX 53.

115. Mr. Loumiet received no remuneration as a result of Greenberg's retention in the class action. Mr. Martinez-Fraga and Mr. Loumiet kept one another generally appraised of developments in their respective assignments. Tr. 2046-48, 2054-55 (Martinez-Fraga).

116. Between February 5 and March 14. 2001, while Greenberg lawyers were concurrently representing the Bank in the class action and the audit committee in the investigation, there were instances of an individual attorney doing work on both engagements.

117. Mr. Reetz worked with Mr. Loumiet to reach and discuss with Mr. Warnot the change in his earlier statements to Mr. Grossman. He participated in the conversation and then summarized the conversation and his thoughts in an email to Mr. Loumiet with copies to Mr. Martinez-Fraga, Mr. Shnapp and Mr. Grossman. Tr. 1162-65, 2319, 2329-34 (Loumiet); OX 340.

118. Mr. Schnapp, because of his strong prosecutorial experience, was asked to and did participate with Mr. Alexander and Mr. Grossman on February 14 in an intense interrogation of Mr. Jacobs to assess his truthfulness. Tr. 2319-24 (Loumiet); Tr. 2620-29 (Schnapp).

119. There also may have been phone conversations in which Greenberg attorneys working on the two different engagements worked together or exchanged information, however, the time logs lack sufficient detail to establish it occurred. Tr. 1686-90 (Moore); Tr. 2325-29 (Loumiet); Tr. 2116-19 (Martinez-Fraga); JX 54 pp. 6, 8.

120. The *Indriksons* defense team had a strong interest in preserving the integrity of Mr. Jacobs and the other Bank officers should its procedural defense fail and a substantive defense be required.

121. From at least February 6 to March 14, 2001, there was at least a potential conflict between the investigation's duty to neutrally evaluate the Bank officers' representations that no swap had been intended and the *Indriksons* defense's need to preserve the officers' integrity and the truth of their representations. Tr. 2965-67 (Alfieri).

122. Violation of Rule 4-2.3 of the Rules Regulating the Florida Bar was not alleged in the Notice but evidence of its violation was allowed. The rule allows a lawyer to undertake an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client and the client consents after consultation.

123. Commentary to the rule states a lawyer must be satisfied that making the evaluation is compatible with other functions undertaken on behalf of the client. An example of incompatibility is given as a lawyer while defending a client against fraud charges undertaking an evaluation for others concerning the same or a related transaction. Clearly, the rule applies to a representation that predates undertaking an evaluation, which is the opposite of that presented here. Greenberg's investigation was undertaken well before the *Indriksons* representation. Professor Moore's opinion to the contrary is rejected. Tr. 1718-21(Moore); Tr. 2970-74 (Alfieri).

124. Mr. Loumiet had a fiduciary duty to the Bank that precluded him from abandoning the nearly completed investigation when Greenberg undertook a potentially more profitable engagement in *Indriksons.*

STATEMENTS THAT BANK CUSTOMARILY VALUED LOANS AT PAR

125. The Greenberg reports contained the following underlined statements regarding the Bank's customary practices that Enforcement Counsel maintains are false and misleading:

> That in September 1998 it customarily purchased and sold debt assets, including assets similar to those at issue, at face value, carried them at face value on its books, and held them to maturity. JX 2, p. 8.
>
> That it traditionally carries the loans that it purchases and sells, on its books, at face value, rather than marking them to market. Consequently, in acquiring or disposing or loans it has not historically faced the necessity of dealing with current market pricing or valuations of loans, since regardless of that pricing or valuation, those loans will be carried on its books, for all purposes, at face value.

Tr. 334-35 (Rardin); JX 3 p. 4.

126. The assets the Bank purchased in the adjusted price trades were bearer instruments, underwritten as loans, funded as lending transactions, valued at par and carried as hold to maturity until the OCC required they be written down to market value. *See infra* Findings 20 – 22, 28.

127. Loans or securities available for sale are accounted for at market value whereas those held to maturity are accounted for at amortized cost, usually par value. If a loan is impaired, a reserve is established for the impairment, but the loan is not marked to market value unless it is collateralized. Tr. 507-18 (Rardin); Tr. 1465-66 (E. Hernandez); Tr. 2752-55, 2793-94, 2895 (R. Hernandez).

128. Whether an asset is available for sale or is to be held to maturity is intent-driven. If the intent changes, so does the accounting. Tr. 1413 (Echevarria); Tr. 2752, 2776-77, 2780-81 (R. Hernandez).

129. The Greenberg reports were written for Deloitte and the audit committee, and both understood the assets discussed were IULs. Deloitte and the audit committee were very familiar with the Bank's normal investment practices and objectives and when

reviewing drafts of the reports or commenting on the completed reports neither suggested the above quoted statements were erroneous. Tr. 813, 898 (Rardin); Tr. 1203-06, 2198, 2231-33, 2248-56, 2284-85, 2339-43, 2464-65 (Loumiet); Tr. 2761-63, 2813-17 (R. Hernandez); JX 62; LX 92.

130. On one draft, Mr. Echevarria commented, "[T]he Banks mindset was they were buying and selling loans . . . . So rightly or wrongly they never thought of market values, or seeking market values or what was the market value of the purchases or sales." Tr. 1363-65, 1440-41 (Echevarria); JX 62; LX 86 p. 4.

131. When the trades occurred there was growing confusion among accountants about whether IULs should be accounted for as loans or securities. Previously an IUL was classified as a security only if it traded on an active, liquid and well-established secondary market where it could be readily sold. In 1998, that requirement was relaxed to allow IULs trading on less liquid and active secondary markets to be classified as securities. Although regulations might permit an IUL to be purchased under investment authority, the conservative approach was to underwrite. Tr. 1315 (Echevarria); Tr. 2771-76, 2853-57 (R. Hernandez).

132. Some sort of price quotes were probably available for all of the IULs, but only two Colombian bonds and two perpetual notes had secondary markets sufficiently active and liquid to permit their classification as securities. Tr. 2856, 2891-94 (R. Hernandez); JX 3 p. 22; JX 6 pp. 1-2; LX 86 pp. 2, 5.

133. Both the Colombian bonds and the perpetual notes had been underwritten and approved as loans in the loan department, though they were processed on investment application forms and were investment grade. Tr. 2555-65 (Loumiet); 2738-43 (R. Hernandez); JX 6 pp. 1-2; LX 734; LX 735.

134. The Bank listed the two Colombian bonds and two perpetual notes at par value as investments in its October 31, 1998 investment portfolio, and described them in

the Bank's holding company's 1998 year end 10K report as "eligible as collateral for overnight investment." Tr. 2558-59 (Loumiet); JX 13; JX 16 p. 7.

135. Bearer instruments are generally accounted for as securities as opposed to loans. Tr. 1315 (Echevarria).

136. The terms debt securities, debt obligation, debt assets, investment security have been used throughout this proceeding without any agreed upon definitions and at times interchangeably. Regardless of the term used, whether an asset should be accounted for at par or market value depends upon whether it is to be held to maturity or is available for sale. *See infra* Finding 127; *See, e.g.,* Tr. 368-69, 686-94 (Rardin): Tr. 2843-46 (R. Hernandez).

137. Any factual findings made in Mr. Masferrer's criminal trial arise from an evidentiary record different from this one and cannot be relied on to supply evidentiary facts in this one.

138. The underwriting of the IULs was not in all cases fully completed before they were purchased which was criticized by examiners but which would not have been totally improper if timely verbal approval had been obtained. Tr. 376 (Rardin); Tr. 2738-43, 2851-53 (R. Hernandez); LX 86 p. 4; LX 734; LX 735; OX 180 – OX 182.

139. The Greenberg reports' statements regarding the Bank's customary valuation of loans at par value were not materially false and misled neither Deloitte nor the audit committee.

STATEMENTS THAT MARKET PRICE WAS NOT CONSIDERED

140. In its November report Greenberg wrote, "[W]e saw no evidence indicating that Hamilton inquired into or considered the market pricing of any of the assets involved." JX 3 p. 21.

141. The perpetual notes were purchased on September 25, 1998 and four days later on September 29, 1998, the Bank treasurer asked the assistant treasurer to obtain Bloomberg screens for one of the perpetual notes from a friend since the Bank did not subscribe to the service. The treasurer did so. Tr. 1874-77, 1912-13 (McKey); JX 57.

142. Because the sale had already occurred, it appears that the screens were obtained to get a description of the note, not pricing information. Tr. 800-01 (Rardin); Tr. 1913-15 (McKey).

143. The Bank obtained market values for all of its securities monthly and included them in monthly reports to the ALCO committee, but only marked to market value those assets that were available for sale. Tr. 1467-69 (E. Hernandez). No evidence was presented to show that market prices were obtained or considered for any of the assets acquired as IULs prior to their purchase.

144. The March report faulted the lack of experience, poor coordination and inadequate resources within the Bank for the failure to take advantage of large discounts available, but did not directly address the cause of the $22.2 million loss. JX 2 pp. 12-13.

145. Market turmoil and instability in emerging markets at that time might also have explained the Bank's overpayment. LX 86 p. 4.

146. Prudent banking practice is to buy and sell both securities and loans at the best available price and was reflected in the Bank's stated policy of obtaining the highest yield possible consistent with market conditions, desirable levels of risk and maturity profiles. Tr. 1033-34, 2455-62 (Loumiet); Tr. 1944-46 (Walsh); JX 8 p. 2; JX 9 p. 1.

147. Greenberg owed fiduciary duties to its client, the audit committee, to conduct the investigation requested and report the results. It did not owe the OCC fiduciary duties or any other duty to investigate the red flags.

STATEMENT OF THE ABSENCE OF EVIDENCE SHOWING ADJUSTED PRICE TRADES

148. In the treasury department records was a wire advice from Barclays Bank referencing “LA Asset Swap” with “Attn John Jacobs Interest Earned on the Funds Placed With Us From 29 9 98 Re LA Asset Swap.” The handwriting on it indicates Mr. Jacobs forwarded it to the Bank treasurer, noting “interest from Standard London re money’s invested.” Tr. 237-38 (Rardin); OX 175.

149. The advice notified the Bank that funds deposited as security for some adjusted price trade purchases were being transmitted to Hamilton. Tr. 238-39 (Rardin).

150. The advice reflects that its author, Barclays Bank, labeled the transaction a swap, consistent with the counterparties understanding, but is not evidence that the Bank viewed it as a swap.

151. At hearing, Enforcement Counsel introduced certain Bank records and statements that allegedly Greenberg should have reviewed and from which it would have realized the Bank officers were misrepresenting Bank practices and hiding the true nature of the adjusted price trades. OCC had not previously brought them to Greenberg’s attention and, as they concerned investments and were not located in the loan department, they were not considered by or included in either report. Tr. 255-56 (Rardin); Tr. 2246-47 (Loumiet).

152. A four-page facsimile sent on September 21, 1998 is also alleged to have evidenced the trades were adjusted price trades and is discussed below. JX 4.

SUPPRESSION OF MATERIAL EVIDENCE

153. The evidence does not establish that Mr. Loumiet suppressed material evidence that would have exposed the Bank’s intent to engage in an exchange or the falsity of material statements in the reports.

154. As discussed above, the Bloomberg screens referenced as JX 57 clearly postdate the purchases and most probably were obtained for reasons other than pricing. They are not evidence that market pricing was considered in the purchase and do not otherwise expose the Bank's actual intent. Tr. 1914-15 (McKey); JX 57.

155. On September 15, 1998, the Bank received a fax from West Merchant Bank offering to buy the City of Moscow loan from Hamilton and to sell Hamilton a Standard Chartered perpetual note and a Hong Kong Shanghai Banking Corporation perpetual note. JX 3 pp. 27-28.

156. On September 21, 1998 Hamilton sent to West Merchant Bank a four-page fax consisting of:

(a) a cover page directing the fax to Peter Bartrouni,

(b) a one page letter dated September 18 to West Merchant Bank confirming Hamilton would sell it the City of Moscow loan on the terms set forth in the September 15th fax and would not buy the two perpetual notes offered in West Merchant Bank's previous fax, and

(c) a two-page letter dated September 18 to Deutsche Bank Securities confirming Hamilton would purchase the two perpetual notes from Morgan Grenfell, a Deutsche Bank subsidiary, on the same terms previously offered by West Merchant Bank in its September 15th fax.

Tr. 337-40 (Rardin); JX 4.

157. The two letters suggest that Morgan Grenfell was acting as an intermediary, that West Merchant Bank was the actual seller of the perpetual notes and that the sale of the Moscow loan and the purchase of the two notes were in fact linked. Tr. 1309-1310, 1314, 1429-31, (Echevarria); JX 3 pp. 27-28; JX 4.

158. An explanation offered for Morgan Grenfell's involvement in the trades is that West Merchant Bank was reluctant to take the settlement risk on Hamilton's purchase and that Morgan Grenfell, which had previous dealings with Hamilton, was willing to serve as an intermediary to reduce that risk. JX 2 pp. 10-11; JX 3 pp. 9-10.

159. The counterparty documents which the OCC had obtained from New York state banking authorities showed the counterparties understood the transactions were swaps, not independent transactions. JX 3 pp. 68, 91, 96.

160. Two of the four pages from JX 4 were attached as annexes to Greenberg's November report. The letter to West Merchant Bank agreeing to sell the Moscow loan and declining to buy the notes comprised Annex III. The first page but not the second and final page, of the letter agreeing to buy the notes from Morgan Grenfell comprised Annex IV. Also missing was the transmittal cover sheet which showed the transmission was to Mr. Bartrouni, who worked at West Merchant Bank. Tr. 337, 340 (Rardin); JX 3 pp. 30-32.

161. At the top of each of the four pages was a transmittal line giving the date and time of the fax, identifying the sender as Hamilton Bank Legal Department and showing the sequence of each of the four pages transmitted. JX 4.

162. Greenberg had a copy of the complete four-page fax. This is shown by the Bates stamps "026242 – 026245" of the New York banking authorities and GT 007773 – 007776 of Greenberg. JX 4.

163. The annexes to the November report, including Annexes III and IV, were prepared by Mr. Clark and there is no indication that Mr. Loumiet saw the complete, four-page fax until much later. Tr. 2214-17 (Loumiet).

164. In its entirety the four page fax suggested a link between the buy and sell sides which the November report discussed. It also suggested the Bank officers'

representation that the two sides were not dependent on one another was erroneous. Tr. pp. 1310, 1314, 1430-33, 1442 (Echevarria); Tr. 2220-2226 (Loumiet); Tr. 2839-40 (R. Hernandez); JX 3 pp. 7-8, 20.

165. At a November 28, 2000 meeting to review the November report Mr. Echevarria asked Mr. Loumiet, Mr. Grossman and Mr. Varney a variety of questions including whether the two annexes were part of the same fax as the fax transmittal line appeared to indicate. Subsequently, Mr. Varney provided the fourth page of the fax, but reported that the Bank did not generally keep fax coversheets and did not produce it. Tr. 1306-11 (Echevarria); Tr. 1214-16, 2284-86 (Loumiet); JX 5 pp. 5-6. Because Greenberg had a copy of the coversheet in its files, it should have produced it. Tr. 2838 (R. Hernandez).

166. Mr. Echevarria also questioned why Hamilton had sent West Merchant Bank about the purchases to be made from Morgan Grenfell to which they were not a party. The response was that the Bank's general counsel had sent the fax following Mr. Jacobs' instructions in his absence and did not know why. Deloitte also asked why Hamilton declined to buy from West Merchant Bank the identical securities it agreed to buy from Morgan Grenfell and was told that according to Mr. Jacobs they were bought from the individuals they were originally offered by. JX 5 p. 4.

167. Because Hamilton seemed to have paid substantially in excess of market value for its purchases and that excess was less than it was overpaid for the Russian loans, Deloitte asked if the investigation had considered whether kickbacks were paid. The response was that it had been considered and no evidence of any was found. JX 5 p. 4.

168. Deloitte was sufficiently satisfied with these answers that it accepted the adequacy of the investigation and the report, but nonetheless concluded that for accounting purposes there was sufficient grounds to conclude that the assets should be carried at fair market value. Tr. 2889-90 (R. Hernandez).

CONCLUSIONS OF LAW

1. Only an institution or "institution-affiliated party" as defined at 12 U.S.C. § 1813(u) can be subject to a cease and desist order or civil money penalty pursuant to 12 U.S.C. § 1818(b) and 12 U.S.C. § 1818(i)(2)(B) respectively.

2. A party charged as an independent contractor must "knowingly or recklessly" participate in misconduct that causes or is likely to cause more than minimal financial loss to or significant adverse effect on the insured depository institution.

3. Respondent Carlos Loumiet did not knowingly or recklessly participate in misconduct that caused or was likely to cause more than minimal financial loss or significant adverse effect on Hamilton Bank, N.A., an insured depository institution.

RECOMMENDED ORDER

Based on the foregoing findings of fact, conclusions of law and discussion, it is recommended that the charges against Carlos Loumiet be dismissed.

Ann Z. Cook

Ann Z. Cook
Administrative Law Judge

Dated: June 17, 2008

CERTIFICATE OF SERVICE

The undersigned certifies that on June 17, 2008, the foregoing Recommended Decision, the Certified Index of the Record, and the Administrative Record in the above proceeding was served by electronic medium upon:

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