

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

In the Matter of

FRANK E. SMITH and MARK A. KIOLBASA

Institution-affiliated parties of
FARMERS STATE BANK
Pine Bluffs, Wyoming, a state-member bank

Docket No. 18-036-E-I

Notice of Intent to Prohibit
Pursuant to Section 8 of the Federal
Deposit Insurance Act, as Amended

The Board of Governors of the Federal Reserve System (the “Board of Governors”) is of the opinion or has reasonable cause to believe that:

(A) Frank E. Smith (“Smith”), an institution-affiliated party of Farmers State Bank (“Farmers”), Pine Bluffs, Wyoming, a state-member bank, engaged in unsafe or unsound practices and breached his fiduciary duties. The practices involve misappropriating confidential and proprietary information, including trade secrets, of Central Bank & Trust (“Central”), Lander, Wyoming, conspiring with Mark A. Kiolbasa (“Kiolbasa”) to acquire Central’s confidential and proprietary information, aiding and abetting Kiolbasa’s acquisitions of such information for their use at Farmers, and secretly providing services for and acting on behalf of Farmers while employed by Central. In connection with the misconduct described herein, Smith received a financial gain or other benefit and Central and Farmers suffered financial loss or other damage.

(B) Kiolbasa, an institution-affiliated party of Farmers, engaged in unsafe or unsound practices and breached his fiduciary duties. The practices involve misappropriating confidential

and proprietary information, including trade secrets, of Central, conspiring with Smith to acquire Central's confidential and proprietary information, and contacting Central borrowers, while at Central, to obtain their consent to transfer their loans to Farmers once he was at Farmers. In connection with the misconduct described herein, Kiolbasa received a financial gain or other benefit and Central and Farmers suffered financial loss or other damage.

(C) The misconduct described herein involves personal dishonesty or a continuing or willful disregard for the safety and soundness of Central and Farmers on the part of Smith and Kiolbasa.

Accordingly, the Board of Governors hereby institutes this Combined Notice of Intent to Prohibit (the "Notice") for the purpose of determining whether an appropriate order should be issued:

- i. Permanently barring Smith and Kiolbasa from participating in any manner in the conduct of the affairs of any institution specified in 12 U.S.C. § 1818(e)(7)(a), pursuant to section 8(e) of the Federal Deposit Insurance Act, as amended (the "FDI Act"), 12 U.S.C. § 1818(e).

In support of this Notice, the Board of Governors alleges as follows:

JURISDICTION

1. Farmers is and was at all material times relevant to this Notice, a state-member bank subject to the supervision and regulation of the Board of Governors. Accordingly, the Board of Governors is the appropriate Federal Banking Agency to bring charges against institution-affiliated parties of Farmers within the meaning of sections 3(q)(3) and 8(b)(3) of the FDI Act, 12 U.S.C. §§ 1813(q)(3), 1818(b)(3). Farmers is a subsidiary of Commercial Bancorp,

Pine Bluffs, Wyoming (the “Company”), a registered bank holding company subject to the supervision and regulation of the Board of Governors.

2. Since May 27, 2015 to the present, Smith has been employed as President and Chief Executive Officer of Farmers, at its location in Pine Bluffs, Wyoming, and is also a member of its Board of Directors and a shareholder of the Company. Accordingly, Smith is an institution-affiliated party of Farmers as defined by sections 3(u) and 8(b)(3) of the FDI Act (12 U.S.C. §§ 1813(u) and 1818(b)(4)). Prior to May 27, 2015, Smith was the Chief Financial Officer (CFO) of Central.

3. Since on or about September 22, 2014, Kiolbasa was employed at Farmers as a Loan Officer. Since or about May 27, 2015, Kiolbasa has been employed as an Executive Vice President of Farmers, at its location in Pine Bluffs, Wyoming, and is also a member of its Board of Directors and a shareholder of the Company. Accordingly, Kiolbasa is an institution-affiliated party of Farmers as defined by sections 3(u) and 8(b)(3) of the FDI Act (12 U.S.C. §§ 1813(u) and 1818(b)(4)). From approximately 2010 until September 19, 2014, Kiolbasa was employed as a branch President at Central.

4. The relevant period for purposes of this notice, unless otherwise stated, is November 21, 2013 through April 2, 2018.

FACTUAL ALLEGATIONS

5. While still employed by Central, Smith and Kiolbasa conspired to misappropriate Central’s proprietary business information in connection with their plan to acquire an ownership interest in Farmers’ holding company, Commercial, and to take management positions at Farmers. On or about November 21, 2013, Kiolbasa sent Smith detailed plans about taking Kiolbasa’s Central loan portfolio to Farmers. On December 23, 2013, Smith and Kiolbasa put

together a draft of their business plan to acquire an ownership interest in the Company, Farmers' holding company.

6. On or about June 1, 2014, while employed by Central, Smith and Kiolbasa met with Farmers' board of directors and made an initial presentation of their business plan. At the meeting, Smith and Kiolbasa advised the Farmers board members that they had obtained commitments from certain Central customers to move their loans to Farmers, upon execution of the contemplated transaction for Smith and Kiolbasa to acquire an ownership interest in Commercial.

7. While still employed at Central, Smith took several actions on behalf of and/or as an agent of Farmers. For example, Smith engaged in discussions with Federal Reserve Bank ("Reserve Bank") personnel on behalf of Farmers, to seek the Reserve Bank's approval for Kiolbasa's move from Central to Farmers. In an email to Farmers' President, Smith apologized for speaking on Farmers' behalf with Reserve Bank personnel, but Farmers' President confirmed that Smith was authorized to speak on Farmers' behalf, even though Smith was still employed as Central's CFO. Smith also contacted a prospective Farmers employee, to request that she accept a position at Farmers as a Loan Support Officer, and spent approximately 100 hours preparing regulatory filings of Farmers.

8. Smith sought to dissuade Central's management from acquiring another bank because, based on information acquired at Central, he thought it was a good opportunity that Smith and Kiolbasa might wish to exploit for themselves once they began their employment at Farmers.

9. On or about February 2, 2014, while employed by Central, Kiolbasa represented to Farmers' then-President that he and Smith had obtained consent from several Central

borrowers to transfer their loans to Farmers, upon their employment with Farmers. Further, sometime in June 2014, while employed by Central, Kiolbasa met with Farmers' board members and advised them that he and Smith had approached Central loan customers and obtained their agreement to transfer their loans from Central to Farmers, upon their employment with Farmers.

10. On or about September 22, 2014, Kiolbasa started working at Farmers as a Loan Officer. Kiolbasa took with him to Farmers several of Central's proprietary forms for his use at Farmers, without Central's authorization.

11. Shortly after Kiolbasa began his employment at Farmers, many of the loans he managed while employed at Central began moving to Farmers. Smith supplied Kiolbasa confidential Central loan and customer information to facilitate this process.

12. Throughout the fall of 2014 and early 2015, while Smith was still employed at Central, Smith provided Kiolbasa with Central's proprietary information, sometimes at Kiolbasa's request and at other times on his own accord.

a. For example, on or about October 2, 2014, Kiolbasa emailed Smith to request information about several Central loans that they were seeking to transfer to Farmers. In response, Smith sent Kiolbasa the loan balance for two Central loans and agreed for Kiolbasa, on behalf of Farmers, to offer the borrower better terms than those under the Central loans. Kiolbasa was not authorized by Central or its customers to receive or use this information.

b. During this period, Smith also sent a Farmers employee a copy of Central's "Customer Information Profile" form, which is a proprietary form Central purchased. Smith did not obtain permission from anyone at Central to send its

proprietary form to Farmers. This Farmers employee was not authorized by Central to receive or use this form.

c. On or about November 10, 2014, Kiolbasa emailed Smith's personal email account, requesting the loan payoff information for three Central loans he was seeking to move from Central to Farmers, without customer authorization for the release of the information. In response, Smith, through his personal email account, sent Kiolbasa the balance, accrued interest and daily accrual rate for the three Central loans. Smith did not obtain Central's customers' or Central's authorization for the disclosure of this confidential information to Kiolbasa. Kiolbasa was not authorized by Central or its customers to receive or use this information.

d. Sometime in February 2015, Kiolbasa requested and Smith provided Kiolbasa with other proprietary (non-customer) information, including: Central's Liquidity, Public Funds and GAP Reports and Central's ALCO Model Look Back and Asset - Liability Management/Interest Rate Sensitivity analysis by Central Trust Company. Smith did not obtain Central's authorization for the disclosure of this information to Kiolbasa. Kiolbasa was not authorized by Central to receive or use this information.

13. Smith's and Kiolbasa's misappropriation of Central's confidential and proprietary information was in violation of Central's policies. On or about January 1, 2009, Central issued an Employee Handbook ("the Handbook"), setting forth various employment policies for its employees. Among these policies, the Handbook provides that Central's employees should keep customers' information in strict confidence, and avoid situations where their personal interest conflicts with or appears to conflict with the bank's interests.

14. On February 24, 2009 and May 30, 2013, Smith acknowledged in writing receiving the Handbook and agreeing to comply with the policies set forth in the Handbook.

15. On May 30, 2013, Kiolbasa acknowledged in writing receiving the Handbook and agreeing to comply with the policies set forth in the Handbook.

16. On or about March 6, 2015, Smith, Kiolbasa and Commercial executed a Stock Purchase Agreement, providing for Smith and Kiolbasa to purchase approximately eight and nineteen percent, respectively, of Commercial's stock, upon receiving regulatory approval for the change in control. On or about March 12, 2015, a local newspaper published a legal notice of Smith's and Kiolbasa's intention to acquire over 25 percent of the shares of Commercial. Following this publication, on or about March 18, 2015, Central's management requested Smith to resign his position with the bank, which he did.

17. On or about May 1, 2015, Smith began his employment with Farmers. On or about May 27, Farmers appointed Smith as President and CEO and Kiolbasa as Executive Vice President.

18. On September 29, 2016, Central filed suit against Farmers, Smith, Kiolbasa, and the other members of Farmers' board of directors, alleging (the "Central Litigation"), among other things, that Smith and Kiolbasa misappropriated trade secrets, breached their fiduciary duties, and converted property of Central.

19. During the Central Litigation, Smith testified that he sent certain confidential Central documents to Kiolbasa – including Central's Liquidity, Public Funds and GAP Reports and Central's ALCO Model Look Back and Asset-Liability Management/Interest Rate Sensitivity analysis by Central Trust Company – at the request of a Reserve Bank Senior Examiner. This testimony was false.

20. On April 2, 2018, after a two-week trial, the presiding court issued a judgment against Smith and Kiolbasa, and in favor of Central, for misappropriation of trade secrets, breaches of fiduciary duties and tortious interference with a contract or prospective economic advantage. As part of the judgment, the Court awarded Central \$1,180,000 in total damages against Smith, which included \$50,000 in punitive damages and \$1,040,000 in total damages against Kiolbasa, which included \$25,000 in punitive damages.

21. During the relevant period, Smith and Kiolbasa hid their misappropriation of Central's confidential and proprietary information from Central for use at Farmers, including deleting information from Central's computer files relating to their proposed (and ultimately completed) transaction to acquire an ownership interest in Commercial, Farmers' holding company.

22. During the relevant period, Smith aided and abetted Kiolbasa's misappropriation of Central's confidential and proprietary information, including trade secrets, for the benefit of Farmers. For example, on January 7, 2015, Smith emailed Kiolbasa, through his personal email account, Central's Dormant Account Procedures, without Central's authorization. Smith testified in the Central Action that he did not know why he would be doing so at that time.

23. Smith and Kiolbasa received a financial benefit from their misappropriation and use of Central's confidential and proprietary information in the form of compensation from Farmers and in the form of increased value of the stock they own in Commercial.

24. Smith's and Kiolbasa's misconduct resulted in a financial damage to Central, in excess of one million dollars, and to Farmers, of at least \$156,421 in legal fees related to the Central Litigation, that was predicated on Smith's and Kiolbasa's misconduct.

**UNSAFE OR UNSOUND PRACTICES AND
BREACHES OF FIDUCIARY DUTY BY SMITH**

COUNT I: Unsafe or Unsound Banking Practices

25. As set forth in paragraphs 1 through 24 above, Smith engaged in unsafe or unsound banking practices by misappropriating confidential and proprietary information of Central, including trade secrets, conspiring with Kiolbasa to acquire Central's confidential and proprietary information, aiding and abetting Kiolbasa's acquisitions of such information, secretly performing services for and acting on behalf of Farmers, and seeking to misappropriate a business opportunity of Central, all while employed at Central.

26. As set forth in paragraphs 1 through 24 above, Smith's unsafe or unsound conduct resulted or was likely to result in financial loss or other damage to Central and/or Farmers, prejudice to their depositors, or financial gain or other benefit to Smith; and this conduct involved personal dishonesty or a willful or continuing disregard for the safety or soundness of Central and/or Farmers.

COUNT II: Breaches of Fiduciary Duty

27. Smith, as an officer of Central and later as an officer and director of Farmers, owed a fiduciary duty of care, candor and loyalty to Central and Farmers, respectively. As set forth in paragraphs 1 through 24 above, Smith's scheme to misappropriate Central's confidential and proprietary information for his and Kiolbasa's benefit (and to the detriment of Central) breached his fiduciary duties of care, candor and loyalty to Central. Further, his misconduct breached his fiduciary duty of care to Farmers.

**UNSAFE OR UNSOUND PRACTICES
AND BREACHES OF FIDUCIARY DUTY BY KIOLBASA**

COUNT III: Unsafe or Unsound Banking Practices

28. As set forth in paragraphs 1 through 24 above, Kiolbasa engaged in unsafe or unsound banking practices by misappropriating confidential and proprietary information of Central, including trade secrets, conspiring with Smith to acquire such information for the benefit of Farmers, and contacting Central borrowers while at Central to seek their consent to transfer their loans to Farmers once he was at Farmers. Further, Kiolbasa engaged in unsafe or unsound practices while employed by Farmers by seeking, receiving, and using confidential and proprietary information of Central.

29. As set forth in paragraphs 1 through 24 above, Kiolbasa's unsafe or unsound conduct resulted or was likely to result in financial loss or other damage to Central and/or Farmers, prejudice to their depositors, or financial gain or other benefit to Kiolbasa; and this conduct involved personal dishonesty or a willful or continuing disregard for the safety or soundness of Central and/or Farmers.

COUNT IV: Breaches of Fiduciary Duty

30. Kiolbasa, as an officer of Central and later as an officer of Farmers, owed a fiduciary duty of care, candor and loyalty to Central and Farmers, respectively. As set forth in paragraphs 1 through 24 above, Kiolbasa's scheme to misappropriate Central's confidential and proprietary information for his and Smith's benefit and to the detriment of Central, breached his fiduciary duties of care, candor and loyalty to Central. Further, his misconduct breached his fiduciary duty of care to Farmers.

REQUESTED RELIEF

PROHIBITION ACTION

31. Notice is hereby given that a hearing will be held on _____, 2019, at the United States District Court of Wyoming, or any place designated by the presiding administrative law judge, for the purpose of taking evidence on the charges specified herein, in order to determine whether an appropriate order should be issued under section 8(e) of the FDI Act to prohibit the future participation of Smith and Kiolbasa in the affairs of any insured depository institution, holding company thereof, foreign bank, or any institution specified in section 8(e)(7)(A) of the FDI Act, 18 U.S.C. § 1818(e)(7)(A). As set forth above, by reason of Smith's and Kiolbasa's unsafe or unsound practices and breaches of fiduciary duty, Smith and Kiolbasa received financial gains or other benefits and Central and Farmers have suffered or will suffer financial loss or other damage, or the interests of their depositors have been or could be prejudiced; and, the unsafe or unsound practices and breaches of fiduciary duty involved Smith's and Kiolbasa's personal dishonesty or continuing or willful disregard for the safety and soundness of Central and/or Farmers.

32. The hearing shall be held before an administrative law judge to be appointed from the Office of Financial Institution Adjudication ("OFIA"), pursuant to section 263.54 of the Board of Governors Rules of Practice for Hearings ("Rules of Practice"), 12 C.F.R. § 263.54. The hearing shall be public, unless the Board of Governors determines that a public hearing would be contrary to the public interest, and in all other aspects shall be conducted in compliance with the provisions of the FDI Act and the Rules of Practice.

33. **Smith and Kiolbasa are hereby directed to file an answer to this Notice within 20 days of the service of this Notice, as provided by section 19 of the Rules of**

Practice, 12 C.F.R. § 263.19, with OFIA. Smith and Kiolbasa are encouraged to file any answer to this Notice by electronic mail with the Office of Financial Institution

Adjudication at ofia@fdic.gov. Pursuant to section 263.11(a) of the Rules of Practice, 12 C.F.R. § 263.11(a), any answer filed with OFIA shall also be served on the Secretary of the Board of Governors. As provided in section 263.19(c)(1) of the Rules of Practice, 12 C.F.R. § 263.19(c)(1), the failure of Smith or Kiolbasa to file an answer required by this Notice within the time provided herein shall constitute a waiver of their respective rights to appear and contest the allegations of this Notice in which case the presiding officer is authorized, upon proper motion, to find the facts to be as alleged in the Notice and to file with the Secretary of the Board of Governors a recommended decision containing such findings and appropriate conclusions. Any final order issued by the Board of Governors based upon a failure to answer is deemed to be an order issued by consent.

34. Smith or Kiolbasa may submit to the Secretary of the Board of Governors, within 20 days of the service of this Notice, a written statement detailing the reasons why the hearings described herein should not be public. The failure to submit such a statement within the aforesaid period shall constitute a waiver of any objection to a public hearing.

35. Authority is hereby delegated to the Secretary of the Board of Governors to designate the time and place and presiding officer for any hearing that may be conducted on this Notice and to take any and all actions that the presiding officer would be authorized to take under the Board of Governors' Rules of Practice for Hearings with respect to this Notice and any hearing to be conducted hereon, until such time as a presiding officer shall be designated.

