

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

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| In the Matter of |) | |
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| Kelly M. Dulaney, |) | |
| |) | Docket Nos. 08-008-B-I |
| A former Institution-Affiliated |) | 08-008-E-I |
| Party of Fifth Third Bank, |) | |
| Grand Rapids, Michigan, |) | |
| |) | |
| Respondent. |) | |
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FINAL DECISION

This is an administrative proceeding pursuant to the Federal Deposit Insurance Act (“the FDI Act”) in which the Board Enforcement Counsel seeks to prohibit the Respondent, Kelly M. Dulaney (“Respondent”), from further participation in the affairs of any financial institution and to require her to pay restitution based on actions she took while employed at Fifth Third Bank, Grand Rapids, Michigan (the “Bank”).

Upon review of the administrative record, the Board issues this Final Decision adopting the Recommended Decision (“Recommended Decision”) of Administrative Law Judge C. Richard Miserendino (the “ALJ”), and orders the issuance of the attached Order of Prohibition and to Cease and Desist.

I. STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

Under the FDI Act and the Board's regulations, the ALJ is responsible for conducting proceedings on a notice of charges relating to a proposed order requiring payment of restitution or prohibition from banking. 12 U.S.C. §§ 1818(b), 1818(e)(4). The ALJ issues a recommended decision that is referred to the Board together with any exceptions to those recommendations filed by the parties. The Board makes the final findings of fact, conclusions of law, and determination whether to issue the requested orders. 12 C.F.R. § 263.38.

The FDI Act sets forth the substantive basis upon which a federal banking agency may issue against a bank official or employee an order of prohibition from further participation in banking. To issue such an order, the Board must make each of three findings: (1) that the respondent engaged in identified misconduct, including a violation of law or regulation, an unsafe or unsound practice, or a breach of fiduciary duty; (2) that the conduct had a specified effect, including financial loss to the institution or gain to the respondent; and (3) that the respondent's conduct involved either personal dishonesty or a willful or continuing disregard for the safety or soundness of the institution. 12 U.S.C. § 1818(e)(1)(A)-(C).

The FDI Act also spells out the requirements for an order requiring restitution, which is a type of cease-and-desist order under the Act. Specifically, a cease-and-desist order may be imposed when the agency has reasonable cause to believe that the respondent has engaged or is about to engage in an unsafe or unsound practice in conducting the business of a depository institution, or that the respondent has violated or is about to violate a law, rule, or regulation or condition imposed in writing by the agency. 12 U.S.C. § 1818(b)(1). Such an order may require the respondent to make restitution if the respondent was "unjustly enriched" in connection with

the violation or practice, or the violation or practice in involved “reckless disregard” of the law or applicable regulations or a prior agency order. 12 U.S.C. § 1818(b)(6)(A).

An enforcement proceeding is initiated by filing and serving on the respondent a notice of charges setting forth the basis for relief and the relief sought. Under the Board’s regulations, the respondent must file an answer within 20 days of service of the notice. 12 C.F.R. § 263.19(a). Failure to file an answer constitutes a waiver of the respondent’s right to contest the allegations in the notice, and a final order may be entered unless good cause is shown for failure to file a timely answer. 12 C.F.R. § 263.19(c)(1).

B. Procedural History

On April 11, 2008, the Board issued a Notice of Intent to Prohibit and Notice of Charges and of Hearing (“Notice”) that sought an order of prohibition against Respondent based on her conduct while employed at the Bank and an order requiring her to make restitution to the Bank. Enforcement Counsel sent the Notice to Respondent by Federal Express and by Certified Mail on the date of issuance, but both copies were returned stating that Respondent had moved and left no forwarding address. At the direction of Enforcement Counsel, a licensed process server personally served the Notice on Respondent on June 4, 2008. The Notice directed Respondent to file a written answer within 20 days of the date of service of the Notice in accordance with 12 C.F.R. § 263.19, and warned that failure to do so would constitute a waiver of her right to appear and contest the allegations. Nonetheless, Respondent failed to file an answer within the 20-day period or thereafter.

On July 11, 2008, Enforcement Counsel filed a Motion for Entry of an Order of Default against Respondent. On July 28, 2008, the ALJ issued an Order to Show Cause, providing Respondent until August 18, 2008, to show cause why a timely answer to the Notice was not

filed and why a default judgment granting the relief requested in the Notice should not be entered against Respondent. The Order was delivered by overnight delivery to Respondent's address.

To date, Respondent has not filed any reply to the Order to Show Cause or answered the Notice.

C. Respondent's Actions

The Notice alleges that Respondent was employed as a customer service manager at the Port Orange, Florida, branch location of the Bank and its predecessors from no later than April 2004 through August 2006, when she resigned from the Bank. Her responsibilities included maintaining relationships with customers, creating certain accounting entries, and reconciling the Bank's cash items account. The cash items account was a general ledger account where "rejected items," such as deposit tickets with incorrect account numbers, were sent for reconciliation. Respondent had complete control over the cash items account until shortly before she resigned.

By virtue of her responsibilities, Respondent was able to falsify Bank debit and credit tickets and customer checks to make unauthorized withdrawals from the certificate of deposit ("CD") accounts of three of the Bank's customers, using the proceeds for her own purposes. She concealed her activity by making unauthorized transfers between the CD accounts of the customers and the general ledger account. When one of the Bank's customers sought to roll over a matured CD into a new CD, Respondent provided the customer with a CD account receipt and subsequently requested that the CD be purged from the Bank's records in order to conceal her activity.

Respondent's actions were discovered when that customer asked the Bank about the status of his CD accounts and learned that one account had no remaining funds and the other CD account had been purged. Respondent resigned several months before the customer's

inquiry and before the Bank's discovery of her defalcation. The Bank restored its customer's accounts with interest for the amounts defalcated by Respondent. As a result of these actions, the Bank's total loss was approximately \$203,923.

II. DISCUSSION

The Board Rules of Practice and Procedure set forth the requirements of an answer and the consequences of a failure to file an answer to a Notice. Under the Rules, failure to file a timely answer "constitutes a waiver of [a respondent's] right to appear and contest the allegations in the notice." 12 C.F.R. § 263.19(c). If the ALJ finds that no good cause has been shown for the failure to file, the judge "shall file . . . a recommended decision containing the findings and the relief sought in the notice." *Id.* An order based on a failure to file a timely answer is deemed to be issued by consent. *Id.*

In this case, Respondent failed to file an answer to the Notice despite notice to her of the consequences of such failure, and also failed to respond to the ALJ's Order to Show Cause. Respondent's failure to file an answer constitutes a default.

Respondent's default requires the Board to consider the allegations in the Notice as uncontested. The allegations in the Notice, described above, meet all the criteria for entry of an order of prohibition under 12 U.S.C. § 1818(e). It was a breach of fiduciary duty, unsafe and unsound practice, and violation of law, for Respondent to falsify Bank debit and credit tickets and customer checks to make unauthorized withdrawals from the CD accounts of the Bank's customers and to manipulate the Bank's systems and records to conceal her actions. Respondent's actions resulted in loss to the Bank and financial gain to the Respondent, in that the Respondent used the proceeds for her own purposes and the Bank was forced to repay its

customer for the amounts defalcated by Respondent. Finally, such actions also exhibit personal dishonesty and willful or continuing disregard for the safety and soundness of the Bank.

For the same reasons, the allegations in the Notice meet all the criteria for the entry of an order requiring restitution. Respondent engaged in unsafe or unsound practices and violations of law when she falsified Bank debit and credit tickets and customer checks to make unauthorized withdrawals from the CD accounts of the Bank's customers and manipulated the Bank's systems and records to conceal her actions, and she was unjustly enriched by her actions in that she used the proceeds of her defalcation for her own purposes. Respondent's unsafe or unsound practices and violations of law also involved a reckless disregard for the law.

Accordingly, the requirements for an order of prohibition and for an order for restitution have been met and the Board hereby issues such an order.

CONCLUSION

For these reasons, the Board orders the issuance of the attached Order of Prohibition and Order to Cease and Desist.

By Order of the Board of Governors, this 15th day of December, 2008.

**BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM**

(SIGNED)

Robert deV. Frierson
Deputy Secretary of the Board

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ORDER OF PROHIBITION AND TO CEASE AND DESIST

WHEREAS, pursuant to sections 8(b) and 8(e) of the Federal Deposit Insurance Act, as amended, (the “FDI Act”) (12 U.S.C. § 1818(b) and (e)), the Board of Governors of the Federal Reserve System (“the Board”) is of the opinion, for the reasons set forth in the accompanying Final Decision, that a final Order of Prohibition and to Cease and Desist should issue against KELLY M. DULANEY (“Dulaney”), a former employee and institution-affiliated party, as defined in Section 3(u) of the FDI Act (12 U.S.C. § 1813(u)), of Fifth Third Bank, Grand Rapids, Michigan (the “Bank”).

NOW, THEREFORE, IT IS HEREBY ORDERED, pursuant to section 8(e) of the FDI Act, 12 U.S.C. § 1818(e), that:

1. In the absence of prior written approval by the Board, and by any other Federal financial institution regulatory agency where necessary pursuant to section 8(e)(7)(B) of the FDI Act (12 U.S.C. § 1818(e)(7)(B)), Dulaney is hereby prohibited:

(a) from participating in any manner in the conduct of the affairs of any institution or agency specified in section 8(e)(7)(A) of the FDI Act (12 U.S.C. § 1818(e)(7)(A)), including, but not limited to, any insured depository institution, any insured depository institution holding company or any U.S. branch or agency of a foreign banking organization;

(b) from soliciting, procuring, transferring, attempting to transfer, voting or attempting to vote any proxy, consent or authorization with respect to any voting rights in any institution described in subsection 8(e)(7)(A) of the FDI Act (12 U.S.C. § 1818(e)(7)(A));

(c) from violating any voting agreement previously approved by any Federal banking agency; or

(d) from voting for a director, or from serving or acting as an institution-affiliated party as defined in section 3(u) of the FDI Act (12 U.S.C. § 1813(u)), such as an officer, director, or employee in any institution described in section 8(e)(7)(A) of the FDI Act (12 U.S.C. § 1818(e)(7)(A)).

2. (a) Dulaney shall make restitution to the Bank in the sum of \$203,923 for its loss as a result of Dulaney's violations of law and unsafe or unsound practices;

(b) the restitution shall be remitted in full, payable to the "Board of Governors of the Federal Reserve System" and forwarded to Jennifer J. Johnson, Secretary of the Board, Board of Governors of the Federal Reserve System, Washington, D.C. 20551, who shall make remittance of the same to the Bank.

3. Any violation of this Order shall separately subject Dulaney to appropriate civil or criminal penalties or both under section 8 of the FDI Act (12 U.S.C. § 1818).

4. This Order, and each and every provision hereof, is and shall remain fully effective and enforceable until expressly stayed, modified, terminated or suspended in writing by the Board.

This Order is effective upon service on the Respondent.

By Order of the Board of Governors, this 15th day of December, 2008.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

(SIGNED)

Robert deV. Frierson
Deputy Secretary of the Board